



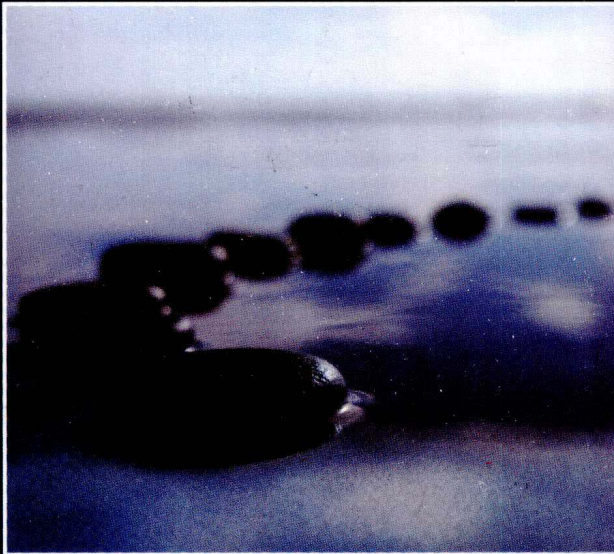
# INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM

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Proposals for Reform of TRIPS

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EDITED BY **Annette Kur** WITH **Marianne Levin**



# Intellectual Property Rights in a Fair World Trade System

Proposals for Reform of TRIPS

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## Preface

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This project, which has been conducted since 2001 under the aegis of the Institute for Intellectual Property Law and Market Law (IFIM) at Stockholm University in cooperation with the Max Planck Institute for Intellectual Property and Competition Law (MPI) in Munich, took its cue from intense private discussions between the editors over dinners and coffees from the mid 1990s, exchanging views on actual developments and prognoses for the future of intellectual property (IP) matters. We soon observed that the tendency to apply a one-sided and inflexible approach to IP on the global as well as on the domestic level might distort the necessary equilibrium between the different interests involved, and thus become a source of systemic malfunctions and increasing discontent. The response to that, in our opinion, could only be found in promulgating an overarching “balancing instrument” to which all IP must conform.

While the basic tenor of the message was clear even then, the task remained to cast it in a form which combined academic substance with communicative appeal. Elaborating the necessary groundwork called for institutionalization in the form of a project, which came to operate under the name Intellectual Property in Transition (IPT). External funding, without which the work would have been impossible, was received from the Swedish Research Council (“Vetenskapsrådet”) for three years from 2001. Initial plans to finish the work within that time period proved to be far too optimistic; it took more than twice as long. The reasons for such procrastination were many; academic work is not easily fitted into tight schedules. It was also not until we were in the midst of project activities that we realized that the most appropriate way of presenting and illustrating the impact of an IP balancing instrument would be to propose pertinent amendments to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), so as to be heard and understood by a broader audience, and to provide a concrete impetus for the further development of international IP law.

Apart from the two of us, the following persons participated in the working group: Professors Niklas Bruun (Helsinki), François Curchod (Strasbourg), Antonina Bakardjieva Engelbrekt (Stockholm) and Jens Schovsbo (Copenhagen). Dr. Henning Grosse Ruse-Khan (MPI), doctoral candidates Frantzeska Papadopoulou (Stockholm) and Andrea Wechsler

(MPI) were involved in the work as permanent or temporary project group members. Doctoral candidate Åsa Hellstadius (Stockholm) acted as the group's secretary. Without them, the exploration of ways to re-establish the balance between different interests involved would never have matured into a book. Not least did François Curchod's knowledge and experience, and his engaged participation in all group meetings and revisions of all draft texts, provide an invaluable resource. Others who have taken part in the work over time were Professors Bengt Domeij (Uppsala), Thomas Dreier (Karlsruhe), Ole Andreas Rognstad, Are Stenvik (both of Oslo), and Joseph Straus (MPI), as well as Dr. h.c. Henry Olsson (Stockholm). We are very thankful indeed for all their useful input!

As has been stated, the project was originally generously funded by the Swedish Research Council (2001–2005). But since we had by no means completed the work in 2005, the participating institutions have kindly supported us with personal resources to enable the continuance of the project work. The Swedish Research Council also financed, in November 2005, a two-day “Friends of the Project Meeting” for some 30 participants from all over the world. A first draft version of our proposals was presented at this occasion, and valuable input was received which is reflected in a number of changes made to the original text. We gladly take this opportunity to finally thank all those attending the meeting for the many constructive, and sometimes harsh, comments, as well as for their encouragement! We also had the honour to present the framework of the IPT project at the ATRIP Meeting in Parma in September 2006, for which we are grateful to the organizer, Professor Gustavo Ghidini. Some early ideas of the project were also discussed at an MPI symposium in Schloss Elmau, Bavaria in early 2002.

It is every academic's aim to be read and discussed, and we are no different. So, it is our hope that by reaching, at last, the stage of publication, our work will stimulate further discussions on the development of international IP law, including its overlaps with areas such as Human Rights and Sustainable Development in their various facets, as well as regarding the *IP-consumer interface*, just to mention a few. In addition, we hope that the meetings, work and discussions that we have enjoyed so much over almost a decade are now revived and continued in what may be a second phase of the IPT project.

Munich and Stockholm, July 2010

Annette Kur and Marianne Levin

# Abbreviations and acronyms

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A2K	Access to Knowledge
AB (Report)	(Report by the) Appellate Body (WTO)
AIPPI	International Association for the Protection of Intellectual Property
Art., Arts	Article, Articles
ASCAP	American Society for Composers, Authors and Publishers (US)
ATRIP	International Association for the Advancement of Teaching and Research in Intellectual Property
BASCAP	Business Action to Stop Counterfeiting And Piracy
BGE	Entscheidungen des Schweizerischen Bundesgerichts (Decisions by the Swiss Supreme Court)
BIAC	Business and Industry Advisory Committee (OECD)
BITs	Bilateral Investment Treaties
CBD	Convention on Biodiversity
Cf.	Confer
CFI	Court of First Instance (EU; now referred to as “General Court”)
Ch.	Chapter
CISAC	Confédération Internationale des Sociétés d’Auteurs et Compositeurs
CISDL	Centre for International Sustainable Development Law
COM	Working paper issued by the EU Commission
COP	Conference of Parties (CBD)
CRMO	Collective rights management organization
DESA	Department of Economic and Social Affairs (UN)
DRM	Digital rights management
DSU	Dispute Settlement Understanding (WTO)
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice (EU)
ECOSOC	Economic and Social Committee (EU; UN)
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEC	European Economic Community

EHHR	Exposure and Human Health Committee (US Environmental Protection Agency Science Advisory Board)
e.g.	for instance
EPA	Economic Partnership Agreement
EPC	European Patent Convention
EPO	European Patent Organisation; European Patent Office
EST	Environmentally sound technologies
et seq.	and following
et al	and others
FAO	Food and Agriculture Organization (UN)
FDI	Foreign direct investment
ff	and following
fn.	footnote
FRAND	Fair, reasonable and non-discriminatory (licence terms)
FTA	Free Trade Agreement
FTC	Federal Trade Commission (US)
GAIA	GAIA foundation
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GI(s)	Geographical Indication(s)
GR(s)	Genetic Resources
GRAIN	Genetic Resources Action International
GRUR	Gewerblicher Rechtsschutz und Urheberrecht (Law Journal, Germany)
ibid.	at the same place
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Law Commission
ICT	Information and communications technology
ICTSD	International Centre for Trade and Sustainable Development
id.	at the same place
i.e.	that is
IIC	International Review of Intellectual Property and Competition Law (Law Journal, Germany)
I.L.M.	International Legal Materials
IP, IPR	Intellectual property, intellectual property right(s)
ISP	Internet service provider
JZ	JuristenZeitung (Law journal, Germany)
LDCs	Least developed countries

L.J.I.L.	Leiden Journal of International Law
LoR	License(s) of Right
MFN	Most Favoured Nation Treatment
MPI	Max Planck Institute
n., note	footnote
NGO	Non-governmental organization
NJA	Nytt Juridskt Arkiv (Law journal, Sweden)
NJW	Neue Juristische Wochenschrift (Law Journal, Germany)
NT	National treatment
OECD	Organisation for Economic Cooperation and development
OHIM	Office for the Harmonisation in the Internal Market (Trade Marks and Designs)
OJ (C, L)	Official Journal of the EU, series C or L
op cit	work cited
p., pp.	page, pages
para.	paragraph
PTO	Patent and Trademark Office (UK)
R&D	Research and development
RAND	reasonable and non-discriminatory (license terms)
RBC	Berne Convention (Revised)
SCCR	Standing Committee on Copyright and Related Rights (WIPO)
SCP	Standing Committee on the Law of Patents (WIPO)
SCT	Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (WIPO)
Sec.	Section
STIM	Sveriges Tonsättares Internationella Musikbyrå (CMRO, Sweden)
s., ss.	section, sections
3D	Trade – Human Rights – Equitable Economy
TFEU	Treaty on the Functioning of the European Union (also referred to as Lisbon Treaty)
TK	Traditional Knowledge
TPM	Technical protection measures
TRIPS	Trade Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN, UNO	United Nations, United Nations Organization
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization



UNFCCC	United Nations Framework Convention on Climate Change
UNHR	United Nations High Commissioner for Refugees (UN Refugee Agency)
U.N.T.S.	United Nations Treaty Series
UPOV	International Union for the Protection of New Varieties of Plants
US/USA	United States of America
USC	United States Code
USPTO	US Patent and Trademark Office
USTR	US Trade Representative
VCLT	Vienna Convention on the Law of Treaties
vs.	against
WCT	WIPO Copyright Treaty
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

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## **PART I**

### **Background**



# 1. The pendulum keeps swinging – present discussions on and around the TRIPS Agreement

**Marianne Levin**

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## 1. INTRODUCTION

Intellectual property (IP) rights in some form are almost universally recognized as an essential policy tool for market economies. During the last two decades the system has been expanding with respect to objects of protection, scope of protection, period of protection, as well as in importance. Part of this obvious expansion has to do with modern technological developments. The greater appreciation seems to be a reflection of the increasing awareness of the value of intellectual assets in successful business enterprises, which in turn is reflected in politicians' attitudes towards the importance of the IP system for the national and international economy. Lately, however, the global legitimacy of the system has been challenged and has become the object of intense discussions. There are good reasons to ask whether these challenges are really directly IP-related or rather a battle over political and economic powers in the world, where IP has become a symbol for developed countries' hegemonial business interests. Nevertheless, depending on from which starting point the system is approached, the answer to what IP is, or should be, is inconclusive: a financial asset; a tool of national or international competitiveness; a moral issue; or a means to rapidly share technological solutions to complex problems?<sup>1</sup>

As can be seen from the title of this chapter, the aim here is merely to provide a brief introductory, overarching and fairly superficial summary of the many and intense discussions on a great number of issues that have taken place, to some extent already during the negotiations, but mainly after the conclusion in 1994 of the World Trade Organization (WTO)

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<sup>1</sup> Cf. EPO (2007), 106.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>2</sup> Section 2 thus focuses on the various rationales for IP rights and how the utilitarian approaches have become more pragmatic and investment orientated over time, which at least by some is connected to the present trade-related dimension of IP. Section 3 explores this shift more closely from the perspective of the negotiating powers. Not least have a number of new stakeholders entered the IP arena, whose focus is on the need for equality and common responsibilities in a globalized world. Section 4 therefore addresses some of these new interfaces with IP: human rights, access to information, sustainable development and the environmental crisis. Finally, Section 5 of this chapter returns to the basic idea of the project on Intellectual Property in Transition (IPT project), to investigate, support and substantiate what could be ‘user-friendly amendments’ to TRIPS. In light of the revealed imbalances of the present system, a more flexible approach may better serve the needs of a vital and sound market economy with open competition in a globalized setting where IP plays a partly new and more complex role. This is therefore followed up and supported by eight in-depth studies on various topical questions of the project, which over the years since 2001 are the results of mutual discussions and individual research under the auspices of the IPT project.

## 2. TRANSFERRING KNOWLEDGE FROM THE PUBLIC GOOD TO THE PRIVATE GOOD

### 2.1. Utilitarian Rationale

The basic concept of IP rights can be traced back as far as the fourth century BC. The argument for rewarding innovators is that the idea belongs to its creator, because the idea is a manifestation of the creator’s personality and that the unpleasantness of labour should be rewarded with property. Such thoughts were later part of Locke’s theory on labour and ownership.<sup>3</sup> Individual property rights arise against the backdrop of

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<sup>2</sup> It should be emphasized that in view of the vast range of material that exists on these issues, the references cited in this text constitute only a small sample of the books, articles and websites and are mere examples of the information that is available on a certain issue. For example, at the SSRN alone (<http://papers.ssrn.com/>), over 200 articles have been published and a Google search on “Intellectual Property, TRIPS” gives approximately 31 000 hits.

<sup>3</sup> Merges (2008c), 107–109, citing John Locke, *Two Treatises on Government*.

group rights and in turn have helped explain the transaction cost theory because at least some individual exclusive rights are necessary for people to make full use of resources.<sup>4</sup> In Europe, IP rights have an offspring in the development of natural rights theories. During the Enlightenment, the emphasis was on the individual's work as a blessed spark of God that should be rewarded, and later, at the time of the French Revolution, an element of human rights was added, thus giving grounds for private ownership. In the United States of America (USA), already in 1789, the federal Constitution shows a more utilitarian intent "[t]o 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".<sup>5</sup> This was most certainly expressed in the interest of society as a whole,<sup>6</sup> and to strike a balance between creators/innovators and the baseline competition.<sup>7</sup>

Along with the advances in technology, economic and entrepreneurial market- and business-related motivations have taken over. Today these dominate the objectives for upholding, strengthening and developing IP as private and personal rights to ownership in a more concrete sense,<sup>8</sup> which sometimes is referred to as commodification.<sup>9</sup> At least from a US perspective,<sup>10</sup> "property" encapsulates an individualistic, almost libertarian, vision: "what is mine, no one can take away".<sup>11</sup> By denoting IP rights as private property, their limited reach and public benefit character are overridden, which has served well in the political discourse.<sup>12</sup> This does not change, however, the fact that the original rationale for protecting IP

<sup>4</sup> Merges, *ibid.*

<sup>5</sup> Art. I, § 8, cl. 8.

<sup>6</sup> Cf. Anderson and Wager, 713, 721.

<sup>7</sup> Lemley (2005), 1032.

<sup>8</sup> The notion "IP" probably emanates from the 20th century; see Drahos (1999).

<sup>9</sup> Cf. Landes and Posner, 12 *et seq.*, who at 22 point out that: "Free-market ideology is friendly to property rights. In extreme versions of that ideology, the goal of economic liberalism is total commodification – everything of economic value owned by someone."

<sup>10</sup> From a Germanic-Nordic perspective the notion "*Immaterialgüterrecht*", which translated into English becomes "intellectual property", was meant to express an opposite idea to "real property", as the basic idea was precisely to separate such *intellectual* property from other more concrete properties.

<sup>11</sup> Cf. Netanel, 13.

<sup>12</sup> Cf. Netanel, *ibid.*

is essentially utilitarian,<sup>13</sup> which highlights the dynamic interplay of rights and interests for overall welfare.<sup>14</sup>

While certain issues can be regarded as (generic) “global public goods” that should be freely accessible to everybody and must be addressed collectively on a multilateral basis because they are important to the whole international community,<sup>15</sup> other issues can be decided by the individual states and put in private hands for a limited time. To the former belong for example, international economic stability, security (political stability), the environment, civil aviation and telecommunications, humanitarian assistance, and knowledge.<sup>16</sup> The latter could be exemplified by the further development and refinement of new knowledge: if everyone were free to access evolutionary knowledge, inventors would have little incentive to commit resources to producing it. By transferring knowledge from the public good to the private good, creative minds and innovative firms have an incentive to engage in inventive activities and are guaranteed to recoup their expenditures by creating new knowledge and making a profit;<sup>17</sup> only if some form of property right covers what one makes can the output confidently be sold on the mass market.<sup>18</sup> Eventually, IP rights facilitate hedging against risk and provide creators with the opportunity to engage in some sort of commercial interaction<sup>19</sup> which serves societal objectives such as economic growth.<sup>20</sup> This need is seldom disputed and without it welfare distribution would be even more difficult.

At any event the scope of exclusive rights – in terms of duration, technology, activities and geographical application – should be carefully defined to maximize the benefits to the public and strike the proper balance between incentives and fair returns to innovators on one hand,<sup>21</sup> and the risk of market dominance, monopoly rents and loss of consumer

<sup>13</sup> Netanel, at 12, points out that the “property” rhetoric stands in contrast to the US Supreme Court’s traditional characterization of copyright as “monopoly privileges that while ‘intended to motivate . . . creative activity . . . by provision of a special reward’, are limited in nature and must ultimately serve the public good” with references to case law in fn. 29.

<sup>14</sup> Taubman, 3.

<sup>15</sup> Cf. Balasubramaniam. “Information as a global public good: a right to knowledge and communication” was an unsuccessful proposal for an Oxfam International advocacy campaign, to run 2002 to 2004.

<sup>16</sup> Cf. Balasubramaniam, *ibid*.

<sup>17</sup> Africa-Europe Faith and Justice Network, 5.

<sup>18</sup> Merges (2008b), 11.

<sup>19</sup> Cf. Ghafele, 1.

<sup>20</sup> Idris, Ch. 3.

<sup>21</sup> Gibson, 5 with ref. to Art. 7 TRIPS.



welfare on the other.<sup>22</sup> However, in today's market-based economies this balance seems to be at risk, where legislative measures tend to be initiated by industry and other big right holders and are frequently negotiated behind closed doors, thereby jeopardizing and downplaying the democratic procedure.<sup>23</sup> If this is the case, the basic idea of inspiration to creation, or to investment in creation for the social benefit, has arguably been overridden in the name of private or national competitiveness in the global market place.

## 2.2. Economic Rationale<sup>24</sup>

Increased recognition of the value of IP rights has not only led to stronger enforcement and growing policy actions focused on how IP rights should be manifested, but IP has also had a significant impact on how firms behave and interact with each other, and how countries behave with respect to the safekeeping of their respective IP portfolios.<sup>25</sup> With the development of an "intellectual capitalism",<sup>26</sup> IP tends to be appreciated as a tool for protecting investments rather than as an incentive for cultural, including innovative, developments. When providing the basis for investors to place their resources at risk,<sup>27</sup> IP rights are evaluated as (any other) commodity objects,<sup>28</sup> or even regarded as "currency".<sup>29</sup> This can be seen especially

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<sup>22</sup> Downes and Stilwell, 3.

<sup>23</sup> Downes, 1.

<sup>24</sup> For an extensive account of the economic rationale behind IP protection and the consequences this entails for the relationship between IP and competition law, see Ch. 7.

<sup>25</sup> McAleer and Oxley, 490.

<sup>26</sup> As defined by Granstrand (2000) as "an economic system with basic capitalist institutions (private property rights, private profit motives, competitive markets and free enterprises) in which productive assets and processes, as well as commercial transactions and products, are predominantly intellectual or non-material rather than physical in nature for instance".

<sup>27</sup> Cardullo, 1.

<sup>28</sup> Even if the linkage between venture capital and IP may not be direct, it is an important element in the total system, see Cardullo, 2 (figure 1). The recorded rise in immaterial assets in bigger companies has been from 40 percent to 75 percent or more in a decade and is therefore the dominant asset in bigger companies. Cf. in another spirit GRAIN (2004), 16: "In order for anything to be covered by an intellectual property right, it must first be made into property, into a commodity, into something that can be bought and sold. This is where IP systems fundamentally clash with the notion of traditional knowledge as a community heritage, as something which by its nature cannot be sold or bought."

<sup>29</sup> Ghafele, 1.