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Introduction

Do we need another book on whether or not intellectual property (IP) is property? The answer is, probably not. Not just because of the vast quantity of publications that exists already on the topic but also because of the elusiveness of the property concept.[1] The word property has different meanings in different contexts, and a discussion about whether or not IP – or even patents, copyright, and trademarks to start with – is really property is hardly meaningful.[2] This is particularly so when discussing IP matters in a transnational context, which we often do since knowledge and information – which IP ultimately is about – cross country borders as much as they circulate within them, not least in our age of information. Knowing that the term property is used differently in different jurisdictions, and also that the English term property can be translated differently, depending on both the language and the jurisdiction,[3] a discussion about the property status of IP is likely to create more confusion than clarification, at least unless confined to a specific context or jurisdiction.

So this book does not engage in a debate about the property status of IP. Rather, it is taken for granted that in the English language, the property metaphor is used in relation to IP – this is, after all, what the "P" stands for. A decade or more ago, a popular claim used to be that the term intellectual property was a relative novelty.[4] This claim has been refuted by historical

[1] See, for example, James Harris, "The Elusiveness of Property" (2005) 48 *Scandinavian Studies of Law* 123–131.

[2] Compare Stephen L. Carter, "Does It Matter Whether Intellectual Property Is Property?" (1993) 68 *Chicago-Kent Law Review* 715–723, 715, who notes, "scholars write about whether intellectual property is property. Nobody else seems to care."

[3] See Ali Riza Çoban, *Protection of Property Rights within the European Convention on Human Rights* (Aldershot: Ashgate, 2004), pp. 11–14.

[4] See, for example, Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2001), pp. 11–12; Mark A. Lemley, "Romantic Authorship and the Rhetoric of Property" (1997) 75

evidence showing that the use of the term property in relation to copyright, patents, and even trademarks goes back to the seventeenth, eighteenth, and nineteenth centuries, and that there are also traces of the term intellectual property at least as early as the eighteenth century.[5] Still, it should be undisputed that the property metaphor calls to mind different associations, among both laypersons and lawyers, and not least associations to property in tangible objects. The possibility that this may have a legal impact cannot be ruled out.[6] Language matters, not least in law.

Rather than discussing whether or not IP is property, this book will deal with possible reasons for and implications of using the term (or metaphor of) property in relation to IP, in particular in transnational or international legal contexts. As already pointed out, it is a fact that the property metaphor is used in these contexts: the term intellectual property rights (IRPs) has become the common denominator for the kinds of rights that are central to this study, both in contracts as well as negotiations and discussions across country borders and even in international conventions. The term property rights is also used when addressing IPRs in these contexts. This itself may have an impact on courts or legislators. In this book, we will discuss the impact it should have, bearing in mind the different meanings that are given to the term property in various jurisdictions. To do that, a secular Western

Texas Law Review 873–906, 895; Mark A. Lemley, "Property, Intellectual Property and Free Riding" (2005) 83 *Texas Law Review* 1031–1075, 1033; Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004), p. 28, fn. 7. For a review, see Justin Hughes, "Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson" (2006) 79 *Southern California Law Review* 993–1084, 1001–1003.

5 See Hughes, "Copyright and Incomplete Historiographies," 1004 et seq. See also Justin Hughes, "A Short History of 'Intellectual Property' in Relation to Copyright" (2012) 33 *Cardozo Law Review* 1293–1340. For trademarks specifically, see Lionel Bently, "Communication to Thing: Historical Aspects to the Conceptualisation of Trade Marks as Property" (2007) 7 *University of Iowa Legal Studies Research Paper* 1–48. On the situation in Germany, but with attention paid to French and English law also, see Volker Jänich, *Geistiges Eigentum – eine Komplementärerscheinung zum Sacheigentum?* (66 Jus Privatum, Tübingen: Mohr Siebeck, 2002), pp. 1–186. See further Thomas Dreier, "How Much 'Property' Is There in Intellectual Property? The German Civil Law Perspective," in Helena R. Howe & Jonathan Griffiths (eds.), *Concepts of Property in Intellectual Property Law* (Cambridge: Cambridge University Press, 2013), pp. 118–122.

6 See, for example, Pamela Samuelson, "Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?" (1989) 38 *Catholic University Law Review* 365–400, 398: "Clearly the word property is a very powerful metaphor that radically changes the stakes in legal disputes. Once a property interest is established, the law provides a wide range of legal protections for it, a much wider range, particularly in the criminal law area, than for breaches of trust or confidence, or other specific kinds of unfair conduct."

hemisphere perspective (Western Europe and North America) will be taken,[7] in addition to looking at international regulations. This implies that the framework is not meant to be limited to a specific legal order.

Consequently, we will not carry out a top-down analysis of the concept of "property" in various jurisdictions. Instead, we will build on the previously mentioned premise that the term – in its linguistic variations – is used differently in different contexts. A common core, which should not be too controversial and is often referred to as the layperson's perspective on property, is that the term property designates something that belongs to someone (be it an individual or a group of people).[8] This implies, of course, that property is a powerful metaphor.[9] Thus, the presence of the term in intellectual property inevitably suggests that what is protected by IP belongs to the right holder.

It is not surprising then that debate over the use of the term property or the property metaphor in relation to IP is based on the premise that its use implies an expansion of intellectual property rights. Indeed, the term propertization is frequently employed in critical approaches to expansionist tendencies.[10] Rights expansion is certainly a possible repercussion. Nevertheless, in transnational contexts or international relations, it is important to remember that the term property has a variety of meanings and that there are also different property traditions. For example, against the backdrop of a strong nationalization trend in Scandinavia after

[7] For an analysis of IP and property in Jewish law, for example, see Neil W. Netanel & David Nimmer, "Is Copyright Property? The Debate in Jewish Law" (2011) 12 *Theoretical Inquiries in Law* 241–274. The analysis shows that there are similarities between the discussion in Jewish law and the parallel discussion on the background of secular Western law, although there are also differences in reasoning. In this book, religious legal regimes will not be discussed.

[8] This is the position expressed, for example, by Immanuel Kant, "The Metaphysics of Morals," reprinted in Mary J. Gregor (trans. and ed.), *The Cambridge Edition of the Works of Immanuel Kant. Practical Philosophy* (Cambridge: Cambridge University Press, 1996), pp. 353–603, "The Universal Doctrine of Right," part 1 chap. 1 § 1 p. 401: "That is *rightfully mine* (*meom iuris*) with which I am so connected that another's use of it without my consent would wrong me." In the German original: "Das Rechtlich-Meine (meum juris) ist dasjenige, somit ich so verbunden bin, daß der Gebrauch, der ein Anderer ohne meine Einwilligung von ihm machen möchte, mich lädieren würde," cited from Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre. Metaphysik der Sitten Erster Teil*, neuherausgegeben von Bernd Ludwig (Hamburg: Felix Meiner Verlag, 1986), p. 53.

[9] See *supra* fn. 6.

[10] See, for example, Michael A. Carrier, "Cabining Intellectual Property through a Property Paradigm" (2004) 54 *Duke Law Journal* 1–145, 4, noting that "[o]ne of the most revolutionary legal changes in the past generation has been the 'propertization' of intellectual property" where the "duration and scope of rights expand without limit, and courts and companies treat IP as absolute property bereft of any restraint."

the Second World War, it was pointed out in legal commentaries that the use of the property metaphor in the context of intellectual property could easily also lead to the curtailing of IPRs.[11] Thus, "property" does not necessarily imply a Blackstonian concept of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual of the universe."[12] It is, in other words, "possible to speak of IP as property while resisting the idea that IP is or ought to be intensively expansive across all its dimensions."[13] Still, as already pointed out, the word property often calls to mind property in tangible goods.[14] Judges and other decision makers may be influenced by tangible goods analogies as long as the property metaphor is used in relation to IP. Hence, when discussing the use of the property metaphor in transnational and international contexts, the possible analogies with property in tangibles is a central theme and will be considered as such in this book.

In discussions about property, several distinctions are made. One distinction is between private property and other kinds of property (communitarian, common, state and public property).[15] Here, we will focus on the term property as referring to private property given that intellectual property rights (IPRs), in the sense discussed in this book – and we will return to this shortly – are private rights (i.e., rights that can be invoked by individuals and not by a community or society at large).[16]

Another distinction is between private property and constitutional property.[17] The distinction is important, as the concepts are different in most jurisdictions. In some jurisdictions – Germany and the Scandinavian

[11] Mogens Koktvedgaard, *Konkurrenceprægede immaterialretspositioner: bidrag til læren om de lovbestemte enerettigheder og deres forhold til den almene konkurrenceret* (Copenhagen: Juristforbundets forlag, 1965), pp. 193–195.

[12] William Blackstone, *Commentaries on the Laws of England, Book 2: The Rights of Things* (Oxford 1766; e-book reprint), p. 2.

[13] As recently expressed by Robert P. Merges, "What Kind of Rights Are Intellectual Property Rights?" (2018), in Rochelle Dreyfuss & Justine Pila (eds.), *The Oxford Handbook of Intellectual Property Law*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2959073, 1–50, 3.

[14] Compare the approach of Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), pp. 33–34, who takes property in tangibles as a point of departure before discussing "objects of property which are not corporeal," including IP.

[15] See, for example, James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996), pp. 102–110.

[16] See the Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299; 33 ILM 1197 (1994) [hereinafter TRIPS Agreement or TRIPS].

[17] See, for example, Çoban, *Protection of Property Rights*, pp. 10–34.

countries, for example – IPRs are not generally considered private property rights[18] but are still covered by the concept of constitutional property.[19] In this book, we will not discuss the distinction between private property and constitutional property specifically, but the concept of constitutional property will be addressed to the extent that it elucidates problems to be discussed in this book. The European Court of Human Rights (ECtHR) has, for example, repeatedly held that intellectual property rights are "possessions" under Protocol 1 Article 1 of the European Convention on Human Rights (ECHR) and are thus covered by the protection of property under this provision.[20] Article 17 of the European Union's Charter of Fundamental Rights has as its heading "Right to Property," where Article 17(1) contains a general protection for "possessions" and Article 17(2) a provision that solely states that "Intellectual property shall be protected." The Court of Justice of the European Union (CJEU) has thus confirmed that the fundamental right of property includes the rights linked to intellectual property.[21] This shows that "property" in relation to IP in certain international contexts is not only a metaphor but also a legal term.

A third distinction to be mentioned is between unitary property concepts – such as in civil law, under strong influence from Roman law, with an emphasis on holistic ownership—and bundle-of-sticks concepts of property, typical of common law and reflecting "the estate system and its many methods of carving up property from life estates to defeasible fees and various future interests."[22] For the purposes of this book, the distinction will not be problematized, as the aim is to discuss the use of the property term or metaphor in IP contexts at the international level, irrespective of domestic property regimes. This is not to say

[18] In the sense of "ownership" (*Eigentumsrecht*, *eiendomsrett*).

[19] Compare Çoban, *Protection of Property Rights*, p. 12; Wolfgang Mincke, "Property: Assets or Power? Objects or Relations as Substrates of Property Rights," in James W. Harris, *Property Problems: From Genes to Pension Funds* (London, Haag, Boston: Kluwer, 1996), pp. 78–88 (chap. 7). See also Dreier, "How Much 'Property' Is There in Intellectual Property?" 118–125.

[20] European Convention on Human Rights November 4, 1950, 213 UNTS 221, in force September 3, 1953 [hereinafter ECHR]. The relevant provision and case law will be cited in Chapter 7 (Sections D.2.b and D.4.b).

[21] See, for example, case C-70/10, *Scarlet Extended* v. *SABAM*, ECLI:EU:C:2011:771, para. 44. See further Chapter 7 (Section E.2) below.

[22] See Yun-Chen Chiang & Henry E. Smith, "An Economic Analysis of Civil versus Common Law Property" (2012) 88 *Notre Dame Law Review* 1–55, 2. See also Dreier, "*How Much 'Property' Is There in Intellectual Property?*" 116–118; Geoffrey Samuel, "The Many Dimensions of Property," in Janet McLean (ed.), *Property and the Constitution* (Oxford and Portland OR, 1999), pp. 40–63 (chap. 3); and Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Analysis* (Westport, CT: Greenwood Press, 2000), pp. 7–21.

that various concepts, such as the "bundle of sticks," will not be touched upon when referring to discussions relevant to the IP-property interface. But insofar as the concepts nevertheless "coincide to a remarkable extent in their basic features,"[23] the analysis applies irrespective of the precise property regime.

The aim of this book is, first and foremost, to contribute to an awareness of the connotations of the property metaphor in relation to IP, particularly in view of its use in transnational and international contexts. This will be achieved by discussing three aspects of the use of the metaphor: (1) in relation to the *justification* of the rights, (2) in relation to the *structuring* of the rights, and (3) in relation to *IPRs as assets*. "Justification," in this context, refers to the reasons given for having (various kinds of) IP protection in the first place. The overarching question raised is the following: What does it mean to use, and what are the possible implications of using, the property metaphor in justifying IP rights? Recalling that the property metaphor is easily associated with property in tangible objects, it is worth noting that there are indeed some common grounds for justifying property in tangibles and in IPRs. In this book, these grounds will be outlined (Chapter 2) and their possible implications, in light of the use of the property metaphor, will be discussed (Chapter 5).

By "structuring" of rights, I refer to the way in which rights are built or constructed. On the face of it, there is a strong resemblance between property in tangibles and IP in that both entail exclusive rights apparently related to an object or a thing, which also may explain the use of the property metaphor in relation to IP. We will go deeper into this apparent resemblance (Chapter 3), including the commonly accepted notion that IP relates to "intangible goods." We will also discuss what conclusions should be drawn on the basis of the use of the property metaphor to characterize the structuring of IPRs (Chapter 6).

Finally, we will look into the use of the term property, or the property metaphor, in relation to IPRs as *assets*, that is, as objects having some sort of value. As will be explained in Chapter 4, it is analytically important – though largely ignored in the scholarship – to distinguish between the object of the rights, which in this book is dealt with under the structuring of rights, and rights as objects in the sense of assets. The further implications of rights as objects or assets will be discussed in Chapter 7.

These three aspects – justification of the rights, structuring of the rights, and the rights as assets – are closely interrelated and are often "fused" in property theories. Implicit in this analysis is a belief that our understanding of the

[23] Chiang & Smith, "An Economic Analysis of Civil versus Common Law Property," 3. See also Dreier, "How Much 'Property' Is There in Intellectual Property?" 116–117; and Mattei, "Basic Principles of Property Law," 18–21.

property connotations of IP would benefit from discussing these three aspects separately, though the link between them will be subsequently emphasized. As indicated, the analysis consists of two main parts: first, the sketching out of the three aspects (Part I, Chapters 2–4) and, second, a discussion of the (legal) conclusions that may be drawn from the use of the property metaphor (or term) in relation to the justification of rights, the structuring of the rights, and IP as assets respectively (Part II, Chapters 5–7).

The ambition of the book is not to unveil another property theory. To be sure, the analysis – particularly on the justification of the rights – draws on various kinds of property theories, but the main focus is on the practical legal implications of the use of the property metaphor in IP law. My personal background is not irrelevant in this respect. I come from the Scandinavian legal realist tradition,[24] which means that I have an interest in uncovering the realities behind legal concepts and metaphors and that I find legal arguments sustainable to the extent they reflect realities and not fictions.[25] Consequently, I will point to problems related to the use of the property metaphor in international and transnational legal discourse from a realist point of view. My background does not, however, imply that I entirely embrace Scandinavian realism as a legal philosophy, nor does it imply the rejection of the usefulness of legal concepts or of "a strict separation between law and politics and law and morality."[26] Nevertheless, it is fair to say that both the problems that I seek to explore and the arguments that are put forward in the book reflect my background.

Here, I will follow with a disclaimer. The topic of the book is extremely broad and touches on a myriad of complicated issues on which there is an insurmountable amount of previous research and writings. It is neither possible nor is it my ambition to delve deeply into the discussions that I touch upon.

[24] For an account of Scandinavian realism as a legal philosophy, see Jes Bjarup, "The Philosophy of Scandinavian Realism" (2005) 18 *Ratio Juris* 1–15. For a comparison of Scandinavian and American legal realism, including an evaluation of how property is treated under the two "schools of thought," see Gregory S. Alexander, "Comparing the Two Legal Realisms: American and Scandinavian" (2002) 50 *American Journal of Comparative Law* 131–174.

[25] For a classical example of the Scandinavian legal realist approach, applied to a topic relevant to this book, see Alf Ross, "Tû Tû" (1957) 70 *Harvard Law Review* 812–825, on the concept of "ownership," comparing this concept with the tribal language expression "tû tû," which on the one hand means "nothing at all," but is "a word devoid of any meaning whatever," while on the other hand, "in spite of its lack of meaning, [it] has a function to perform in the daily language"; its "pronouncement seem[ing] to fulfill the two main functions of all language: to prescribe and to describe; or, to be more explicit, to express commands or rules, and to make assertions about facts" (812–813).

[26] See Alexander, "Comparing the Two Legal Realisms," 132, on the characteristics of Scandinavian legal realism.

My ambition is, first and foremost, limited to showing certain correlations that may be useful to legal thinking and practice when dealing with the property-IP interface. In doing so, I draw on previous writings and research. For those who wish to delve deeper into the historical, economic, and philosophical underpinnings, the sources referred to in this book may be more useful than the book itself.

In the same way, since I avoid providing a top-down definition of the term property for the purposes of this book, the analysis does not require an exact account of what is meant by "intellectual property." Nevertheless, some qualifications will be made. The fact that certain national legal systems (including the private law traditions in certain countries, such as Germany and the Scandinavian countries) are reluctant to classify intellectual property rights as property, is, however, irrelevant for the present analysis.

Recalling that "intellectual property" is not a homogeneous concept, but "really a handy shorthand for a whole slew of disparate" phenomena related to products of the human mind,[27] we will in this context concentrate on rights that are related to some kind of effort or achievement and not to a person's personality or personal characteristics. Thus, rights of publicity to one's image or other kinds of personality rights will not be covered by the term "IPR" as used in this book. Copyright in literary or artistic works (authors' rights) and performers' rights may, in some jurisdictions, be classified as personality rights,[28] but that does not prevent them from being categorized here as IPRs since they remain effort or achievement related. Following this scheme, rights that are covered by the World Trade Organization (WTO) agreement[29] on IPRs – the TRIPS Agreement[30] – may serve as a starting point for what will be considered as IPRs in this context, including copyright and related rights, patents, trademarks, industrial design, protection of layout-design of integrated circuits, and even protection of trade secrets.[31] Regarding protection of trade secrets, its status as an IPR is debatable,[32] and there are indeed structural

[27] David Vaver, "Intellectual Property: The State of the Art" (2000) 116 *Law Quarterly Review* 621–637, 621.

[28] See Dreier, "How Much 'Property' Is There in Intellectual Property?" 120.

[29] Agreement: Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement], available at www.wto.org.

[30] See *supra* fn. 16. [31] TRIPS Agreement, Part II, Sections 1–7 (Articles 9–39).

[32] See, for example, Tania Aplin, "Right to Property and Trade Secrets," in Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham and Northampton MA: Edward Elgar Publishing, 2015), pp. 421–437 (chap. 22), 426–431. See also Lionel Bently, "Trade Secrets: Intellectual Property but Not Property?" in Howe & Griffiths (eds.), *Concepts of Property in Intellectual Property Law*, pp. 60–93 (chap. 3),

differences between the protection of trade secrets and "classical IPRs" such as copyright and patents.[33] We will nevertheless include protection of trade secrets in the analysis since trade secrets are closely connected to a business's efforts or achievements. Trademarks and trade names are normally classified as intellectual property, although hardly "intellectual" in the true sense of the word. They too, though, are related to efforts or achievements in terms of their importance in building up a business. For the purposes of this book, a distinction will be drawn between what we will call "creational IPRs," where the effort or achievements that give rise to IPR protection are acts of creation in a broad sense (typically copyright and most related rights), patents and design rights and "business-related IPRs," where the effort or achievements are related to building up a business without being creative in nature (typically trademark and trade name rights). Protection of trade secrets may be considered a hybrid in this respect.

Protection against unfair competition is covered by Article 10bis of the Paris Convention for the Protection of Industrial Property[34] and mentioned in Article 39(1) TRIPS in connection with the protection of trade secrets. Here, norms of unfair competition will be regarded as IPRs to the extent that they target specific efforts or achievements (e.g., trade secrets), but norms dealing with unfair competition in general will serve as a contrast to IP protection, rather than being considered part of it, for the purposes of the present analysis. We will come back to this in Chapter 3 when discussing the structuring of IP rights. Given that we will concentrate on private (or individual) IPRs, community property protection, like protection of traditional knowledge and folklore, although of utmost importance in many cultural settings, is outside the scope of this book.

83–84, for examples of various legal contexts where trade secrets are not considered intellectual property.

[33] See further Chapter 3 (Section C).

[34] Paris Convention for the Protection of Industrial Property March 20, 1883, as last revised at Stockholm, July 14, 1967, 21 UST 1583, 828 UNTS 305 [hereinafter the Paris Convention].