

Intellectual Property Rights between Nationalization and Globalization. Introduction

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The present volume deals with the role and function of intellectual property rights in the nationalization and globalization of cultural, scientific and economic relations from the 19th century to the present with regard to the following key questions: Why are modern societies increasingly regulating their relations in culture, science and the economy in terms of property? How have institutions and standards of intellectual property spread in the course of history? What are the actors behind the international harmonization of intellectual property rights and their dissemination as a global social and cultural system of reference, and what acting options do they have? Why has their role been controversial until the present day? The articles on the internationalization of cultural works and markets (Isabella Löhr), the international harmonization of patent law (Margrit Seckelmann), the marketing of technical and medical knowledge in India (Sabil Francis) and on scientific property (Gabriel Galvez-Béhar) explore central tendencies, problems and conflicts in the history of the property-related institutionalization of cultural, scientific and economic relations.

The volume examines the way in which intellectual property rights were implemented on a global level by asking how programmes, strategies and processes of propertization, nationalization and globalization interlock.¹ The term propertization refers to the tendency

1 The idea for this volume originally goes back to the section "The Propertization of Culture. The International Governance of Intellectual Property Rights" at the "Second European Congress on World and Global History" in Dresden (3rd – 5th July 2008). We would like to thank all authors, as well as Lionel Bently (Cambridge) for their

to increasingly understand social relations as *property-related relations* and to govern them on a property-related basis.² Nationalization means that social, cultural, scientific, legal and political relations are predominantly governed from the perspective of national sovereignty, integration and delimitation. Globalization refers to transborder economic, social, cultural and political interlinking processes and attendant regulation strategies in which state, private and international actors and organizations are equally involved and which consequently go beyond any of the strictly inter-state forms of action in the sense of bilateral or multilateral policies as suggested by conventional historiographical approaches to analyzing international relations.³

The volume examines the way in which social, cultural, scientific, economic and political structures and processes determine the dynamics of propertization, nationalization and globalization; how these processes mutually enhance or impede each other; how the actors perceive them in the relevant social and cultural context and set against the background of the institutional tradition, and agree on rules for dealing with cultural and knowledge-based goods. Insofar as the articles historicize and contextualize the development and dissemination of intellectual property rights, they are able to show why concepts and norms of intellectual property often reinforce hierarchies, differences and

assistance in further developing the themes with us in a discussion. We thank the Centre for History and Culture of East-Central Europe, Leipzig, and the German Federal Ministry of Education and Research for financial support of the translation.

- 2 In the present volume, "propertization" is used as a heuristic concept for the historical and comparative analysis of social, cultural and legal strategies and processes which amount to governing social relations with material and immaterial objects from a property perspective. Propertization is a process concept which serves as an aid in comprehending a number of concrete and abstract forms of the property-related institutionalization of cultural, scientific and economic relations: H. Siegrist, *Die Propertisierung von Gesellschaft und Kultur. Konstruktion und Institutionalisierung des Eigentums in der Moderne*, in: *ibid.* (ed.), *Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen*, Leipzig 2007 (= *Comparativ* 16 (2006), no. 5/6), pp. 9-52; H. Siegrist, *Strategien der Propertisierung kultureller Beziehungen. Die Rolle von Urheber- und geistigen Eigentumsrechten in der Institutionalisierung moderner europäischer Kulturen (18.-20. Jh.)*, in: S. Leible/A. Ohly/H. Zech (eds.), *Wissen – Märkte – Geistiges Eigentum*, Tübingen 2010, pp. 3-36. In everyday and political discussions on the extension and delimitation of individual intellectual property rights and the privatization and commercialization of culture and knowledge, "propertization" has also been used as a concept of dispute since the 1990s by critics of certain propertization phenomena. With the help of the following legal and legal-political studies, it can be seen how "propertization" has been transformed for a decade from a concept of dispute to a systematic concept for a critical scientific analysis of legal and institutional processes: L. Lessig, *Reclaiming a Commons. Keynote Address*, in: *The Berkman Center's Building a Digital Commons*, May 20, 1999, Cambridge/MA, Draft 1.01, URL: <http://cyber.law.harvard.edu/events/lessigkeynote.pdf> (accessed June 25, 2011); R. A. Posner, *Do we Have too Many Intellectual Property Rights?*, in: *Marquette Intellectual Property Law Review* 9 (2005), no. 2, pp. 173-185; P. Drahos/J. Braitwaite, *Information Feudalism. Who Owns the Knowledge Economy?*, London 2002 (1st eds.)/New York 2007 (paperback); M. J. Radin, *A Comment on Information Propertization and its Legal Milieu*, in: *Cleveland State Law Review* 23 (2006), pp. 1- 16; T. Dreier, *Verdichtungen und unscharfe Ränder. Propertisierungstendenzen im nationalen und internationalen Recht des geistigen Eigentums*, in: H. Siegrist (ed.), *Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen*, Leipzig 2007 (= *Comparativ* 16 (2006), no. 5/6), pp. 172-192.
- 3 J. Osterhammel/N. P. Petersson, *Globalization: A Short History*, Princeton/New Jersey 2003; A. G. Hopkins (ed.), *Global History. Interactions Between the Universal and the Local*, New York 2006; P. Manning, *Navigating World History. Historians Create a Global Past*, New York 2003; P. Vries (ed.), *Global History*, Innsbruck 2009 (= *Österreichische Zeitschrift für Geschichtswissenschaft* 20 (2009), no. 2); M. Hughes-Warrington (ed.), *Palgrave Advances in World Histories*, Basingstoke 2005; F. Hadler/M. Middell (eds.), *Verflochtene Geschichten: Ostmitteleuropa*, Leipzig 2010 (= *Comparativ* 20 (2010), no. 1/2).

dependencies on a global scale. On the other hand, they also indicate that this motivates processes of adjustment and opens up chances of participation. Intellectual property rights have become more ambiguous and multifunctional over the course of history and their worldwide dissemination.

The requirements, forms and consequences of the property-related institutionalization of cultural, scientific and economic processes are mainly of interest from a socio-historical perspective in the present volume. The articles analyze relations in cooperation, competition and governance between individuals, interest groups, associations, companies, states and international organizations. They bring back the problem of intellectual property more closely to general historiography, where it has hitherto only been of marginal interest. Research on intellectual property claims and the meaning of intellectual property law has remained a special area of legal history and legal science until recently. Intellectual property rights are occasionally interesting from the perspective of special disciplines, such as business history, the history of economic growth, labour and professions and of social inequality, the history of technology and science and of media, literature and culture. Until recently historians have generally been interested in non-property-related forms of dealing with culture, science and information; national and universal history in many cases assume unquestioningly that culture and knowledge is about commons.

In the following, we will outline the conceptual basis of this research programme (Chapter 1). Then we will sum up the history of the nationalization and globalization of intellectual property rights from the 19th century to the present from selected viewpoints (Chapter 2). Finally, in ten theses we will link the history of the dissemination of intellectual property to central developments and conflicts of the modern age (Chapter 3).

1. Key terms in socio-historical research on intellectual property: institutional change and propertization

Legally speaking, intellectual property rights are understood in the broadest sense as a “bundle of individual and exclusive *rights*.” Intellectual property is thus an umbrella term whose scope includes copyright, patent law, trademark law and related power protection rights. Whereas patent law sets down how to deal with technical inventions, copyright law governs how to deal with cultural goods and the relationship between authors, agents, users and the public. Research on the practices, norms and effects of intellectual property in modern cultures and societies is generally geared towards questions posed by individual scientific disciplines and mainly concentrates on special areas of knowledge. The concern of the present volume, however, is to show, systematically and by means of examples, how disparate findings from research in the historical, legal, cultural and social sciences can be integrated with the aid of interdisciplinary heuristic concepts. In the following we will structure the research on the meaning of intellectual property into social, cultural, economic and political relations using the concepts of institutionalization and propertization.

From a socio-historical and sociological perspective, intellectual property rights are of interest as “institutions”, i.e. as rules which societies use to structure relations in governance, cooperation and competition. Institutions are collective rules and rules of play which standardize, normalize and sanction social and cultural action. As consolidated cultural patterns, they ensure a security of expectation in social relations. By internalizing the rules in the context of socialization and acculturation processes, the actors acquire a specific social habitus or a group-specific mentality, which also have a retroactive effect on the persistence and change of the institutions.

The social history of intellectual property asks why rights and obligations, functions and relations in culture, science, media science and industry are grasped in terms of property. It understands propertization in modern culture and science as a specific form of an “institutionalization” of social relations. The term institutionalization refers to processes of constructing, implementing and embedding institutions.⁴ In modern and globally networked societies, institutional change is characterized by acceleration, transfers, interlinking and delimitation. Institutional knowledge – i.e. the knowledge of actors regarding *possible forms* of regulating social, cultural and economic relations – is expanded and differentiated. Institutions such as intellectual property become more ambiguous and multifunctional as a result of their being used in different social constellations and cultural contexts. At the same time, conflicts regarding their meaning and function increase. The tension between traditional and innovative, as well as between indigenous and foreign institutions, becomes permanent and intensifies periodically. It is a structure characteristic of modern societies.

One of the distinctive features of modern societies then is that proprietary institutions and propertization processes are becoming increasingly more important. “Propertization” generally means that exclusive claims to the disposal, monitoring and exploitation of material and immaterial goods are regulated and justified by means of theories, concepts and norms of *property*.⁵ In the special case of cultural goods and knowledge,

4 Processes of institutionalization are examined on a social, cultural and legal level. Institutionalistic research approaches are widespread both in the historical, social and cultural sciences, and in the legal and economic sciences. The institutions approach is the cornerstone of interdisciplinary research specifically on intellectual property, and more generally on the institutionalization of cultural, scientific, economic and political relations. On the institution concept and on the analysis of institutions in the social, cultural, economic and historical sciences: W. R. Scott, *Institutions and Organizations*, Thousand Oaks 2001 (2nd ext. ed.); K.-S. Rehberg, *Institutionen, Kognitionen und Symbole. Institutionen als symbolische Verkörperungen*, in: A. Maurer/M. Schmid (eds.), *Neuer Institutionalismus. Zur soziologischen Erklärung von Organisation, Moral und Vertrauen*, Frankfurt am Main 2002, pp. 39-56; K.-S. Rehberg, *Weltrepräsentanz und Verkörperung. Institutionelle Analyse und Symboltheorien. Eine Einführung in systematischer Absicht*, in: G. Melville (ed.), *Institutionalität und Symbolisierung. Verstetigungen kultureller Ordnungsmuster in Vergangenheit und Gegenwart*, Köln 2001, pp. 3-49; D. C. North, *Theorie des institutionellen Wandels. Eine neue Sicht der Wirtschaftsgeschichte*, Tübingen 1988; D. C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge 1990; R. K. Merton, *The Matthew Effect in Science II: Cumulative Advantage and the Symbolism of Intellectual Property*, in: *Isis* 79 (1988) no. 4, pp. 606-623.

5 H. Siegrist, *Die Propertisierung* (annotation 2). On the problems of propertization in agriculture and rural societies, cf. the ethnological studies by C. Hann, *Propertization und ihre Gegentendenzen. Beispiele aus ländlichen Gebieten Europas*, in: H. Siegrist (ed.), *Entgrenzung des Eigentums* (annotation 2), pp. 84-98; F. v. Benda-Beck-

“proPERTIZATION” refers to programmes, strategies and processes which amount to regulating social dealings with commercially exploitable forms of expression and know-how with reference to the conception of intellectual property and with the aid of intellectual property law.⁶ This means that relations in culture, science and the economy are increasingly standardized with regard to property, the validity of proprietary rights and rules is extended in terms of both space and time, alternatives are relativized, superimposed or displaced. Specific groups of professions, interest associations, national states and international organizations tend to extend the scope of the function and validity of institutions and norms of intellectual property in a national and international context.

The articles in this volume deal with the causes, motives, forms, consequences and limits of various proPERTIZATION and de-proPERTIZATION processes in their respective historical and cultural context, using objects and problems as examples. They do not proceed from the assumption that proPERTIZATION processes are uniform or that they proceed in a unilinear manner. Rather, they seek to understand the dialectics and forms of proPERTIZATION and de-proPERTIZATION processes. They therefore take the competition of actors, interests, ideas and institutions as their starting-point and examine how and why property-related rules spread and become established in the “battle of institutions” and “institutional fashions”;⁷ and how intellectual property rights – nationally and internationally – are embedded in the relevant institutional, legal and social structure.⁸

The volume examines the exclusion and inclusion effects of intellectual property rights within and beyond the national state and thus on a national, international and global level. It begins with traditional nation-centred research on intellectual property and the institutionalization of modern culture and science, but then concentrates on the interfaces of state, inter-state and transnational action. It shows how the actors – states, interest groups, non-governmental organizations and international organizations – negotiate and implement the legal and institutional foundations of a *global governance* of culture, media science and knowledge industries;⁹ how far the influence of national states and as-

mann, ProPERTIZATION in Indonesien. Parallele und gegenläufige Entwicklungen, in: H. Siegrist (ed.), *Entgrenzung des Eigentums* (annotation 2), pp. 99–111.

- 6 H. Siegrist, *Strategien der Propertisierung* (annotation 2); exemplary: S. Klotz, *Zwischen musikalischer sprezzatura und labeur. Komponieren in der frühen Neuzeit als Investition*, in: H. Siegrist (ed.), *Entgrenzung des Eigentums* (annotation 2), pp. 193–201; A. Götz von Olenhusen, *Balzac und das Urheber- und Verlagsrecht*, in: UFITA. *Archiv für Urheber- und Medienrecht* (2008), pp. 441–463.
- 7 W. Schluchter, *Interessen, Ideen und Institutionen. Key Terms of a Sociology Orientated Towards that of Max Weber*, in: S. Steffen et al. (eds.), *Soziale Konstellation und historische Perspektive. Festschrift für M. Rainer Lepsius*, Wiesbaden 2008, pp. 57–80, here p. 57 f.
- 8 Cf. the article by G. Galvez-Behar in this volume. Classic: D.C. North, *North, Institutions, Institutional Change and Economic Performance* (annotation 4). P. Drahos/J. Braitwaite, *Information Feudalism*, (annotation 2), p. 2 indicate the problems of an “institutional mismatch”, whereby imported institutions lose the capacity for achievement and acknowledgement which they expected.
- 9 Cf. on this, exemplary for the history of copyright law, I. Löhr, *Die Globalisierung geistiger Eigentumsrechte. Neue Strukturen internationaler Zusammenarbeit, 1886–1952*, Göttingen 2010. A comprehensive introduction to current theory approaches and challenges of governance research are provided by: A. Benz (ed.), *Handbuch Governance. Theoretische Grundlagen und empirische Anwendungsfelder*, Wiesbaden 2007; S. Quack, *Zum Werden und Vergehen von Institutionen – Vorschläge für eine dynamische Governanceanalyse*, in: G. F. Schup-

sociations reaches; and why international contracts and organizations have been gaining importance in regulating and controlling cross-border cultural, scientific and economic processes since the late 19th century. From the following historical overview of the construction and implementation of intellectual property rights, it is clear to see that claims for monitoring and controlling the transfer of cultural goods and knowledge increased in the long-term; and that agreement on rules regarding the cross-border exchange of cultural goods and knowledge was dramatically complicated as a result of extending the scope of the actors, objects, interests and institutional preferences.

2. The construction and implementation of intellectual property rights between nationalization and globalization

From a historical viewpoint, modern copyright and invention rights are actually institutional innovations of late 18th and early 19th centuries. The dissemination of intellectual property rights occurred for the first time in Western and Central Europe, and in America, in the context of the great institutional revolutions and reforms between 1770 and 1870. In the context of the freedom of trade and commerce and a middle-class public, copyright and patent laws served to protect specific claims for use and exploitation. In this way, societies wished to regulate dealings with knowledge and forms of expression in a liberal order.¹⁰

pert (ed.), *Governance-Forschung – Vergewisserung über Stand und Entwicklungslinien*, Baden-Baden 2005, pp. 346-370; for a discussion of global governance in the state and administration sciences: M. Seckelmann, *Keine Alternative zur Staatlichkeit – Das Konzept der "Global Governance"*, in: *Verwaltungsarchiv. Zeitschrift für Verwaltungslehre, Verwaltungsrecht und Verwaltungspolitik* 98 (2007), pp. 30-53; T. Risse-Kappen, *Structures of Governance and Transnational Relations: What Have we Learned?*, in: *ibid.* (ed.), *Bringing Transnational Relations Back In. Non-State Actors, Domestic Structures and International Institutions*, Cambridge 1995, pp. 280-313; M. Zürn, *Global Governance*, in: G. F. Schuppert (ed.), *Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien*, Baden-Baden 2005, pp. 121-146.

- 10 Cf. for this and the following research on copyright law or copyright in individual national and regional states: M. Rose, *Authors and Owners. The Invention of Copyright*, Cambridge 1993; B. Sherman/L. Bently, *The Making of Modern Intellectual Property Law. The British Experience 1760–1911*, Cambridge 1999; R. Deazley, *On the Origin of the Right to Copy. Charting the Movement of Copyright Law in Eighteenth Century Britain, 1695–1775*, Oxford 2004; E. Wadle, *Geistiges Eigentum. Bausteine zur Rechtsgeschichte*, vol. 1, Weinheim 1996, vol. 2, München 2003; M. Vogel, *Die Entwicklung des Urheberrechts*, in: G. Jäger et al. (eds.), *Geschichte des deutschen Buchhandels im 19. und 20. Jahrhundert*, vol. 1: *Das Kaiserreich 1870–1918*, Frankfurt am Main 2001, pp. 122-169; H. Bosse, *Autorschaft ist Werkherrschaft. Über die Entstehung des Urheberrechts aus dem Geist der Goethezeit*, Paderborn, München 1981; F. Kawohl, *Urheberrecht der Musik in Preußen (1820- 1840)*, Tutzing 2002; C. Hesse, *Publishing and Cultural Politics in Revolutionary Paris 1789–1810*, Berkeley 1991; M. Woodmansee, *Intellectual Property and the Construction of Authorship*, New York 1992; M. Borghi, *La manifattura del pensiero. Diritti d'autore e mercato delle lettere in Italia 1801-1865*, Milano 2003; M. T. Buinicki, *Negotiating Copyright. Authorship and the Discourse of Literary Property Rights in Nineteenth-Century America*, New York 2006; P. E. Geller, *Copyright History and the Future. What's Culture Got to do With it?*, in: *Journal of the Copyright Society of the USA* 47 (2000), pp. 209-264. Cf. also the commented and digitalized collection of sources on England, France, Germany and the USA: L. Bently/M. Kretschmer (eds.), *Primary Sources on Copyright (1450–1900)*, URL: www.copyrighthistory.org. – b) International comparisons of copyright: E. Wadle, *Entwicklungsschritte des Geistigen Eigentums in Frankreich und Deutschland. Eine vergleichende Studie*, in: H. Siegrist/D. Sugarman (eds.), *Eigentum im internationalen Vergleich (18.-20. Jahrhundert)*, Göttingen 1999, pp. 243-261; S. Strömholm, *Le*

The property-related institutionalization of cultural and scientific relations gained its importance at that time in the context of the modernization of the territorial state and the “nationalization” of society and culture, the economy and the law. (“Nationalization” refers here in an abbreviated form to processes of integration and homogenization taking place at that time not only in national states such as France and England, but also in the numerous pre-national German and Italian regional states and in the Empires.) Intellectual property rights were meant to ensure security of expectation in the relations of cooperation and competition between professional groups and interest groups in the territory of the national state. Propertization and nationalization were in many cases complementary institutionalization strategies. States and social elites coordinated their particular professional, social, cultural and economic interests and objectives with the aid of the concept and norms of intellectual property with the overall aim of establishing a productive national culture, science and economy.¹¹ The modern legal and cultural state assigned authors and publishers, inventors and industrialists exclusive individual rights for intellectual works and inventions which it considered socially, culturally and economically relevant, but did not manufacture and convey under its own management. Gradually, what began as a pragmatically grounded claim by authors and inventors to their achievements became defined as a natural right or fundamental right, which was then specified by special laws, court decisions, legal commentaries and legal doctrines. Between the late 18th and late 19th centuries more and more states began to hope that legally anchoring and codifying intellectual property law would provide an efficient means of regulating problems which traditional legal instruments and institutions such as pub-

droit moral de l’auteur en droit allemand, français et scandinave. Avec un aperçu de l’évolution internationale, Stockholm 1966; A. Strowel, *Droit d’auteur et copyright. Divergences et convergences. Etude de droit comparé*, Brüssel/Paris 1993; F. Rideau, *La formation du droit de la propriété littéraire en France et en Grande Bretagne. Une convergence oubliée*, Aix-en-Provence 2004; B. Dölemeyer, *Urheber- und Verlagsrecht*, in: H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III.3, Munich 1986, pp. 3955-4066; D. Halbert, *Intellectual Property in the Information Age. The Politics of Expanding Ownership Rights*, Westport 1999; G. Davies, *Copyright and the Public Interest*, Weinheim 1994. – c) On the history of patents: W. R. Cornish, *Intellectual Property. Patents, Copyright, Trade Marks and Allied Rights*, London 1981; H. I. Dutton, *The Patent System and Inventive Activity During the Industrial Revolution 1750–1852*, Manchester 1984; A. Beltran/S. Chauveau/G. Galvez-Behar, *Des brevets et des marques. Une histoire de la propriété industrielle*, Paris, 2001; F.-K. Beier, *Gewerbefreiheit und Patentschutz. Zur Entwicklung des Patentrechts im 19. Jahrhundert*, in: H. Coing/W. Wilhelm (eds.), *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert*, vol. 4, Frankfurt am Main 1979, pp. 183-205; M. Seckelmann, *Industrialisierung, Internationalisierung und Patentrecht im Deutschen Reich, 1871–1914*, Frankfurt am Main 2006; R. E. Evenson/J. D. Putnam, *Institutional Changes in Intellectual Property Rights*, in: *American Journal of Agricultural Economics* 69 (1987), no. 2, pp. 403-409; A. Aer, *Patents in Imperial Russia. A History of the Russian Institution of Invention Privileges under Old Regime*, Helsinki 1995.

- 11 In the 19th century and until well into the 20th century, property-holding and educated middle-class circles were interested above all in protecting intellectual property, i.e. industrial, media and cultural entrepreneurs, authors of all kinds, freelance artists, inventors, engineers and architects, small groups of copyright, patent law and trademark law specialists among lawyers, as well as educated audience groups. Exemplary for this: M. Woodmansee, *The Cultural Work of Copyright. Legislating Authorship in Britain 1837–1842*, in: A. Sarat/T. R. Kearns (eds.), *Law in the Domains of Culture*, Ann Arbor 1998, pp. 65-96; D. P. Miller, “Puffing Jamie”: The Commercial and Ideological Importance of Being a “Philosopher” in the Case of the Reputation of James Watt (1736–1819), in: *History of Science* 38 (2000), no. 1, pp. 1-24.

lishers' privileges, trade monopolies and corporate rights – real or alleged – had failed to solve. In contrast to material property rights, however, which were becoming established at the same time, intellectual property was from the outset only temporary. The legal status and legally dogmatic justification of the new cultural and technical-scientific exclusive rights remained controversial for a long time. Depending on the place, time, field of knowledge and legal culture, the latter were understood and standardized as property, duplication, competition, investment protection or monopoly rights; in some areas of Central and Eastern Europe even still as privileges until the late 19th century.¹² In any case, proprietary protection always stood in the foreground at that time, i.e. the exclusive individual right to duplication and commercial exploitation. Not until the 20th century was the proprietary dimension of intellectual property law in Europe complemented more strongly by the moral rights of the author and the employed inventor.¹³ For a long time, intellectual property law only regulated a few selected functions and forms of exploitation, such as the commercial dissemination of mechanically duplicated cultural goods and the commercial application of new technical knowledge. Literary and artistic property law standardized functions and relations in the literary economy and elite culture. In the USA and Great Britain, such exclusive rights were understood and designated as *copyrights*, on the European continent as literary and artistic property rights, then later increasingly as personal rights of the author or rights to immaterial goods. Patent law gained importance in technically innovative and especially economically dynamic areas of industry and science.¹⁴ Legislators limited individual intellectual property rights in the public and state's interest, by relativizing them, firstly with the term of their duration, secondly by so-called threshold rules in copyright and patent law¹⁵ and

12 L. Gieseke, Vom Privileg zum Urheberrecht. Die Entwicklung des Urheberrechts in Deutschland bis 1845, Göttingen 1995; T. Gergen, Die Nachdruckprivilegienpraxis Württembergs im 19. Jahrhundert und ihre Bedeutung für das Urheberrecht im Deutschen Bund, Berlin 2007.

13 Cf. on the dispute constantly blazing up above all in Continental Europe since the 19th century on the property-related or personality-related legal justification of intellectual property law: L. Pahlow, Geistiges Eigentum, in: Enzyklopädie der Neuzeit, vol. 4, Stuttgart 2006, pp. 291-296; L. Pahlow, Intellectual Property, Propriété Intellectuelle und kein geistiges Eigentum? Historisch-kritische Anmerkungen zu einem umstrittenen Rechtsbegriff, in: UFITA 115 (2006), pp. 705-726; H. Mohnhaupt, Zur Entstehung der Rechtsdisziplin "Urheberrecht" im 19. Jahrhundert, in: L. Pahlow/J. Eisfeld (eds.), Grundlagen und Grundfragen des Geistigen Eigentums. Diethelm Klippel zum 65. Geburtstag, Tübingen 2008, pp. 131-154; V. M. Jänich, Geistiges Eigentum – eine Komplementärscheinung zum Sacheigentum?, Tübingen 2002; M. Goldhammer, Die Begründung des geistigen Eigentums in der US-amerikanischen Rechtswissenschaft und ihre Bedeutung für die deutsche Diskussion, in: Zeitschrift für geistiges Eigentum 1 (2009), pp. 139-166. From the late 19th century until the present day, prominent representatives of German jurisprudence have encountered the view widespread in the Anglo-Saxon world and in Western Europe, that authorial rights are to be understood primarily as intellectual property rights, critically and dismissively: M. Reh binder, Urheberrecht, Munich 2006; H. Schack, Urheber- und Urhebervertragsrecht, Tübingen 2007; K.-N. Peifer, Individualität im Zivilrecht. Der Schutz persönlicher, gegenständlicher und wettbewerblicher Individualität im Persönlichkeitsrecht, Immaterialgüterrecht und Recht der Unternehmen, Tübingen 2001; T. Hoeren, Medienumbrüche und das Urheberrecht. Eine einführende Betrachtung, in: R. Schnell (ed.), Medienrevolutionen. Beiträge zur Mediengeschichte der Wahrnehmung, Bielefeld 2006, pp. 167-183.

14 Cf. on this in the present volume the articles by Gabriel Galvez-Behar and Margrit Seckelmann.

15 They determine, for example, that works protected by copyright in the public or state's interest could be freely used, for instance, for state celebrations, in schools or by the military. One of the limitation rules was also the right of quotation. Similar limits apply to patents relevant on a national, military or political security level. Cf. for

thirdly, by embedding them in cultural, educational, economic and social policy. That is to say, on a national scale the history of intellectual property was defined from the outset by the search for an acceptable balance between particular and general interests.

When international exchange relations in the cultural, media and knowledge industries were intensifying in the 19th century,¹⁶ the question of how to balance interests in cross-border relations became more acute. Cultural goods protected in the country of origin were reprinted, edited, translated and commercially exploited beyond the national territory, patent-protected manufacturing processes were used freely abroad. Even in countries which already had a modern form of patent law, the “first registered” was also able to receive a patent for a foreign invention they had not created. That is to say, as long as intellectual property rights were not secured expressly by a *private contract* between the indigenous author, first publisher or patent owner on the one hand and a foreign user or agent on the other, they evaporated beyond the state border. Those parties affected by imitation and reproduction referred to this as piracy, yet were unable to do much against, since the sovereign state’s power of regulation and sanctioning ended at its border. Propertization strategies of a national extent were inadequate. Thus the view sworn by the emerging liberal owner society, that material and immaterial property rights were about universal natural, liberty-related or human rights – justified by individual work, achievement and investments – threatened to become an illusion.

Right into the early 20th century, the role of intellectual property was not consolidated either in the regulation of cultural exchange processes or in a cross-border flow of goods and money, even in Western and Central Europe and the USA. States which declared intellectual property rights to be sacrosanct in their own area, behaved ambivalently towards the exclusive legal demands of foreign citizens and businesses. In the competition for political power, cultural influence, economic affluence and military strength, they repeatedly placed their own advantage above the exclusivity demands justified by foreign law.

The regional and national states, however, were also searching for solutions to the problem that texts, pictures, notes and new commercial knowledge could be used in duplicated form and at the same time in many places. As the cross-border exchange of cultural goods and knowledge increased and trade and customs borders were dismantled over the course of the 19th century, they focused increasingly on the institutions of intellectual property. Copyright, patent, trademark and ultimately a whole host of exclusive rights derived from these were intended to moralize, regulate and sanction the competition and cooperation relations between individuals, organizations and states even on an international level. Intellectual property rights became an instrument of external trade and external culture politics. Some Western and Central European industrial states, countries

the 20th century the article by M. Seckelmann and F. Mächtel, *Das Patentrecht im Krieg*, Tübingen 2009.

16 Cf. exemplary for this, on the internationalization of the book market: E. Fischer, *Buchmarkt*, in: *European History Online (EGO)*, published by the Institute of European History (IEG) Mainz, March 12, 2010, URL: <http://www.ieg-ego.eu/fischere-2010-de>, URN: urn:nbn:de:0159-20100921215 [accessed May 21, 2011]; F. Barbier, (ed.), *Est-Ouest. Transferts et réceptions dans le monde du livre en Europe (XVII^e-XX^e siècles)*, Leipzig 2005.

of cultural export and the USA determined the standards which were subsequently to be assumed voluntarily or by force by other states.

Entrepreneurs, authors, inventors and lawyers were increasingly demanding that legislators should formulate internationally binding regulations for dealing with cultural goods and technical inventions. Private and national interests were to be protected by means of international contracts which would reinforce legal and expectation-related security in cross-border cultural and economic relations. In Europe, inter-state negotiations on legal standards related to property and trade intensified in the course of the liberalization and free trade policies around 1840 and from the 1860s onwards. Large and medium-sized cultural and industrial states protected the intellectual property rights of their entrepreneurs, inventors and authors at first by means of a network of bilateral trade contracts.

When plans to create uniform international protection standards failed, industrial and cultural export states such as France, Germany and Great Britain agreed to protect both literary and artistic works and technical inventions by means of multilateral contracts, as was customary at the time in other fields.¹⁷ The legal, institutional and organizational foundations for the international protection of intellectual property rights were laid in the 1880s: the Paris Convention for the Protection of Industrial Property, founded in 1883, regulated international patent protection,¹⁸ the Berne Union, founded in 1886, regulated the international protection of literary and artistic property.¹⁹ The international intellectual property regime from then on was based on principles of mutual recognition of national copyright titles (reciprocity), the equality of foreigners and natives in the respective national patent and copyright law (treatment of natives) and an alignment of the law. In the case of technical inventions, although the criteria which states used to award their patents became more universal, a special patent still had to be acquired for each country.²⁰ The aforementioned international conventions safeguarded the globalization of cultural, media and science industries in the 20th century, and ensured Western standards in cultural, scientific and economic relations were spread worldwide.

17 For general information on the question of international conventions and organizations: M. Herren, *Governmental Internationalism and the Beginning of a New World Order in the Late Nineteenth Century*, in: M. H. Geyer / J. Paulmann (eds.), *The Mechanics of Internationalism. Culture, Society, and Politics From the 1840s to the First World War*, Oxford 2001, pp. 121-144. Specially on intellectual property: M. Vec, *Weltverträge für Weltliteratur. Das Geistige Eigentum im System der rechtsetzenden Konventionen des 19. Jahrhunderts*, in: L. Pahlow / J. Eisfeld (eds.), *Grundlagen und Grundfragen des Geistigen Eigentums*, Tübingen 2008, pp. 107-130; B. Dölemeyer, „Geistiges Eigentum“ zwischen „Commerzien“ und „Informationsgesellschaft“. Einzelstaatliche Gesetzgebung und internationaler Standard, in: L. Pahlow / J. Eisfeld (eds.), *Grundlagen und Grundfragen des Geistigen Eigentums*, Tübingen 2008, pp. 107-130; H. Siegrist, *Geistiges Eigentum im Spannungsfeld von Individualisierung, Nationalisierung und Internationalisierung. Der Weg zur Berner Übereinkunft von 1886*, in: R. Hohls / I. Schröder / H. Siegrist (eds.), *Europa und die Europäer. Quellen und Essays zur modernen europäischen Geschichte*, Wiesbaden 2005, pp. 52-61.

18 Cf. on this the article by Margrit Seckelmann in this volume (with further literature).

19 Cf. on this the article by Isabella Löhr in this volume (with further literature).

20 Cf. the articles by G. Galvez-Béhar and M. Seckelmann in this volume, as well as C. Mersch, *Die Welt der Patente. Eine soziologische Analyse des Weltpatentensystems*, in: B. Heintz / R. Münch / H. Tyrell (eds.), *Zeitschrift für Soziologie. Sonderheft „Weltgesellschaft“*, Stuttgart 2006, pp. 239-259.

However, acceptance of the international standards was neither free of problems nor seamless, neither in Europe nor on a global scale. European Empires such as England and France implemented the legal order of the mother country and international conventions even in their colonies, but persisted in treating authors, inventors and businesses from the mother country with a certain amount of preference.²¹ On the European continent as well, the convergence and alignment of intellectual property rights was repeatedly, dramatically slowed down as a result of diverging interests and different legal traditions and institutional preferences, right up to the First World War. Industrial countries such as Germany, Switzerland and the Netherlands hesitated to completely recognize the international patent convention until around 1900.²² Multi-ethnic empires such as Austro-Hungary and the Russian Czarist Empire distanced themselves from the Berne Convention for the protection of literary and artistic property, as publishers warned that the translation and remunerative costs for foreign authors, in view of the limited market in the minor languages, was disproportionate with regard to what profit could be expected from them.²³ Only hesitantly did they conclude bilateral agreements with the major culture-exporting states. The states of North and South America also did not enter the Berne Union, but instead reached a series of multilateral agreements under the umbrella of the Pan-American Union, and refused entry to non-American states.

A renewed propertization effort occurred after the First World War, with the entry of the East Central European national states emerging from the Habsburg Empire in the Berne Union, in the context of the peace treaties. A new actor entered into the game in the 1920s with the League of Nations, which systematically linked and vehemently promoted propertization and globalization strategies in culture, science and the economy.²⁴ In 1945, after a period of stagnation and dramatic setbacks during the world economic crisis, and above all the Second World War, the Berne Union, UNESCO, the Paris Convention for the Protection of Industrial Property and leading Western industrial countries resumed the propertization projects of the interwar period and implemented large sections of them up until 1960/70. From the 1960s onwards, more and more countries from the Socialist world and the so-called Third World started to participate in the in-

21 E. Röthlisberger, *Der interne und internationale Schutz des Urheberrechts in den Ländern des Erdballs*, Leipzig 1901 (1st edition), 1904 (2nd edition), 1914 (3rd edition), 1931 (4th edition).

22 Cf. on this the article by Margrit Seckelmann in this volume.

23 W. Dillenz, *Warum Österreich-Ungarn nie der Berner Übereinkunft beitrug*, in: E. Wadle (ed.), *Historische Studien zum Urheberrecht in Europa. Entwicklungslinien und Grundfragen*, Berlin 1993, pp. 167-189; N. Bachleitner, *Produktion, Tausch und Übersetzung im österreichischen Buchhandel im 19. Jahrhundert*, in: F. Barbier (ed.), *Est-Ouest. Transferts et réceptions dans le monde du livre en Europe (XVII^e-XX^e siècles)*, Leipzig 2005, pp. 109-123; F. Majoros, *Hundertzehn Jahre staatsvertraglich geregelten Urheberrechts des Zarenreiches und der Sowjetunion (1861–1971)*, in: *Osteuropa-Recht* 18 (1972), no. 1-3, pp. 61-97. For more on the problems of translation: L. Bently, *Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries*, in: *Symposium. Intellectual Property, Trade and Development. Accommodating and Reconciling Different National Levels of Protection*, in: *Chicago-Kent Law Review* 82 (2007), no. 3, pp. 1181-1240; M. Vogel, *Die Entfaltung des Übersetzungsrechts im deutschen Urheberrecht des 19. Jahrhunderts*, in: R. Dittrich (ed.), *Die Notwendigkeit des Urheberrechtsschutzes im Lichte seiner Geschichte*, Vienna 1991, pp. 202-221.

24 Cf. on this the articles by Isabella Löhr and Gabriel Galvez-Behar in this volume.

ternational agreements to protect intellectual property, such as the Universal Copyright Convention founded in 1952 with its moderate (in comparison to the Berne Union's) protection standards. In 1967, a new umbrella organization known as the World Intellectual Property Organization (WIPO) assumed the claim to leadership in developing a regime of intellectual property rights with a global scope.

From 1970/1980 onwards, expectations have risen dramatically once again with regard to intellectual property rights. Reasons for this include an increasing liberalization of economic, scientific and economic relations, digitalization and the expansion of cultural, media and information goods industries. In the context of the liberalization of international trade relations, patent, copyright, trademark and related protection rights are deemed the central legal and moral institutions of the world economy. They are disseminated and aligned worldwide, in order to guarantee an expectation-related security in international relations. Since 1994, the World Trade Organization's (WTO) TRIPS agreement on trade-related aspects of intellectual property has raised pressure on state and non-state actors wishing to reject or limit the international standards with reference to associated equality deficits or economic and cultural disadvantages.²⁵

184 states belong to the WIPO today, over 150 states to the WTO, i.e. officially, the legal standards represented by the international umbrella organizations are recognized worldwide. Nonetheless, they remain contentious for a variety of theoretical and practical reasons. Critics from the "peripheries" complain that patent law protects the special interests of rich states and multinational businesses in the knowledge industry, instead of the human right to culture, knowledge, health and prosperity. Critics in the "centres" of a multicentric, post-colonial world warn that copyright law does not so much serve those producing culture, the general public or the national culture as globally acting media companies. Discussions on adapting national copyright, patent and trade mark protection laws to the directives of the WTO and the European Union indicate that even in the larger European states, in which intellectual property rights have traditionally been firmly anchored, objections are being raised repeatedly against a uniform international

25 Cf. on this and on the following the articles in this volume, as well as exemplary: P. Drahos/J. Braitwaite, *Information Feudalism* (annotation 2); C. May, *A Global Political Economy of Intellectual Property Rights. The New Enclosures?* London 2002; M. P. Ryan, *Knowledge Diplomacy. Global Competition and the Politics of Intellectual Property* 1998; J. L. Bikoff/D. I. Wilson, *Intellectual Property Protection under NAFTA and TRIPS and the Future of Bilateral Intellectual Property Initiatives. Part I*, in: *Copyright World* (1994), no. 44, pp. 27-33; Part II, in: *Copyright World* (1994), no. 45, pp. 32-37; J. Drexel, *Entwicklungsmöglichkeiten des Urheberrechts im Rahmen des GATT. Inländerbehandlung, Meistbegünstigung, Maximalschutz, eine prinzipienorientierte Betrachtung im Lichte bestehender Konventionen*, Munich 1990; S. Kreibich, *Das TRIPS-Abkommen in der Gemeinschaftsordnung. Aspekte der Kompetenzverteilung zwischen WTO, Europäischer Gemeinschaft und ihren Mitgliedstaaten*, Frankfurt am Main 2004; C. Heineke, *Adventure Trips. Die Globalisierung geistiger Eigentumsrechte im Nord-Süd-Konflikt*, in: J. Hofmann (ed.), *Wissen und Eigentum. Geschichte, Recht und Ökonomie stoffloser Güter*, Bonn 2006, pp. 141-163; P. Buck, *Geistiges Eigentum und Völkerrecht. Beiträge des Völkerrechts zur Fortentwicklung des Schutzes von geistigem Eigentum*, Berlin 1994; N. Thumm, *Intellectual Property Rights. National Systems and Harmonisation in Europe*, Heidelberg 2000; J. Marly, *Urheberrechtsschutz für Computersoftware in der Europäischen Union. Abschied vom überkommenen Urheberrechtsverständnis*, Munich 1995.

law. Conflicts over this and a search for new forms of agreement and mediation have thus moved into the centreground of public discussion.

3. Propertization, nationalization and globalization – theses

In the following, the role and significance of intellectual property rights in institutionalizing cultural, scientific and economic relations will be discussed on the basis of 10 theses.

1. *Intellectual property law regulates not only exclusion but also inclusion processes.*

“Intellectual property” refers to the claims and rights of a subject, and at the same time to an objective legal system, namely intellectual property law, which regulates certain aspects of cultural, scientific and economic relations. The relevant intellectual property law supports and consolidates social, cultural and economic inequalities and the imbalance of power in intercultural relations, but can also redynamize them. Intellectual property rights are above all exclusive rights. In the context of intellectual property law, rights of disposal on intellectual works and knowledge are allocated asymmetrically; the owner of the rights can exclude a third party from disposal and utilization. Intellectual property rights serve to safeguard expectation-related security in market- or competition-regulated relations of exchange and cooperation.

The history of the property-related institutionalization of cultural, scientific and economic relations indicates that intellectual property law regulates both processes of exclusion and inclusion. In modern societies and legal systems based on a formal legal equality, everyone who has created their own intellectual work can *in principle* become a holder of exclusive rights to it. Anyone who provides the special services or produces the artefacts required to recognize or acquire intellectual property rights can – in accordance with the country and time, with no or very few formalities in the case of copyright law, as a result of prescribed registration or evaluation procedures in the case of patents – become an intellectual property owner. This enables social, cultural and scientific processes of inclusion and advancement.

The use of the individual intellectual property rights is corrected by maxims relativizing individual utilization in consideration of fair use. Cultural, scientific and economic relations are not exclusively regulated by means of intellectual property law. Property rights are relativized by alternative and complementary claims and rights. The history of the institutionalization of cultural and scientific relations shows that non-proprietary institutions assert themselves tenaciously – even in countries which view themselves as historical pioneers of propertization. Cultural and scientific relations are also regulated from professional, academic, disciplinary, national, ethnic and denominational viewpoints, or along the lines of endowment, relations, friendship etc.²⁶ Corresponding institutional-

26 Cf. exemplary on this, P. Bourdieu, *Les règles de l'art. Genèse et structure du champ littéraire*, Paris 1992; R. K. Merton, *The Matthew Effect* (anotation 4); H. Siegrist, *Professionalization, Professions in History*, in: N. J. Smelser/P. B.

zation strategies have been understood, both in the past and present, on the one hand as radical alternatives to the liberal-individualistic form of propertization, on the other hand as complementing it. The antagonism between private goods and goods in the public domain is thereby relativized again.²⁷

Set against the background of the tradition of a multi-institutional organization of culture, science and the economy, many of the current conflicts between rich industrial nations and the so-called developing and emerging nations appear in a different light. The latter participate actively in the debate on the globalization of institutional pluralism by negotiating the acknowledgement and embedding of their institutions.²⁸

2. Concepts of intellectual property are historically shaped by the linking of propertization processes to processes of liberalization, social stratification, legal codification and state building in a national context.

Property-related institutionalization first gained strength and shape during the period in which modern culture, science and the economy were formed, in the 18th and 19th centuries. In Europe and America, intellectual property rights became embedded in the complex institutional structure of the emerging modern nation state and combined with processes of liberalization, social stratification, legal codification and nationalization of social, cultural, scientific and economic relations. The concept of intellectual property was originally used to protect the individual and entrepreneurial achievements of certain groups of the property-owning and educated middle classes and to justify their special claims during the transition from the feudal to the modern class society. However, states of that time did not only regulate dealings with cultural and scientific goods with regard to property, but also from a bureaucratic, professional, market liberal etc. perspective. That is to say, the nation state controlled the effects of its propertization policies by attuning the extent and the scope of individual intellectual property rights to its cultural, educational, legal, economic and socio-political aims.

Baltes (eds.), *International Encyclopedia of the Social and Behavioral Sciences* (IESBS), Oxford 2001, pp. 12154-12160; D. P. Miller, *Intellectual Property and Narratives of Discovery/Invention. The League of Nations' Draft Convention in 'Scientific Property' and its Fate*, in: *History of Science* (2008), pp. 299-342; C. E. McClelland, *Prophets, Paupers, or Professionals? A Social History of Everyday Visual Artists in Modern Germany 1850 – present*, Oxford 2003; P. J. DiMaggio, *Constructing an Organizational Field as a Professional Project. U.S. Art Museums, 1920–1940*, in: W. W. Powell/P. J. DiMaggio (eds.), *The New Institutionalism in Organizational Analysis*, Chicago 1991, pp. 267-292; T. Adam/S. Lässig/G. Lingelbach (eds.), *Stifter, Spender und Mäzene. USA und Deutschland im historischen Vergleich*, Stuttgart 2008; R. Stichweh (ed.), *Wissenschaft, Universität, Professionen. Soziologische Analysen*, Frankfurt am Main 1994, pp. 278-336; J. Fohrmann/W. Voßkamp (eds.), *Wissenschaft und Nation. Zur Entstehungsgeschichte der deutschen Literaturwissenschaft*, Munich 1991, pp. 99-112; R. Jessen/J. Vogel (eds.), *Wissenschaft und Nation in der europäischen Geschichte*, Frankfurt am Main 2002.

27 A. Ohly/D. Klippel (eds.), *Geistiges Eigentum und Gemeinfreiheit*, Tübingen 2007; L. Pfister, *La propriété littéraire est-elle une propriété? Controverses sur la nature du droit d'auteur au 19^{ème} siècle*, in: *Revue internationale du droit d'auteur* 205 (2005), pp. 117-209; F. Leinemann, *Die Sozialbindung des "Geistigen Eigentums". Zu den Grundlagen der Schranken des Urheberrechts zugunsten der Allgemeinheit*, Baden-Baden 1998; D. Bollier, *Public Assets, Private Profits. Reclaiming the American Commons in an Age of Market Enclosure*, Washington 2001; J. Boyle, *The Public Domain. Enclosing the Commons of the Mind*, New Haven, London 2008.

28 Cf. the article by Sabil Francis in this volume.

Intellectual property law also served the interests of the nation state, which used limiting rules to ensure that protected works could be used by it and the public free of charge in certain cases. By temporally limiting the term of intellectual property rights, it defined a dynamic boundary (moving wall) between cultural and knowledge assets which were *protected* and in the *public domain*. The latter were considered as national or world culture and were allowed to freely be used by anyone.

3. The ambivalences of intellectual property in global relations are based on the fact that it justifies not only national exclusion strategies but also international inclusion strategies.

States and national interest groups use the instruments of intellectual property to protect – really or allegedly – forms of expression and knowledge originating from their area, in cross-border processes of exchange and exploitation. In this way, the state protects national interests against third-party countries and foreign users. Industrial and culture-exporting countries with a higher level of protection for intellectual works and inventions press states with a lower level of protection to adapt to their rules. The stronger countries insist on universalizing their rules and laws, but see themselves repeatedly obliged, when the usual means of pressure no longer help, to back down from their maximum demands.²⁹ Authors and inventors, businesses in the culture and knowledge industries, and dynamic industrial and cultural nations wishing to expand due to cultural, economic or political motives and necessities, have to try to convince potential cooperation partners and countries not (yet) systematically involved in proprietary relations of the moral, economic and legal advantages of their intellectual property law. They point to their own history of advancement to do so and present intellectual property law as a generally applicable recipe for an enduring modernization and efficient regulation of cross-border relations.

The chances of convincing economically weaker or culturally dependent states and user groups of the general advantage of proprietary rules tend to increase when they perceive that participating in property-related, regulated processes of cooperation improve their own acting options and rights in the medium term; i.e. when they can expect to be able to become providers and rightholders themselves. When positive effects are absent and the chances of participation with equal rights incline towards zero, the acceptance of intellectual property rights among weaker actors generally remains low. Research in social and cultural history shows that intellectual property rights are often judged in these countries not only from the perspective of economic benefit, but also from the perspective of social, cultural, moral and political recognition.

29 Cf. on this, in the present volume, the work on compulsory licences in the articles by Isabella Löhr and Margrit Seckelmann and on benefit-sharing between stakeholders in the article by Sabil Francis.

4. Due to the persistence of social, economic and cultural inequality, the global convergence of intellectual property law does not lead to equivalent real chances. The balancing of interests is not merely a legal problem.

For vast swathes of history, the international conventions of intellectual property have represented the interests, conceptions and institutional preferences of culturally, scientifically and economically dominant societies. Due to inequality and an imbalance of power in international relations, weaker actors have often been unable to effectively realize the formal rights granted them by international conventions. The basic problem encountered in settling rights and interests, ever since the establishment of international organizations aimed to protect intellectual property, has been the fact that stronger countries have seen themselves as members of a cartel agreeing on the rules of settlement and deciding on how members should be disciplined. The economic and cultural effects of these rules cannot be controlled by the weaker actors. International relations lacked a seriously higher level of authority which could comprehensively ensure interests in a way deemed fair by all parties. Since international conventions aiming to protect intellectual property concentrate on solving special problems and disseminating special rules, they very often produce neither the expectation-related security which was desired nor the settlement which was promised. They safeguard the continuity and dissemination of proprietary regulations and standards, but are unable to or do not wish to correct negative or undesirable effects. Although they see themselves in a broad sense as custodians and guarantors of the cultural and scientific order, they actually concentrate on selected aspects, special interests and specific regulation strategies. By unilaterally pursuing proprietary institutionalization strategies, they tend to devalue non-proprietary forms of institutionalization. Individual states therefore repeatedly call for the role, significance and effects of proprietary institutions to be taken into greater consideration in the relevant context.

5. On a global level, propertization strategies are often viewed as strategies of supremacy.

Discourses, institutions and norms of intellectual property are used to regulate, moralize and sanction hierarchical relations. One special variant of the supremacy thesis is that propertization strategies were and are elements of a comprehensive global control strategy of the West. From the early 19th century onwards, European states and the USA have been implementing concepts and standards of intellectual property originally developed for their own culture, science and economy worldwide, even against considerable resistance and concerns, and declaring them to be universal standards, in order to promote the interests of their cultural and knowledge-based industries, to strengthen their economic power and cultural influence and to permanently secure their political hegemony. In this way, they boosted the dissemination of their values, merchandise, creativity and innovation concepts, cultural canons, scientific standards and technical goods. The behaviour of a wide variety of actors was homogenized and disciplined by means of a dominant West-

ern idea and social conventions and legal standards derived from this. This was aided by the international conventions and organizations.

The supremacy thesis is supported, among other things, by the West's way of dealing with forms of expression, symbols and cultural artefacts from non-western cultures in which conceptions of subjective creativity and individual intellectual property have traditionally been quite unpronounced.³⁰ Many affiliated with Western property cultures treat the knowledge, practices and forms of expression of non-western or indigenous cultures as goods in the public domain. According to a traditional and widespread line of reasoning, they are not based on any individual creative achievement and therefore cannot be protected by any form of Western intellectual property law. Should options of utilizing them arise, intellectual property rights will be claimed for them by foreign companies and protected with the means of Western intellectual property law. That is to say, the question of whether symbolic goods and forms of knowledge can be owned or protected is traditionally decided on the basis of relations of power and control.

At present such dealings with so-called indigenous forms of expression, traditional knowledge, natural resources and genes are increasingly being regulated on a property-related basis in the outlying areas of India, America, Russia and Africa; manifest in these dealings, moreover, is a generalization of commercial and proprietary standards in cultural relations. In the meantime, however, it is no longer only globally acting Western companies and states who are actively involved in the propertization processes, but also companies, governments, elites, interest groups and local communities from emerging and developing countries, with the result that for some decades now concepts, standards and mentalities of intellectual property have been diffusing from top to bottom and from the centre to the periphery. More and more actors are articulating their disposal and design claims in the language of intellectual property. Occasionally, this helps in the formulation of emancipation claims and in protecting collective exclusive rights by tribes, ethnic groups, village communities and regions which would find it difficult to justify themselves with reference to local traditions in global contexts. However, this also globalizes the conflicts over exclusive rights of disposal and utilization once again in a new way.

6. The history of the 20th century was characterized by global conflicts over the homogenization and differentiation of discourses, institutions and standards of intellectual property.

In the 20th century, ideas and concepts, institutions and standards of intellectual property spread worldwide and in a variety of different forms.³¹ In vast areas of the world,

30 Cf. on this and for the following: S. Francis in this volume and R. J. Coombe, *The Cultural Life of Intellectual Properties. Authorship, Appropriation and the Law*, Durham 1998; M. Brown, *Can Culture be Copyrighted?*, in: *Current Anthropology* 39 (1998), no. 2, pp. 193-223; M. F. Brown, *Who Owns Native Culture?* Cambridge 2003; C. B. Graber, Wanjina and Wunggurr. *The Propertisation of Aboriginal Rock Art under Australian Law*, in: G.-P. Calliess et al. (eds.), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*, Berlin 2009, pp. 275-297.

31 International comparative legal research concentrates on proving and accounting for differences, similarities

they decisively helped determine how social and cultural action was perceived and what it meant. The globalization of intellectual property rights, meanwhile, led not only to homogenization, but also to new forms of differentiation and local hybrids. International hegemonial standards were adapted, on account of national and local traditions, mentalities and interests, and ones specific to the legal culture, to the special relations and requirements. Intellectual property law thus became more ambiguous and multi-functional.

The Anglo-Saxon concepts of *copyright* and *intellectual property rights*, and the Continental European concepts of *literary and artistic property* and moral rights functioned as the leading legal models of worldwide propertization. The development of patent law in many cases followed French, English, German or US-American standards. Together with the international conventions, these basic models decisively shaped the history of the global expansion of intellectual property rights. In the 20th century, as a result of intensive transfer relations and interweaving, conceptions, standards and forms of practice largely became aligned for the long term, especially in the transatlantic area, and comparative research on the form and function of copyright and patent rights indicates that they fulfilled similar social, cultural, economic and political functions – whatever the differences on a legal level.

Again and again, the pioneer states of intellectual property tended to underestimate the problems of how to transfer their customs into new contexts, and to overestimate the global benefit of their own standards and institutions. These often appeared to be less robust in the fringe areas of globalization than in the areas they originated from.³² The hegemonial states and the international organizations recurrently lost part of the control of the propertization process as it expanded further and further worldwide. Hybrid models and forms of a legal pluralism developed, in which traditional and new, native and foreign standards coexisted. Both in the centres and in the periphery, criticism of intellectual property became connected in ever new forms with criticism of the governing authorities, culture, society and globalization.

While advocates of propertizing cultural and scientific relations as extensively as possible today point to the successful history and robustness of intellectual property, and consider its regulatory potential to be far from exhausted, critics warn of a delimiting and overstraining of intellectual property law. The propertization of culture, information and life would weaken non-proprietary rights and regulations, reduce the extent of the commons and increase obstacles to accessing cultural goods and knowledge. Over the last decades,

and functional equivalents in the law (M. Stolleis, *Nationalität und Internationalität. Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts*, Stuttgart 1998). It researches regional, national, civilization-specific and legal culture-specific peculiarities of intellectual property law, but also shows that individual exclusive rights to cultural goods and knowledge are enjoyed in different legal forms and accounted for differently, from a legal dogmatic perspective. Cf. on this the works on legal history quoted in annotations 12, 16, 26 and 28.

32 In the colonial areas, the imported standards for a long time only applied to goods and citizens from the motherland, while the majority of the native population was geared towards traditional, often non-proprietary rules when using forms of expression and knowledge.

the boundaries between copyright law, patent law, trademark protection law and associated protection laws have become blurred by manufacturers of sound storage media and media companies, since they are employed alternatively and cumulatively.³³ Jurisprudential critics warn of a “fraying” of intellectual property rights and an “over-properitization” of the law.³⁴ An excessive and occasionally arbitrary use of intellectual property rights to protect ever newer particular interests and special objects would lead, according to critics, to a straining and overburdening of proprietary institutions. Once used to protect private commercial interests, they would forfeit their functional effectiveness and social acceptance sooner or later. One of the core traditional functions of intellectual property law, namely guaranteeing a balance between individual and general interests, would consequently be disregarded.

7. The robustness of intellectual property is decisively determined by the general quality of the institutionalization and organization of international relations. A legal settlement needs to be underpinned by social, cultural, scientific and political compromises.

Processes of properitization help to solve specific problems, but also create and intensify further tensions and conflicts. Constructing and implementing rules which can be effective and recognized in using symbolic forms thus becomes a permanent process. For over two hundred years, those involved have pointed firstly to the right of the creative individual to intellectual property, secondly to the general human right or right of citizens to culture, knowledge and prosperity, and thirdly to the principle, recognized early on in the case of intellectual property, of settling interests or balancing rights. The articles in this volume explore how the different actors argued and agreed, under their particular conditions, regarding the contents, forms, procedures and conditions of settlement. They show, firstly, that in the modern age legal settlement is not only secured by means of intellectual property law, but is also dependent on complementary principles and procedures which have been standardized in civil law, constitutional law, competition law, labour law and public international law etc. Secondly, a socio-historical analysis highlights the fact that a normative legal settlement will remain unstable unless it is underpinned by social, cultural, economic and political compromises. Thirdly, a political analysis makes it clear that the effectiveness and acceptance of intellectual property law in cross-border relations is decisively determined by the general quality of the institutionalization and organization of international relations. Fourthly, a willingness to regulate cross-border processes by means of universal property norms increases when these standards are compatible with “national” institutional paths, interests, experiences and expectations; and when there is a prospect of international conventions mitigating previous cultural, social, economic, legal and political asymmetries. A central role is played in these processes

33 H.-P. Götting, Die Komplexität von Schutzrechten am Beispiel des geistigen Eigentums, in: H. Siegrist (ed.), *Entgrenzung des Eigentums* (annotation 2), pp. 146-156.

34 Cf. on this the further literature tips in annotation 2.

– both positively and negatively – by international organizations. Their work is complicated, however, by the fact that the diversity of cultural goods and knowledge in the long term is growing to immeasurable proportions, and the number of actors interested is increasing considerably.

8. International organizations for intellectual property are gaining in significance and in their own importance in the regulation and control of complex cultural, scientific and economic processes. They are competing with other international organizations for competence and authority.

In the context of the liberalization of cultural, scientific and economic relations, intellectual property law is being given more and more monitoring and control functions, and demands and expectations regarding intellectual property law are increasing considerably. Debates on rules related to manufacturing, disseminating, using and utilizing cultural goods and knowledge are turning into a permanent structural conflict, breaking out on more and more fronts and in ever newer forms in the centres and peripheries of the world. Processes of negotiating and implementing international rules for a cross-border commerce of cultural goods and knowledge are thus becoming more demanding on an organizational level. Intellectual property law, which was originally conceived to regulate relations between *individuals*, is increasingly regulating relations between national, international and transnational *organizations* – states, confederations of states, cartels, businesses, interest groups and social movements. Intellectual property rights have thus become a central regulation mechanism in *inter-organizational* relations.

The articles show that the negotiating of abstract guidelines and concrete standards in the 20th century has shifted more and more towards international organizations to protect copyright, patent, performance protection and trademark laws. Although the international conventions need to be ratified by sovereign states, the international organizations are gaining in competence, influence and power. By initiating, moderating and monitoring the negotiation, standardization and worldwide transfer of concepts and institutions of intellectual property, they are assuming a central role in the emergence of a regime of intellectual property rights with a global scope. The articles in this volume show that it is becoming increasingly important for nation states and interest groups of producers, agents and users to be involved in the decisions of the international organizations.

It has remained debated, from the 20th century to the present, as to which of the ever more numerous international organizations can claim the highest authority and guideline competence for the global institutionalization of cultural, scientific and economic relations. Up until today, several international organizations have been competing – above all the WIPO and the WTO – for the top responsibility for developing and implementing globally valid legal standards, without consistently adapting their aims and strategies to those of other international organizations.

The international organizations for intellectual property have expanded their authority and regulation claims considerably for the long term. During the interwar period, they benefitted from the much more widely established institutionalization efforts of

the League of Nations. Its plans and work amounted to a multi-institutional regulation of international relations in culture, science and the economy, in which intellectual property rights were to play a central, but not exclusive role. In principle, this policy was continued after the Second World War by the UN. However, since the UN's committees were unable to agree on standards to satisfy all parties, its regulation competence shifted more strongly to its sub-organizations for culture and science, especially to the special organizations for intellectual property (such as the WIPO) and free trade (WTO), which were and are strengthening their own area of competence.³⁵

9. The conceptions and standards of intellectual property have been spreading continuously and cyclically to ever more regions of the world for around two hundred years. Development has not been unilinear, but characterized rather by disruption, a lack of synchronism and setbacks.

Intellectual property rights have constantly been gaining in importance since the late 18th century on a national and international scale. The development and global dissemination of intellectual property law would generally intensify during periods of economic expansion and in times of fundamental cultural, technical-scientific and political change. On a global scale, propertization tendencies and the conflicts associated with them grew stronger around 1870/80, 1900, 1920/30, 1950/60 and from 1980/90 to the present. The institutions of intellectual property respectively became more robust, ambiguous and polyvalent in the process. During the economic and political crises of the 20th century, they often proved to be comparatively stable and resistant. However, their effects varied quite considerably, as a result of the external conditions in the respective countries and regions of the world.

Strategies of propertization and depropertization stand in a dialectic relationship to each other. In the context or wake of a push towards propertization, a search for alternative, non-proprietary institutionalization strategies also intensifies. At the centre of current debates on propertization is the question of the extent to which cultural, scientific and economic processes ought to be and can be regulated on a proprietary basis. Belonging to the discussion is a leading institution which owes its rise originally to the promise that intellectual property owners would be granted strong, but not unlimited rights of disposal, irrespective of their social, cultural or political backgrounds and in a socially balanced way.

10. Expectations regarding institutions of intellectual property have been increasing worldwide from the 18th century to the present day. Due to the growth of cultural, media, knowledge and service industries, intellectual property has become a leading institution in the globalized world over the last decades.

The reference to institutions of intellectual property is practically and functionally motivated on the one hand, and on the other hand by their historic tradition. Throughout

35 Cf. the literature detailed in annotation 28 and A. K. Menescal, *Changing WIPO's Ways? The 2004 Development Agenda in Historical Perspective*, in: *The Journal of World Intellectual Property* 8 (2005), no. 6, pp. 761-796.

its long, conflict-laden and differentiated development, the cultural and legal pattern of intellectual property has been consolidated in a variety of different forms. It shapes everyday social, cultural, political and economic conventions, forms of practice and mentalities, legislation and jurisprudence and the international conventions, and becomes manifest in historical master narratives, myths and experiences. The figure of intellectual property has thus developed its own dynamic, leading repeatedly to tensions between established legal standards on the one hand and new cultural, technical, scientific and social demands on the other hand.

Conflicts over intellectual property on a global level are essentially based on its ambiguity and multifunctionality. Intellectual property law structures relations of governance, competition and cooperation and justifies claims for exclusion and inclusion. The fact that intellectual property rights have been defining more and more areas and dimensions of culture, science and the economy for two hundred years argues for their being one of the most robust institutions of the modern period. Since, in the context of the present acceleration and delimitation of social and cultural change, more and more functions are being conferred on and expected of them with regard to regulating and controlling processes of exclusion *and* inclusion, of governance *and* settlement, there is an increasing risk that they will be overstrained and overburdened. In answer to the question of whether gradual or fundamental processes of upheaval are at play in the current change in cultural, scientific and economic relations and intellectual property law, neither special legal, microeconomic, technical and philosophical knowledge nor references to moral principles indifferent to time or space will suffice. In order to understand the present propertization processes, more interdisciplinary and historical-critical analysis of institutional paths of development, handed-down forms of practice, historical concepts and standards, experiences and mentalities is required.

Translated by Nick Emm