

THE CAMBRIDGE HANDBOOK OF INTELLECTUAL PROPERTY AND SOCIAL JUSTICE

Protection for intellectual property has never been absolute; it has always been limited in the public interest. The benefits of intellectual property protection are meant to flow to everyone, not just a limited population of creators and the corporations that represent them. Given this social-utility function, intellectual property regimes must address issues of access, inclusion, and empowerment for marginalized and excluded groups. This handbook defines an approach to considering social justice in intellectual property law and regulation. Top scholars in the field offer surveys of social justice implementation in patents, copyright, trademarks, trade secrets, rights of publicity, and other major IP areas. Chapters define Intellectual Property Social Justice theory and include recommendations for reforming aspects of IP law and administration to further social justice by providing better access, more inclusion, and greater empowerment to marginalized groups.

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The Cambridge Handbook of Intellectual Property and Social Justice

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For Joseph and Primrose, and for Rwanda

– LM

This book is dedicated to all those working for social justice.

– SDJ

“The arc of the moral universe is long, but it bends toward justice.”

– Martin Luther King, Jr. (revised by Dr. King from a sermon by Rev. Theodore Parker in 1853)

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Foreword

By David J. Kappos, Karyn A. Temple, and James Pooley

Intellectual property (IP), the fruit of human creativity and ingenuity, is extant in every culture. However it might be labeled or described, every society maintains traditions, customs, rules, or laws which foster human intellectual experiment, achievement, and enterprise.

Throughout much of the twentieth century, the prevailing perspective of IP law and protection was that of a system that provides economic incentives to promote the production and distribution of IP. From books and movies to machines and drugs, supporters of this view deferred to the commercial marketplace to identify society's IP needs and to offer the prospect of pecuniary profit to creatives and innovators to develop responsive products and services.

Toward the end of the last century, however, a number of scholars and policymakers posited that society does not gain the full benefits that IP protection can provide if IP is assessed and administered based solely on economic terms. They demonstrated that various "extra-economic" social conditions such as race, gender, and class inequality limit the opportunities for some artists and inventors to contribute to or benefit from IP production. Furthermore, many IP social needs such as access to health and medicines and widespread, shared progress in human development cannot be properly addressed in terms of commercial profit.

To fulfill its social potential, IP protection must be structured around more than just economic incentives, values, and metrics. A fully realized system for IP protection must also account for and address broader social justice interests and concerns. Some IP law and policymakers were early to appreciate the inherent social justice obligations and effects of IP protection, and helped to reposition IP discourse and major policy goals within the context of the fulfillment of human potential toward humanity's greater good. Three of these thought leaders share their aspirations for a social justice-centered IP regime in this Foreword.

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THE IMPORTANCE OF SOCIAL JUSTICE TO THE GLOBAL INNOVATION SYSTEM

Innovation is vital to progress and development in any society, and IP, the embodiment of innovative and creative achievement, is the currency of innovation. IP is the vessel that captures value as an idea moves from the mind to the marketplace. Just as a robustly kinetic monetary

currency fuels economic activity, the continuous production and broad dissemination of IP, such as patented inventions, enhances the quality of human life, inspires further innovation, and thereby sustains a perpetual cycle of innovative accomplishment and socio-economic and technological progress.

In the global innovation ecosystem, patent protection provides important incentives to inventors. Patent rights augment the natural drive to invent by providing opportunities for inventors to commercialize and distribute their inventions to the public, which not only brings financial reward to inventors, but also funds research and development for further innovation. But in order for inventors and the public to obtain the benefits of patent protection, inventors must have access to the legal support needed to navigate the many complexities of the patent system successfully. Many inventors who lack the resources to retain a patent attorney, especially those in underserved communities, never enter the patent system, and the public is deprived of the benefit of their inventive genius.

Ensuring that all inventive minds have effective access to patent protection is a social justice aspiration that affects the ultimate efficacy of the patent system and its function in promoting the development and distribution of new innovations for the public good. In 2011, the United States Patent Office (USPTO) sought to meet this social challenge by establishing the Patent Pro Bono Program (PPBP), a nationwide initiative through which volunteer patent attorneys provide free legal advice to financially under resourced inventors and small businesses, to assist them in obtaining patent protection for their inventions.

Since the inception of the PPBP, patent practitioner volunteers have been matched with more than 3,400 inventors and have helped them to file more than 1,800 patent applications.¹ Many of the inventors who have participated in the program come from under represented groups and communities. In a recent survey of participants in the program, 30 percent of the respondents identified as African American or Black and 41 percent were women.² Today the program is offered in all 50 states and supports the entrepreneurial goals of many underresourced inventors, who in turn contribute to our nation's economic growth by creating jobs and providing the public with innovative products and services.

The success of the PPBP has inspired the creation of a companion initiative through which patent pro bono assistance is provided on an international level. In 2015, the World Intellectual Property Organization (WIPO) and the World Economic Forum (WEF) consulted with the USPTO to collaborate in the creation of the Inventor Assistance Program (IAP), which is designed to “mak[e] the IP system more accessible by matching financially underresourced inventors of promising new technologies and ideas with qualified IP counsel, to assist in securing patent protection for their innovations.”³

WIPO and WEF appreciate the fact that, while “an adequate, inclusive global IP system brings benefits to everyone,”⁴ for many underresourced inventors the lack of financial and knowledge resources can block access to that system.

[T]he process for protecting one's inventions and ideas remains mysterious, complex, or simply inaccessible for many talented inventors around the world . . . While the circumstances vary by

¹ Eileen McDermott, *Data Show USPTO Patent Pro Bono Program is Working for Women and Minorities*, IP WATCHDOG, Mar. 24, 2022, <https://www.ipwatchdog.com/2022/03/24/data-show-uspto-patent-pro-bono-program-working-women-minorities/id=147830/>.

² *Id.*

³ See WIPO IP Portal, *Inventor Assistance Program Online Platform*, <https://iap.wipo.int/iap/about-inventor.xhtml>; IAP Guiding Principles, at 2, https://www.wipo.int/export/sites/www/iap/en/docs/iap_guiding_principles.pdf.

⁴ IAP Guiding Principles, *supra* note 3, at 3.

individual and country . . . recent data indicates that a common problem for many inventors is the sheer complexity of the patent laws and rules for those who, due to financial constraints, are unable to retain a qualified attorney, and instead are forced to navigate the system on their own . . . This data indicates that what is needed most for many inventors [is] the expertise of qualified legal counsel to assist with the complexities of patent prosecution.⁵

Following and expanding upon the model of the PPBP, the IAP directly matches experienced but underresourced inventors with qualified patent counsel. The IAP also reaches inventors who are largely unfamiliar with the patent system, by offering an online IP education course to such inventors, who, upon completing the course, are also matched with patent counsel.

The inclusion of underresourced inventors in the patent system not only increases the quantity of innovation output,⁶ but it also enhances the diversity of achievements within the global innovation system, particularly in many developing nations. For example, whereas a great deal of traditional knowledge, traditional cultural expressions, and genetic resources (collectively TKGR) is generally considered to be outside the purview of IP protection, in today's knowledge-based economies TKGR has assumed a greater economic potential and scientific value to a wide range of stakeholders, including as a source of revenue to the groups and communities which are the caretakers of these resources. Through the IAP, more innovators from TKGR-rich communities can become familiar with the benefits of IP protection, and likewise share perspectives toward TKGR that will better enable the IP system to strike the proper balance between promoting the dissemination and socially beneficial use of TKGR, and respecting the cultural heritage and economic interests of the communities which produce and sustain these resources.

Ideas for innovation come from every corner of society and no society can afford to allow ideas to remain undeveloped merely because some inventors cannot afford access to the IP system. In the twenty-first century, it has become increasingly clear that innovation is the only sustainable source of competitive advantage for world economies. The social function of IP protection in promoting innovation, and the social justice obligations and effects inherent to that function, are self-evident. An IP system built on the social justice principles of universal access, inclusion, and empowerment ensures that IP achievement reaches the hands of all Americans and peoples throughout the world, improving the quality of daily life and inspiring further technological and cultural progress.

Karyn A. Temple, thirteenth and Former United States Register of Copyrights and Director U.S. Copyright Office

INCLUSION, DIVERSITY, AND THE BEAUTY OF THE COPYRIGHT SYSTEM

I still recall the first time I attended the Institute for Intellectual Property and Social Justice's (IIPSJ) inspirational CLE seminar at the Howard University School of Law as a – relatively – young lawyer early in my legal career. At that time, while I had already attended several IP and copyright conferences, this one to me felt quite different. The conference approached the issue of IP in a new and radical way – one that I had often thought about myself but had never really

⁵ *Id.* at 2.

⁶ See, e.g., *People, Planet, Patent: Spotlight on the 50th IAP Invention*, https://www.wipo.int/iap/en/news/2020/news_0001.html.

heard articulated publicly before – the idea of copyright and the IP system not simply as a general incentive for production of creative works but as an impetus for broader societal justice and advancement.

It was in that initial conference that I first began to recognize that my interest in IP and copyright had actually not deviated too far from my personal commitment (long fostered by my historian father and social worker/lawyer mother) to civil and human rights. In my first year of law school, I had the honor of spending a summer undertaking a human rights legal internship in Durban, South Africa and I started my legal career in the public sector, working for the Department of Justice. While my concurrent interest in copyright eventually took me to the private sector, the IIPSJ IP and Social Justice conference provided a roadmap for me on how those interests could align – that copyright itself could often serve as a form of empowerment for minorities and the economically disadvantaged – its own social justice tool for good. But, importantly, only so long as there was equal access to, understanding of, and inclusion in this complex legal system.

What struck a particular chord for me was the comprehensive view that IP social justice (IP-SJ) takes of copyright. Rather than unfairly demonizing a legal system that has admittedly been used at times to exploit rather than empower, the concept of IP-SJ identifies where there are gaps but also readily affirms that the existing copyright system *already* has the basic framework and tools to impact our society in meaningful and positive ways.

Many years and many conference attendances later, I can no longer claim to be an even “relatively” young lawyer. My career has taken me on some unexpected yet very fulfilling paths, including serving as the first person of color to hold the position of United States Register of Copyrights and Director of the U.S. Copyright Office (serving in the Office for a total of nearly nine years, including three-and-a-half years heading/leading the Office of 400-plus employees). But one constant has not changed: The inspiration I took from Professor Mtima’s profound work in this area to support inclusivity in the copyright legal system to the benefit of our society. A highlight for me was spearheading the first ever copyright and social justice program at the U.S. Copyright Office and inviting Professor Mtima as the keynote speaker.

I have attempted to weave in social justice principles in many of my conversations about copyright law. From speaking about how iconic copyrighted works, whether films, photographs, or music, have enabled critical thought on certain issues – the iconic photograph of a mutilated Emmet Till in *Jet* magazine, the controversial book *The Jungle*, the films *Norma Rae*, *Moonlight*, and *Philadelphia* all come to mind – IP protection has literally incentivized and changed the world for the better.

I have also continued to question, engage, debate, and assess the copyright regime and whether it has fulfilled its promise of inclusivity, diversity, and empowerment. In a June 2019 hearing before the House Judiciary Committee when I headed the Copyright Office, I borrowed a phrase from Professor Mtima and noted that “copyright is a social justice.” I expect that may have been one of the first times members of Congress had heard it discussed in quite that way, that is, in social justice terms during a formal Congressional hearing. *Saying* copyright is a social justice is not the solution in and of itself, of course. Gaps in the system must be identified and filled. We must continue to ensure that copyright works not just for large corporations but for everyday individuals and especially those from marginalized communities.

These principles were at the forefront when I testified before Congress in support of a copyright small claims tribunal in 2020. Access to the court system when faced with the theft of your creative endeavors cannot be a privilege only of the wealthy. I was gratified later to see Congress pass the CASE Act, which is a prime example of IP-SJ principles actively at work in the

copyright field. More recently, I had an occasion to serve on a panel discussion of the fourth fair use factor – market harm.⁷ One thing that bothered me about recent opinions in this area was the ways in which courts considered the background and stature of the creator in considering harm to the market.⁸ An IP-SJ lens tells that unduly favoring more established and successful creators in analyzing fair use undermines rather than promotes the goals of the copyright system and does not reflect a socially just application of IP rights. Nor does allowing major technology corporations to profit from the unauthorized use of creators' works without recourse.⁹ That too is a social justice issue.

Diversity within the copyright industry itself, of course, remains one of those ongoing “gaps” which dilute the social efficacy of the copyright ecosystem. In testimony to the House Judiciary Committee in 2020, I highlighted both the ongoing problems in this area, as well as the progress that has been made. Again, from an IP-SJ perspective, without diversity within the creative community (behind, in front of, and beside the camera, etc.), copyright will be unable fully to achieve its purpose as an incentive for economic opportunity and social good. We need diverse stories to challenge us, inspire us, and teach us. And we need diverse creators to be able to reap the economic benefits of their own creativity fairly. But isn't it amazing that diverse creators have at their fingertips *intellectual property rights* guaranteed by our copyright laws that do not require

⁷ Under the fair use doctrine, the unauthorized use of copyrighted works can be legally permitted, dependent upon judicial evaluation of such use in accordance with four factors: the purpose of the use; the nature of the work being used; the amount and substantiality of the portion of the work used; and the effect on the commercial market for the subject work. See 17 U.S.C. § 106.

⁸ For example, in *Cariou v. Prince*, 714 F. 3d 694, 699, 709 (2d. Cir. 2013), in evaluating whether appropriation artist Richard Prince's unauthorized use of Patrick Cariou's copyrighted photographs should be allowed as a fair use, the Court of Appeals for the Second Circuit made the following comparison:

Cariou's publisher Powerhouse Books, Inc. printed 7,000 copies of *Yes Rasta*, in a single printing [and] the book enjoyed limited commercial success. The book is currently out of print [and] over sixty percent of [the copies sold] sold below the suggested retail price of sixty dollars. PowerHouse has paid Cariou . . . just over \$8,000 from sales of the book . . . Prince is a well-known appropriation artist . . . He is a leading exponent of this genre and his work has been displayed in museums around the world, including New York's Solomon R. Guggenheim Museum and Whitney Museum, San Francisco's Museum of Modern Art, Rotterdam's Museum Boijmans van Beuningen, and Basel's Museum fur Gegenwartskunst . . . Prince's work appeals to an entirely different sort of collector than Cariou's. Certain of [Prince's] artworks have sold for two million or more dollars. The invitation list for a dinner . . . hosted in conjunction with the opening of [one of Prince's art] show[s] included a number of the wealthy and famous such as the musicians Jay-Z and Beyonce Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, model Gisele Bundchen, *Vanity Fair* editor Graydon Carter, *Vogue* editor Anna Wintour, authors Jonathan Franzen and Candace Bushnell, and actors Robert DeNiro, Angelina Jolie, and Brad Pitt. Prince sold eight artworks for a total of \$10,480,000, and exchanged seven others for works by painter Larry Rivers and by sculptor Richard Serra. Cariou on the other hand has not actively marketed his work or sold work for significant sums.

The Court thus concluded that Prince's unauthorized use did not impact the market for Cariou's photographs and therefore constituted a fair use. Similarly, in *Warhol v. Goldstein*, 382 F. Supp. 3d 312, 317 (S.D.N.Y. 2019), in determining whether the unauthorized use of photographer Lynn Goldstein's work by the late Andy Warhol should be permitted as a fair use, the District Court for the Southern District of New York observed that “Andy Warhol [was] an ‘art-world colossus’ . . . who contributed significantly to contemporary art across a variety of media . . . Warhol's contemporary art brand has remained powerful.” The Court dismissed Goldstein's claims; however, she appealed, and the litigation is currently pending before the United States Supreme Court.

⁹ See, e.g., *Authors Guild v. Google, Inc.*, 804 F. 3d 202 (2d. Cir. 2015) (holding that Google's unauthorized digital scanning of tens of millions of copyrighted books for the purpose of (i) creating a digitally searchable corpus and (ii) providing digital “archive copies” to the institutional owners of analog copies of the subject books constitutes a Fair Use of said works, and therefore allowed these uses over the objections of and without any compensation to the copyright owners).

a college education or wealthy background, but instead merely a “pad and a pen”¹⁰ or “one mic”?¹¹ That is the true beauty of the copyright system.

Today, social justice issues are being increasingly discussed, whether it is debating how social media influencers are sometimes taking advantage of lesser-known dancers and creators – and how IP might help protect those communities – to questioning whether aspects of our IP system need to be improved – social justice principles have reached the mainstream of IP. These are great developments and the social justice rationale of copyright provides the analytical foundation that will help to ensure that copyright will fulfill its true social potential. The global creative ecosystem is indebted to the legal scholars and thought leaders who devised the analyses which acknowledge the inherent social justice obligations and effects of copyright, and I look forward to doing my small part to help foster these discussions and otherwise to promote widespread and equitable participation in and social uplift and empowerment through copyright endeavor.

James Pooley, Deputy Director General World Intellectual Property Organization (2009–2014)

IP SOCIAL JUSTICE AND HUMAN DEVELOPMENT: FORGING AN INCLUSIVE IP ECOSYSTEM

Throughout our global society, IP shapes the quality of human life. From the evolution of social and political norms sparked by information technology in developed nations to life-sustaining resource management innovation in the developing world, IP achievement enhances the physiological, technocratic, and aesthetic aspects of all our daily experiences.

The social justice perception of IP prioritizes human development and advancement as the cardinal social function of the IP regime and, in characterizing diverse and equitable inclusion as essential to the IP ecosystem, provides a path toward universal participation in and benefit from that regime. Intellectual innovation and achievement are innate to every culture. When administered through a social justice lens, a sound IP regime is sufficiently robust to accommodate the broad range and full social potential of human intellectual capability, to society’s collective good.

The mission of the World Intellectual Property Organization (WIPO) is to lead the development of a balanced and effective international IP system that enables innovation and creativity for the benefit of all.¹² One of WIPO’s important initiatives is the WIPO Development Agenda,¹³ the aspirational goals of which embody the fundamental IP-SJ ideals of equitable access, inclusion, and empowerment. A core objective of the Development Agenda is to foster a more diverse and inclusive community of IP stakeholders and correspondingly enhance the positive effects of the global IP regime.

One of the most effective means for expanding the IP stakeholder community is to promote IP awareness, education, and system access, particularly in developing nations and for indigenous and other IP-underserved communities. Many innovators and creatives are unfamiliar with the IP system and the ways in which IP protection can help them to exploit their talents to benefit themselves and their communities. With access to grassroots IP education, coupled with

¹⁰ *A Tribe Called Quest*, https://en.wikipedia.org/wiki/A_Tribe_Called_Quest.

¹¹ *Nas*, <https://en.wikipedia.org/wiki/Nas>.

¹² <https://www.uspto.gov/ip-policy/patent-policy/world-intellectual-property-organization> (last visited Nov. 20, 2022).

¹³ <https://www.wipo.int/ip-development/en/agenda/> (last visited Nov. 20, 2022); <https://www.wipo.int/ip-development/en/agenda/recommendations.html> (last visited Nov. 20, 2022).

adjutant pro-bono or low-cost IP expert assistance, many developing nations and indigenous peoples can use IP rights to achieve important development goals and other socio-economic progress.

In support of these goals, WIPO has promulgated a number of IP education initiatives, including the WIPO Academy,¹⁴ the WIPO e-Learning Center,¹⁵ and the Inventor Assistance Program,¹⁶ among others. Through these programs, inventors, creatives, entrepreneurs, and social activists in developing and least developed nations can acquire the skills needed to harness IP rights to their individual and communal benefit. As beneficiaries of IP protection, historically underserved peoples and nations become genuine stakeholders in the global IP regime.

Another important path for achieving a more inclusive and equitable IP ecosystem may lie in extending IP protection to forms of intellectual accomplishment generally considered as falling outside the scope of the IP regime, such as various kinds of indigenous traditional knowledge and cultural expressions (TCEs).¹⁷ Many indigenous peoples and developing nations were not involved in shaping the prevailing IP standards,¹⁸ and consequently it can be difficult to fit many of their creative and innovative traditions into the established IP framework. However, just as IP protection evolves to address revolutionary technological advances,¹⁹ its mechanisms can also be construed to accommodate many of the claims and interests appurtenant to TCEs and similar kinds of achievement.

WIPO initiatives promulgated to address these concerns include the WIPO Performances and Phonograms Treaty,²⁰ the WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore,²¹ and the WIPO Initiative on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions.²² These and other programs can empower indigenous peoples and other underserved groups and their advocates to employ the principles of IP protection in support of their self-determined socio-economic and cultural agenda.

In addition to reorienting IP mechanisms toward social justice objectives, the effects of external social conditions on the IP system must also be considered. Systemic problems of race, gender, and cultural bias can muddy the IP playing field. Recent WIPO initiatives such as the WIPO Policy on Gender Equality, Diversity, and Intellectual Property²³ and WIPO for Creators²⁴ are designed to remove such obstacles to maximum IP engagement and otherwise mitigate the impact of these impediments to IP social progress.

The social justice rationale of IP protection recognizes the necessity of widespread and equitable access, inclusion, and empowerment to the fulfillment of the social function of IP protection. A global IP regime buttressed with these principles can engage the full spectrum of human talent and benefit all nations and peoples throughout the global community.

¹⁴ <https://www.wipo.int/academy/en/> (last visited Nov. 20, 2022).

¹⁵ <https://welc.wipo.int/> (last visited Nov. 20, 2022).

¹⁶ <https://iap.wipo.int/iap/about-inventor.xhtml> (last visited Nov. 20, 2022).

¹⁷ See, e.g., <https://www.wipo.int/tk/en/folklore/> (last visited Nov. 20, 2022).

¹⁸ See, e.g., *WIPO – A Brief History*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <https://www.wipo.int/about-wipo/en/history.html>.

¹⁹ See, e.g., *WIPO Copyright Treaty*, <https://www.wipo.int/treaties/en/ip/wct/>.

²⁰ <https://www.wipo.int/treaties/en/ip/wppt/> (last visited Nov. 20, 2022).

²¹ <https://www.wipo.int/tk/en/igc/> (last visited Nov. 20, 2022).

²² <https://www.wipo.int/publications/en/details.jsp?id=4504> (last visited Nov. 20, 2022).

²³ <https://www.wipo.int/women-and-ip/en/> (last visited Nov. 20, 2022).

²⁴ <https://www.wipo.int/wipoforecreators/en/> (last visited Nov. 20, 2022).

This book articulates a social justice-centered theory of IP protection. The theory of IP-SJ is based on fundamental precepts of socially equitable access, inclusion, and empowerment: IP protection can only fulfill its social function in the total political economy through the broadest and most diverse participation of everyone in the IP ecosystem. In this volume, leading IP scholars and commentators explore IP-SJ theory in addressing various traditions and challenges of IP inequity and unmet need, to chart a path toward an IP regime that promotes human actualization toward the ultimate benefit of humankind and the world we inhabit. We hope you find the analyses and proposals herein engaging and provocative, and above all, an inspiration to reimagine the role of IP protection in shaping – and serving – our global community.

Prolusion: What Is Intellectual Property (And Why Should You Care About It Anyway?) – A Layperson’s Guide to Intellectual Property Law

Lateef Mtima

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In the contemporary global society, intellectual property (IP) is the coin of the realm. As the product of human minds, hearts, and souls, IP is perhaps the most valuable natural resource of the information age. Equipped with the knowledge of what IP is, how important it is in daily life, and how the rules work, anyone can harness IP to empower themselves and their communities.

For many people, the words “intellectual property” are intimidating and mysterious. We all know what property is – it’s something tangible, something that you can touch and own, like a house, crops, cell phone, car, or land. But something that is “intellectual” has to do with the thoughts that people think, so how can “property” be something that exists in someone’s mind?

Actually, “IP” refers to certain types of things that result from the mind (or heart or soul). Stories, songs, a chemical formula, a recipe, a machine, a way to make a drug, and the like are each a type of IP. In much the same way that a house, a phone, or land can become individual property as a result of a person’s *physical* efforts (building, buying or making, trading), IP is what sometimes results from a person’s intellectual efforts (thinking, conceiving, imagining).

As is perhaps evident from the above list of examples of IP, such products of the mind, heart, and soul can provide enormous benefits to people and to society. Intellectual property can educate, cure, enable, inspire. Intellectual property can also entertain, and otherwise just make everyday life more pleasant or convenient. In modern society, IP impacts virtually every dimension of our aesthetic (books, art, music, films), physiological (drugs and medicines, health, lifespan), and technocratic (cars, mobile phones, the Internet) quality of life.

Given its significance, it may come as no surprise that most societies have established rules and customs to encourage people to produce and to use IP. The general idea underlying such rules and customs is to establish a kind of social bargain with those who produce IP – in exchange for the benefits that society receives from their intellectual products, the producers of IP are granted certain legal rights over their creations.

The IP rules and customs of a society can help to determine what kinds of IP people produce and who participates in and benefits from IP endeavors. With respect to the kinds of IP to be produced, the rules and customs might encourage or prioritize the production of IP that educates and cures, or IP that entertains, or simplifies routine chores and tasks, or any range or combination of IP products to meet society's needs. With respect to who participates in or benefits from IP production, if the rules and customs are very complicated or difficult to satisfy, it is likely that only privileged members of society will have the knowledge and resources necessary to comply with them, and consequently only the elite will produce or own IP. This could also make the production of IP costly, which in turn could make IP products expensive and consequently available only to those members of society who can afford to purchase them.

Considering the many ways in which the IP rules and customs can determine what kinds of IP society will have and who will enjoy access to it, certainly everyone should have a meaningful opportunity to have a say in determining what those rules and customs are to be and, in turn, to participate in the production, use, and enjoyment of IP.¹ Every day, many people produce highly beneficial and extremely valuable IP, but because they are unaware of the IP rules, definitions, categories, and customs, or had no voice in the adoption of those rules, definitions, categories, and customs, they are unaware that they have produced IP, how valuable that IP is, or how to protect, exploit, or otherwise benefit from these intellectual achievements and accomplishments. This is often the case for members of marginalized groups and communities, many indigenous peoples, and developing nations.

The purpose of this “Layperson’s Guide” is to demystify the words “intellectual property” and the laws which govern IP production and use, through a succinct and plain language explanation of the subject. As indicated by its title, this prologue has been written for the layperson – from the artist to the clergyman, from the small business owner to the social activist, from the student to the politician – for anyone seeking economic or social or political advancement and empowerment for themselves or for their community. In today’s global information society, production and use of IP is vital to the achievement of these goals.

The following discussion is divided into two parts. The first part briefly describes the five main types or categories² of IP and summarizes the basic rules and procedures for owning, protecting, and exploiting your IP. The second part briefly discusses the importance of IP to personal and communal self-determination, economic advancement, and socio-political empowerment.

I. WHAT IS INTELLECTUAL PROPERTY (A “PLAIN LANGUAGE” SUMMARY . . .)

The basic categories of IP are relatively easy to understand and will likely be surprising as you discover how much IP you already own. There are five main kinds of IP recognized in the United States, most Western nations, and in many other countries around the world: (1) trade secrets, (2) patents, (3) copyrights, (4) trademarks, and (5) publicity rights. Each kind of IP has specific characteristics and, in some cases, certain administrative steps (such as filing registration

¹ For example, as Professor Jamar explains in his chapter considering the question of IP protection for artificial intelligence (AI), given the increasing prevalence of AI in daily life, it is important that social justice obligations and effects be considered in deciding what legal rights and obligations should be extended to the producers of AI, in order to ensure that AI is used to benefit people and society properly and fairly.

² *What Is Intellectual Property*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <https://www.wipo.int/about-ip/en/>. There are other special types of IP which also receive some protection, including semiconductor chip designs (maskworks), so-called design patents, specialized treatment for biological patents, boat hull design, and more, that are not included in this introduction.

papers with the appropriate governmental agency, much the same as filing the deed to a house) that must be followed in order to claim legal ownership over it or to restrict others from using or exploiting it.³ Once the appropriate administrative steps have been taken, the owner of the IP gains certain legal rights, which vary according to the type of IP involved. The specific characteristics, any required administrative steps, and the accompanying legal rights for each type of IP are briefly summarized below.

A. Trade Secrets

Trade secrets are the oldest form of IP, dating back at least 4,000 years. A trade secret is any secret, valuable information used in a business, which provides an actual or potential competitive advantage. Perhaps the most familiar examples of trade secrets include typical types of business information such as manufacturing processes and secret formulas (like the formula for Coca-Cola), as well as financial information, customer lists, and marketing strategies. Other common – albeit perhaps less familiar examples – include secret cooking recipes, home remedies, and hair and nail care techniques, when these secrets are commercially exploited, such as when they are used in a business.

Unlike some other kinds of IP, there are no special legal or administrative steps or registration process that one must follow in order to own and protect a trade secret – all that is needed is that the owner takes proper measures to keep the otherwise qualified information secret. For example, keeping your business' secret recipe in a locked drawer or maintaining your customer lists and information in a posted “restricted access” area would generally qualify as appropriate efforts to keep the information secret. At the same time, if you need to disclose your trade secret to your employees or others in order to conduct your business, you need only have them sign confidentiality and nondisclosure agreements to protect the trade secret status. You should also include “noncompetition” provisions in your agreements, through which the persons to whom you disclose your trade secret agree not to use the information for their own benefit (for example, later using your trade secret in their own competing business).

The owner of a trade secret is protected from *misappropriation* of the trade secret, which is the unauthorized taking, disclosure, or use of the trade secret. Examples of misappropriation of a trade secret include obtaining it by dishonest means, such as by stealing a document or breaking into a file cabinet, or where the owner disclosed the secret in exchange for a promise (such as the signing of a confidentiality agreement) that it would be kept secret and the promisor subsequently breaks that promise. However, if the information is made public by the owner, even by mistake, it generally loses its status as a trade secret.

To defend against a lawsuit for trade secret misappropriation, the person who obtained the information can argue that the information was already generally known or that the information was obtained through proper means such as through their own independent research or through “reverse engineering,” that is by buying a product and then analyzing it to discover its ingredients or chemical composition, or inner workings, depending on the type of product at issue.⁴

³ For information on how to protect your IP see Sue A. Purvis, *The Fundamentals of Intellectual Property for the Entrepreneur*, <http://www.uspto.gov/about/offices/ous/121115.pdf>; see also World Intellectual Property Organization, <http://www.wipo.int/about-ip/en/index.html#ip>.

⁴ For a detailed discussion of trade secret and the accompanying social justice objectives, obligations, and effects, see Steven D. Jamar, *Trade Secrets from an Intellectual Property Social Justice Perspective*, ch. 7 in *THE CAMBRIDGE HANDBOOK OF INTELLECTUAL PROPERTY AND SOCIAL JUSTICE* (Steven D. Jamar & Lateef Mtima eds., 2023).