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# TRADEMARKS AND HUMAN RIGHTS: OIL AND WATER? OR CHOCOLATE AND PEANUT BUTTER?

*By Megan M. Carpenter\**

## I. INTRODUCTION

In recent years, there has been a growing discourse at the intersection of intellectual property and human rights. Whether there is a direct connection between intellectual property, or the subjects of intellectual property, on the one hand, and human rights, on the other, has been the subject of lively debate.<sup>1</sup> Most recently, the discussion has turned to the field of trademarks, which has prompted the question, Are trademarks human rights? In this article I seek to explore this question, and to consider directly whether there is a proper place for trademarks within the human rights framework—whether trademarks and human rights are immiscible, like oil and water, or whether they are a great combination that creates a whole that is bigger than the sum of its parts, like chocolate and peanut butter.

The analysis begins with a discussion of human rights generally, both as those rights are defined and as they are realized within an overarching legal structure. Next, I examine the inclusion of intellectual property rights within international human rights instruments and explore the dimensions of implementation and interpretation of intellectual property rights pursuant to those instruments. I conclude that, in contrast to copyrights and patent rights, trademark rights are not the types of rights that are considered to be human rights *per se*. The third part of the analysis discusses the inclusion of intellectual property within the property rights provisions of the European Convention

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\* Associate Professor of Law, Texas Wesleyan University School of Law. This paper is based on a presentation given at the International Trademark Association (INTA) Leadership Meeting in November 2008. The author wishes to acknowledge the assistance of Joseph Barber and Keith Hirokawa in preparing this article, and is indebted to J.W. Cox, whose assistance was invaluable.

1. See, e.g., Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?* 5 Minn. Intell. Prop. Rev. 47 (2003); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 16 U.C. Davis L. Rev. 971 (2007); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. Davis L. Rev. 1039 (2007); Mary W.S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 Cardozo Arts & Ent. L.J. 775 (2009).

of Human Rights and Fundamental Freedoms. Under the jurisprudence of the European Court, intellectual property rights fall squarely within the parameters of property rights, and a recent opinion by the Grand Chamber makes clear the inclusion of trademark registrations and applications within that property right. The fourth part examines the human right to property, including how that right has developed in both breadth and depth over time. Next, I examine trademark rights as property rights, and consider the question, Are trademark rights property rights within United States trademark law? While historically there has been great resistance to defining trademark rights as a form of property right, I posit that this recalcitrance has grown out of both a misconception of the nature of property rights and a lack of recognition of the nature of trademark rights in relation to other forms of property rights. In the last part, I conclude that trademarks, while not human rights *per se*, can be human rights insofar as they exist as a form of property right, and caution that to the extent that trademark rights are viewed from the lens of human rights, they must be balanced with other rights as well, such as the right to culture.

## II. INTELLECTUAL PROPERTY RIGHTS WITHIN A HUMAN RIGHTS FRAMEWORK

### *A. Human Rights Are Fundamental Rights Inherent to All Human Beings*

A full explication of the place of trademarks within the human rights framework, if there is such a place, must consider a most basic question: What are human rights? At a fundamental level, human rights are thought of as rights inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, color, religion, language, or other status. They are, quite simply, “timeless expressions of fundamental entitlements of the human person.”<sup>2</sup> As a matter of first steps, when we think about whether anything is a human right, a logical place to turn to is the United Nations, which has played a front and center role with regard to the promotion of international human rights since the mid-twentieth century. The United Nations has created a

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2. U.N. Comm. on Economic, Social & Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (International Covenant on Economic, Social and Cultural Rights art. 15(1)(c)), Jan. 12, 2006, U.N. Doc. E/C.12/GC/17 [hereinafter General Comment No. 17], <http://www.unhcr.org/refworld/docid/441543594.html> (last visited Apr. 24, 2009). For an interpretation, see Helfer (2007), *supra* note 1, at 997-1000.

global framework for protecting fundamental human rights, including multiple declarations and multilateral treaties on human rights. These agreements, both declarations and treaties, contain provisions that are commonly cited when asserting that intellectual property is a human right.<sup>3</sup>

### 1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR), and, really, the entire United Nations international human rights regime, were born from the wreckage of a post-World War II environment and culture, and they very much reflect the political climate of the time.<sup>4</sup> The Allied nations were determined to establish a peacekeeping structure for international cooperation that would prevent widespread trauma and violence from occurring in the future.<sup>5</sup> In 1945, after U.S. President Franklin Delano Roosevelt, British Prime Minister Winston Churchill, and Russian Premier Joseph Stalin met at Yalta and agreed to form “a general international organization to maintain peace and security,” the United Nations was established and the U.N. Charter was drafted and signed.<sup>6</sup>

Following the establishment of the United Nations, the UDHR became one of the first international documents based on the tenet

3. See, e.g., Universal Declaration of Human Rights art. 27, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR] (“(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”); International Covenant on Economic Social and Cultural Rights art. 15(1)(b), (c), Dec. 16, 1966, 993 U.N.T.S. 3, 5 [hereinafter ICESCR] (recognizing the right “[t]o enjoy the benefits of scientific progress and its applications” and “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”).

4. Paul Gordon Lauren, *The Evolution of International Human Rights* 181 (1998). Lauren notes that those who endured the traumas of the Depression, Hitler’s Third Reich, and World War II sought to learn from the perceived mistakes of the past to create a lasting peace with rights. See also Yu, *supra* note 1, at 1050 (citing Matthew C.R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* 6 (1995) (“As a reaction to events prior to and during the Second World War, the allies, and later the international community as a whole, came to the belief that the establishment of the new world order should be based upon a commitment to the protection of human rights and fundamental freedoms.”); Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* xiv (1999) (“[W]ithout the delegates’ shared moral revulsion against [the Holocaust] the Declaration would never have been written.”)).

5. Lauren, *supra* note 4, at 181.

6. U.N. Department of Public Information, *Milestones in United Nations History: Yalta Conference (1997)*, <http://www.un.org/Overview/milestone4.htm> (last visited Apr. 24, 2009).

that human beings have inherent and fundamental rights.<sup>7</sup> While the Declaration is not legally binding, it is the cornerstone, if not the foundation, of our contemporary human rights regime, and sets standards that are codified in multiple international treaties. It contains 30 articles specifying particular individual rights. The first two articles set a foundation of equality and basic dignity for all people, and the remaining rights encompass both civil and political rights and economic, social, and cultural rights.

The United Nations was itself an unprecedented effort at international cooperation, and the drafting of the main human rights instruments at the heart of this effort was an amalgamation of cooperation and conflicting ideologies. The first draft of provisions for the UDHR, which were compiled by John Humphrey, the director of the Division on Human Rights at the United Nations, did not include protection for the moral and/or material interests of creators, but did include “the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science,”<sup>8</sup> a version of which eventually became Article 27(1). There was little controversy over that article. There was some discussion as to whether to stipulate that “the development of science must serve the interests of progress and democracy and the cause of international peace and cooperation,” which grew out of concern by the Soviet Union regarding the United States’ sharing secrets about the atomic bomb.<sup>9</sup> The additional phrase was rejected in the final version of the document, in part because of (unsurprising) widespread difficulties defining precisely the word “democracy.”<sup>10</sup> Some delegates were also passionate about the inclusion of the word “freely,” believing that it was inadequate to state that everyone has the right to cultural participation without further emphasizing complete freedom “to protect . . . from harmful pressures which were only too frequent in recent history.”<sup>11</sup> The final provision, a product of cooperation and compromise, reads, “[E]veryone has the right freely to participate in the cultural life of the community, to

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7. Previous international agreements generally were based in positivism, the idea that international rights and obligations exist only after those rights are recognized in national legislation. See Yu, *supra* note 1, at 1045-46 (citing Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* 44 (Abdullahi Ahmed An-Naim ed., 1992)).

8. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* 274 (2001) (quoting Article 44 of the Humphrey Draft).

9. Yu, *supra* note 1, at 1053 (citing Morsink, *supra* note 4, at 61-62). For a detailed history of the drafting process of the UDHR, see Yu, *supra* note 1, at 1047-75.

10. Yu, *supra* note 1, at 1053 (citing Morsink, *supra* note 4, at 61-62).

11. Yu, *supra* note 1, at 1053 (citing Morsink, *supra* note 4, at 218 (quoting Peruvian delegate José Encinas)).

enjoy the arts and to share in scientific advancement and its benefits.”<sup>12</sup>

In contrast to the relatively smooth adoption of Article 27(1), the process for inclusion of Article 27(2) was fraught with controversy.<sup>13</sup> The protection of creators’ moral interests did not arise in the first draft, but was added in a later draft compiled by Rene Cassin after further discussions of the Drafting Committee.<sup>14</sup> The Cassin draft provided initially that “authors of all artistic, literary, scientific works and inventors shall retain, in addition to just remuneration for their labour, a moral right on their work and/or discovery which shall not disappear, even after such a work or discovery shall have become the common property of mankind.”<sup>15</sup> The draft article seems to implicate material interests in addition to moral ones, through the use of the phrase “just and favourable remuneration,” as well as the seeming negative implication that creators will, at least for a time, have exclusive property rights in their creations.<sup>16</sup> Some scholars have suggested that the Humphrey draft assumed material interests in intellectual property as well, by virtue of other property rights provisions.<sup>17</sup> The draft provision was the subject of much controversy, and was objected to by various states on multiple grounds, including particularly the moral rights provisions.<sup>18</sup> Delegates split over growing Cold War ideologies. In the end, the product of compromise afforded every individual “the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>19</sup> This provision has served as the model language for both international and regional human rights instruments for the last half century.

It is no surprise to discover that enforcement mechanisms for international human rights are categorically inadequate. Setting aspirational standards for human rights in the interest of international cooperation and the well-being of citizens around the world is one thing, but creating legally cognizable individual rights vis-à-vis domestic sovereign entities is another matter entirely.

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12. UDHR, *supra* note 3, art. 27(1).

13. Yu, *supra* note 1, at 1054.

14. *Id.*

15. Glendon, *supra* note 8, at 275-80 (quoting Article 43 of the Cassin Draft).

16. UDHR, *supra* note 3, art. 23(3).

17. Yu, *supra* note 1, at 1052.

18. *Id.* at 1054 (“While the additional element of moral rights provided the provision’s *raison d’être*, it raised considerable concern for the United Kingdom and United States”).

19. UDHR, *supra* note 3, art. 27(2).

The UDHR, as such, does not and is not intended to create specific legal binding rights and duties between individuals and the states.<sup>20</sup> Rather, as a Declaration, it is intended to establish what Eleanor Roosevelt called a common standard of rights “for all peoples and all nations.”<sup>21</sup> In contrast to a legally enforceable instrument, the UDHR was designed to proclaim a united vision of human rights for the world, a world that, looking forward, would believe in the “inherent dignity” of the individual and the “inalienable rights of all members of the human family.”<sup>22</sup> It has served this function well, and has become a lighted path to guide states, both collectively and individually, in the direction of fundamental human rights.

## 2. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations in 1966, although it did not enter into force for another decade, a delay that perhaps was due in large part to the escalating Cold War and ideological conflicts between Western capitalist democracies and Communist regimes.<sup>23</sup> The ICESCR is a legal instrument that is binding upon its more than 150 States Parties.<sup>24</sup> There has been some debate as to why (and how) intellectual property protection ended up in the final version of the ICESCR. The ideological conflicts of the Cold War had only intensified in the time since the passage of the UDHR, and the future of intellectual property in a human rights framework was uncertain. In Article 15, however, the final version of the ICESCR sets out binding protection for the

20. See Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science 2* (1998) (noting that although “the UDHR is aspirational or advisory in nature” and “does not legally bind member states of the U.N. to implement it,” over time, it “has gradually assumed the status of customary international law”); Paul Torremans, *Is Copyright a Human Right?*, 2007 Mich. St. L. Rev. 271, 277 (2007).

21. Lauren, *supra* note 4, at 234 (citing *Searching Study of Human Rights Declaration*, 5 U.N. Wkly. Bull. 858 (Nov. 1, 1948)).

22. UDHR, *supra* note 3, preamble.

23. Yu, *supra* note 1, at 1069 (quoting Maria Green, International Anti-Poverty Law Center, Drafting History of Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights para. 43, U.N. Doc. E/C.12/2000/15 (Oct. 9, 2000), [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.2000.15.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.2000.15.En?Opendocument) (last visited Apr. 24, 2009) (“The final vote was straight down cold war faultlines, with the opposed roster holding Romania, Ukrainian Soviet Socialist Republic, USSR, Albania, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, and Iraq . . .”).

24. Helfer (2007), *supra* note 1, at 988.

intellectual property rights detailed in the UDHR.<sup>25</sup> The Covenant provides:

1. The States Parties to the present covenant recognize the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.<sup>26</sup>

The Committee on Economic, Social and Cultural Rights (CESCR) is the body charged with monitoring the implementation of the Covenant.<sup>27</sup> The CESCR is composed of 18 independent experts, and while it does not have a mechanism to adjudicate individual complaints, it is responsible for receiving and reviewing individual reports by States Parties, which detail the actions a state has taken to implement the provisions of the ICESCR on a domestic level.<sup>28</sup> Thus, the CESCR is charged with both interpreting the provisions of the Covenant and monitoring its implementation by more than 150 States Parties. As part of its interpretive duties, the CESCR publishes "General Comments" interpreting specific treaty articles or specific human rights issues.<sup>29</sup> While the General Comments do not create legally binding obligations on the part of States Parties, they do serve a standard-setting function for the CESCR in reviewing compliance with the treaty.<sup>30</sup>

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25. The language in Article 15 of the ICESCR closely tracks that of Article 27 of the UDHR.

26. ICESCR, *supra* note 3, art. 15.

27. Helfer (2007), *supra* note 1, at 988.

28. *Id.*

29. *Id.*

30. *Id.*



### 3. Regional Human Rights Treaties

Regional human rights treaties buttress the intellectual property provisions found in the UN instruments, and often contain language modeled after the UDHR and the ICESCR. The American Declaration on the Rights and Duties of Man, for example, parallels the ICESCR and provides that “[e]very person . . . has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.”<sup>31</sup> The American Declaration was innovative in providing protection for the moral and material interests of creators of intellectual property. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 provides protection for the interests of creators as well.<sup>32</sup>

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) is one of the most, if not the most, influential of the regional human rights instruments. The ECHR creates legal obligations within the European Union, and has judicial oversight by the European Court of Human Rights. Like the American Declaration, the ECHR protects intellectual property rights, albeit through a different approach—the right to property.<sup>33</sup> The European Court of Human Rights has held that intellectual property is protected by Article 1 of Protocol 1 to the ECHR, which provides, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions.”<sup>34</sup> The ECHR is a powerful regional mechanism for the enforcement of human rights, including “tens of thousands of complaints each year, and its jurisdiction extends the length and breadth of the continent,

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31. American Declaration of the Rights and Duties of Man art. 13(2), O.A.S. Res. XXX, adopted by Ninth International Conference of American States (1948), *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), [http://www.hrcr.org/docs/OAS\\_Declaration/oasrights.html](http://www.hrcr.org/docs/OAS_Declaration/oasrights.html) (last visited Apr. 24, 2009).

32. Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights art. 14(1)(c), O.A.S. T.S. No. 69 (1988), <http://www.oas.org/juridico/English/treaties/a-52.html> (last visited Apr. 24, 2009) [hereinafter Additional Protocol].

33. Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 Harv. Int'l L.J. 1, 2 (Winter 2008) (citing Convention for the Protection of Human Rights and Fundamental Freedoms protocol 1, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol 1] (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”)).

34. Helfer (2008), *supra* note 33, at 2.

encompassing 800 million people in forty-seven nations from Azerbaijan to Iceland and from Portugal to Russia.”<sup>35</sup>

### ***B. What Is Intellectual Property?***

*Intellectual property* refers to “creations of the mind.”<sup>36</sup> At a basic level, all forms of intellectual property share many characteristics of other forms of property, in that intellectual property is generally considered to be an asset, and as such can, to the extent of the rights, be bought, sold, licensed, exchanged, or given away, and the intellectual property rights holder has the ability to prevent its unauthorized use or sale.<sup>37</sup> Intellectual property is unique because it is intangible in nature and cannot generally be identified by its own physicality.<sup>38</sup> The World Intellectual Property Organization divides intellectual property into two categories: industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and copyright, which includes literary and artistic works such as novels, poems, plays, films, musical works, software, drawings, paintings, photographs, sculptures, and architectural designs.<sup>39</sup> Copyrights have many layers that can coexist in separate parties even within the context of a singular work. Rights of a performing artist, for example, can coexist with rights in the underlying composition, rights in the sound recording, and rights of radio broadcasters.<sup>40</sup> Intellectual property may include a certain shade of color (such as the use of brown as a trademark for the United Parcel Service),<sup>41</sup> a place of origin (such as geographical indications for Champagne<sup>42</sup> or Gorgonzola<sup>43</sup>), or a

35. *Id.* at 1.

36. WIPO, What is Intellectual Property?, <http://www.wipo.int/about-ip/en/> (last visited July 21, 2009). See Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 Yale Hum. Rts. & Dev. L.J. 51, 56 (2004).

37. Carpenter, *supra* note 36, at 57.

38. *Id.*

39. *Id.* See WIPO, *supra* note 36.

40. Carpenter, *supra* note 36, at 57. See WIPO, *supra* note 36.

41. Carpenter, *supra* note 36, at 57 (citing U.S. Trademark Ser. No. 76408109 (filed June 20, 2002), <http://tess2.uspto.gov/bin/showfield?f=doc&state=4006:a7e60u.7.1>).

42. Carpenter, *supra* note 36, at 57 (noting “Champagne’ is protected as a geographical indication in Europe because it refers to a specific wine-producing region of France. In other markets, such as the United States, the term is viewed as being descriptive.” See Australian Department of Foreign Affairs & Trade, What Does TRIPS Say About the Protection of Geographical Indications?, [http://www.dfat.gov.au/ip/geographical\\_indications.html](http://www.dfat.gov.au/ip/geographical_indications.html)).

43. Carpenter, *supra* note 36, at 57 (citing Geographical Indications, PTC Forum: Online Journal of the Patent, Trademark & Copyright Research Foundation ¶ 2,

shape (such as design patent protection for the COCA-COLA bottle).<sup>44</sup> There are intellectual property implications for plant varieties,<sup>45</sup> sacred religious and cultural knowledge,<sup>46</sup> and genetic resources.<sup>47</sup> Intellectual property is found on coffee tables, walls, and in the pantry; in buses; in stores; and in nature. Simply put, intellectual property is the fruit of human creativity and invention.<sup>48</sup>

### *C. The Scope of Intellectual Property as a Human Right*

General Comment No. 17 of the CESCR provides guidance as to the scope, implementation, and enforcement by States Parties of the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he or she is the author. Importantly, the Comment helps to define and distinguish the human rights aspects of intellectual property from the typical policy objectives of intellectual property regimes. While the human rights provisions contained in Article 15 of the ICESCR “safeguard[] the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments.”<sup>49</sup> Specifically, while intellectual property rights can be temporary and limited in nature, human rights are conceived of as fundamental and enduring. However,

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<http://www.ptcforum.org/> (follow hyperlink to the right of “Part One: Editorial Comments”; follow hyperlink labeled “10006” beside “Geographical Indications”) (last visited Apr. 24, 2009)).

44. Carpenter, *supra* note 36, at 57 (citing U.S. Trademark Reg. No. 1057884 (registered Feb. 1, 1977), <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=73088384>) (last visited Apr. 24, 2009)).

45. Carpenter, *supra* note 36, at 57. See generally Laurie Anne Whitt, *Indigenous Peoples, Intellectual Property, and the New Imperial Science*, 23 Okla. City U.L. Rev. 211 (1998); Craig D. Jacoby & Charles Weiss, *Recognizing Property Rights in Traditional Biocultural Contribution*, 16 Stan. Envtl. L.J. 74 (1997).

46. Carpenter, *supra* note 36, at 57. See generally Lucy M. Moran, *Intellectual Property Law Protection for Traditional and Sacred “Forklife Expressions”—Will Remedies Become Available to Cultural Authors and Communities?*, 6 U. Balt. Intell. Prop. L.J. 99 (1998); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 Conn. L. Rev. 1 (Fall 1997).

47. Carpenter, *supra* note 36, at 57. See generally Whitt, *supra* note 45; Jacoby & Weiss, *supra* note 45.

48. Carpenter, *supra* note 36, at 57 (citing WIPO, *At Home with Invention*, <http://www.wipo.int/about-ip/en/athome.htm>) (last visited Apr. 24, 2009)).

49. General Comment No. 17, *supra* note 2, ¶ 2.

both have as their underlying goal the encouragement of “the active contribution of creators to the arts and sciences and to the progress of society as a whole.”<sup>50</sup> This objective is achieved in intellectual property regimes often through ensuring the limited nature of those rights. We protect the rights of creators so that those individuals will create, and we limit the rights so that the public can benefit from those creations, in turn so that more individuals can create. This balance is struck in intellectual property regimes worldwide, and is made perhaps no clearer than in Article 1, Section 8, Clause 8 of the United States Constitution, which states as a goal, “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>51</sup>

General Comment No. 17 notes that States Parties have the obligation to respect, protect, and fulfill the obligations contained in Article 15.1(c) of the ICESCR:

The obligation to *respect* requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. The obligation to *protect* requires States parties to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to *fulfil* requires States parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of article 15, paragraph 1 (c).<sup>52</sup>

Creators’ rights to benefit from the moral and material interests of their creations are an intrinsic part of States Parties’ obligations vis-à-vis the other provisions of Article 15, and all must strive to seek a continual balance to ensure exclusive, if limited, rights and the dissemination of information to society as a whole.<sup>53</sup> The right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, and the freedom

50. *Id.* ¶ 4.

51. U.S. Const. art. 1, § 8, cl. 8.

52. General Comment No. 17, *supra* note 2, ¶ 28 (citing General Comment No. 13 ¶¶ 46, 47 (1999); General Comment No. 14 ¶ 33 (2000)). *See also* Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 6, Maastricht, 22-26 January 1997).

53. Helfer (2007), *supra* note 1, at 997 (citing General Comment No. 17, *supra* note 2, ¶¶ 22, 35; *see also id.* ¶ 11 (stating that nothing in Article 15.1(c) prevents States Parties from “adopting higher protection standards” in intellectual property treaties or national laws, “provided that these standards do not unjustifiably limit the enjoyment by others of their rights under the Covenant”)).

indispensable for scientific research and creative activity are “mutually reinforcing and reciprocally limitative” with the rights of creators.<sup>54</sup>

Multiple sources speak broadly of intellectual property rights in the context of Article 15, and sometimes specifically mention this provision as describing the fundamental rights of individuals to “copyright, patent, and trademark protection.”<sup>55</sup> It is relatively easy to see how copyrights and patents might fall under the umbrella of this protection. Trademark rights, however, are materially different. Trademark rights simply are not based in scientific, literary, or artistic productions. The General Comment illustrates this distinction through its clarifying interpretation of the normative content of Article 15.1(c). It defines the individual who receives protection under that article as a “creator, whether man or woman, individual or group of individuals, of scientific, literary or artistic productions, such as, *inter alia*, writers and artists.”<sup>56</sup> The CESCR further interprets “any scientific, literary or artistic production” to include “creations of the human mind, that is[,] ‘scientific productions’, such as scientific publications and innovations, including knowledge, innovations and practices of indigenous and local communities, and ‘literary and artistic productions’, such as, *inter alia*, poems, novels, paintings, sculptures, musical compositions, theatrical and cinematographic works, performances and oral traditions.”<sup>57</sup> While copyrights involve “literary and artistic productions” and patents involve “scientific productions,” trademark rights—although they can be quite creative—involve neither.

Furthermore, the irrelevance of trademarks to this provision is supported by the content of the country reports submitted to the CESCR. As part of their treaty obligations, States Parties are responsible for submitting country reports that “identify appropriate indicators and benchmarks designed to monitor, at the national and international levels,” compliance with the provisions

54. General Comment No. 17, *supra* note 2, ¶ 4.

55. See, e.g., A Summary of United Nations Agreements on Human Rights: Covenant on Economic, Social and Cultural Rights, <http://www.hrweb.org/legal/undocs.html> (last visited Apr. 24, 2009).

56. General Comment No. 17, *supra* note 2, ¶ 7. “This follows from the words ‘everyone’, ‘he’ and ‘author’, which indicate that the drafters of that article seemed to have believed authors of scientific, literary or artistic productions to be natural persons, without at that time realizing that they could also be groups of individuals. Under the existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights. However, as noted above, their entitlements, because of their different nature, are not protected at the level of human rights.” *Id.*

57. General Comment No. 17, *supra* note 2, ¶ 9.

of the ICESCR.<sup>58</sup> A review of all country reports submitted to the CESCR since 2000 regarding compliance and implementation of the Covenant reveals that the vast majority of reports have no mention of trademarks, either in general or specifically with reference to Article 15.<sup>59</sup> When countries do mention the development of trademark law as a part of their Article 15 compliance, it is vague and without connection to the substance of the article itself. To the contrary, States Parties may assume some connection of trademarks with Article 15, but this connection is not borne out in the substance of the article in the country reports.

58. *Id.* ¶ 49.

59. To access individual state reports, see bayefsky.com, The United Nations Human Rights Treaties: State Reports: CESCR, <http://www.bayefsky.com/docs.php/area/reports/node/2/treaty/cescr/opt/0> (last visited Apr. 24, 2009). These reports can also be found on United Nations Human Rights: Human Rights by Country, <http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx> (last visited Apr. 24, 2009) (click on a country; then follow ">>Full list of documents in the Treaty Body Database" hyperlink; follow "E" hyperlink beside document type "State Party Report"). To access 2008 state reports, see Office of the United Nations High Commissioner for Human Rights, Committee on Economic, Social & Cultural Rights, 41st Sess. (Nov. 3–21, 2008), <http://www2.ohchr.org/english/bodies/cescr/cescrs41.htm> (last visited Apr. 24, 2009). Of the 75 countries that have filed state reports to the CESCR since 2000, only 12 made any mention of steps taken to improve the protection afforded to trademarks: Albania, Azerbaijan, China, Ecuador, El Salvador, Former Yugoslav Republic of Macedonia, Madagascar, Mauritius, Mexico, Philippines, Republic of Moldova, and Tajikistan. Albania, ¶ 567, U.N. Doc. E/1990/5/Add.67 (Apr. 11, 2005); Azerbaijan, ¶¶ 418-22, U.N. Doc. E/1990/6/Add.37 (Dec. 1, 2003); China, ¶¶ 233, 256 U.N. Doc. E/1990/5/Add.59 (Mar. 4, 2004); Ecuador, ¶ 608, U.N. Doc. E/1990/6/Add.36 (Dec. 20, 2002); El Salvador, ¶ 920, U.N. Doc. E/1990/6/Add.39 (Feb. 23, 2005); Former Yugoslav Republic of Macedonia, ¶¶ 894, 918, 941, U.N. Doc. E/C.12/MKD/1 (Mar. 29, 2006); Madagascar, ¶ 669, U.N. Doc. E/C.12/MDG/2 (Aug. 22, 2008); Mauritius, ¶ 90, U.N. Doc. E/C.12/MUS/4 (Jan. 6, 2009); Mexico, ¶ 844, U.N. Doc. E/C.12/4/Add.16 (Feb. 25, 2005) (noting protection for "brand recognition"); Philippines, ¶¶ 1031-34, U.N. Doc. E/C.12/PHL/4 (Sept. 7, 2007); Republic of Moldova, ¶ 611, U.N. Doc. E/1990/5/Add.52 (Apr. 14, 2003); Tajikistan, ¶ 786, U.N. Doc. E/C.12/TJK/1 (May 31, 2006). Additionally, 24 of the 75 countries, roughly one-third, made no mention of steps taken to improve the property protection afforded to any category of intellectual property. Algeria, U.N. Doc. E/1990/6/Add.26 (July 28, 2000); Angola, U.N. Doc. E/C.12/AGO/3 (Apr. 28, 2008); Australia, U.N. Doc. E/C.12/AUS/4 (Jan. 7, 2008); Austria, U.N. Doc. E/1994/104/Add.28 (July 8, 2004); Columbia, U.N. Doc. E/C.12/4/Add.6 (Aug. 31, 2000); Finland, U.N. Doc. E/C.12/FIN/5 (Feb. 8, 2006); France, U.N. Doc. E/C.12/FRA/3 (Mar. 15, 2007); Iceland, U.N. Doc. E/1994/104/Add.25 (Oct. 19, 2001); Ireland, U.N. Doc. E/1990/6/Add.29 (Nov. 6, 2000); Israel, U.N. Doc. E/1990/6/Add.32 (Oct. 16, 2001); Italy, U.N. Doc. E/C.12/4/Add.13 (May 21, 2003); Jamaica, U.N. Doc. E/1990/6/Add.28 (May 10, 2001); Kenya, U.N. Doc. E/C.12/KEN/1 (Sept. 11, 2007); Libyan Arab Jamahiriya, U.N. Doc. E/1990/6/Add.38 (Feb. 15, 2005); Morocco, U.N. Doc. E/1994/104/Add.29 (Jan. 17, 2005); Paraguay, U.N. Doc. E/C.12/PRY/3 (Feb. 26, 2007); Republic of Serbia, U.N. Doc. E/1990/5/Add.61 (Nov. 26, 2003); Solomon Islands, U.N. Doc. E/1990/5/Add.50 (July 30, 2001); Spain, U.N. Doc. E/C.12/4/Add.11 (Jan. 14, 2003); Ukraine, U.N. Doc. E/C.12/UKR/5 (Aug. 14, 2006); United Kingdom of Great Britain and Northern Ireland, U.N. Doc. E/C.12/GBR/5 (Jan. 31, 2008); Uzbekistan, U.N. Doc. E/1990/5/Add.63 (June 24, 2004); Yemen, U.N. Doc. E/1990/5/Add.54 (May 17, 2002).

### III. TRADEMARKS

“And on the eighth day, God created trademarks.”

The very first trademark appears as early as the Book of Genesis, where it is written that God “set a mark upon Cain, lest any finding him should kill him,” for “therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold.”<sup>60</sup> Trademarks were used in the branding of cattle and animals in the Bible, as well.<sup>61</sup> Modern trademark law, however, can only be traced to the fourteenth and the sixteenth centuries.<sup>62</sup> This time period heralded a revival of learning and expansion of trade. Personal marks, such as a family seal, a house mark, or a coat of arms, were used to identify individuals.<sup>63</sup> Proprietary marks were also used to identify ownership of goods and often derived from a particular house mark.<sup>64</sup> The brands used for cattle were also often derived from a particular house mark.<sup>65</sup> On a broader scale, as goods began to flow to broader commercial markets, appellations of geographic origin were used to identify tapestries and to signify a certain quality. Watermarks began to be used in France in the thirteenth century.<sup>66</sup> Trademark law was necessarily developed to address breaches of custom: in the fourteenth century, Sydney Diamond notes an innkeeper was hanged for passing off a low grade of wine under a deceptive mark.<sup>67</sup> Whether this is a testament to the importance of a trademark or to the importance of decent wine is left to the imagination of history.

Trademark law preceded copyright law, and thus trademark rights were seen as more important than copyrights when it came to printed works. In the early 1500s, there was no copyright, so with the invention of the printing press, publishers and printers competed for the most accurate version of a particular work. In 1512, a foreigner passed off a painting as one by the renowned painter Albrecht Durer by putting the painter’s initials, “AD,” on the work, and the foreigner was held liable for what we would

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60. *Genesis* 4:15 (King James).

61. Sidney A. Diamond, *The Historical Development of Trademarks*, 65 TMR 265, 266-88 (1975), *reprinted in* Robert P. Merges & Jane C. Ginsburg, *Foundations of Intellectual Property* 444 (2004).

62. *Id.* at 272.

63. *Id.* at 273.

64. *Id.*

65. *Id.*

66. *Id.* at 274.

67. *Id.* at 279.

think of today as trademark infringement.<sup>68</sup> Interestingly, presumably the infringer could continue to copy the works of Durer, just not sign them with Durer's initials. With an increase in trade, authentication of goods became of vital importance: later in the sixteenth century, for example, a law was passed that punished infringers of Flemish tapestries by cutting off their right hands.<sup>69</sup>

Because trademark infringement falls under the broader rubric of consumer protection, trademark cases have historically been classified as unfair competition cases. As early as 1871, the U.S. Supreme Court stated that the function of a trademark is "to point out distinctively the origin, or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer."<sup>70</sup> Trademark law and unfair competition law both prohibit conduct that is likely to confuse or deceive consumers as to the source of goods and/or services. In *Elgin National Watch Co.*, the Supreme Court emphasized that the foundation of trademark law is consumer protection: "[T]he manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those, and other, goods; and protection is accorded against unfair dealing. . . ."<sup>71</sup> In *Hanover Star Milling Co. v. Metcalf*, the Supreme Court further supported this view, stating, "The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another. . . . This essential element is the same in trade-mark cases as in cases of unfair competition unaccompanied with trade-mark infringement. In fact, the common law of trade-marks is but a part of the broader law of unfair competition."<sup>72</sup>

### ***A. Trademarks and Human Rights: This Bud's for You***

In 2007, the European Court of Human Rights held that it had jurisdiction over a trademark case through the property rights

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68. *Id.*

69. *Id.* There is, however, no evidence that this sentence was ever carried out.

70. *Canal Co. v. Clark*, 80 U.S. 311, 322, 323 (1871) (noting that "[p]roperty in a trade-mark . . . has very little analogy to that which exists in copyrights, or in patents for inventions," and that the misappropriation of a trademark may injure the trademark holder and deceive the public "by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another").

71. *Elgin Nat'l Watch Co. v. Illinois Watch Case Co.*, 179 U.S. 665, 674 (1901).

72. *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916). *See id.* at 414 ("[T]he trade-mark is treated as merely a protection for the good-will, and not the subject of property except in connection with an existing business.").



provision found in Article 1 of Protocol 1 to the ECHR.<sup>73</sup> The European Court began as a mechanism for judicial review of cases falling under the ECHR, which came about as an outgrowth of the Council of Europe after World War II.<sup>74</sup> The Council had been given the task of drafting a human rights treaty, a task that met with several stumbling blocks, including disagreement over the inclusion of a right to property.<sup>75</sup> Some delegates were concerned about references to compensation for the taking of property, which they feared may compromise postwar economic and social policies.<sup>76</sup> In the end, the Convention was passed without a direct provision for property rights, but with a commitment to continuing negotiations.<sup>77</sup> The right to property was eventually included in Article 1 of Protocol 1 of the ECHR.<sup>78</sup> This right does not explicitly include compensation guarantees, and instead declares that “[n]o one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and by the general principles of international law.”<sup>79</sup>

The Court has struggled to define the scope of the human right to property found in Article 1 of Protocol 1 over the last few decades. The provision protects individuals from interference with the peaceful enjoyment of their possessions.<sup>80</sup> The definition of “possessions” has at times been one of contention, and the Court has stated that the right applies only to existing property rights, rather than rights to acquire property, or hopes of acquiring property.<sup>81</sup> However, “possessions,” as interpreted by the Court,

73. *Anheuser-Busch, Inc. v. Portugal*, 45 Eur. Ct. H.R. 830 (Grand Chamber 2007).

74. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 *Euran. J. Int'l L.* 125, 130 (2008).

75. Tom Allen, *Compensation for Property Under the European Convention on Human Rights*, 28 *Mich. J. Int'l L.* 287, 291 (2007).

76. *Id.* (noting that the British government, for example, opposed the notion that every taking of property requires compensation, as well as the idea that the international community has an interest at all in a member state's substantive law on compensation).

77. *Id.*

78. Protocol 1, *supra* note 33, art. 1.

79. *Id.*

80. *Id.*

81. Helfer, *supra* note 33, at 8-9. “Possessions” may include future proprietary interests; however, something more than an aspirational interest in property must exist. *Id.* The European Court of Human Rights has held, for example, that future interests such as vested social security and pension benefits, as well as options, can fall within the parameters of proprietary protection. *Id.* Rights that are less tangible or are not vested, or are conditional claims that lapse “as a result of the non-fulfillment of the condition,” are not protected, as they represent merely the “hope of recognition of a property right” rather than a property right in itself which can be exercised effectively under the law. *Id.*

can be “either ‘existing possessions’ or assets, including claims, in respect of which the applicant . . . has at least a ‘legitimate expectation’ of obtaining effective enjoyment of a property right.”<sup>82</sup> Furthermore, the line between personal rights and property rights is a fine one. The Court has affirmed that the concept of “possessions” has an “autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as property rights, and thus as ‘possessions,’ for the purposes [of the Convention].”<sup>83</sup>

While the property rights clause is contained in the document as a first tier right, along with civil and political liberties, the Court has interpreted the provision flexibly, giving governments a wide berth when it comes to regulation of private property for public use and welfare.<sup>84</sup> Within the last few years, the Court has turned its sights to the subject of intellectual property, holding that interests in intangible knowledge are protected as property interests by Article 1.<sup>85</sup> Relevantly, in a landmark judgment in 2007 in *Anheuser-Busch v. Portugal*, the Grand Chamber of the European Court partially reversed an earlier decision of the lower Chamber and clearly extended the protection of fundamental property rights under Article 1 not simply to trademark registrations but also to trademark registration applications.<sup>86</sup>

*Anheuser-Busch v. Portugal* is merely the latest step in what may be the most protracted litigation in intellectual property history. In this particular case, Anheuser-Busch argued that Portugal had violated its property rights under the ECHR by denying Anheuser-Busch registration of its BUDWEISER mark under a bilateral treaty that had entered into force six years after it had applied to register the mark.<sup>87</sup> In 1981, Anheuser-Busch applied to register BUDWEISER as a trademark in Portugal; however, the Portuguese National Institute for Industrial Property did not grant the application, as the mark BUDWEISER BIER had

82. *Id.* at 8 (citing *Kopecný v. Slovakia*, 2004-IX Eur. Ct. H.R. at 139-40).

83. *Gasus Dosier- und Fördertechnik GmbH v. Netherlands*, 306-B Eur. Ct. H.R. (Ser. A) at 46 (1995); *see also* Allen, *supra* note 75, at 308-09.

84. Helfer, *supra* note 33, at 2.

85. *Id.* at 3 (citing *Dima v. Romania*, App. No. 58472/00, para. 87 (2006) (admissibility decision) (holding copyrighted works protected by Article 1 of the ECHR); *Melynychuk v. Ukraine*, App. No. 28743/03, para. 8 (2005) (admissibility decision) (holding intellectual property protected by Article 1 of ECHR); *Anheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, 44 Eur. H.R. Rep. 42 [846], 855-56 (Grand Chamber 2007) *rev'g in part* Second Section, Chamber, judgment of Oct. 11, 2005 (registered trademarks protected by Article 1 of ECHR)).

86. *Anheuser-Busch*, *supra* note 85; *see also* Helfer, *supra* note 33, at 3.

87. *Anheuser-Busch*, *supra* note 85, at 830.

previously been registered as a geographic designation of origin by the Czech company Budejovicky Budvar. Anheuser-Busch sought to cancel the registration of the geographic designation, which petition was granted in 1995. Budejovicky Budvar appealed that decision based upon a bilateral treaty (the "1986 Agreement") between Portugal and then-Czechoslovakia that protected geographic designations of origin. The 1986 Agreement entered into force in 1987. The lower court refused to overturn the decision, but the Court of Appeals reversed, and cancelled the BUDWEISER mark belonging to Anheuser-Busch.

Anheuser-Busch then filed a petition with the European Court of Human Rights, alleging a violation of its right to property under Article 1. The lower Chamber held that Article 1 did not apply to the dispute at hand, generally, and specifically, that Article 1 applies only "after final registration" of a trademark.<sup>88</sup> On appeal, the Grand Chamber partially reversed the lower Chamber's decision, holding that both trademark registrations and trademark registration applications are covered by Article 1's right to property.<sup>89</sup> While it was undisputed in the European Court that registered marks are property interests for purposes of Article 1, the question to consider was whether trademark registration applications constituted a "legitimate expectation" such that they were "possessions."<sup>90</sup> The Grand Chamber balanced the conditional nature of a trademark registration application with the "bundle of financial rights and interests that arise" upon its filing.<sup>91</sup> In first-to-file countries, such as the case at bar, these rights may include entering into transactions such as licensing agreements, and, particularly with regard to a famous mark such as the BUDWEISER mark, those transactions may have "substantial financial value."<sup>92</sup> Thus, the Court concluded that the trademark registration application came within the parameters of Article 1.<sup>93</sup>

#### IV. THE FUNDAMENTAL HUMAN RIGHT TO PROPERTY

The right of an individual to own property and not to be deseized of it can be traced back to the beginnings of the human rights discourse. As early as the thirteenth century, the right to

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88. *Id.* at 849.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

property has been an integral part of legal instruments propounding civil liberties. The Magna Carta, for example, provided that “[n]o freeman shall be taken or imprisoned, or be disseised of his freehold or liberties, or free customs or be outlawed or exiled, or any otherwise damaged, nor will we pass upon him, nor send upon him but by lawful judgment of his peers or by the law of England.”<sup>94</sup>

Growing out of individualized efforts, a widespread and recognized right to own property arose out of the natural law movement in the seventeenth century.<sup>95</sup> During that time period, rebellions in France, Spain, and England supported the rights of people to resist absolutist governments.<sup>96</sup> These rebellions led to internal movements supporting the rights of the individual against governmental oppression.<sup>97</sup> A democratic movement in England during that country’s Civil War, for example, known as “The Levellers,” demanded constitutional reform and supported equal rights; their name was coined by opponents who believed that their agenda would have the effect of “leveling” society.<sup>98</sup> In 1649, the Levellers published a manifesto for constitutional reform entitled “Agreement of the People,” which called for guaranteed natural rights, including the right to property, as well as democratic elections and freedom of religion.<sup>99</sup>

John Locke was perhaps the largest proponent of property rights as human rights during that time period. A major pioneer of natural rights philosophy, Locke argued that all individuals have certain natural rights that exist outside of any organized society: human beings are born in a “state of perfect equality, where naturally there is no superiority or jurisdiction of one over another.”<sup>100</sup> This equality, according to Locke, includes the rights

94. See Thomas Y. Davis, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of Due Process of Law*, 77 *Miss. L.J.* 1, 45 (citing 2 Sir Edward Coke, *The Institutes of the Lawes of England* 45-56).

95. Lauren, *supra* note 4, at 14.

96. *Id.*

97. *Id.*

98. *Id.* (citing A.S.P. Woodhouse, *Puritanism and Liberty* 444 (Dent & Sons 1938); G.E. Aylmer, *The Struggle for the Constitution* 132-36 (Blandford 1975)).

99. Edward L. Rubin, *Rethinking Human Rights*, 9 *Int’l Legal Theory* 23-24 (2003) (citing John Lilburne, *The Young Men’s and the Apprentices’ Outcry*, in Andrew Sharp, ed., *The English Levellers* 179, 182-83 (Cambridge University Press 1998); John Lilburne, William Walwyn, Thomas Prince & Richard Overton, *A Manifestation*, in *id.* at 158, 160-61, 175-76; Richard Overton, *An Arrow Against All Tyrants*, in *id.* at 54, 55-57. See C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* 137-42 (Oxford University Press 1962).

100. Lauren, *supra* note 4, at 15.

of individuals to preserve their "property, including life, liberty, and estate—against the injuries and attempts of other men."<sup>101</sup>

The human right to property became further defined in legal instruments throughout the eighteenth century. The French Revolution resulted in the Declaration of Rights of Man and Citizen.<sup>102</sup> Modeled in part after the United States Declaration of Independence, the French Declaration asserted that all men "are born and remain free and equal in rights," and established a wide array of civil rights, including the right to possess property.<sup>103</sup> The French Declaration was not unequivocally supported, however. Long-acknowledged elements of difference served as a great challenge to notions of equality and basic human rights.<sup>104</sup> Prejudice on the basis of race and gender persisted; male-dominated societies were the norm, contributing to a perception of women as being the weaker or lesser sex.<sup>105</sup> Racism as well was supported by a long tradition of philosophers, scientists, and geographers who asserted non-white inferiority.<sup>106</sup> This societal order created a structure that was predictable and stable, and an economy that flourished; defenders of tradition were concerned that a loss of a sense of natural subordination would disrupt society as a whole and "seriously threaten enviable conditions of law and order and private property that had proven themselves again and again over time and location throughout the world."<sup>107</sup>

Paul Gordon Lauren, in his book *The Evolution of International Human Rights*, notes the double-edged sword that exists in the language and vision of human rights generally and

101. *Id.*

102. *Id.* at 17-18.

103. *Id.* at 15 (citing Henri Chantavoine, *Les principes de 1789; la Déclaration des droits, la Déclaration des devoirs* (Société française d'imprimerie et de librairie 1906)).

104. Lauren, *supra* note 4, at 20-28.

105. *Id.* at 24.

106. *Id.* at 24-25. Such racially prejudicial notions can be found in the ideas expressed by "Aristotle, historians such as Herodotus and Tacitus, geographers such as Solinus, and chroniclers such as Gomes Eannes de Azurara." *Id.* The geographer André Thevet claimed that black Africans were "stupid, bestial, and blinded by folly," and Jesuit missionary Alexandre Valignano declared that "all these dusky [non-European] races . . . are very stupid and vicious, and of the basest spirits." *Id.* (quoting André Thevet, *Cosmographie universelle* 67 (Paris, Huillier 1575); Alexandre Valignano, *cited in* C.R. Boxer, *The Portuguese Seaborne Empire* 252 (Knopf 1969)). Furthermore, noted anthropologist Johann Friedrich Blumenbach argued that "'the white color holds the first place' while the others of black, yellow, brown, and red skin color are merely degenerates from the original." *Id.* (quoting Johann Friedrich Blumenbach, *On the Natural Varieties of Mankind* 209, 264, 269 (1775) (reprint, Bergman 1969)).

107. Lauren *supra* note 4, at 26 (citing Edmund Burke, *Reflections on the Revolution in France* 115, 344 (1790)).

property rights specifically.<sup>108</sup> Over centuries, property rights had become a foundational and intrinsic part of the language of human rights discourse, encouraging people to consider them integral and essential: “the most sacred of all the rights of citizenship,” and “even more important in some respects as liberty itself.”<sup>109</sup> As a result, it was not much of a leap to the place where these arguments about property rights were used as “a defense for the great holdings of the few rich against the poverty of the many unpropertied poor, and to do so when definitions of private property actually included living human beings: slaves, serfs, and women.”<sup>110</sup> Thus, one individual’s right to property could seriously compromise another individual’s right to self-determination.

The fundamental human right to own property, and not to be arbitrarily deprived of it, is contained in the constitution of every country in the Western Hemisphere,<sup>111</sup> and is a standard provision found in contemporary human rights instruments on a regional and international scale as well. The UDHR provides for the right of everyone to own property alone, as well as in association with others, and for the right to be free from any arbitrary deprivation of that property.<sup>112</sup> The right to property is found also in the French Declaration of the Rights of Man and of the Citizen,<sup>113</sup> the

108. Lauren *supra* note 4, at 26 (noting Burke’s fear of the destabilizing effects that notions of human rights may have on the existing social order).

109. Lauren, *supra* note 4, at 26 (quoting Jean-Jacques Rousseau, *A Discourse on Political Economy*, in *The Social Contract and Discourses* 311 (Dutton, 1950 ed.).

110. Lauren, *supra* note 4, at 26.

111. Thomas T. Ankersen & Thomas K. Ruppert, *Defending the Polygon: The Emerging Human Right to Communal Property*, 59 Okla. L. Rev. 681, 733-34 (2006) (citing U.S. Const. amend. V; Constitucion Argentina [Const. Arg.] art. 17; Constitucion de Belice de 1981 § 3(d); Constitucion Politica de la Republica de Bolivia de 1967 art. 7; Constitui o Federal [C.F.] art. 5, §§ 22-23 (Braz.); Constitucion Politica de la Republica de Chile de 1980 art. 19, no. 24; Constitucion Politica de 1991 art. 58 (Colom.); Constitucion de 1985 con las Reformas de 1993 art. 39 (Guat.); Constitucion Politica de 1982 arts. 61, 103, 105-06 (Hond.); Jamaica (Constitution) Order in Council 1962 arts. 13, 18; Constitucion Politica de la Republica de Nicaragua [Cn.] [Constitution] tit. I, art. 5, La Gaceta [L.G.] 9 Jan. 1987, *amended by Ley No. 192*, 1 Feb. 1995, *Reforma Parcial a la Constitucion Politica de la Republica de Nicaragua*, L.G., 4 July 1995; Constitucion Politica del Paraguay de 1992 art. 109; Constitucion Politica del Peru de 1993 arts. 2, 70; Constitucion Politica de la Republica Oriental del Uruguay de 1967 con las Modificaciones Hasta 1996 arts. 7, 32).

112. UDHR, *supra* note 3, art. 17 (declaring that “(1) [e]veryone has the right to own property alone as well as in association with others” and “(2) [n]o one shall be arbitrarily deprived of his property”).

113. Declaration of the Rights of Man and of the Citizen, art. XVII, [http://oll.libertyfund.org/index.php?option=com\\_content&task=view&id=1347&Itemid=264#doc09](http://oll.libertyfund.org/index.php?option=com_content&task=view&id=1347&Itemid=264#doc09) (last visited Apr. 24, 2009) (“Property being an inviolable and sacred right, no one may be deprived of it except when public necessity, certified by law, obviously requires it, and on the condition of a just compensation in advance.”). Article II provides that all citizens are to be guaranteed rights of “liberty, property, security, and resistance to oppression.” *Id.* art. II.

United States Bill of Rights,<sup>114</sup> and the African Charter on Human and Peoples' Rights.<sup>115</sup>

***A. Property Rights Properly Defined:  
It's My Bundle of Sticks!***

The recalcitrance toward defining trademarks, and perhaps intellectual property generally, as property often comes from a misconception of property as the absolute dominion over some thing. This concept of property arose in the early 1800s.<sup>116</sup> At that time, property laws conceived of their subject matter as a physical thing, to have and to hold, and the rights over that thing were absolute.<sup>117</sup> Later in the nineteenth century, however, we began to see a dephysicalization of property; courts began to protect interests as property that did not fit into the physical definition, in either or both respects.<sup>118</sup> Rather, any valuable interest could be the subject matter of property, whether tangible or intangible in form. In this spirit of discourse and change, Dean Acheson remarked that the "all absorbing legal conception of the nineteenth century was that of the property right."<sup>119</sup> Courts no longer viewed property rights as absolute, nor the subject matter of property as necessarily a thing. Francis Swayze, addressing a graduating law class at Yale in 1915, described "new kinds of property of great

114. U.S. Const. amend. V (providing that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation").

115. African Charter on Human and Peoples' Rights art. 14, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter ACHPR] ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.").

116. For example, William Blackstone described property rights as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, *Commentaries on the Laws of England* 2 (facsimile ed. 1979) (1765-69), cited in Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 Yale L.J. 601, 601, 603-04 (1998).

117. Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 Buff. L. Rev. 325, 328-30, 341-48 (1980) (noting that during the early part of the nineteenth century, land was the primary source of wealth, and, consequently, property interests were defined in absolutist terms in relation to this physical thing).

118. *Id.* As industry supplanted land as the dominant source of wealth in the latter half of the nineteenth century, the Blackstonian conception of property as absolutist and physicalist became anachronistic. Consequently, courts began to recognize an expanded notion of property that had shifted away from its agrarian root in physical things toward the recognition of rights in incorporeal things, such as business interests. *Id.*

119. *Id.* (quoting Dean Acheson, *Book Review*, 33 Harv. L. Rev. 329, 330 (1919)).

value,” including, in point of fact, business goodwill, trademarks, and trade secrets.<sup>120</sup>

Within this reconceptualization of what a property interest is, courts had then to decide what would qualify as property *per se*, and how much protection a given piece—or form—of property should get. Hohfeld encapsulates the modern approach to property rights as “a set of legal relations between people.”<sup>121</sup> In 1913, he outlined eight fundamental legal relations that formed the basis for property: To own property is to have rights, privileges, powers, and immunities; to not own property meant no rights, duties, disabilities, or liabilities.<sup>122</sup> Similarly, in 1936 the American Law Institute Restatement of Property defined four constituent elements of property: rights, privileges, powers, and immunities, with the negative corollaries.<sup>123</sup>

If property can be defined as any valuable interest, however, it fails categorically to have material significance; that is, it does not serve to distinguish one set of legal relations from another. The greater the variety of interests that are protected as property, the more difficult it is to assert that all forms of property should be protected to the same degree, and, at some point on the spectrum, the category of “property” becomes meaningless. Yet property rights, as Posner notes, are essential: “The creation of individual . . . ownership rights is a necessary rather than a sufficient condition for the efficient use of resources.”<sup>124</sup> Justice Holmes, in his dissent in *INS v. AP*, voiced this concern:

Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable

120. Vandeveld, *supra* note 117 (citing Francis J. Swayze, *The Growing Law*, 25 Yale L.J. 1, 10 (1915)).

121. Wesley N. Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

122. *Id.* at 30. Although the term “right” is often used indiscriminately to convey a broad array of notions, including “property, interest, power, prerogative, immunity, privilege,” the term is better understood in relation to its correlative, “duty,” or obligation. *Id.* at 30-31. Thus, for every right, some other person, persons, or society generally has a correlative (and equal) duty. *Id.* “[A] privilege is the opposite of a duty and the correlative of a ‘no-right.’” *Id.* at 32. “[A] legal power . . . is the opposite of a legal disability and the correlative of legal liability.” *Id.* at 44. And, “immunity is the correlative of disability (‘no-power’), and the opposite, or negation, of liability.” *Id.* at 55.

123. Restatement (First) of Prop. § 5 (1936) (defining a property “interest” as an aggregate of “rights, privileges, powers and immunities”); *id.* § 5 cmt. a. (noting that “[t]here is no corresponding term in common use which includes generically duties, lack of rights, liabilities, and disabilities”).

124. Richard A. Posner, *Economic Analysis of Law* 33 (7th ed. 2007).



values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference.<sup>125</sup>

Justice Brandeis, also dissenting, added, “[T]he fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to insure to it this legal attribute of property.”<sup>126</sup>

The modern conception of property, which will likely ring familiar to anyone who has taken property courses at a law school in the United States, is as a bundle of sticks.<sup>127</sup> While the subject matter of property can be anything of value, property is defined as a bundle of rights—metaphorically speaking, sticks—not all of which one needs to have to create a property interest, and all of which come in varying strengths and forms. These rights are more specific than the broad “rights, privileges, powers, and immunities” criteria; they can include, *inter alia*, the right to exclude, use, possess, transfer, and/or destroy. Felix Cohen described private property as not necessarily comprehensive of the bundle of rights, but rather as “a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision.”<sup>128</sup> Furthermore, individual rights, or sticks in the bundle, may exist but be extremely limited. An easement, for example, is clearly a property interest, and yet it may be limited for one purpose, such as utility lines, over one section (of one corner) (of a piece) of land.<sup>129</sup> A right of way to access a beach is another example of a real property interest that is extremely limited but yet is clearly a property

125. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting).

126. *Id.* at 250 (Brandeis, J., dissenting).

127. According to Schorr, the “bundle of rights” concept of property is most often attributed to Hohfeld. David B. Schorr, *How Blackstone Became a Blackstonian*, 10 *Theoretical Inquiries in Law* 103 n.2 (2009) (citing Hohfeld, *supra* note 122; Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *Yale L.J.* 710 (1917); see also A.M. Honoré, *Ownership*, in *Oxford Essays In Jurisprudence* 107 (A.D. Guest ed., 1961)).

128. Felix Cohen, *Dialogue on Private Property*, 9 *Rutgers L. Rev.* 357, 373 (1954), reprinted in Richard H. Chused, *A Property Anthology* 97 (2d ed. 1997).

129. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The U.S. Supreme Court held in *Loretto* that a state law preventing a landlord from interfering with the installation of cable television facilities on his property constituted a taking for which just compensation was due, as required under the Fifth and Fourteenth Amendments to the Constitution. *Id.* at 422, 441. Despite the cable’s diminutive size, a mere one-half inch in diameter and 30 feet in length, the Court concluded that the statute’s grant of the permanent physical occupation of the landlord’s property effectively appropriated the landlord’s rights to possess, use, and dispose of the property. *Id.* at 435-36.

interest.<sup>130</sup> A property interest may involve the right to use, but only for a specific purpose and in a specific way; it may also involve the right to transfer, or to possess, but, then, it may not.

Property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.<sup>131</sup> Property rights emerge with new or different harmful or beneficial effects, including new techniques, new ways of doing the same things, and doing new things. Thus, ways of conceptualizing property itself become important when there are new forms of property, or the application of established forms of property to distinct contexts, for not only is the right to property a fundamental human right, but also the “legal protection of property rights creates incentives to use resources efficiently.”<sup>132</sup>

## V. TRADEMARKS ARE ABSOLUTELY PROPERTY RIGHTS (BUT PROPERTY RIGHTS ARE NOT ABSOLUTE)

### *A. Long-Standing Controversy*

The controversy over whether trademark rights are or are not property rights is a long-standing one. At times it has been as colorful a dispute as that of the Hatfields and the McCoys. However, this debate is at base one of form over substance, akin to seeing a glass as half full or half empty. Early cases throughout the nineteenth century propounded the characterization of

130. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984). In *Matthews*, the New Jersey Supreme Court extended the public's access to beaches under the “public trust doctrine,” whereby the public has traditionally enjoyed access to beach areas touched by the tide, by requiring private landowners with land abutting coastal areas to allow not only the public's use of private coastal lands but also its access to them. *Id.* at 360, 364.

131. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347 (Pap. & Proc. 1967), reprinted in Robert C. Ellickson et al., *Perspectives on Property Law* 135 (3d ed. 2002). Historically, according to Demsetz, societies have adopted increased and more elaborate systems of private property in response to changes in technology and consequent changes in the relative prices of goods. Taking Demsetz's analysis a step further, it would seem that improved modes of transportation open up new markets, altering relative commodity prices as greater demand is realized. This increased demand sparks improvements in the methods of acquisition, such as hunting and farming implements. In the absence of property rights, these technological improvements lead invariably to overuse, and consequent social turmoil as members of society seek to appropriate as much of a good made newly valuable as they can. To ameliorate this threat to social cohesion and stability, societies begin to demarcate rights to property in an effort to direct the behavior of individuals toward socially useful ends.

132. Richard A. Posner, *Economic Analysis of Law* 32-33 (4th ed. 1992).

trademarks as property. In *Millington v. Fox*,<sup>133</sup> for example, a defendant was found to have infringed a mark without intent or knowledge, but an injunction was issued. Using the reasoning in *Millington*, a later court acknowledged that a cause of action for deceit or fraud would lie at law, but instead the court chose to grant an injunction in equity, acting “on the principle of protecting property alone.”<sup>134</sup> The theory of trademarks as property rights gained a following by courts throughout the nineteenth century, with courts of equity applying basic property principles time and again to trademark rights.<sup>135</sup> Courts reasoned that “the same things are necessary to constitute a title to relief in equity in the case of the infringement of a right to a trade-mark as in the case of a violation of any other right of property.”<sup>136</sup> Finally, in 1882, Lord Blackburn proclaimed with some sense of finality that it was well settled that “both trade-marks and trade names are in a certain sense property.”<sup>137</sup>

Judicial opinions during this time period were not uniform in their characterization of trademarks as property, however. There was a line of cases contemporaneous with those above, in fact, that held precisely the opposite view. In 1896, for example, the House of Lords held directly that there was no property right in a trademark, despite the fact that “some of the rights incident to property might attach thereto.”<sup>138</sup> Almost forty years earlier, in

133. 3 Myl. & C. 338 (Ch. 1838). Prior to *Millington*, courts provided trademark protection through an action for deceit. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 Harv. L. Rev. 813, 813-14, 816, 817, 818-22, 825, 830-31 (1927), reprinted in Merges & Ginsburg, *supra* note 61, at 462. Thus considered, trademark protection came in the form of a negative right or duty to refrain from deceiving the public. In *Millington*, however, a court of equity expanded this notion, inferring a legal right to possess a trademark and issued the first ever injunction to protect a trademark. *Id.*

134. *Edelsten v. Edelsten*, 1 De G. J. & S. 185, 199 (1863). Boylan suggests that later courts interpreted the *Millington* court’s rationale and the *Edelsten* court’s elimination of the element of intent from a finding of fraud in trademark infringement actions as an endorsement of a conception of trademark protection rooted in property law. Kristine M. Boylan, *The Corporate Right of Publicity in Federal Dilution Legislation*, 82 J. Pat. & Trademark Off. Soc’y 5, 7 (2000).

135. See Rudolf Callmann, *Unfair Competition Without Competition*, 95 U. Pa. L. Rev. 443, 454-56 (1983). Callman notes that property rights have never been absolute. *Id.* at 465. To the extent that trademark rights are limited, this affects “not the nature but only the scope of protection. . . . In this respect, trademark property does not differ from other property which is subject to general limitations.” *Id.*

136. *Id.* at 455 (citing *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15, 33 (1882)).

137. Callmann, *supra* note 135, at 455 (citing *Hall v. Barrows*, 4 De. G.J. & S. 150, 32 L. J. Ch. 548 (1863)).

138. *Reddaway v. Banham*, A.C. 199, 209 (1896). In *Reddaway*, Lord Herschell declared that the proper inquiry in trademark appropriations cases is not whether the defendant has infringed upon some legal right in the trademark but rather whether the facts proved that the defendant intended to mislead the public when it used the trademarked word or words.

what appears in retrospect to be a bit aspirational in nature, the court in *Collins Co. v. Brown* proclaimed that it was “now settled that there is no property whatever in a trade-mark.”<sup>139</sup>

As it is apparently well settled that trademark rights both are and are not property rights, it is worthwhile to look a bit deeper into the analysis. The concept of trademarks as property rights does not conflict with the traditional justification for trademark rights as consumer protection devices designed to prevent deception as to source of goods. The notion of trademark rights as property rights first appeared in United States jurisprudence during the second half of the nineteenth century. In *The Trade-Mark Cases*, the U.S. Supreme Court stated that the right to adopt and use a symbol or device to identify one’s goods and services and to distinguish them from those of others is a right long recognized at common law, and that a trademark right “is a property right for the violation of which” either damages or an injunction may be sought.<sup>140</sup> The beginning of the twentieth century, however, saw a narrowing of perception when it came to trademarks and property rights, and courts began to qualify their statements on the issue. Thus, for example, the Supreme Court held in 1917 that “the word property as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the

*Id.* at 209-10. The plaintiff had for a number of years stamped the words “camel hair belting” onto its belts. Some ten years after the plaintiff had begun this practice, the defendant, a former employee of the plaintiff’s, began stamping the same words on his belts. The court upheld the jury’s verdict for the plaintiff, finding that although the defendant’s products were “belts” and were made with “camel hair,” products in that trade had never before been advertised as being composed of camel hair; rather, that usage had only been employed by the plaintiff to refer to his particular belts. *Id.* at 212-13. As such, the jury was justified in attaching liability to the defendant, not because he used the trademarked words but because he did so in order to deceive members of the public, who would have purchased the defendant’s belts believing them to be those of the plaintiff. *Id.* at 215.

139. *Collins Co. v. Brown*, 3 K. & J. 423, 426 (1857) (holding that while “there is no property whatever in a trademark . . . a person may acquire a right of using a particular mark for articles which he has manufactured, so that he may be able to prevent any other person from using it, because the mark denotes that articles so marked were manufactured by a particular person”).

140. *The Trade-Mark Cases*, 100 U.S. 82, 92 (1879). In this case, the Court struck down a federal trademark statute as unconstitutional, finding that trademarks do not meet the constitutional requirements that they be original “writings” and that their possessor be an “author” to receive protection. The Court noted, however, that trademark protection “has long been recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States.” *Id.* This right was not created by Congress nor does it depend on Congress; rather, it antedated the federal statute. *Id.* Consequently, relief for trademark infringement may be obtained only under state law. *Id.* The Court noted, however, that Congress could create a system of federal trademark protection under the authority it derives from the Commerce Clause. *Id.*

primary fact that the law makes some rudimentary requirements of good faith.”<sup>141</sup>

Widmaier objects to what he calls “the propertization of trademarks.”<sup>142</sup> He states that trademarks are distinct from property rights insofar as they serve as a commercial signifier. In 1942, Justice Frankfurter summarized the foundation of trademark law, describing the power of a trademark as being its “commercial magnetism”:

The protection of trademarks is the law’s recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. . . . If another poaches upon the commercial magnetism of the symbol he has created, the [trademark] owner can obtain legal redress.<sup>143</sup>

Throughout the twentieth century, trademark rights became generally viewed as “qualified” property rights. The first explication of a particular (and attenuated) property interest in trademarks was provided in *Hanover Star Milling Co. v. Metcalf*:

Common-law trademarks, and the right to their exclusive use, are, of course, to be classed among property rights . . . but only in the sense that a man’s right to the continued enjoyment of his trade reputation and the good will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which a trademark is an instrumentality.<sup>144</sup>

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141. *E.I. DuPont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917).

142. Uli Widmaier, *Use, Liability, and the Structure of Trademark Law*, 33 Hofstra L. Rev. 603, 615 (2004). Widmaier contends that “U.S. trademark law does not create true property rights,” basing this assertion on the fact that rights in trademarks are contingent on the trademarks’ continued use and consumers’ belief that the trademark indicates a source. *Id.* at 610-11.

143. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942), cited in Widmaier, *supra* note 142, at 613-14.

144. *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916). In *Hanover*, the Court denied relief to a flour manufacturer for trademark infringement, concluding that because the defendant’s flour did not reach the plaintiff’s market and the plaintiff did not market or advertise its flour in the defendant’s market, the defendant’s use of the mark could not have misled any of the potential buyers in the plaintiff’s market. *Id.* at 411-12. The right to the exclusive use of a trademark “extends only to those markets where the trader’s goods have become known and identified by his use of the mark.” *Id.* at 412. Trademark rights exist to protect the goodwill of the holder’s trade or business, and, because the defendant could not have interfered with or harmed the plaintiff’s reputation or good will, no infringement had occurred for which relief would be granted. *Id.* at 413.

This characterization of trademarks as a kind of attenuated property interest became the norm. Courts emphasized time and again that there were no rights in a trademark beyond those rights associated with a source-indicating function, that a trademark was itself inseparable from the goodwill it represented, and that it had no existence unconnected with that use.<sup>145</sup> In *United Drug Co. v. Theodore Rectanus Co.*, the U.S. Supreme Court summarized, "There is no such thing as property in a trademark except as a right appurtenant to an established business or trade in connection with which the mark is employed."<sup>146</sup>

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the U.S. Supreme Court distinguished the constitutionally protected property interest of trademarks from other rights falling under the U.S. Trademark (Lanham) Act.<sup>147</sup> In that case, the Court held that neither the right to be free from a competitor's false advertising nor a more generalized right to be secure in one's business interests is a property right protected under the Due Process Clause of the United States Constitution.<sup>148</sup> Rather, the Court reasoned, "The hallmark of a protected property interest is the right to exclude others[, which is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"<sup>149</sup> Citing its earlier opinion in *K Mart Corp. v. Cartier, Inc.*,<sup>150</sup> the Court included trademark rights within the parameters of that protected property interest:

145. See, e.g., *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918); *Am. Photographic Publ'g Co. v. Ziff-Davis Publ'g Co.*, 135 F.2d 569, 572 (1943) (stating that "[a]lthough trade-mark rights are property, they are not protected per se;" protection extends only to the "good will in connection with which the mark is used").

146. *United Drug Co.*, 248 U.S. at 97.

147. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999).

148. *Id.* at 673-75. The Fourteenth Amendment to the Constitution provides that no State shall "deprive any person of . . . property . . . without due process of law." U.S. Const. amend. XIV, § 1.

149. *Coll. Sav. Bank*, 527 U.S. at 673.

150. *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 185-86 (1988). The Court stated that trademark law accords trademark holders the right to exclude and "the right to enlist the Customs Service's aid to bar foreign-made goods bearing that trademark." *Id.* (citing 71 Cong. Rec. 3871 (1929) (remarks of Sen. George) (Section 526(a) [the trademark statute] "undoubtedly had its origin not in an effort to exclude merchandise bearing a trade-mark, but for the purpose of protecting the interest of the owner of the trade-mark who had gone to the trouble of registering it"); 62 Cong. Rec. 11603 (1922) (remarks of Sen. Sutherland) (Section 526(a) is designed to "protect the property rights of American citizens who have purchased trade-marks from foreigners"). Additionally, the sole discretion to determine what, if any, products will enter and who may import them is vested in the trademark holder, as is the discretion to stipulate any necessary conditions on the importation or satisfactory purpose. *K Mart Corp.*, 485 U.S. at 186.

Trademark law, like contract law, confers private rights, which are themselves rights of exclusion. It grants the trademark owner a bundle of such rights.<sup>151</sup>

Because trademark rights contain a right to exclude, and the false advertising provisions of the Lanham Act do not, the Court reasoned that trademark rights are properly characterized as property interests, and the false advertising claims are not.<sup>152</sup> Furthermore, while business assets are clearly property interests, the act of doing business or making a profit is not.<sup>153</sup>

### ***B. The Debate Over the “Propertization” of Trademarks Is Mischaracterized***

Categorizing trademarks as “attenuated” property interests, or “qualified” property interests, misses the mark, because it fails to consider the reality of property rights. Property rights, by their nature, are more often than not both attenuated and qualified. Of course trademarks perform a source-identifying function, but that does not make a trademark right any less of a property right. Property rights are not rights in gross, nor are they absolute.<sup>154</sup> Rather, they are nearly always limited in nature. To claim that a trademark right is any less of a property interest because it is associated with business goodwill would be like saying a tenancy in a leasehold estate is less of a property interest because it is characterized in certain limited ways, or that an easement is less of a property interest because it is beholden to a servient estate, or, for that matter, that a future springing executory interest is less of a property right because it does not actually (and may never) involve the right of present possession.<sup>155</sup> Furthermore, property

151. *Coll. Sav. Bank*, 527 U.S. at 673 (quoting *K Mart Corp.*, 485 U.S. at 185-86).

152. *Id.* (“The Lanham Act’s false-advertising provisions . . . bear no relationship to any right to exclude; and Florida Prepaid’s alleged misrepresentations concerning its own products intruded upon no interest over which petitioner had exclusive dominion.”).

153. *Id.* at 675. *But see id.* (Stevens, J., dissenting) (“the activity of doing business, or the activity of making a profit . . . is a form of property”).

154. Rose notes that Blackstone must have been and was clearly aware of qualifications to his description of property in terms of total exclusion and despotic dominion, as he himself discussed specific limitations, including neighborly responsibilities and duties in relation to riparian and nuisance law, claims by the destitute to subsistence from the more prosperous, and family obligations created by fee tails. Rose, *supra* note 116, at 601, 603-04.

155. Widmaier contends that U.S. trademark law does not accord true property rights to trademark owners, as rights in a trademark are contingent on the mark’s continued use and consumers’ belief that it indicates a source. Widmaier, *supra* note 142, at 610-11. This stipulation, however, that property rights in a trademark exist so long as it is continually used and consumers believe that it indicates a source closely parallels the language used to create a determinable fee, “to A so long as land is used for X,” yet no one would deny that a determinable fee is a property interest.

rights are not necessarily static over time; as water rights evolve depending upon what (and how much) water is in a given place at a given time, trademark rights ebb and flow pursuant to the minds of consumers. There are many sticks in the bundle, and trademark rights enjoy a multitude of them: the right to use; the right to alienate; the right to possess; the right to exclude. Furthermore, these rights are not absolute in either trademark law or real property law.

A parallel to trademarks can be found in the real property interest of the determinable fee. A fee simple determinable is an interest that is conditioned by durational language and a certain event. A determinable fee may last forever, but it may terminate if the property is not used in a certain way—that is, upon the happening or non-happening of a specified event, at which point the property interest automatically terminates. An example of a determinable fee is when an owner conveys an interest “to A and his heirs so long as his chocolate remains in peanut butter, and if his chocolate is no longer in peanut butter, then to B.” In that situation, A has a fee simple determinable, which is conditioned upon a particular use of the property. If A ceases to use it in the prescribed manner, unconnected with the conditioned use, the property interest terminates. The determinable fee is similar to a trademark, which is also a property interest that has conditions upon its use. Should the trademark owner allow the mark to be used in other ways, the property interest terminates. Such conditions do not preclude, nor do they affect, classification of a trademark as a property interest.

The current debate over the propertization of trademarks is mischaracterized. While it is undisputed that the strength of trademark rights has grown significantly in recent years, symbolized in large part by the development of dilution as a broadened form of trademark infringement,<sup>156</sup> that strengthening does not make a trademark any more of a property right than it was. By contrast, tenants’ rights have grown significantly since the widespread adoption of the Warranty of Habitability,<sup>157</sup> for example, but this strengthening of rights is not, and should not be, characterized as the propertization of tenancies. Whether trademark rights are too expansive is a worthwhile and interesting

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156. Under the Trademark Dilution Revision Act of 2006, subject to equitable principles to the contrary, an owner of a famous trademark may seek an injunction against any entity that uses the mark in commerce after the mark has become famous if this use is likely to tarnish or diminish its value, even if the new use is not in competition with the prior use, is not likely to cause confusion, and does not cause any actual injury. 15 U.S.C.A. § 1125(c)(1) (West 2006).

157. See, e.g., *Hilder v. Peter*, 478 A.2d 202 (Vt. 1984) (incorporating the warranty of habitability into Vermont leasehold law).



subject for debate, but it is not correlative with a debate over whether trademark rights are property interests *per se*. To argue that trademark rights are too expansive is not to argue that they should not be a property right.

Commentators who rise up against the “propertization” of trademarks<sup>158</sup> usually cite the absolute nature of property rights,<sup>159</sup> but, as discussed above, this is a clear misunderstanding of property law generally. Blackstone’s characterization of property, “that sole and despotic dominion conferring total exclusion of the right of any other individual in the universe,”<sup>160</sup> is far from an accurate description of modern property law. Lemley notes that laypeople, lawyers, and judges might describe property rights “along the lines of ‘you own it, so you can do what you want with it.’”<sup>161</sup> However, this description would not be unique to real property. Certainly, intellectual property owners often have the same perception of their rights,<sup>162</sup> an assumption of which many intellectual property lawyers have had to disabuse their clients. In the case of both real and intellectual property, the property owners would be mistaken. The misperception of laypeople over what it means to have a property right is not evidence of the unqualified nature of property rights, but it may be evidence of why people are afraid of them. In any event, the characterization of property rights as absolute is an inaccurate statement of what property rights—or intellectual property rights, for that matter—are under the law.

158. See, e.g., Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 Tex. L. Rev. 1031 (2005). Lemley argues that the fear of free riding, which has traditionally served as the primary economic justification for treating intellectual property as property, is unjustified as it applies to intellectual property and a tragedy of the commons would not result if intellectual property were denied the property protection it currently receives. *Id.* at 1047-55. Additionally, while incentives may be necessary for the types of works covered by copyrights and patents, the need to create incentives does not apply to trademarks. *Id.* at 1058 (noting that William Kratzke made the similar point that the free riding argument in defense of intellectual property protection for trademarks derives from “conclusionary epithets rather than workable economic principles.” William P. Kratzke, *Normative Economic Analysis of Trademark Law*, 21 Memphis St. U. L. Rev. 199, 223 (1991)). Lemley also argues that the propertization of intellectual property leads to the overcompensation of creators, as the additional rights accorded create inefficiencies by “distort[ing] markets away from the competitive norm,” interfere with the rights of others to create, encourage wasteful rent-seeking behavior, entail administrative costs, and encourage overinvestment in creation. Lemley, *supra*, at 1058. See also Widmaier, *supra* note 142, at 610. See also Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 L. & Contemp. Probs. 89, 90 (2003).

159. See, e.g., Widmaier, *supra* note 142, at 610-11.

160. Blackstone, *supra* note 116.

161. Lemley, *supra* note 158, at 1037.

162. I will pause for a moment while we all think of personal client examples in our minds.

Lemley describes the “tragedy of the commons,” which is often provided as a justification for property rights generally.<sup>163</sup> The tragedy of the commons occurs when the value of a particular piece of property is depleted by overuse.<sup>164</sup> It is perhaps best illustrated by the example of a fishing pond, or a college dorm’s common areas. In a fishing pond, if there are no property rights, everyone will benefit from fishing as much as possible, and, in the end, the fishing pond will be depleted of fish. In the commons area of a college dorm, without some kind of rights or responsibility, everyone will leave their beer cans and pizza boxes lying about, and will fail to take care of the space, until the space is substantially reduced in value. Lemley posits that, unlike the case with real property, “there is no tragedy of the commons in intellectual property.”<sup>165</sup> As support for this assertion, Lemley interchanges the concept of intellectual property rights with information; he claims that the consumption of information is nonrivalrous, and that “my use of an idea does not impose any direct cost on you.”<sup>166</sup> He argues that “precisely because its consumption is nonrivalrous, information does not present any risk of the tragedy of the commons.”<sup>167</sup> “It simply cannot be ‘used up.’”<sup>168</sup>

However, the concept of “information” is materially distinct from the concept of intellectual property rights, and while a different argument might be made with regard to copyrights or patent rights, this reasoning falls flat when applied to trademark rights. When it comes to trademark rights, what we are concerned about is not information itself: of course information can be

163. *Id.* at 50. *See also* Demsetz, *supra* note 131.

164. *Id.*

165. Lemley, *supra* note 158, at 1050-51.

166. *Id.*

167. *Id.* (citing James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & Contemp. Probs. 33, 41 (2003) (“[A] gene sequence, an MP3 file, or an image may be used by multiple parties; my use does not interfere with yours.”); Rose, *supra* note 158, at 90 (“In Intellectual Space, [the tragedy of the commons argument] falls away, since there is no physical resource to be ruined by overuse.”)). Rather, Lemley argues that the opposite occurs—a “comedy of the commons” results whereby everyone benefits. Lemley, *supra* note 158, at 1050-51 (citing David Bollier, *Silent Theft: Private Plunder of Our Common Wealth* 37 (2002); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 Minn. L. Rev. 129 (1998); Benjamin G. Damstedt, Note, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 Yale L.J. 1179, 1182-83 (2003) (“suggesting that it is waste by underuse rather than depletion by overuse with which intellectual property theorists should be concerned”). Lemley argues that the use of protected ideas or words is not the type of use with which property theory has traditionally been concerned, as this use does no harm to the original creator. Lemley, *supra* note 158, at 1052.

168. Lemley, *supra* note 158, at 1051.

repeated and reproduced. What we are concerned about, quite to the contrary, is the rights themselves, which, even more than a dorm room or a fishing pond, present in the case of trademarks what one might consider the *ultimate* tragedy of the commons.

The rights that a trademark holder has involve exclusive use of a mark as a source-identifier on certain goods and services. The very rights accorded a trademark owner depend, in fact, on that owner's ability to police the mark. To the extent of his rights, the trademark owner is responsible for protecting that mark from being used by others to identify their goods and services. If a trademark owner allows others to use his mark on the same goods and services, the very rights themselves will disappear. While information itself may be nonrivalrous, trademark rights are, by definition, rivalrous. To the extent that a trademark rightsholder allows the public to fish in his pond, or to leave beer cans in his dorm room's common area, the pond and the common area may disappear entirely. That is, he may end up with no trademark at all.

Trademarks are *de facto* treated as property interests. To the extent of the right, a trademark can be used, sold, abandoned, or licensed. Trademarks are recognized as assets in bankruptcy proceedings.<sup>169</sup> Since 2001, the Financial Accounting Standards Board has issued regulations requiring that an acquiring entity in a bankruptcy perform a detailed purchase price allocation that segregates values attributable to trademarks in an effort to address the problem of undervaluing of intellectual property assets.<sup>170</sup> Trademarks can even be seized as part of a criminal forfeiture in a governmental raid.<sup>171</sup> In October 2008, the U.S. Department of Justice (DOJ) indicted members of the Mongols gang on racketeering charges.<sup>172</sup> As part of the indictment, the

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169. *Adams Apple Distrib. Co. v. Papeleras Reunidas, S.A.*, 773 F.2d 925 (7th Cir. 1985). The Seventh Circuit held in *Adams* that a lien could be placed on a trademark in a bankruptcy proceeding. *Id.* Noting that a trademark is not a property interest in gross that may be sold apart from its associated business or goodwill, the court stated that imposing an equitable lien on the trademark would not give the lienholder an in gross right to the trademark itself. *Id.* Rather, the lienholder would obtain a security interest on the property. *Id.*

170. See Fernando Torres, *Trademark Values in Corporate Restructuring*, presented at Western Economics Association International (July 1, 2007), <http://ssrn.com/abstract=1014741> (last visited Apr. 24, 2009).

171. Any person found guilty of racketeering under Title 18, Section 1962 of the U.S. Code may be ordered to forfeit any of his property, including real property, tangible and intangible personal property, and any "rights, privileges, interests, claims, and securities" he may derive from any personal property. 18 U.S.C.A. § 1963(b) (West 2006).

172. Press Release from Thom Mrozek, Public Affairs Officer, United States Attorney's Office for the Central District of California, U.S. Department of Justice, ATF Undercover Investigation Leads to Federal Racketeering Indictment and Arrest of 61 Members of So.

DOJ sought forfeiture of the MONGOLS trademark<sup>173</sup> as part of the gang's assets. An attorney for the DOJ stated that the seizure of the gang's trademark was an attempt to strip the gang of its "very identity."<sup>174</sup> In an order by the U.S. District Court, the judge acknowledged that the trademark was subject to possible forfeiture:

Count eighty-five of the indictment alleges the Mongols trademark as an asset which the government seeks to forfeit in these criminal proceedings. The indictment alleges that the defendants control the Mongols Motorcycle club, also known as Mongol Nation, which in turn owns the trademark, and that in the event of the defendants' convictions, the trademark would be subject to forfeiture to the United States under 18 U.S.C. § 1963(a)(1), (2) and (3).<sup>175</sup>

This was not the first time that the United States government had sought seizure of trademark assets. The government seized the famous Las Vegas brothel Mustang Ranch in 1999 after obtaining guilty verdicts against its parent companies and manager in a federal fraud and racketeering trial.<sup>176</sup> As part of its assets, the government seized the MUSTANG RANCH trademark.<sup>177</sup> The government later sold the buildings on the eBay Internet auction site for \$145,000 to an individual, who moved the buildings and reopened the business.<sup>178</sup> The original proprietor of the Mustang Ranch argued that the new owner should be unable to use the trademark MUSTANG RANCH because the assignment

Cal.-Based Mongols Outlaw Motorcycle Gang, No. 08-142 (Oct. 12, 2008), <http://www.usdoj.gov/usao/cac/pressroom/pr2008/142.html> (last visited Apr. 24, 2009). "The Mongols have been in an escalating battle with the Hells Angels motorcycle gang since 2002 when the two groups engaged in a massive riot at a casino in Laughlin, Nevada. The Mongols have also been involved in an ongoing and violent feud with the Mexican Mafia over Mongols drug trafficking activities in areas controlled by the Mexican Mafia." *Id.*

173. U.S. Trademark Reg. No. 2916965 (registered Jan. 11, 2005), <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=76532713> (last visited Apr. 24, 2009) (USPTO record for MONGOLS trademark).

174. Scott Glover, *Raid Targets Mongols Motorcycle Gang*, L.A. Times, Oct. 22, 2008, <http://www.latimes.com/news/local/la-me-mongols22-2008oct22,0,5451131,full.story> (last visited Apr. 24, 2009).

175. Amended Order Restraining Trademark at 2, *United States v. Cavazos*, No. CR 08-1201 (C.D. Cal. Oct. 22, 2008), [http://extras.mnginteractive.com/live/media/site205/2008/1022/20081022\\_061031\\_SU22-MONGOLS%20order.pdf](http://extras.mnginteractive.com/live/media/site205/2008/1022/20081022_061031_SU22-MONGOLS%20order.pdf).

176. Martin Griffith, *Judge: Mustang Ranch Brothel Keeps Name*, Wash. Post, Dec. 16, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/16/AR2006121601138.html> (last visited Apr. 24, 2009); *Burgess v. Gilman*, 475 F. Supp. 2d 1051, 1053-54 (D. Nev. 2007).

177. Griffith, *supra* note 176; *Burgess*, 475 F. Supp. 2d at 1057.

178. Griffith, *supra* note 176; *Burgess*, 475 F. Supp. 2d at 1059.

was made in gross and was not made in connection with the goodwill of the business. Finally, in September 2008, the U.S. Court of Appeals for the Ninth Circuit concluded that the U.S. Bureau of Land Management had indeed owned the trademark as part of the assets of Mustang Ranch, and that the assignment of the trademark did not have to be in connection with tangible property—that the asset of the trademark alone, in connection with the goodwill of the business, was enough to overcome allegations of its being an assignment in gross.<sup>179</sup>

## VI. TRADEMARKS ARE NOT HUMAN RIGHTS, BUT PROPERTY RIGHTS WITH HUMAN RIGHTS IMPLICATIONS

Trademark rights are not human rights *per se*, any more than is the computer on which I typed this article or the chair upon which I sat. The provisions found in international and regional human rights instruments commonly cited as the intellectual property provisions clearly reference both the subjects of, and the rights implicated by, copyrights and patents, but they do not, in contrast to common misconception, include trademark rights. Trademarks are not literary or scientific works, and do not implicate the moral and material interests of the creators that we seek to protect in the UDHR or the ICESCR. Like the computer and the chair, however, or like an easement, a tenancy, a springing executory interest, or a right of way, a trademark right is a property interest. It is treated like a property interest, and measured by sticks in the bundle of property rights—the right to use, the right to transfer, the right to exclude.

To the extent that trademarks are increasingly implicated within in a human rights framework, it will be important to consider the consequences on a practical level. It is important to note, for example, that human rights are not a zero-sum game, nor are they mutually exclusive. The realization of the human rights

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179. *Burgess*, 475 F. Supp. 2d at 1059. In *Burgess*, the court stated that when a business is transferred and no mention is made of the business's trademark, it is presumed to have transferred as well. *Id.* at 1055 (citing *Am. Dirigold Corp. v. Dirigold Metals Corp.*, 125 F.2d 446, 453 (6th Cir. 1942)). Therefore, the court presumed that the mark transferred to the U.S. Department of the Treasury when it seized the entire business. *Burgess*, *supra* note 176, at 1059 Next, the court held that the assignment was not in gross, and therefore valid, because prostitution remained the core of the business and the new owners used the same building as the previous owner, though they moved it to a different location, and maintained the same interior design and furnishings. *Id.* Although the trademark was not used during the two years from when it was seized and when it was sold, this non-use was excused, as no one could reasonably expect the government to operate the brothel in the interim, given the certain public outcry that would ensue, simply to maintain the mark. *Id.* at 1061.

enumerated in Article 27 of the UDHR, Article 15 of the ICESCR, and indeed Article 1 of Protocol 1 to the ECHR are both interdependent and dependent on other unspecified human rights guaranteed in those instruments. The Vienna Convention on the Law of Treaties instructs that treaties shall be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>180</sup> With regard to human rights treaties, an interpretation must “take into account the specific characteristics of human rights treaties”<sup>181</sup> and construe provisions in a manner “favourable to the individual.”<sup>182</sup> Limitations on human rights contained in the treaties should, consequently, be construed narrowly.<sup>183</sup> Accordingly, the right to the protection of the moral and material interests of creators must be in some ways balanced with the right to own property alone and in association with others.<sup>184</sup> These rights must also be balanced with the right to freedom of expression, which includes the right to information and ideas of all kinds,<sup>185</sup> the right to the full development of the human

180. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 31, 8 I.L.M. 679.

181. Magdalena Sepulveda, *The Nature of the Obligations Under the International Covenant on Economic, Social, and Cultural Rights* 8 (2003).

182. Craven, *supra* note 4, at 3; *see also* Yu, *supra* note 1, at 1047.

183. Craven, *supra* note 4, at 3. Craven noted, however, that “the obscure and imprecise nature of many of [the] terms [in the ICESCR] frequently leaves important questions unanswered.” *Id.*

184. *See* UDHR, *supra* note 3, art.17; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(v), Dec. 21, 1965, G.A. Res. 2106 (XX), U.N. Doc. A/6014, <http://www2.ohchr.org/english/law/pdf/cerd.pdf> [hereinafter ICEAFRD]; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) protocol 1, art. 1, Nov. 4, 1950, E.T.S. No. 5 [hereinafter ECHR]; American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; ACHPR, *supra* note 115, art. 4 (“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”).

185. *See* UDHR, *supra* note 3, art. 19; International Covenant on Civil and Political Rights art. 19 ¶ 2, Mar. 23, 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 [hereinafter ICCPR]; ECHR, *supra* note 184, art. 5; American Declaration of Human Rights art. 13, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. L/V/II.4 Rev. (1965); ACHPR, *supra* note 115, art. 9 (“1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.”).

personality;<sup>186</sup> and the right to cultural participation,<sup>187</sup> including cultural rights of specific groups.<sup>188</sup>

One area in which human rights discourse may find conflict is that of indigenous peoples' rights. Within the framework of human rights, indigenous peoples' rights must be balanced alongside the rights of trademark owners, and, as human rights discourse begins to consider issues of trademark rights, those rights may be antagonistic to the ability of indigenous groups to enjoy certain cultural rights respecting cultural participation, identity, and self-determination. One of the most apparent examples of such a conflict involves the appropriation of aspects of indigenous cultural identity to signify the goods and services of non-indigenous, commercial interests. Under the Lanham Act, U.S. trademark law bars registration of marks that present a false association with an individual or group, as well as marks that are disparaging. In the well-known Washington Redskins litigation, the plaintiffs, seven Native Americans, alleged that the REDSKINS mark was disparaging to Native Americans. The TTAB held that a trademark will be barred from registration where the likely meaning of the trademark is disparaging to a substantial composite of the referenced group of people. On appeal, however, the U.S. District Court for the District of Columbia held that the defense of laches applied, and that court's subsequent grant of summary judgment to the plaintiff, Pro-Football Inc., was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit.<sup>189</sup> Laches could easily preclude the successful effort to assert rights under the Lanham Act on the part not just of the particular plaintiffs in the Washington Redskins case but also, given the particular history of indigenous communities, of indigenous peoples more generally. While there is a public interest exception to the laches defense, it has not been used to effectively protect these types of claims. Furthermore, the Section 2(a) bar to registration under the Lanham Act affects only registration of trademarks, not their use in commerce. To the extent that

186. UDHR, *supra* note 3, art. 26 ¶ 2. See also ICESCR, *supra* note 3, art. 13 ¶ 1.

187. See ICEAFRD, *supra* note 184, art. 5(e)(vi); Additional Protocol, *supra* note 32, art. 14; ACHPR, *supra* note 115, art. 17 ¶ 2 ("Every individual may freely, take part in the cultural life of his community.")

188. See ICCPR, *supra* note 185, art. 27; Convention on the Elimination of all Forms of Discrimination Against Women art. 13(c), Dec. 18, 1979, 1249 U.N.T.S. 513; Convention on the Rights of the Child art. 31, Nov. 20, 1989, G.A. Res. 44/25, U.N. Doc. A/44/49; International Convention on the Rights of All Migrant Workers and Members of Their Families art. 31, U.N. Doc. A/RES/45/158 (1991).

189. Harjo v. Pro-Football, Inc., 1999 TTAB LEXIS 181 (T.T.A.B. Apr. 2, 1999), *rev'd*, 284 F. Supp. 2d 96 (D.D.C. 2003), *plaintiff's petition for summary judgment granted*, 567 F. Supp. 2d 46 (D.D.C. 2008), *aff'd*, 565 F.3d 880 (D.C. Cir. 2009).

trademarks are a property interest with human rights implications, the courts may more frequently confront questions of conflict with peoples' rights to cultural life and self-determination.

As the debate over intellectual property rights and human rights develops, it is important to recognize the various forms of intellectual property rights, to realize their differences, and to distinguish their treatment within the structure of human rights law. While a strong argument can be made that copyrights and patent rights fall squarely within the language protecting the moral and material interests of creators, found in fundamental human rights treaties, trademark rights are materially different in kind and in function.

Trademark rights involve key sticks in the bundle of property rights: the right to use, the right to transfer, and the right to exclude. Like many real property interests, these rights are not unlimited, but, like all property, the right itself is defined by these sticks in the bundle, and is valued accordingly. Importantly, if a trademark owner fails to protect these rights and allows them to be used by others, it results in the ultimate tragedy of the commons, wherein the trademark rights themselves (not to mention the existence of the mark itself) disappear.

Whether or not it is "well settled" even today that trademarks are property *de jure*, they are certainly property *de facto*, and as such, like the computer on which I type, the chair in which I sit, or the glass of wine I will drink after I finish this article—or, like an easement, a leasehold interest, or a determinable fee—trademark rights may be implicated in human rights discourse that protects individuals from being arbitrarily deprived of their property. Furthermore, including trademarks within a discussion of human rights is not without practical consequence. For example, the property interests of trademark owners must be balanced with other fundamental rights, and may in form and/or substance conflict with one or more of those rights, such as the right to cultural identity of indigenous groups. It is without equivocation that I posit that trademark rights are not human rights *per se*; there is no fundamental right to own a trademark that one gets simply by being born. Trademarks are not as immiscible as oil and water, nor are they a combination so great that it becomes larger than the sum of its parts, as chocolate and peanut butter. However, trademarks clearly are property interests, and as such they have human rights implications. The intersection of trademarks with human rights is something that has consequences both theoretical and practical—which, particularly following the Anheuser-Busch BUDWEISER case in Europe, will become only more relevant on both a domestic and an international scale in the coming years.

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