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Intellectual Property

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Series Preface

The International Library of Essays in Law and Society is designed to provide a broad overview of this important field of interdisciplinary inquiry. Titles in the series will provide access to the best existing scholarship on a wide variety of subjects integral to the understanding of how legal institutions work in and through social arrangements. They collect and synthesize research published in the leading journals of the law and society field. Taken together, these volumes show the richness and complexity of inquiry into law's social life.

Each volume is edited by a recognized expert who has selected a range of scholarship designed to illustrate the most important questions, theoretical approaches, and methods in her/his area of expertise. Each has written an introductory essay which both outlines those questions, approaches, and methods and provides a distinctive analysis of the scholarship presented in the book. Each was asked to identify approximately 20 pieces of work for inclusion in their volume. This has necessitated hard choices since law and society inquiry is vibrant and flourishing.

The International Library of Essays in Law and Society brings together scholars representing different disciplinary traditions and working in different cultural contexts. Since law and society is itself an international field of inquiry it is appropriate that the editors of the volumes in this series come from many different nations and academic contexts. The work of the editors both charts a tradition and opens up new questions. It is my hope that this work will provide a valuable resource for longtime practitioners of law and society scholarship and newcomers to the field.

AUSTIN SARAT
William Nelson Cromwell Professor of Jurisprudence and Political Science
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Introduction

What is a 'Law and Society' Perspective on Intellectual Property?

'Intellectual Property' is a rather awkward term that denotes several distinct bodies of law, including the law of patents, copyrights, trademarks, trade secrets and so-called rights of publicity. These laws protect diverse types of intangible products of the human intellect, such as biotechnology inventions, digitalized music, consumer product brand names and industrial know-how – hence the term 'intellectual'. They provide 'property-like' protection for such intangibles by granting the owner of intellectual property rights the ability to exclude others from using their intellectual property, at least to a certain extent and, usually, for a limited period of time (Hetcher, 2002). Until fairly recently, intellectual property law was a relatively obscure legal speciality, and one that was subject to little scholarly (much less public) attention. With the rise of the global economy and the prominence of post-industrial information-based industries over the past several decades, however, intellectual property law and related policy issues has become the subject of everyday culture. Indeed, it is hard to read a daily newspaper without encountering references to patent, copyright, or trademark disputes. Intellectual property is also increasingly the subject of attention in the popular press (see, for example, Bollier, 2002, 2005; Klein, 2000; McLeod, 2001, 2005, 2007). Perhaps most telling, contemporary intellectual property law topics are also the subject of mainstream popular culture, such as cartoons.[1] Intellectual property law and related issues thus permeate many areas of everyday life, just like other areas of law long-studied by law and society scholars. Yet, somewhat surprisingly, even though intellectual property is a subject that has attracted an increasing amount of scholarly attention worldwide, relatively little of this academic work focuses on themes or approaches that are at the core of 'law and society' scholarship. To be sure, it is problematic to identify a clear or single 'core' or 'canon' of law and society research (Friedman, 2005, 1986; Sarat, 2004; Seron and Silbey, 2004). Traditionally, however, law and society scholarship has focused on social scientific empirical studies of law in action, including studying the actors, institutions and processes of the law. More recently, law and society scholarship has also encompassed humanities-based approaches to understanding the cultural life of law, everyday legal experiences and law's socially constitutive nature (Friedman, 2005; Sarat and Simon, 2003; Seron and Silbey, 2004). One common assumption in all of these approaches is that law must be understood in its social, cultural and historical context.

Yet most scholarship on intellectual property law continues to be doctrinal or abstractly philosophical, which is the dominant approach to the study of law in most American law

[1] See, for example, Hilary B. Price's syndicated newspaper comic 'Rhymes With Orange', dated 1/23/00: http://www.rhymeswithorange.com/home.php?date=20000123. This single-panel comic is entitled 'The New Agenda'. It depicts an elementary school teacher with her children sitting around her on the floor. The teacher explains 'Class, today's lesson on sharing has been cancelled. It will be replaced by a lesson called "protecting intellectual property"'. The comic is funny and revealing about popular culture's understanding of intellectual property.

schools (Coombe, 2004).[2] This focus on legal doctrine and abstract theory is changing, however, as scholars from a variety of disciplines – such as sociology, political science, anthropology and cultural studies as well as law, – have begun to explore intellectual property law from different perspectives. The essays in this volume draw on and develop this emerging law and society approach to the study of intellectual property, whether or not the author of any particular essay self-identifies as a 'law and society' scholar. The essays as a whole have a creatively eclectic approach to the study of intellectual property. They focus on different types of intellectual property, including patent, copyright, trademark, trade secret and right of publicity laws. They employ diverse methodologies. Many of the essays also explore law's relationship to society and the social institutions and cultures of which it is a part. Importantly, the essays in this volume examine different aspects of intellectual property in several different countries and include a significant focus on the increasingly important global politics of intellectual property worldwide.

I Social and Cultural Histories of Intellectual Property

Historical perspectives on law and a focus on the cultural life of law are at the core of the law and society tradition (Seron and Silbey, 2004). The essays in Part I of this volume focus on different types of intellectual property and focus on different historical periods to examine their particular research questions. Yet these essays share some common approaches and themes, including an appreciation for the historical and cultural dimensions of intellectual property. This perspective highlights that intellectual property is a relatively recent development in Western history. Intellectual property doctrines that create private ownership rights in intangible creations, inventions and information (as well as the social practices and institutions relating to them) are historically contingent and socially contested rather than natural or inevitable (May and Sell, 2006). As the essays in this section show, intellectual property creates boundaries of private ownership that are in tension with principles of public access; these tensions and boundaries are developed and contested in different ways over time.

Martha Woodmansee's essay (Chapter 1) is an influential and seminal study of the social construction of an ideology of 'authorship' in eighteenth-century Germany. Her work is part of a large and interdisciplinary body of scholarship, influenced by Foucault[3] and often grounded in literary theory and cultural studies, that explores how, why and to what effect the modern Western notion of authorship arose (see, for example, Boyle, 1996; Jaszi, 1991; Rose, 1995; Woodmansee and Jaszi, 1994). Woodmansee examines the social and cultural conditions that gave rise to a particular, Romantic, ideology of the author in eighteenth-century Germany. Focusing on an interpretation of published debates during this period, involving writers, literary theorists, publishers and others, Woodmansee shows how eighteenth-century Germany saw the rise of a new concept and social practice of authorship. Renaissance

[2] Indeed, there is an important and large body of literature outside of the law and society tradition that focuses on justifying intellectual property from primarily philosophical or economic perspectives. (See, for example, Drahos, 1996; Fisher, 2001; Hughes, 1988; Landes and Posner, 2003; Shiffrin, 2001.)

[3] Woodmansee cites Foucault's essay, 'What Is an Author?', in Harari (1979), as framing the issues examined in her essay for this volume.

notions focused on the writer's status as craftsman, of largely equal status to other craftsmen responsible for creating books, such as the bookbinder or publisher. The writer was viewed as a scribe or 'vehicle' who wrote primarily with input from external sources of inspiration. In sharp contrast, Romantic notions of authorship that arose during the eighteenth century came to view the writer as a creative 'genius' whose inspiration derived solely from within. As Woodmansee shows, this transformation of notions of authorship took place in a specific social, economic and aesthetic context, as writers consciously and publicly advocated for a model of authorship that would provide a justification for granting them property rights in the products of their creative efforts. The changing notion of authorship was an important link in justifying the rise of copyright law as a legal means to create a property interest in writings – one that vested in the first instance in authors.

One key insight that this body of work develops is that modern notions of authorship that underlie copyright law in particular are historically contingent and specific constructs that are mutually constitutive with other arenas of social and cultural discourse (Jaszi, 1991). Some of this scholarship also attempts to delineate the ways in which modern intellectual property law (primarily copyright law) has been influenced and, at times, constrained by the ideology of the individual author (Boyle, 1996; Jaszi, 1991). In particular, copyright law privileges the author as an individual creative genius by requiring 'originality' as a necessary basis for protection. One result of this privileging of the individual creative genius in copyright law is that it ignores the social fact that much creative work is the product of collective rather than individual creativity (Arewa, 2006; Demers, 2006; Jaszi, 1991; Seeger 2004; Sherman, 1995). All sorts of creative work, from music to painting to storytelling, are collaborative and cumulative rather than stemming from the mind of a single creative genius creating wholly from nothing.

While the work of Woodmansee and others has been influential to intellectual property scholarship, critics of the Romantic author scholarship have pointed out that it is often difficult to discern the sometimes ambiguous or contradictory relationship between the 'genius-author' construct and any particular strand of copyright law doctrine over time (Lemley, 1997). Bracha (2004) has a related criticism in a suggestive article examining the transformation of patent law from a system of royal 'privileges' in the seventeenth century to a system of 'rights' by the early nineteenth century. As Bracha correctly points out, it is a challenge to the historian of intellectual property law to speak broadly about 'intellectual property' since intellectual property law doctrines – such as the patent law he discusses – may mean very different things in different historical periods. His article demonstrates that early Western patent systems have a very different ideological, institutional and economic context that makes comparison of the logics of early patent law and policy to modern patent law issues problematic.

The question Woodmansee explores historically – who is an 'author' – has a parallel in patent law: who counts as an 'inventor'. Intellectual property scholars have yet to fully study this question historically, although it is clear that a related notion of 'inventive genius' arose in patent law (albeit at a later period) and likewise influenced both legal doctrine and social practices (Bracha, 2005, chapter 5; Fisk, 1998).

One of the most contentious issues in contemporary intellectual property law is the political economy of intellectual property rights. Nations with highly developed IP-based industries,

such as the USA,[4] promote strong intellectual property law systems worldwide and pressure countries with weaker intellectual property law protection by a variety of means, including international trade agreements (Drahos and Braithwaite, 2002; May and Sell, 2006; Sell, 2003). Historian Doron Ben-Atar's essay (Chapter 2) provides an interesting historical perspective on contemporary debates over the politics of industrial policy in early US history.[5] Ben-Atar examines and interprets Treasury secretary Alexander Hamilton's views in the early 1790s on the political economy of international economic competition. Ben-Atar focuses on the 'Report on Manufactures' (ROM) that Hamilton submitted to Congress which set forth what Ben-Atar describes as very bold and aggressive views for the creation of economic prosperity in the new, post-colonial US society. For Hamilton, and others, the key to economic prosperity lay in self-sufficiency, particularly in technologies of manufacture – which were almost entirely lacking in the new nation. The ROM, Ben-Atar argues, advocated such measures to encourage emigration from Europe of skilled artisans, craftsmen and managers who would bring their industrial and technological know-how with them, and even encouraging the smuggling of modern machinery out of Europe to the USA by offering financial incentives. Although the policies Hamilton advocated risked creating further enmity with England, in particular, he strongly believed that the need for technological self-sufficiency overrode any potential political dangers. Interestingly, Ben-Atar argues that Hamilton also took a very partisan view of the need to protect US technology and innovation, advocating for strong protection against transmission out of the USA of American-owned technology and know-how whilst at the same time advising Congress to adopt policies sanctioning 'piracy' of similar information from Europe.[6] Ultimately, Ben-Atar reveals that Hamilton's proposed industrial policies were not adopted, but were largely rendered unnecessary in the light of continued immigration into the USA by many of the skilled workers whom Hamilton's proposals targeted.

> The main theme of Ben-Atar's essay, which he also advances in a recent book (2004), is that the USA in its earliest years as a new nation was an active appropriator of industrialized Europe's technological know-how, which was used to develop a thriving indigenous manufacturing capability. This is especially ironic in the light of contemporary international debates over intellectual property where the USA, now an intellectual property exporter, advocates for strong international property protection worldwide.

Many recurring issues relating to intellectual property occur in the workplace. Perhaps this is not surprising since many workers in post-industrial societies are employed as knowledge workers whose creative and inventive products may be protected as intellectual property. Among the most important and potentially vexing issues in this context is who actually owns intellectual property that is either produced by employees or acquired by them in the course of

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[4] For example, computer software and hardware, pharmaceuticals and biotechnology, and entertainment industries (movies, music) are all powerful users of intellectual property systems.

[5] For other useful histories of intellectual property during this period, see Ben-Atar (2004); Bowrey (1997); Bracha (2005); Deazley (2004); Khan (2005); and MacLeod (1988).

[6] This aspect of Ben-Atar's arguments has been criticized by intellectual property historians. Fisk, for example, stresses that the term 'pirate' cannot meaningfully capture the actions that Ben-Atar describes, since in the late eighteenth century, there was no clear law of 'trade secrets' that might protect industrial know-how, nor was there any international law that prohibited the use of technological information or patented inventions in another country (Fisk, 2005).

their jobs.[7] To contemporary minds, the notion that an employer (often a corporation) owns or controls various types of intellectual property of its employees seems unremarkable. Yet, in a series of creative and insightful articles, legal historian Catherine Fisk shows how this modern legal reality is a relatively recent – and contested – development. Her work explores the rapid and sometimes torturous transformation of legal doctrines that came to privilege employer ownership of intellectual property.

Fisk's essay (Chapter 3) focuses on issues of ownership and control of intellectual property in the context of the employment relationship – not on who *is* an author under an IP regime, as developed in Woodmansee's work, but who *owns* the products of authorship and inventorship under IP law doctrines. This contribution is part of a larger body of scholarship in which Fisk explores these issues as they have played out in different arenas of intellectual property law between the nineteenth and early twentieth centuries (Fisk, 1998, 2003). Focusing primarily on a creative analysis of US published legal decisions, and with a deep understanding of the social, cultural and historical context of these decisions, Fisk's work challenges some of the taken-for-grantedness of contemporary understandings of IP law. In particular, Fisk examines the relatively rapid shift between the early nineteenth and early twentieth centuries of several intellectual property law doctrines that privileged employees at the beginning of this period but benefited employers at the end. Fisk's work carefully delineates this dramatic transformation (both in doctrine and in ideology) and convincingly explains why it took place.

Fisk's work on copyright law (Fisk, 2003) shows that throughout much of the nineteenth century, copyright law privileged employee authors who created copyrighted works. Examining all reported judicial decisions in the USA before 1910 that involved an employee author contesting ownership of the authored work, Fisk concludes that, until the early twentieth century, 'virtually every court' dealing with the issue held as a 'default rule' that employee-created copyrighted works were owned by the employee as a matter of copyright doctrine, even if these works were created in the course of employment. This is striking, Fisk notes, because nineteenth-century courts in non-intellectual property law cases were not particularly solicitous of employee rights; the modern default rule that arose in court decisions in the late nineteenth century and was codified in the 1909 Copyright Act (in the so-called 'work for hire' doctrine) is exactly the opposite: it generally recognizes the legal fiction that the employer is the 'author' of works produced by creative employees. Fisk's essay skilfully interprets this transformation in copyright law and draws out the multiple legal, social and cultural factors that influenced it.

Fisk develops a similar theme while looking at the question of how patent law answers the question of who owns patented invention created by an employee (Fisk, 1998). As she does in her work on copyright, Fisk examines patent law as reflected in published US cases, understood in historical, social and cultural context. Her work is a sophisticated and creative interpretation of a shift in patent law understanding of employee ownership rights in their inventions. Thus, Fisk shows that roughly between 1840 and 1880 courts routinely held that an inventor was presumed to own his invention, regardless of his status as an employee. By the turn of the twentieth century, however, this legal presumption changed as courts increasingly held that the employment contract of inventorship, rather than patent law doctrines (and ideologies),

[7] See, for example, the thorny and unresolved issues of who owns the intellectual productions of academic employees in McSherry (2001).

controls who owns a patented invention. As with the related copyright law example that Fisk explores, the reasons for this transformation in patent law are complicated and often subtle. They include changing judicial attitudes towards the creative and inventive process, the rise of corporations and collaborative employee inventorship, and changing notions of the employment contract.

In Chapter 3, Fisk investigates other intellectual property law doctrines: trade secret law and restrictive covenants.[8] She explores how the rise of trade secret law and the use of restrictive covenants between the nineteenth and early twentieth centuries combined to both limit employee job mobility and to support the rise of corporate control of intellectual property. As with her work on patent law and copyright law, Fisk's work is based on a rich analysis of published cases (primarily from the USA) that deal with issues of ownership and control of trade secrets as well as the appropriate uses of restrictive covenants that limit an employee's ability to switch jobs or to use their knowledge acquired from one employer for the benefit of another employer. Fisk's work is based on a case study of a corporate employer whose archival records during this period allow Fisk to examine transformations of legal doctrine but also to see how changes in legal doctrine actually influenced (or not) corporate actor behaviour.

Fisk examines how at the beginning of the nineteenth century trade secret law simply did not exist; and there were no restrictive covenants to limit employees' ability to use knowledge gained in the course of employment in subsequent employment. There were some restrictions on employees' ability to use valuable workplace information and know-how, but these were limited and tended to stem from formal apprenticeship or fiduciary relationships – they were not duties imposed by law. Fisk concludes: 'There simply was no basis in the law for most people who employed assistants to prevent them from using in a later employment the knowledge that they acquired in an earlier employment. In other words, workplace knowledge and skill remained, in the eyes of the law, an attribute of each worker, not an asset of a firm' (p. 80).

By the end of the nineteenth century, however, this situation had changed quite dramatically. Courts increasingly recognized trade secret information as an asset owned by employers, and they increasingly imposed duties on employees not to disseminate or use workplace knowledge in subsequent employment. As Fisk shows, at the early part of the twentieth century, courts recognized strong and expanded categories of trade secrets, covering not simply discrete proprietary information but also general 'know-how' of skilled workers. They also upheld strong injunctions to protect this valuable information when employees took new jobs. The route courts took was not always straightforward or clear, since courts had to balance changing notions of freedom of contract, the imperatives of economic development and ideologies of free labour that were all contested at this time. But the result by the early twentieth century was the creation of doctrines to protect workplace information as an asset of employers and to facilitate strong policies of corporate control of intellectual property generally.

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[8] Restrictive covenants are not typically viewed as a type of 'intellectual property' law. They are agreements that limit an employee's ability to compete with a former employer, and so are properly considered to be within the law of unfair competition. Since restrictive covenants may restrict the use or dissemination of information such as trade secrets, however, this area of law clearly overlaps with intellectual property law.

Fisk's work in this volume and elsewhere challenges the taken-for-grantedness of contemporary understanding in intellectual property law by highlighting the fact that today's reality of corporate ownership and control of intellectual property is a fairly recent and contested development, the consequences of which are as yet not fully understood.

Legal scholar David Wall's essay (Chapter 4) presents a more contemporary focus on an unusual and relatively recent type of intellectual property: so-called 'rights of publicity'. Rights of publicity generally provide for the protection from unauthorized use of one's persona – to include name, likeness, image, or, more broadly, attributes of identity. The right of publicity is most fully developed in US law, in common law doctrines and statutes. However, there are indications that related rights are increasingly being recognized in other countries. Historically, the right of publicity has roots in privacy law (the personal right to be left alone). But, as many intellectual property scholars have criticized, rights of publicity have developed into powerful and expansive property-like rights in a commodified celebrity persona (Coombe, 1998; Langvardt, 1997; Madow, 1993). Indeed, once the right of publicity is understood to be property rather than merely a personal right, logically it has many of the attributes of property, including post-mortem viability of the celebrity subject.[9] Critical scholars are concerned that the law's recognition of expanded rights of publicity, with often uncertain contours or limits, allows celebrities (who are most often the ones asserting publicity rights) to censor unauthorized use of their personas and unduly restrict public expressive activities (Coombe, 1998; Langvardt, 1997; Madow, 1993). This is particularly problematic because right of publicity owners often successfully assert facially non-meritorious claims against unauthorized use of celebrity personas because few targets of threatened legal action are willing or able to defend themselves in light of the uncertainties and costs of intellectual property litigation (Gallagher, 2005).

Wall's essay examines the social construction and policing of cultural icon Elvis Presley as 'intellectual property' after his death. Wall takes a classic 'law in action' approach to understanding how the Elvis persona was created and recognized under right of publicity law, thus removing the Elvis persona from the public domain. He also creatively details how the owners of the Elvis publicity rights have policed these rights to protect against popular culture appropriation that offers alternative meaning of the Elvis persona. In this and later work on the same subject, Wall shows how the celebrity right of publicity is in tension, as the culturally constructed persona must be restricted (or policed) to preserve the owner's ability to control the authorized meanings associated with the celebrity while at the same time it must be circulated in popular culture to maintain the popularity that allows the rights' owner to exploit the economic benefits of the celebrity persona (Wall, 2003).

'Piracy' is a term that denotes moral deviance, and it is a term that historically has long been linked to claims of unauthorized uses of intellectual property. Woodmansee's essay for this volume shows, for instance, how early debates over the development of copyright law invoked the image of piracy at a historical point where the debate over whether the unauthorized copying of books was an act of piracy or a public benefit was far from certain.

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[9] See, for example, California Civil Code Section 3344.1, which sets forth a statutory right of publicity that pertains to deceased celebrities; see also *Comedy III Productions, Inc.* v. *Saderup, Inc.*, 21 P.3d 797 (Cal. 2001), which dealt with the publicity rights of long-deceased celebrities known as 'The Three Stooges'.

In a very different context, Demers (2006) argues that the rhetoric of piracy-as-theft embraced by courts in contemporary debates over the proper scope of copyright protection for various musical works and practices threatens to blur distinctions between legitimate and illegitimate musical practices (see also Arewa, 2006). She argues that the failure by courts in prominent copyright infringement cases to properly distinguish between unlawful practices (such as burning copies of a protected CD and sharing it with thousands of others over the Internet) and lawful uses of copyrighted works created by 'transformative appropriation' (for example, the borrowing from and allusion to pre-existing works that characterize certain musical genres such as hip-hop or jazz) is facilitated by an un-nuanced notion of copyright piracy that threatens to diminish musical creativity. In yet another context, Drahos and Braithwaite (2002) show how the rhetoric of piracy in political discourse concerning the emergence of a global regime of intellectual property protection is significant. Prior to emergence of the World Trade Organization (WTO) and the development of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), nations had no general duty to protect or enforce intellectual property rights within their borders. The linking of intellectual property rights issues with trade agreements under TRIPS, however, substantially altered this arrangement since, for the first time, countries bound by TRIPS were required to provide protection for many types of intellectual property. The rhetoric of piracy, Drahos and Braithwaite argue, was a significant ideological resource and tool for persuasion in changing perceptions about the morality and urgency of establishing TRIPS, an 'agreement that in another era would have been rejected as a global charter for monopolists has come to be thought of as consistent with free trade and competition' (Drahos and Braithwaite, 2002, p. 38).

Political scientist Debora Halbert's essay (Chapter 5) develops similar themes. Halbert provides a critical examination of modern narratives of intellectual property piracy in the international political arena. Focusing on US practices towards Asia-Pacific nations that are deemed to have insufficient protection for the intellectual property products they import – which is viewed as a major threat to US industries such as software, pharmaceuticals and entertainment – Halbert shows how narratives of piracy have been employed strategically to aid US intervention in the international exchange of intellectual goods. The piracy narratives, she argues, were an important concomitant to US strategies to link intellectual property and global trade issues beginning in the 1980s, which led to TRIPS. These narratives facilitated and justified the expansion of intellectual boundaries that privilege intellectual property-rich nations such as the USA and label as criminal nations that do not comply with increasingly hegemonic US intellectual property principles. The rhetoric of piracy was necessary precisely because the political and legal landscape had changed. The one who is properly labeled an intellectual property pirate thus has significant consequences as the US struggles to impose its notion of intellectual property rights (and wrongs) globally, including on nations with very different historical and cultural traditions and where intellectual property concepts are weak or even antithetical to US norms (Alford, 1995).

II Globalization and the Politics of Intellectual Property

One of the most significant developments in the last decades of the twentieth century was the emergence of a global intellectual property regime, which was primarily ushered into existence by the 1995 TRIPS Agreement (see, for example, Yu, 2006). The social, economic, cultural,

technological and legal reasons for this development have been fertile ground for intellectual property scholarship (Bettig, 1996; Braithwaite and Drahos, 2000; Drahos and Braithwaite, 2002; Halbert, 1999, 2005; May and Sell, 2006; Sell, 2003). Drahos and Braithwaite have characterized TRIPS as a 'quiet revolution' in the way that intellectual property rights have been defined, expanded and protected in the global economy – a revolution that primarily benefited advanced nations and their powerful industrial lobbies and disadvantaged developing nations that were persuaded (or coerced) into joining the agreement even though it increased the costs of using intellectual property protected technology and information. The most dramatic aspect of TRIPS was that it linked international trade agreements with intellectual property by mandating that member states provide minimum levels of intellectual property protection under their domestic laws, with only limited flexibility to enact laws that take into account local economic and social considerations and needs (Correa, 2000, pp. 1–21). TRIPS also provided powerful enforcement mechanisms to sanction non-complying nations. Each of the essays in this section examines different aspects of how the exercise of intellectual property rights in the international arena has expanded social and political control in the post-TRIPS world.

Political scientist Susan Sell's contribution (Chapter 6) examines the politics surrounding the adoption of TRIPs in 1994 and the concomitant dramatic twentieth-century expansion of a global system for protecting intellectual property. As Sell argues, TRIPs for the first time linked requirements for strong intellectual property protection to multilateral international trade issues. Countries that wanted – or needed – to benefit from the trade aspects of TRIPs were required to shape their domestic intellectual property laws to conform with those of the most developed nations to provide minimum levels of intellectual property protection. Moreover, TRIPS itself also provided effective enforcement mechanisms to police compliance with these TRIPS intellectual property mandates. As Sell shows in her essay, perhaps the most remarkable aspect of the TRIPS story was how a small group of primarily US-based strategic actors from intellectual property-intensive industries (including computer software, entertainment and pharmaceutical industries) were able to influence the development and adoption of TRIPs. Her work highlights the complex historical, cultural and political factors that made TRIPs possible, including the power of legal norms to frame legal issues as 'commonsensical' and the role of private industry actors and governmental institutions, both seeking change. Moreover, as Sell shows, the fuller story of TRIPS and the global politics of intellectual property includes an analysis of how the aggressive enforcement of TRIPS by developing countries against developed nations has generated a worldwide debate over TRIPS and the political resistance to it. Many developing nations believe that TRIPS is unduly coercive as well as overly solicitous of private corporate rights to the detriment of human rights and developing nations' interests. Sell argues that debates over such issues as 'biopiracy' or patenting of vital medicines such as AIDS/HIV drugs in developing countries are a product of TRIPS and are emblematic of the difficulties intellectual property 'haves' will face in an increasingly contentious global debate over the proper scope of intellectual property, particularly in those developing nations that believe TRIPS was foisted on them without true negotiation.

Peter Drahos and John Braithwaite's essay (Chapter 7) provides rich context to contemporary debates over the global politics of intellectual property. Their essay is part of a larger body of creative empirical research by these scholars that focuses on global business practices