

Cambridge University Press

978-1-107-13538-3 — Framing Intellectual Property Law in the 21st Century

Edited by Rochelle Cooper Dreyfuss, Elizabeth Siew-Kuan Ng

Frontmatter

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“This book critically examines traditional principles of IP, such as the incentive theory for justifying exclusivity and IP protection’s linkage with trade and investment, from new perspectives for the 21st Century. Professor Dreyfuss and Professor Ng brought together global academic leaders to tackle challenging topics: Whether IP is necessary? How human rights, culture and other significant values are incorporated in the current international IP norms? Both students and professionals will benefit from innovative analysis presented in each chapter.”

Toshiko Takenaka, Ph.D., Washington Research Foundation / W. Hunter Simpson
Professor of Technology Law, University of Washington

“A fresh and engaging reassessment of first principles that underlie arguments for different levels of IP protection. The book offers an array of disciplinary, doctrinal, and geographic perspectives, with a special focus on Singapore. Blending the global and the local, and high- and low-protectionist perspectives, the contributors thoughtfully reflect on the value of different frames for enriching and extending contemporary debates over IP rights.”

Laurence R. Helfer, Harry R. Chadwick, Sr. Professor of Law, Duke University

“In this book, a first-rate group of experts provide a sophisticated and candid analysis of the advantages and limitations of various justifications for intellectual property protection, including incentive-based theory, facilitating trade among nations, and protecting public health, culture, and human rights. The book also contains a valuable discussion of empirical studies and doctrinal and institutional reforms. It is essential reading for anyone interested in improving intellectual property laws in our global marketplace.”

Lisa P. Ramsey, Professor of Law, University of San Diego School of Law

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FRAMING INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY

As knowledge production has become a more salient part of the economy, intellectual property laws have expanded. From a backwater of specialists in patent, copyright, and trademark law, intellectual property has become linked to trade through successive international agreements and appreciated as a key to both economic and cultural development. Furthermore, this law has begun to engage the interest of economists, political theorists, and human rights advocates. But because each discipline sees intellectual property in its own way, legal scholarship and practice have diverged and the debate over intellectual property law has become fragmented. This book is aimed at bringing this diverse scholarship and practice together. It examines intellectual property through successive lenses (incentive theory, trade, development, culture, and human rights) and ends with a discussion of whether and how these fragmented views can be reconciled and integrated.

ROCHELLE COOPER DREYFUSS is the Pauline Newman Professor of Law at New York University School of Law and co-Director of its Engelberg Center on Innovation Law and Policy. She is a member of the American Law Institute and was a co-Reporter for its Project on Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes. She was a consultant to the Federal Courts Study Committee, to the Presidential Commission on Catastrophic Nuclear Accidents, and to the Federal Trade Commission and served on the Secretary of Health and Human Services' Advisory Committee on Genetics, Health, and Society.

ELIZABETH SIEW-KUAN NG was the Vice-Chairwoman and Director of the Intellectual Property Unit of the EW Barker Centre for Law and Business, and Associate Professor of Law at the National University of Singapore. She served as an Intellectual Property Adjudicator at the Intellectual Property Office of Singapore and as *amicus curiae* for the Supreme Court of Singapore. In her specialized area of patents, she was retained as a consultant by the World Intellectual Property Organization in Geneva to report on the impact of the patent regime on developing countries.

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FRAMING INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY

Integrating Incentives, Trade, Development, Culture,
and Human Rights

Edited by

ROCHELLE COOPER DREYFUSS

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DEDICATION TO ELIZABETH SIEW-KUAN NG



Elizabeth Siew-Kuan Ng
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Elizabeth, a dear friend and respected colleague, left this world on 5 February 2018 after a short illness. Her sudden demise was a shock to many, in particular her colleagues at NUS Law who mourn the loss of a caring teacher and respected colleague.

Elizabeth joined the NUS Faculty of Law in 1986. One of the first subjects she taught was Intellectual Property Law. Although barely older than some of her students, Elizabeth quickly earned their respect as an excellent tutor. Over the years her reputation as a very fine teacher grew. She gave much of herself to her students, spending hours on preparation

of materials and classes. Generations of students have much to thank her for.

Since 2013, I have had the privilege and pleasure of working closely with Elizabeth at the EW Barker Centre for Law and Business, first as the Centre's Director of Intellectual Property and later when she concurrently served as Deputy Chairwoman of the Centre. Elizabeth was a great partner in this endeavor. She provided strong academic leadership in our Intellectual Property cluster, and played an instrumental role in developing the Centre's reputation. I could always count on her wise counsel, and valued her views immensely, especially when they ran counter to mine. Our slightly different personalities complemented each other to ensure that decisions taken were more thoughtful and holistic. Hers was a strong and courteous voice that I shall greatly miss. The Centre is the poorer for her loss.

In the last several years, Elizabeth was also coming into her own on the research front. For many years she was highly regarded internationally, as demonstrated by her work with organizations such as the World Intellectual Property Organization, the Intellectual Property Organisation of Singapore, and the State Council of Thailand. In more recent years, she had begun turning this wealth of knowledge and insight into academic articles and chapters, while leading some extremely interesting research projects. This was a very fertile and exciting phase of her development as a scholar that has now ended all too prematurely. Elizabeth leaves behind her loving husband, Adrian, whom she met at university, and their daughter Chantal, whom Elizabeth absolutely doted on.

Professor Tan Cheng Han, SC
Chairperson
EW Barker Centre for Law and Business
National University of Singapore

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YIH-SAN TAN served the Intellectual Property Office of Singapore as the Chief Executive from 2011 to 2015. He brought IP closer to the world of innovation through development, education, and internationalization. As Chair of the ASEAN IP community, he helped build a closer and more

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interoperable ASEAN IP community so as to engender greater investment flow into the emerging markets of ASEAN. He was selected as among the fifty most influential people in IP in 2015 by the magazine *Managing Intellectual Property*. He continues to cheer the exciting development of IP thought leadership in Singapore and in Asia, in his current role as a general partner in an investment firm.

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PREFACE

Introduction

With the emergence of the knowledge industries as a salient sector of the economy and the development of new geographically dispersed (and dispersing) business models, methods of production, and technologies of distribution, the demand for intellectual property protection has sharply increased. Responses range from the revision of domestic regimes to new multilateral, bilateral, and regional agreements – all of which tend to harmonize protection at ever higher levels. These changes have engendered considerable controversy. From a backwater of specialists in patent, copyright, and trademark law, developments in intellectual property law have piqued the interest of scholars in such diverse fields as international relations, political theory, business, human rights, medicine, psychology, and economics. It is not surprising that this is so. Intellectual property laws may be intended to promote creative production, but the protection afforded touches on many issues of fundamental importance to human existence, including identity, culture, expressivity, curiosity, education, health, safety, food security, development, and the environment.

It is certainly enriching to welcome new participants into the debate over the proper scope of intellectual property rights and the appropriate balance between the proprietary interests of right holders and the access interests of the public. However, the discussion has become fragmented and heated. Important issues remain unresolved. In our experience, the problem appears, at least in part, to be that those participating in the debate begin with different premises. As a result, they frame the questions involved in balancing interests quite differently. At one end of the spectrum are observers who see intellectual property through a frame of incentives, who believe that strong exclusive rights are necessary to prevent free riders from competing down the price of innovations and undermining the returns available from taking the risks entailed in

creative production. Without strong protection, they say, there would be insufficient impetus to develop new medicines, technologies, educational materials, or cultural products for society to enjoy. To a large extent, their voices are joined by groups interested in improving social welfare by reaping comparative advantages and promoting interdependence among nations. They see in harmonization at high levels a way to facilitate international trade in knowledge products. At the other end of the spectrum are cultural theorists, who examine how society is structured through *both* the creation *and* the sharing of information goods (books, symbols, technology), and human rights advocates, who emphasize human flourishing and development goals, which likewise demand access to the fruits of human ingenuity.

We do not expect this volume to resolve the important questions raised in the debates over the proper scope and strength of intellectual property regimes. Rather, we endeavor to clarify the terms of the debate by examining the underlying premises. The contributors to this volume interrogate the frames that influence the ways in which those participating in the debate perceive intellectual property law. Nine of the chapters examine a particular approach to crafting intellectual property law and identify its limits. They are divided into two sections: the first looks at the frames that fall toward the high-protectionist end of the spectrum; the second examines the frames on the other side. Chapter 10 considers whether these frames can be assembled to work effectively together. The book concludes with commentary on how the themes investigated in the book relate to Singaporean interests.

The Book

High Protectionist Frames: Incentives and Trade

In the opening two chapters of *FRAMING INTELLECTUAL PROPERTY LAW*, Rochelle Cooper Dreyfuss and Christopher Sprigman examine the limits of the Incentives Frame; in the next pair of chapters, Jerome Reichman and Susy Frankel consider the Trade Frame. In her piece, Dreyfuss asks whether intellectual property rights are necessary to promote creative production. After suggesting that they are not always needed, she investigates the question of how creators and inventors would respond in the absence of these regimes. She then compares the social costs of the intellectual property system with these alternatives. While she finds that awarding exclusive rights may sometimes be the

preferred approach, she argues that there is nonetheless considerable room for public-regarding principles that protect access interests.

Sprigman closely examines empirical and experimental studies on the relationship between copyright and creativity to see whether, in fact, there is an evidentiary basis for the claim that increasing protection will motivate more innovation. In most situations, he finds the proof inconclusive. He ends with recommendations for sharpening empirical scholarship and using it to expand our understanding of the incentives frame and the factors that promote creativity.

Jerome Reichman begins with what he calls the Trade Paradigm and suggests that in many ways, the effort to facilitate trade though harmonization has, in fact, harmed innovation and distorted trade. He argues that because harmonization tends to be closely correlated with expanding the reach of intellectual property rights, fundamental science – the well-spring from which both commercial and noncommercial products emerge – has become the subject of exclusive rights. As a result, Reichman says, trade-related rationales can lead to less rather than more inventive activity. In addition, he notes that because developing countries are behind the technological frontier, they are poorly positioned to benefit from stronger protection; indeed, they are hurt by the higher costs associated with intellectual property rights: protection not only makes goods unavailable, it also decreases opportunities for less developed countries to become creative in their own right. Worse, harmonization prevents countries from experimenting with other approaches to incentivizing innovation. Reichman concludes that negotiators must turn their attention to developing trade rules that take better account of the impact of ratcheting up protection in the name of promoting trade.

In her piece, Frankel goes even further and questions the premise that promoting free trade requires high levels of protection. She notes that, at one time, strong rights of exclusivity were regarded as barriers to trade and that even after a contrary view took hold, the main international intellectual property instrument – the Trade-Related Aspects of Intellectual Property (TRIPS) Agreement – imposed minimum standards of protection that left substantial room for national variation. Linkage of intellectual property with trade has, however, created a potent platform for compelling countries to adopt levels of protection that vastly exceed that which is necessary to motivate innovation. Frankel ends with suggestions for countering these effects through interpretations of trade law that keep the object and purpose of the TRIPS Agreement in focus,

through the development of stronger access norms, and through a realistic appraisal of how the innovation landscape might change.

Low Protectionist Frames: Health, Culture, and Human Rights

Moving to the other end of the spectrum, Elizabeth Siew-Kuan Ng and her coauthor, Albert Guangzhou Hu, look at IP protection through the Health Frame; Megan Richardson, with her coauthor Julian Thomas, and David Tan consider the Cultural Frame; while Graeme Austin and Ruth Okediji investigate the limits of the Human Rights Frame. Ng and Hu begin the discussion with an empirical piece on how Asian countries have implemented the flexibilities in the TRIPS Agreement to protect public health. Finding significant differences among these countries, they relate a country's reliance on TRIPS flexibilities to its stage of economic and technological development and to its public health needs. They show that the more innovative a country is, the stronger the protective regime it enacts. Importantly, however, demands for healthcare (as measured by the prevalence of HIV infections) drive the adoption of flexibilities.

Richardson and Thomas consider the reach of the Culture Frame. Using three cases, one involving Hugo Zacchini, a circus performer, and the others involving Paul Hogan (Croccodile Dundee) and the singer Rihanna, they show how a commitment to human flourishing can justify increasing (rather than decreasing) protection. Thus, they advocate for the adoption of novel intellectual property rights that enable people to control their self-presentation. The authors counsel, however, that intellectual property rights in images should come with appropriate limits and defenses and take account of the interplay between the creator and the audience.

David Tan explores that public dimension of the move to protect images. He uses the cultural usage of Mickey Mouse, postmodernist sensibilities, and semiotics to demonstrate how extensively the value of images depends on recoding by the audience. He then examines the flexibilities in copyright law to see how well they permit the public – the audience – to enjoy the value it adds to images of cultural significance.

Ostensibly, the harshest critique of strong intellectual property rights derives from the Human Rights Frame, which regards education, health, and human flourishing as fundamental rights. But as Graeme Austin notes, the Universal Declaration of Human Rights also recognizes the rights of an author to the moral and material interests in his or her work. To reconcile these positions, Austin argues for what he calls an author-

focused human rights approach that provides a justification for limiting intellectual property while protecting the dignity interests of human (as opposed to corporate) creators.

Focusing on the technological side of intellectual property protection, Ruth Okediji expresses similar skepticism about the ability of human rights to improve social welfare and act as a counterweight to efforts to increase intellectual property protection. Like Austin, Okediji notes that the human rights approach to intellectual property law has come late in the game, after the basic principles of protection were embedded into law and practice. Furthermore, she argues that protecting human rights requires effective institutions for implementation – institutions that are lacking in many of the places where there is a recognized need to moderate the exclusivity of intellectual property rights. Thus, she suggests, progress toward obtaining the highest levels of social justice will require novel approaches to both intellectual property and human rights law.

Integration

In the final chapter, Graeme Dinwoodie and Annette Kur discuss the characteristics of each of the frames set out in the earlier chapters. They consider the functions of frames – to constrain, support, or set up – and ask whether the frames can, or should, be deployed so as to compose a conceptual whole – a “Theory of Everything.” The authors conclude that such a theory is neither possible nor desirable. Rather, they see each frame as serving a different purpose in the law – justifying it, calibrating its reach, and managing the influences that are brought to bear upon it.

The Commentary

After the intriguing conclusion contributed by Graeme Dinwoodie and Annette Kur, comments by Yih-San Tan and coauthor Sandra Yu, Mark Fung-Chian Lim and Wee Loon Ng-Loy provide a Singaporean perspective based on their experience as practitioners, regulators, and legal scholars.

Tan and Yu consider how the architecture of the intellectual property system will change as new nations, such as China and Korea, emerge as centers of innovation, and as digital methods of distribution become ever more common. The authors note that Singapore will be required to change its laws if it is to prosper in this new environment. They suggest

that its response should be grounded in three principles: providing accessibility for local innovators, promoting connectivity, and ensuring quality. Looking specifically at the Incentives Frame, Lim agrees with Dreyfuss that the overall goal is to provide incentives but to balance them against access and fairness considerations. However, he stresses that for businesses, lawyers, adjudicators, and regulators, predictability and certainty are of prime importance. Thus, Lim argues, the intellectual property system must strive to produce rules that can be readily and reproducibly applied. In a way, Loy's comment illustrates the problem of uncertainty by focusing on how the image rights proposed by Richardson and Thomas should be interpreted in Singapore.

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*Rochelle Cooper Dreyfuss
 Elizabeth Siew-Kuan Ng*

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As this volume was about to go to press, after all but one chapter were finished and edited, and this Preface completed, my dear coeditor Elizabeth Siew-Kuan passed away. This book, as well as the conference on which it was based, would not have happened without her vision and leadership. She was an earnest scholar, a deeply engaged member of the faculty of the National University of Singapore, and extremely proud of her appointment as Deputy Chairwoman and Director of the Intellectual Property Unit of the EW Barker Centre for Law and Business. She was

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also my friend and collaborator. We spent many hours together on the Internet organizing the conference, choosing contributors, developing the book proposal, writing the Preface, and choosing the cover image. She was wonderfully easy to work with. She sent greetings for every holiday recognized in our religions – and sometimes for occasions of her own devising. I will miss her.

Rochelle Cooper Dreyfuss

ABBREVIATIONS

ACTA	Anti-Counterfeiting Trade Agreement
AIDS	Acquired Immune Deficiency Syndrome
ASEAN	Association of South East Asian Nations
ATRIP	Association for the Advancement of Teaching and Research in Intellectual Property
BIT	bilateral investment treaty
BRIC	Brazil, Russia, India, and China
BRICS	Brazil, Russia, India, China, and South Africa
CBD	Convention on Biological Diversity
CETA	Comprehensive Economic and Trade Agreement
CGIAR	Consultative Group on International Agricultural Research
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DSB	dispute settlement body
ECtHR	European Court of Human Rights
EDB	Economic Development Board, Singapore
E.U.	European Union
FAO	United Nations Food and Agriculture Organization
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GII	Global Innovation Index
GIPC Index	U.S. Chamber International Intellectual Property Index
GIPI	Taylor-Wessing Global Intellectual Property Index
GNP	gross national product
GP Index	Ginarte-Park Index of Patent Rights
HIV	human immunodeficiency virus
ICESCR	International Covenant on Economic, Social and Cultural Rights
IE	International Enterprise, Singapore
IP	intellectual property
IPPF	Intellectual Property (Patent) Flexibility Index

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ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
MFN	most-favored nation
NGO	nongovernmental organization
OECD	Organisation for Economic Co-operation and Development
SIPO	State Intellectual Property Office of China
SPLT	Substantive Patent Law Treaty
TPP	Trans-Pacific Partnership Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership Agreement
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
U.K.	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	UN Human Rights Council
UPOV	International Union for the Protection of New Varieties of Plants
USA	United States of America
USTR	United States Trade Representative
VIP	visually impaired person
WDA	Workforce Development Authority, Singapore
WFCC	World Federation for Culture Collections
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization