CAMBRIDGE

Cambridge University Press & Assessment
978-1-108-48273-8 — The Cambridge Handbook of Intellectual Property and Social Justice
Steven D. Jamar , Lateef Mtima
Excerpt
More Information

Introduction: Intellectual Property Social Justice Theory: History, Development, and Description

Lateef Mtima and Steven D. Jamar

Introduction		*page* 1
I.	Intellectual Property Social Justice Theory	2
II.	Traditional Utilitarian Property Rights Approach to Intellectual Property	4
III.	The Roots of IP Social Justice Theory	6
IV.	IP Social Justice-Oriented Jurisprudence	7
V.	Scholarly Initiatives: From Human Rights to Critical Legal Theory and Beyond	9
VI.	The Shift to IP Social Justice: Identifying Social Justice as Inherent in IP Regimes	12
VII.	The Impact of IP Social Justice Theory on the Global IP Regime	15
Conclusion		18

INTRODUCTION

Throughout most of the twentieth century an exceedingly narrow interpretation and application of the utilitarian rationale for intellectual property protection dominated much of Western intellectual property (IP) law and policy.[1] This was especially evident in the United States, wherein an economic incentive/commodification approach to IP social utility pervaded IP jurisprudence and scholarly discourse. In essence, that limited perception of the utilitarian economic incentive approach to stimulating IP endeavor, including among other things, the production of patentable inventions and copyrightable expressive works, was premised on the belief that IP endeavor is most effectively promoted by providing individuals with nearly absolute property rights in their IP output and the accompanying prospect of monetary rewards for their intellectual labors. Concomitantly, the commercial marketplace would not only determine the "rules of engagement" for IP production and dissemination, but also incentivize and determine the quality and quantity of IP output. Such an approach would result, by design, in IP innovators and creators devoting their energies to producing the kind of IP products that the public was willing to pay for, with little incentive to engage in "nonessential" IP activity unlikely to bring adequate economic returns.

[1] *See generally* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325 (1989). For an in-depth analysis of economic models to promote IP innovation and output see Peter S. Menell & Suzanne Scotchmer, *Economic Models of Innovation: Stand-Alone and Cumulative Creativity*, *in* Research Handbook on the Economics of Intellectual Property Law 119 (Ben Depoorter, Peter Menell, and David Schwartz eds., 2019).

© in this web service Cambridge University Press & Assessment www.cambridge.org

CAMBRIDGE
Cambridge University Press & Assessment
978-1-108-48273-8 — The Cambridge Handbook of Intellectual Property and Social Justice
Steven D. Jamar , Lateef Mtima
Excerpt
More Information

In the latter decades of the twentieth century and continuing through the first decades of the twenty-first century, some IP scholars as well as law and policymakers began to challenge this narrow assessment of the social function of IP in modern society. They argued that the over-emphasis on the economic effects of IP endeavor had led to various conditions of IP-related social deficiency and injustice, from the lack of affordable access to healthcare and medicine throughout much of the developing world to the unchecked misappropriation of marginalized community creative expression by corporate and other mainstream actors in many developed nations. As IP became central to the pursuit of daily life across the globe, it became evident that a more socially responsive and balanced understanding of IP protection in the political economy would be needed to supplant the prevailing myopic and imbalanced economic incentive/commodification rationale.

I. INTELLECTUAL PROPERTY SOCIAL JUSTICE THEORY

IP social justice (IP-SJ) theory recognizes social justice as an inherent and essential obligation of the IP regime. IP-SJ theory treats IP protection as a social ordering mechanism through which society progresses by nurturing beneficent intellectual activity. As an innately "crowd-sourcing" enterprise, however, beneficial innovative and creative activity can only be maximized if the IP regime of law, policy, and administration explicitly addresses equitable access, inclusion, and empowerment of everyone to the maximum extent possible. Stated another way, the social utility function of IP protection (promoting socially beneficial creative and innovative endeavor) can only be fully achieved through recognition of its *interdependent* relationship with the inherent social justice obligations and effects of the IP legal regime (widespread and diverse contribution to and benefit from the IP ecosystem.)

A well-designed regime of IP law and administration built upon an IP-SJ foundation insures socially equitable access to that IP ecosystem irrespective of wealth, class, race, ethnicity, group, or gender status. Such broad equitable access in turn empowers the widest possible network of minds and hearts to conceive, invent, express, share, and experience beneficent intellectual product. Socially just IP rights and their socially just application and enforcement guarantees not only access to the levers of IP power and empowers people to use them, but also insures the equitable inclusion of marginalized as well as developing world artists, inventors, researchers, educators, performers, entrepreneurs, and consumers to the benefit of society and culture generally. Furthermore, such an IP-SJ regime preserves everyone's secular and other incentives to contribute and disseminate the fruits of their intellectual endeavors. Socially balanced exploitation of IP in accordance with IP-SJ principles helps equalize health and education standards, promotes socio-economic empowerment, and fosters universal respect for the IP system, including respect for the IP rights granted under it.

IP S-J does not accept or tolerate the injustice and social indifference permissible under an IP system dominated by an economic incentive/commoditization rationale. IP-SJ instead advocates for the restoration of IP protection to its full and proper function in the total political economy, as articulated in the U.S. Constitution itself under which Congress is granted the power:

> To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.[2]

[2] U.S. Const. art. I, § 8, cl. 8. Accordingly, American IP law is based upon a positive utilitarian grant of authority, as opposed to a recognition of divine or natural rights on behalf of IP producers. Natural law-based IP regimes are built upon a view that law should reflect and incorporate and support human nature, which includes many values beyond economic ones and beyond property rights. As articulated in the Universal Declaration of Human Rights in 1949 and in

© in this web service Cambridge University Press & Assessment www.cambridge.org

CAMBRIDGE

Cambridge University Press & Assessment
978-1-108-48273-8 — The Cambridge Handbook of Intellectual Property and Social Justice
Steven D. Jamar , Lateef Mtima
Excerpt
More Information

The intention to use copyright and patent, which is what the IP clause covers, for the general progress and the good of society and culture writ large is evident in the language "promote the progress," in the granting of rights for limited times after which the inventions or expressive works would be freely available, and in the Constitution's preamble under which the constitution was established in part to "promote the general welfare."[3] IP-SJ thus recaptures and restores the moral and justice-producing dimensions of IP protection which had all but disappeared under the imbalanced treatment of IP as merely an economic tool, which improperly dominated IP discourse and policy for more than half a century.[4]

But there is more to IP-SJ than just a rebalancing of perspectives and foundational ideas of IP regimes. Not only does it move away from a nearly exclusive focus on economic considerations, but rather a fundamental IP-SJ tenet is that the equitable participation of all members of society is essential to achieving the most propitious qualitative and quantitative outcomes. IP-SJ is not merely about restoring a balance and is not merely about changing the substantive aspects of IP regimes to be more socially just; it is also about enhancing the very economic benefits and other values the prior theory sought to achieve through its exclusively or almost exclusively favoring narrowly conceived economic values and personal property rights over other proper interests. As one of us wrote previously:

> Intellectual property social justice occupies a unique space in the IP social reform discourse. Whereas the predominating [IP scholarly] reformist rhetoric confronts the challenge as one of importing pertinent social values *into* the IP regime, intellectual property social justice eschews any implicit conceptualization of intellectual property protection as inherently devoid of non-economic/socially benign objectives . . . Intellectual property social justice regards the values of equitable access, inclusion and empowerment as essential and indeed *intrinsic* to the enterprise. From this perspective, intellectual property social justice confronts "IP law and economics" extremes as promoting and perpetuating socially wasteful inefficiencies in the contemporary intellectual property protection apparatus.[5]

the subsequent instantiation of that declaration in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social, and Cultural Rights, which both recite in their preambles the natural rights foundation of all human rights: "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world," "Recognizing that these rights derive from the inherent dignity of the human person." An approach to IP that treats social justice attributes of access, inclusion, and empowerment of people as an inherent attribute of any fully legitimate IP regime obviously fits hand-in-glove with a natural-rights based IP regime.

[3] U.S. Const. Preamble. *See also* Mason Marks, *People Are the Lifeblood of Innovation*, ch. 4 *in* The Cambridge Handbook of Intellectual Property and Social Justice (Steven D. Jamar & Lateef Mtima eds., 2023). Of course, the Constitution as whole supported slavery and the United States has not lived up to its aspirations contained in its founding documents and Reconstruction Amendments; it is, to put it charitably, still a work in progress. But these flaws do not negate the constitutional purpose of IP law to benefit society generally, which encompasses that the core idea, that IP exists not to make a few wealthy, but rather the making and dissemination of IP exists to benefit everyone. Provision of an economic incentive by granting the IP rights for limited times is the means, not the end.

[4] *See, e.g.*, Anne Flanagan & Maria Lilla Montagnani, Intellectual Property Law: Economic and Social Justice Perspectives xi, xiii (2010) ("Not properly questioning the utilitarian approach and its incentives-to-innovate rationale . . . results in the failure to account adequately for the increasing importance of IP to situations and persons beyond the customary and historical, and that IP implications extend far beyond maximizing cultural and scientific progress . . . [C]onsideration must be given not only to the economic-oriented incentive dimension of IP laws, but also to the regulatory dimension in terms of social goals that can be achieved through their construction . . . if IPRs are truly to be granted for the ultimate goal of welfare maximalization); Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, 55 N.Y.L.S. L. Rev. 77, 89–93 (2010); Hannibal Travis, Copyright Class Struggle, 10–14 (2018).

[5] *See* Lateef Mtima, Intellectual Property, Entrepreneurship and Social Justice: From Swords to Ploughshares 266 (2015).

© in this web service Cambridge University Press & Assessment www.cambridge.org

CAMBRIDGE

Cambridge University Press & Assessment
978-1-108-48273-8 — The Cambridge Handbook of Intellectual Property and Social Justice
Steven D. Jamar , Lateef Mtima
Excerpt
More Information

This introductory chapter charts the history and development of IP-SJ theory from its roots in judicial decisions in which courts attempt to balance competing IP social interests to the more recent scholarly entreaties for a more socially responsible and just IP legal regime. Although often subordinated to IP commodification interests, the social equipoise of the IP ecosystem has always been essential to its effectiveness. As the social justice perspective of IP protection continues to gain prominence and is applied to IP law and administration, the extant IP regime will be properly realigned to maximize its social efficacy.

II. TRADITIONAL UTILITARIAN PROPERTY RIGHTS APPROACH TO INTELLECTUAL PROPERTY

The economic incentive/commodification perspective toward IP protection reached its apogee in the late twentieth century. The prominent place given to IP issues in trade treaties at all levels, broadly international treaties, e.g., TRIPS,[6] regional treaties, e.g., NAFTA,[7] and bilateral treaties and agreements, e.g., USCO Agreement,[8] both exemplify and reinforce the economics-first model. It comes as no surprise that one of the main proponents, if not the main proponent, of the movement to export the economic incentive/commodification approach was the United States because the economic incentive/commodification approach to IP social utility dominated IP jurisprudence and scholarly and policy discourse there.[9]

Although this myopic view of the purpose of IP protection in the political economy did help to promote a robust IP ecosystem in the United States and similarly situated Western nations, the resulting ecosystem was flawed particularly with respect to creating and then ignoring systemic conditions of IP social injustice.[10] One of the most stark examples of the resultant social disconnect is the tragic history of African American and other marginalized groups being

[6] Trade-Related Aspects of Intellectual Property, part of the Uruguay Round (1986–1994) of negotiations leading to the creation of the World Trade Organization, Marrakesh Agreement Establishing the World Trade Organization (1994). The TRIPS Agreement is Annex 1C of the Marrakesh Agreement. *See* Zehra Betül Ayranci, *Intellectual Property Social Justice on the International Plane*, ch. 19 *in* The Cambridge Handbook of Intellectual Property and Social Justice (Steven D. Jamar & Lateef Mtima eds., 2023).

[7] North American Free Trade Agreement (1994), updated and renamed United States–Mexico–Canada Agreement (2020).

[8] United States–Colombia Free Trade Agreement, 2012; Marcela Palacio Puerta, *The Role of Nonrightsholders Advocates and Academics in Achieving Social Justice Balance in Copyright: The Case of Colombia*, ch. 22 *in* The Cambridge Handbook of Intellectual Property and Social Justice (Steven D. Jamar & Lateef Mtima eds., 2023).

[9] *See, e.g.*, Michael Palmedo & Srividhya Ragavan, *The U.S. Posture on Global Access to Medication & the Case for Change*, 16 NALSAR Stud. L. Rev. 2, 3–4, https://ssrn.com/abstract=3838856 (notwithstanding the fact that article 31 of the TRIPS Agreement explicitly "permits a range of negotiated flexibilities during a public health crisis to prevent intellectual property becoming a barrier to public health," the USTR Special 301 Report routinely accuses developing countries which make use of these agreed upon flexibilities of failing to protect IP rights. The USTR then "applies direct and indirect pressure through trade negotiations and preference systems in order to win policy changes favored by U.S. IP-owning stakeholders in the identified countries"). *See also* Michael Palmedo, *Unilateral Norm Setting Using Special 301*, *in* Intellectual Property Law and Access to Medicines: TRIPS Agreement, Health, and Pharmaceuticals 274 (Srividhya Ragavan & Amaka Vanni eds., 2021).

[10] Srividhya Ragavan & Amaka Vanni, *Access to Medicines and TRIPS Agreement: A Mapping of the Tradescape*, *in* Intellectual Property Law and Access to Medicines: TRIPS Agreement, Health, and Pharmaceuticals 1 (Srividhya Ragavan and Amaka Vanni eds., 2021) ("For many developing countries … the TRIPS Agreement prescribed a higher standard [for IP rights] than previously allowed in their national laws such as longer terms, broader rights, and fewer exceptions to the scope of rights … [T]he World Trade Organization's … global patent prescription largely created a privileged societal class with access to lifesaving medication, distinguishing them from those excluded from access to available medications"). *See also* Srividhya Ragavan, *World Trade Organization: A Barrier to Global Public Health?*, https://ssrn.com/abstract=3709643.

© in this web service Cambridge University Press & Assessment www.cambridge.org

CAMBRIDGE
Cambridge University Press & Assessment
978-1-108-48273-8 — The Cambridge Handbook of Intellectual Property and Social Justice
Steven D. Jamar , Lateef Mtima
Excerpt
More Information

systematically defrauded out of the commercial profits derived from their creative genius.[11] Often unaware of the opportunities and protections afforded by the IP law, and sometimes simply lacking the legal or economic resources to secure and enforce their rights, these artists saw their rightful rewards misappropriated by white artists, publishers, entrepreneurs, and promoters, and sometimes even academics and scholars, all of whom possessed the necessary knowledge of the IP systems and who had access to the financial and racial capital essential to commercial development and exploitation of artistic works.[12]

It is probably impossible to tally, much less make reparation for, the billions of dollars stolen from African Americans and other marginalized artists and entertainers through the unauthorized and inequitable exploitation of their aesthetic genius and the manipulation of copyright law.[13] From the annals of jazz to tap to rock and roll, many of the actual originators of some of America's most significant art forms languished in poverty and perished in obscurity, while their white imitators enjoyed fame, riches, and unearned places in history.[14]

[11] *See, e.g.* K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American Reparations*, 25 Cardozo Arts & Ent. L. J. 1179, 1180–81 (2008) ("The institutional music industry has resorted to copyright infringement lawsuits to stem massive Internet piracy in recent years. [T]he 'copynorms' rhetoric the entertainment industry espouses shows particular irony in light of its long history of piracy of the works of African-American artists, such as blues artists and composers. For many generations, black artists as a class were denied the fruits of intellectual property protection – credit, copyright royalties and fair compensation. Institutional discrimination teamed with intellectual property and contract law resulted in the widespread under-protection of black artistic creativity. Similarly, black inventors created technical and scientific works that impacted early American industries. Evidence exists that black inventors also faced similar divestiture in the industrial marketplace. The mass appropriation of the work of black artists and inventors reflects the systemic subordination based on race that characterized most of U.S. history").

[12] *See* Neela Kartha, *Digital Sampling and Copyright Law in the Social Context: No More Colorblindness!!* 14 U. Miami Ent. & Sports L. Rev. 218, 219–23 (1997); *see also* John Collis, The Story of Chess Records 117 (1998); James Lincoln Collier, The Making of Jazz: A Comprehensive History 106 (1978); Evans C. Anyanwu, *Let's Keep it on the Download: Why the Educational Use Factor of the Fair Use Exception Should Shield Rap Music from Infringement Claims*, 30 Rutgers Computer & Tech. L.J. 179, 181–82 (2004); Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess and Unfair Use*, 37 Rutgers L.J. 277, 350–51 (2006); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby-LatCrit Theory and the Sticky Mess of Race*, 10 La Raza L.J. 499, 512–13 (1998); Henry Self, *Digital Sampling: A Cultural Perspective*, 9 UCLA Ent. L. Rev. 347, 352–53 (2002).

[13] See Greene, *supra* note 11, at 1183–84 ("Black artists did not share rewards commensurate with their enormous creativity. From an economic perspective, black artists sustained losses through deprivation of copyright protection that would constitute a massive sum"); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 Am. U. J. Gender Soc. Pol'y & L. 365, 381 (2008); Kartha, *supra* note 12, at 234.

[14] Nelson George, The Death of Rhythm 'n' Blues 108 (1988) ("Blacks create and then move on. Whites document and then recycle. In the history of popular music these truths are self-evident"); Greene, *supra* note 11, at 1184–85, 1188–89 ("In the context of cultural production, Ellisonian invisibility is concrete in all its bitter irony. In the face of prolific and innovative Black musical creativity, 'Whites [in the 1920s] often vehemently denied that African Americans had made any contribution to the creation of jazz. New Orleans "Dixieland" musicians . . . made it a point of honor never to mix with Black musicians or acknowledge their talents.' In later years, it was widely conceded that 'though African-Americans had certainly invented ragtime and jazz, these musical styles were being brought to their highest levels by [White] outsiders'" (quoting Burton W. Peretti, Jazz in American Culture 42–43 (1993)); Kartha, *supra* note 12, at 232–34 ("The compulsory license made it possible for white artists to shanghai the African-American songbook. Pat Boone was notorious for covering Little Richard's music, and eventually, songs 'by niggers for niggers' realized a catalog value as great as those of Tin Pan Alley tunesmiths. Another unfortunate reality was that the Black songwriters and performers did not always understand the value of publishing rights which ended up being owned by white record companies. A great deal of revenue was generated by white groups covering Black hits. Eric Clapton is an excellent example of an artist who reached long term fame using a lot of unoriginal music and styles taken from Black artists. When he was with John Mayall's Bluesbreakers he recorded (blues artist) Freddie King's 'Hideaway,' Otis Rush and Willie Dixon's 'All Your Love,' Robert Johnson's 'Ramblin' On My Mind,' and later, with the rock group Cream, he recorded 'Crossroads,' another Robert Johnson song. When he was with Derek and the Dominos he recorded Willie Dixon's 'Evil,' Elmore James's 'The Sky Is Crying,' and later in his solo career he

© in this web service Cambridge University Press & Assessment www.cambridge.org

CAMBRIDGE

Cambridge University Press & Assessment
978-1-108-48273-8 — The Cambridge Handbook of Intellectual Property and Social Justice
Steven D. Jamar , Lateef Mtima
Excerpt
More Information

Many inventions by African Americans were similarly expropriated and exploited. Whether through denial of recognition, rightful revenues, or in many cases both, the systemic experience of Black innovators in the IP ecosystem was not one that rewarded or encouraged these inventors to participate in exploiting their IP.[15]

The commoditization approach to IP has also led to a lack of investment in meeting society's "noncommercial" IP needs. While there has been little advancement in treatments and cures for "limited market diseases" such as sickle cell anemia, the commercial marketplace is replete with treatments for male pattern baldness and erectile dysfunction. Throughout the developing world, the inability to afford First World prices for patented life-saving drugs has resulted in the widespread lack of access to healthcare and, indeed, in many instances, access to life itself.[16]

The need to rebalance the theory underlying our approach to crafting an inclusive and equitable IP ecosystem is thus obvious. Our response, IP-SJ theory, takes a significant step toward meeting the need.

III. THE ROOTS OF IP SOCIAL JUSTICE THEORY

Despite the dominant economic property rights-focused utilitarian approach toward IP rights that was ascendant in the second half of the twentieth century, it did not reach quite as far as its strongest absolute property rights advocates sought. Its basic bias for economic-based IP theory notwithstanding, certain limits on IP rights in the public interest continued to be recognized. In copyright fair use was still protected as was fair use of trademarks. Works in the public domain were generally protected as well. But the property rights-first mentality had many successes including extending copyright terms and patent terms. Even fair use got twisted away from its

imitated reggae music. He recorded some music in Jamaica (not including 'I Shot the Sheriff') where he recorded Peter Tosh's 'Whatcha Gonna Do.' How would Eric Clapton's career fare under a 'total concept and feel' analysis like that set forth in Roth Greeting Cards v. United Card Co.?").

[15] *See* Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency and Development)*, 40 U.C. Davis L. Rev. 717, 740–41 (2007) ("[B]ecause of the historical realities of race and slavery, the extent of th[e] beneficial distributive impact [of the patent system] on black inventors was illusory at best . . . The early American patent system beckoned many poor white inventors to achieve wealth and recognition through a quasi-egalitarian patent system that facilitated investment in their lucrative ideas. The same opportunities did not await black inventors, whose contributions white society tended to ignore when the commercial value of a black invention was uncertain. In cases where commercial promise was more readily apparent, black inventions were subject to appropriation without attribution. State laws governing property and contract expressly precluded slaves from applying for or holding property. Presumably, this proscription included slaves being precluded from owning patents"); *see also herein* Kara W. Swanson, *They Knew It All Along: Patents, Social Justice and Fights for Civil Rights*, ch. 10 *in* The Cambridge Handbook of Intellectual Property and Social Justice (Steven D. Jamar & Lateef Mtima eds., 2023).

[16] *See* Madhavi Sunder, From Goods to a Good Life: Intellectual Property and Global Justice 1 (2012) ("Intellectual property incentivizes pharmaceutical companies to innovate drugs that sell – hence we are flooded with cures for erectile dysfunction and baldness, but still have no cure for diseases that afflict millions of the poor, from malaria to tuberculosis, because these people are too poor to save their lives"); Jia Wang, Conceptualizing Copyright Exceptions in China and South Africa: A Developing View from the Developing Countries 13 (2018) ("[T]he US and the EEC used the threat of denying market access as a means to build the consensus required to shape the content of the TRIPS Agreement text . . . In the end, developed countries were able to push through higher levels of IP in the form of the TRIPS Agreement text. TRIPS proponents believed that the ability of the WTO to generate threats and the enforcement of retaliatory mechanisms compelled sovereign obedience"); Anupam Chander & Madhavi Sunder, *Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, 40 U.C. Davis L. Rev. 563, 574 (2007) ("Even if we are interested solely in spurring innovation, are we disinterested entirely in what kind of innovation we are spurring? Does it matter if the intellectual property regime fails to incentivize the creation of treatments for poor people's diseases?").

© in this web service Cambridge University Press & Assessment www.cambridge.org

Cambridge University Press & Assessment
978-1-108-48273-8 — The Cambridge Handbook of Intellectual Property and Social Justice
Steven D. Jamar , Lateef Mtima
Excerpt
More Information

proper purposes by the creation and expansion of the idea of transformative use.[17] By the end of the twentieth century and continuing into the twenty-first, scholars had begun critiquing the narrow economic incentive/commoditization rationale of IP protection, employing various theories to support the development of a more socially responsive global IP system. Collectively, they sought to usher in a new perspective toward IP protection, one which places IP as a social ordering function within the total political economy and indeed which recognizes IP's social ordering function as integral to all sorts of social and cultural progress. This chorus of many voices from many perspectives sang that IP protection serves interests beyond economic utility. Indeed, unlike the narrow economic incentive/commoditization perspective which is at best agnostic toward the social justice impacts and obligations of IP, the new perspective – the perspective of IP-SJ (although called by other names at times) – seeks to balance the economic utilitarian perspective of IP protection with a perspective that also explicitly addresses the broader societal impacts IP protection brings. IP-SJ does not seek to eliminate IP protection nor economic considerations; IP-SJ seeks to make IP inclusive for all.

Although the proposition that adherence to social justice is an inherent obligation of IP law is a relatively new idea in American IP discourse,[18] it has roots in earlier efforts to circumscribe the unchecked implications of an excessive deference to rightsholders' economic interests. Some solicitude toward the general public interest can be found in the copyright statutes themselves, and, more importantly for our purposes, in a wide variety of IP legal decisions which pre-date the introduction of IP-SJ theory as a separate field of IP legal scholarship, policy, and social activism. American courts have long accepted the responsibility of assessing and balancing IP rights with other cardinal interests to advance the greater societal good. And in the latter decades of the twentieth century, some scholars and policymakers pushed beyond considerations of the general public good and argued that the global IP regime should not be indifferent to pertinent social deficiencies and injustice. IP-SJ draws upon these rich and important antecedents, which are detailed in the ensuing sections.

IV. IP SOCIAL JUSTICE-ORIENTED JURISPRUDENCE

Judicial decisions addressing the extent of IP protection in light of the public interest pre-date the development of IP-SJ theory as a well-developed field of IP legal scholarship and law and policy social activism. Unlike today where IP-SJ considerations and objectives are often articulated using the rhetoric of social justice explicitly in legal opinions,[19] scholarship,[20] and even in

[17] Perhaps the most egregious case is that of Richard Prince stealing Patrick Cariou's photos of Rastafarians in Jamaica and making burlesques out of them for commercial profit, an action sanctioned as proper by the Second Circuit when it overturned a correct lower court decision in favor of Cariou. Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

[18] The earliest law review symposia which expressly examine the social justice obligations of IP law appear to be *Symposium, Intellectual Property and Social Justice: IP and Brown*, 48 How. L.J. 571 (2005) and *Symposium, Intellectual Property and Social Justice*, 40 U.C. Davis L. Rev. 559 (2006). Collectively, these symposia anticipated and indeed helped instigate a seismic shift in IP scholarly discourse, in as much as they expressly introduce "social justice" terminology into the general IP lexicon and sparked the mapping of IP-SJ theory as a discreet and affirmatively aspirational rationale. *See generally* Steven D. Jamar & Lateef Mtima, *A Social Justice Perspective on Intellectual Property, Innovation, and Entrepreneurship*, *in* Entrepreneurship and Innovation in Evolving Economies: The Role of Law 78, 78–83 (Megan M. Carpenter ed., 2012); Madhavi Sunder, *supra* note 16, at 3 (2012); Mtima, *supra* note 5.

[19] *See, e.g.*, The Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 679 (S.D.N.Y. 2011)

[20] *See, e.g.*, Giovanni Battista Ramello, *Access to vs. Exclusion from Knowledge: Intellectual Property, Efficiency and Social Justice*, *in* Intellectual Property and Theories of Justice 73–93 (Axel Gosseries & Alain Marciano eds., 2008).

© in this web service Cambridge University Press & Assessment www.cambridge.org

CAMBRIDGE

Cambridge University Press & Assessment
978-1-108-48273-8 — The Cambridge Handbook of Intellectual Property and Social Justice
Steven D. Jamar , Lateef Mtima
Excerpt
More Information

treaties and statutes,[21] older support for IP-SJ considerations rarely employs the contemporary IP-SJ lexicon.[22] Regardless of the specific verbiage employed, both older and recent case decisions provide compelling evidence of a venerable tradition of addressing IP-related social issues through interpretation and application of IP legal doctrine. The courts have long understood that the core social function of IP protection is to promote the progress of the arts and sciences to society's benefit, and that to achieve this goal it is necessary to balance the interests of all IP stakeholders properly – creators, distributers, users, and financiers alike. For example, in the United States, cases which involve the impact of IP protection upon consumer rights and public education often include analyses and dispositions relevant toward acknowledgment of the law's social justice obligations generally and provide access as needed to support those interests while still protecting the rights of IP holders.[23] Similarly, judicially developed doctrines which balance IP protection against the public access to the "public domain of ideas" also are built upon a conception of the social justice obligations of the IP law.[24]

In addition to supporting pan-IP concepts like public domain and idea exclusion, social justice considerations and obligations arise within specific forms of IP protection. For example, in copyright, courts are required to balance First Amendment rights[25] and consumer first sale rights[26] against copyright protection, and to evaluate users' right under the fair use doctrine.[27] Courts in such cases often explicitly consider social justice effects as part of the basis of the court's ultimate disposition.

Similarly, in patent law antitrust concerns in connection with patent misuse[28] and "march-in" rights under the Bayh-Dole Act[29] will typically include consideration and assessment of social impacts which sound in social justice. In the areas of trade secrets, considerations of employee

[21] Topics of the European Union: Human Rights and Democracy, https://europa.eu/european-union/topics/human-rights_en; Oskar J. Gstrein, Privacy as a Human Right in the European Union and the Global Internet (2017).

[22] *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'") (quoting Mazer v. Stein, 347 U.S. 201, 209 (1954); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("The limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired").

[23] In re Napster, Inc. Copyright Litig., 2004 U.S. Dist. LEXIS 7236 (N.D. Cal. 2004). *See also* Krista Cox, *Applying Social Justice Principles in the Practice of Intellectual Property Law*, ch. 15 *in* The Cambridge Handbook of Intellectual Property and Social Justice (Steven D. Jamar & Lateef Mtima eds., 2023); Wang, *supra* note 16, at 29–31, 37–40.

[24] *See, e.g.*, Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); Sales Strategies Grp., Inc. v. Fenton, 16 Misc. 3d 171 (N.Y. Sup. Ct. 2007). For an analysis of the IP law's pervasive prohibition against the recognition of property rights in ideas as a means by which to minimize the advantages of socio-economic privileges in the race to develop ideas, *see* Lateef Mtima, *The Idea Exclusions in Intellectual Property*, 28 Tex. Intell. Prop. L. J. 343 (2020).

[25] Eldred v. Reno, 239 F.3d 372 (Copyright law and First Amendment rights).

[26] Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350-51 (1908) (first sale rights). Jonathan Band and Brandon Butler, *Libraries, Copyright Exceptions, and Social Justice*, ch. 17 *in* The Cambridge Handbook of Intellectual Property and Social Justice (Steven D. Jamar & Lateef Mtima eds., 2023).

[27] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (Fair use doctrine). An example of reconciling competing interests would be the doctrine of fair use in U.S. law or fair dealing in other systems under which some uses of copyrighted works are deemed noninfringing even if no permission is sought or obtained. An example of complementary interests would be the way in which providing some protection for expression of ideas serves to encourage the creation and dissemination of those ideas, which serves interests in free speech and the creation and dissemination of ideas that advance social, economic, and cultural development.

[28] Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970 (1990).

[29] Hochendoner v. Genzyme Corp., 95 F. Supp. 3d 15 (D. Mass. 2015) ("march-in" rights under the Bayh-Dole Act).

© in this web service Cambridge University Press & Assessment www.cambridge.org

CAMBRIDGE

Cambridge University Press & Assessment
978-1-108-48273-8 — The Cambridge Handbook of Intellectual Property and Social Justice
Steven D. Jamar , Lateef Mtima
Excerpt
More Information

mobility, discouraging socially harmful business tactics,[30] and requiring "clean hands" to invoke trade secret remedial action[31] also exemplify social justice perspectives being used by courts in shaping IP law to fit some social justice concerns.

Additional examples of court-developed social balancing doctrines include patent exhaustion[32] and experimental use;[33] trade secret reverse engineering[34] and independent discovery[35] rights; trademark nominative use;[36] and the right of publicity relationship[37] and transformation tests.[38] More often than not, the need for such balanced doctrines became evident in disputes which involved the impact of IP protection upon consumers and on other user self-actualization interests. These challenges necessitated analyses and dispositions that recognize law's social justice obligations generally.[39]

Regardless of the specific terminology used, a long chain of court decisions evidences a venerable judicial tradition of acknowledging and addressing IP-related social challenges through socially conscious interpretation and application of IP legal doctrine.[40] These decisions collectively demonstrate that, although legal recognition of creator and innovator property interests is an essential means toward achievement of the IP regime's overarching ends, neither these, nor any other constituent interests, enjoy either exclusivity or even primacy over the system's ultimate purposes. In appreciating the breadth of the Constitutional IP directive, these courts thus laid the foundation for the eventual recognition of the symbiotic relationship between IP social utility and IP-SJ.

V. SCHOLARLY INITIATIVES: FROM HUMAN RIGHTS TO CRITICAL LEGAL THEORY AND BEYOND

Although IP-SJ is not based upon any particular predecessor theory, it does grow out of earlier efforts by scholars addressing IP from various socially conscious perspectives. In the latter decades of the twentieth century scholars writing in the field of law and development addressed the role of IP law in economic, social, and cultural development.[41]

[30] Bayer Corp. v. Roche Molecular Sys., 72 F. Supp. 2d 1111 (N.D. Cal. 1999) (employee mobility); Janse van Rensburg v. Minister van Handel en Nywerheid, 1999 (2) BCLR 204 (T) (S. Afr.) (harmful business practice).

[31] Rotary Sys. v. TomoTherapy Inc., 2014 Minn. App. Unpub. Lexis 1301 (2014) ("clean hands"/trade secrets).

[32] *See* Adams v. Burke, 84 U.S. 453, 456–57 (1873).

[33] *See* City of Elizabeth v. Am. Nicholson Pavement Co., 97 U.S. 126, 135–36 (1877).

[34] *See* ILG Industries, Inc. v. Scott, 273 N.E.2d 393, 396–97 (Ill. 1971).

[35] *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 475–76 (1974).

[36] *See* New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 308 (9th Cir. 1992); Cairns v. Franklin Mint Co., 292 F.3d 1139, 1150–51 (9th Cir. 2002).

[37] *See* Rogers v. Grimaldi, 875 F.2d 994, 1002–1004 (2d Cir. 1989).

[38] *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 **P**.3d 797, 808–11 (Cal. 2001).

[39] *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 426–27, 429–32 (1984); Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2116 (2013).

[40] *See, e.g.*, Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 448 (S.D.N.Y. 2012), *aff'd*, 755 F.3d 87 (2d Cir. 2014), wherein various research universities agreed to allow Google to scan books from their libraries to make digital copies accessible to the blind and visually impaired. Citing the Americans with Disabilities Act as reflecting a strong federal public policy to enhance opportunities for the physically disabled, the court held the unauthorized scanning permissible under the Fair Use doctrine. "Congress declared that our '[n]ation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.'" 755 F.3d at 102. This explicit reference to federal disability law and policy as basis for its decision constitutes the use of social-justice principles of access, inclusion, and empowerment in defining the reach of copyright.

[41] Ultimately, these ideas would find acceptance in the construction of public international law and treaties. *See* Hiroyuki Odagiri et al., Intellectual Property Rights, Development, and Catch-Up: An International

© in this web service Cambridge University Press & Assessment www.cambridge.org

CAMBRIDGE

Cambridge University Press & Assessment
978-1-108-48273-8 — The Cambridge Handbook of Intellectual Property and Social Justice
Steven D. Jamar , Lateef Mtima
Excerpt
More Information

As IP permeated everyday life including work, education, health, and leisure throughout global society,[42] some IP legal scholars began to demonstrate some of the inadequacies in the prevailing IP commodification paradigm and the law and economics theory of IP protection in addressing pressing societal concerns.[43] Scholars, including Keith Aoki, Margaret Chon, Laurence Helfer, and Rosemary Coombe, among others, contended that IP protection performs a more complex function in society's cultural, technological, and social well-being than merely mediating ownership rights and economic development. Accordingly, they argued that the IP ecosystem must accommodate considerations and values beyond property rights and economic concerns, including particularly human rights perspectives and ideas from law and development (which itself had been stretched beyond its original economic development focus).[44]

Comparative Study (2010). In 2012, we wrote a book chapter building on that work. *See* Steven D. Jamar & Lateef Mtima, A *Social Justice Perspective on Intellectual Property, Innovation, and Entrepreneurship*, ch. 6 *in* Entrepreneurship and Innovation in Evolving Economies: The Role of Law (Megan Carpenter, ed., 2012). One of us had published in that space earlier, but was not among the progenitors of the ideas. Steven D. Jamar, *A Lawyering Approach to Law and Development*, 27 N.C. J. Int'l L. & Commercial Reg., 31–66 (2001).

[42] *See* Sunder, *supra* note 16, at 3 ("[IP] laws do more than incentivize the creation of more goods. They fundamentally affect human capabilities and the ability to live *a good life*. At the start of the twenty-first century, the legal regime of intellectual property has insinuated itself more deeply into our lives ... than at any other period of time history, affecting our ability to do a broad range of activities, including to create and contest culture and to produce and distribute life-saving drugs. Indeed, now that full compliance with the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement is required in all but the world's least developed countries, intellectual property has become a question of life or death"); Steven D. Jamar & Lateef Mtima, *The Centrality of Social Justice for an Academic Intellectual Property Institute* 64 S.M.U. L. Rev. 1127, 1129–30 (2011) ("In the technological society of our Information Age, intellectual property has transcendent importance, penetrating, as it has, every aspect of our lives in ways unimagined a few decades ago and in ways so pervasive as to be essentially unnoticed or at least taken for granted (until it breaks down) in our day-to-day lives. The Internet and all forms of digital information technology have become vital components of American daily life. Intellectual property law both facilitates and mediates the impacts of this technological explosion. Because of the ubiquity and increasingly user-friendly and transparent implementations of intellectual property, people are not only more routinely intimate users and consumers of intellectual property but are also more often creators and purveyors of works which are themselves intellectual property, especially in the copyright field. Ultimately, intellectual property today significantly impacts our quality of life not merely in aesthetic ... and technocratic ... ways. One important area is providing pharmaceuticals at affordable rates. In the case of AIDS and other worldwide health epidemics, the importance of the health issue is of the first order worldwide. Indeed, the recent responses to the AIDS crisis in the lowering of prices of some drugs, and the conduct of some foreign countries in refusing to prioritize IP rights over public health illustrates a balancing of interests toward the greater social good (an approach not always consistent with prevailing attitudes in the United States)").

[43] *See, e.g.*, Margaret Chon, *Intellectual Property and the Development Divide*, 27 Cardozo L. Rev. 2821, 2831–32 (2006) ("Intellectual property, when it encounters development either domestically or globally, must incorporate a more comprehensive understanding of social welfare maximization. The overall assessment of intellectual property's instrumental goal – the promotion of 'Progress,' at least in the U.S. context – has been dominated of late by the assumption that pure wealth or utility-maximization serves adequately to evaluate social welfare. This approach dovetails with the interests of intellectual property industries, whose short term goals of maximizing revenue generation are not necessarily aligned with society's long term dynamic goals of maximizing innovation. Over-reliance on utility-maximization ignores distributional consequences"). *See generally* William Fisher, *Theories of Intellectual Property*, *in* New Essays in the Legal and Political Theory of Property 4 (Stephen Munzer ed., 2001), https://cyber.harvard.edu/people/tfisher/iptheory.pdf; Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 Tex. L. Rev. 1853, 1855 (1991); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 Cardozo Arts & Ent. L.J. 345, 346–48 (1995); William Fisher, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659, 1663–64 (1988); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Calif. L. Rev. 125, 132–34 (1993); Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 Vand. L. Rev. 217, 221 (1998).

[44] *See, e.g.*, Aoki, *supra* note 15, at 719; Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 Calif. L. Rev. 1331, 1331–32 (2004); Chon, *supra* note 43, at 2822–23; Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 Minn. Intell. Prop. Rev. 47, 47 (2003), https://scholarship.law.umn

© in this web service Cambridge University Press & Assessment www.cambridge.org