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Meritocracy of Intellectual Property Within the Bandwidth of Equality; Calibrating the Engine of Creativity, Commerce and Innovation

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Abstract
Life is fundamentally unequal, shaped by the arbitrary circumstances of birth and fate. The chapter critically explores the role of intellectual property (IP) law within the framework of meritocracy, arguing that meritocratic IP can provide effective incentives to fostering creativity, commerce, and innovation, to move up one's position in society and change the culture in the process. However, meritocratic IP should not be used to justify or perpetuate inequality. IP rights, copyright, patents, trademarks, geographical indications (GIs), cultural heritage rights (CHR), and trade secrets, are analyzed for their meritocratic value and their potential to either exacerbate or mitigate inequality. The digital transformation and the rise of artificial intelligence (AI) present new challenges, where creative destruction may widen income inequality while also lowering resource inequality by increasing access to goods and services. Additionally, the spatial and cultural dimensions of IP, particularly in the context of GIs and CHRs, are examined for how they can entrench existing disparities. The chapter advocates for a recalibration of IP law that better aligns with true meritocratic principles while ensuring that it does not reinforce inequality. It calls for a more flexible and inclusive IP system that respects both the heritage of the past and the innovation of the future, ultimately aiming to create a society where meritocracy drives inclusive progress and shared prosperity rather than entrenched inequities.

Keywords Meritocracy · Copyright · Patent · Trademark · Geographical indications · Traditional knowledge

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1 Introduction

Life is fundamentally unfair. From the genetic lottery, to the time and place in which we were born, it is by definition unequal.[1] To reconcile this original sin of evolution and fate, ethicality dictates that we level the playing field at the beginning and end of meritocratic competition, but improve the meritocracy within this bandwidth. Meritocracy should not be a justification for inequality, but is necessary as an engine for creativity, commerce and innovation. One can imagine a society, that accommodates equal opportunities and resources as a starting position [2] and for an intellectual property (IP) system that incentivizes people to make use of their ability and effort to create, invent, engage in commerce, etc. Professor Kalpana Tyagi pointed out that the accumulated meritocratic wealth of one generation can form the springboard for the next generation: what she calls "intergenerational transmission of economic advantage,"[3] which can lead to less opportunities to move up in society for those lacking this advantage. This Chapter deals with the inequality of opportunity,[4] resources and relative immobility on the one hand, and the imperfect meritocracy of creativity, innovation and commerce on the other hand in a disaggregated way.[5] IP rights have a complex relation with equality. Creativity, innovation, and commerce can further increase the income inequality, for example due to job replacements, which will be likely exacerbated by artificial intelligence (AI). But this creative destruction potentially decreases the resource inequality, by providing access to goods and services at lower prices.[6] The digital transformation of society is in full swing and informational access will become increasingly important.[7] Technological change can also positively or negatively influence social mobility, for example by removing or creating barriers to entry. Professor Kregor holds that overregulation can stifle innovation and increase inequality.[8] According to Professor Kastelle, comparing the Gini Coefficient and the Innovation Index, demonstrates that the innovation of countries with a Gini Coefficient higher than 45, becomes weak.[9] The probable reason is that it often becomes increasingly difficult to become a market player to obtain a compensation, due to high barriers of entry and vested interests.

One can argue that IP law protects and enforces against values that are not meritocratic, such as passing off, plagiarism, taking credit for things one does not deserve by copying a work slavishly, imitating colourably, deceiving or confusing consumers. It rewards talented and driven people for their creativity, commerce, innovation, and authenticity with a temporary monopoly, but leaves sufficient access

[1] Frank (17) and Sandel (55).

[2] In contrast, Paul demonstrates that the video game industry favours a certain demographic and has rarely gender and racial diverse teams. Paul (50).

[3] Tyagi (56) 16.

[4] Markovits (44).

[5] In a comparable way to Epstein's separability thesis. Epstein (15).

[6] McGinnis (46) 48.

[7] Friedmann (21).

[8] Kregor (37) 42.

[9] Kastelle (2014).

to follow-on users that promotes further creativity, innovation, and competition. All these creative, innovative and competitive goods and services are beneficial to society. However, many IP rights are imperfect meritocratic tools: copyright, intangible cultural heritage rights, traditional knowledge, such as traditional Chinese medicine, and geographical indications (GIs) are not consistently based on merits, and to a certain extent this applies for trademark and patent law as well, and they could be made more meritocratic. The duration of copyright is in most jurisdictions 50 or 70 years after the death of the author. Family members of the author that benefit from the copyright, even though they had no part in the creative process of the work, are not meritocratic. The heirs of the author are not necessarily the best guardians of the work. Sometimes their licensing policy is controversial (Martin Luther King Jr's Estate was not willing to give permission to use King's verbatim words for the movie "Selma," about the civil rights movement,[10] but was willing to do so for a Super Bowl advertisement for Ram Trucks)[11]; or too litigious (heirs of Marvin Gaye in regard to the song "Blurred Lines")12; or prohibit the dissemination of the work (which was the intention of John Boswell's eldest son, Alexander Boswell, in regard to the biography "Life of Samuel Johnson").[13]

Professor Vats has applied critical race theory to IP with the objective to have a more equal society. She asserted that IP doctrines were created in times of racism and argued that this has tainted these doctrines themselves and proposes alternatives such as traditional knowledge.[14] This author agrees that past and present racist implementation of IP doctrines need to be named, shamed, and changed, but differs from Professor Vats that the current IP doctrines themselves are inherently racist. *A fortiori*, one can argue that implementers of those IP systems that are not colour blind, are, by definition, not meritocratic. In the same vein, farmers that happen to be located in a place with a particular GI can reap reputational benefits for something they did not sow. According to conventional IP doctrine, knowledge that has existed for centuries is in the public domain for all humanity. However, the idea of traditional knowledge is to share compensation schemes for the use with those groups, peoples or countries that have created some traditional knowledge in the past, by providing joint ownership of IP rights. This mechanism does not reward the individuals that actually created the knowledge that has become traditional, which makes it antithetical to a meritocracy.

It is understandable that biopiracy creates strong feelings of dissatisfaction among groups that have been using a particular knowledge for ages and suddenly have to pay a premium to some corporation that has registered an IP right that incorporates the traditional knowledge. However, instead of introducing a *sui generis* system for traditional knowledge, one could guarantee access via exceptions and limitations of existing IP rights, although imperfectly. Also, in regard to trademarks, the earlier

[10] Rosati (54).
[11] Hafner (30).
[12] *Williams v Gaye*, 885 F.3d 1150 (9th Cir. 2018).
[13] Macaulay (1841).
[14] Vats (67).

generations are able to pick the best trademark names, logos etc. In the same vein, one can argue that in regard to patent law, for earlier generations the chances of conceiving some pivotal inventions were more likely.

The narrative of this Chapter evolves as follows: after the Introduction, Sect. 2 will assess to what extent IP is based on merits, because a more meritocratic IP system should better direct those with talent and strong work ethics to those works, brands and inventions needed by society; Sect. 3 will look at how to make IP more meritocratic but also to make society more equal (but unequal between humans and AI); Finally, Sect. 4 provides the Conclusion.

2 To What Extent Are IP Rights Based on Merits?

The word "meritocracy" was coined in 1958 by the British sociologist Michael Young,[15] who ironically feared it as a dystopia. In a meritocratic society people advance in life on the basis of their innate or developed talents, skills, work ethics, attitude, character and ideas. So far, so good, but the implication is that those who are successful deserve the success, and those who are not also deserve this, instead of the capriciousness of the fates.[16] Effort and hard work are part of meritocratic virtues, but "sweat of the brow" is anathema to the eligibility of IP property rights. In the EU, the Database Directive[17] is a clear exception to this broadly accepted principle in IP.[18] Copyright in particular seemed to be very much incompatible to this idea: in *Feist*, the Supreme Court of the U.S. determined that merely labour and hard work are insufficient to warrant copyright protection.[19] But perhaps "sweat of the brow" makes a come-back in the era of generative AI (see Sect. 2.1 below).

2.1 Expanding the Universe of Copyright

The three most important justifications of copyright law are arguably Locke's labour theory; Hegel's personality theory, and Bentham's utilitarianism.[20] Gordon applied

[15] Young (77).

[16] The Fates: Clotho in Greek (Nona in Latin) spinning the thread of life; Lachesis (Decima) measures the length of the thread; and Atropos (Morta) cuts the thread. These Moirai (Parcae) are described in Ovid.

[17] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996.

[18] Qualitatively and/or quantitatively substantial investment in either the obtaining, verification or presentation of the contents of a database. Art. 10.3 Directive 96/9/EC, id.

[19] *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). Then, again in the EU, the.

[20] Hughes (32) deals with justifications based on labor theory, personality rights theory based on Hegel, and utilitarianism. Merges (45) covers Locke's labor theory, where individuals have a natural right to own the fruits of their labor, personality theory based on Kant and Hegel, and distributive justice justification based on Rawls. See also, Hughes and Merges (34).

Locke's labour theory[21]; Radin applied Hegel's personality right theory,[22] and Landes and Posner's applied Bentham's utilitarianism[23] to copyright law.

From the perspective of meritocracy, if an author creates new works she should be rewarded. The theoretical substantiation of the labour theory, that the fruits of one's labour becomes one's property, and personality right theory's asserted inalienable link between author and her work, have each a normative and instrumental dimension. The utilitarian justification has an instrumental function to maximize the social welfare and is linked to the incentive of a temporary monopoly for authors as a reward to create new works. Hughes cited *Mazer v Stein* which holds that "[t]he economic philosophy behind the [Patent and Copyright] [C]lause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."[24]

The combination of the three justifications could in principle create effective incentives for authors that would be meritocratic. One can argue that the duration period of copyright protection started out meritocratically, but then degenerated into an ever-expanding universe that skews the balance to the advantage of copyright holders and their progeny over the interest of the public. In 1710, under the Statute of Anne, the duration of copyright protection was 14 years, that was renewable for another 14 years.[25] This ensured that those works that were not considered commercially attractive would ascend to the public domain after 14 years, so that everybody could use these works or build upon them. The British Copyright Act of 1814 extended the term to life of the author plus 28 years.[26] In 1928, the Rome Act of the Berne Convention for the Protection of Literary and Artistic Works, harmonized the obligation among Berne Union members to protect copyright for a duration of minimally fifty years after the life of the author.[27] In 1993, the EU extended the copyright duration to life of the author plus 70 years with the implementation of the Duration Directive.[28] In 1998, the U.S. followed with the Sonny Bono Copyright Term Extension Act.[29] Twice, the Supreme Court of the U.S. held that the extension of the duration of copyright protection was constitutional.[30]

[21] Gordon (29). Where individuals have a natural right to own the fruits of their labor.

[22] Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982) (articulating personhood theory).

[23] Posner & William (2003).

[24] *Mazer v. Stein*, 347 U.S. 201 (1954). See, Hughes (32) 57, fn 57.

[25] Patry (1994, 2000).

[26] Deazley (12).

[27] Article 7(1) Berne Convention for the Protection of Literary and Artistic Works,

[28] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290, 24.11.1993, p. 9–13.

[29] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 (1998).

[30] *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (The Supreme Court upheld the constitutionality of the Sonny Bono Copyright Term Extension Act (CTEA) of 1998, which extended the term of copyright protection for individual authors by 20 years to 70 years after the life of the author. Since the extension was not unlimited, it held that it was reasonable.). *Golan v. Holder*, 565 U.S. 302 (2012) (The Supreme Court held that the restoration of copyright of foreign works that had already entered the public domain in the U.S. was constitutional in the case of Sect. 514 of the Uruguay Round Agreements Act: the "limited

The significance of the Statute of Anne for the genesis of copyright law cannot be overstated.[31] Before, the Statute, publishers compensated authors, via patronage, and applied for state-issued monopolies to publish certain books. The Glorious Revolution relaxed censorship, promoted a printing culture and led to a constitutional monarchy and parliamentary sovereignty, and a Bill of Rights in 1689, that cultivated the atmosphere for the drafting of the Statute of Anne.[32] The Statute of Anne seemed to realize that most works are not commercially exploitable. Therefore, the possibility for copyright holders to renew their work, is very useful, so that those works that are not commercial ascend to the public domain after 14 years. The Statute of Anne also did not provide a duration of life of the author plus some years. A duration of life of the author is arguably putting too much emphasis on the private interests and not enough emphasis on the public interests, so that the public domain will be deprived of these works for too long a period. The incentive to create new works might be best served during a shorter duration.[33] In the optimal situation, it should give a sufficient buffer for authors to create new works.

Life of the author plus some years, in other words: to protect the copyright after the death of the author is problematic from a meritocratic perspective. This was already noticed by politician and historian Thomas Babington Macaulay in 1841.[34] Macaulay saw the monopoly of copyright as a necessary evil, "It is a tax on readers for the purpose of giving a bounty to writers," and urged to minimize the copyright.[35]

Although the direct family of an author might have given the author support, in most cases there seems to be at best a very indirect connection between author's family and the works. The counterargument is that authors might feel extra incentivized in the knowledge that their works will be still under copyright protection so that their children or extended family can benefit from the work after the author's life. However, the harsh reality is that due to an asymmetrical power relation at the beginning of an author's career in many cases the author has assigned his or her copyright to a publisher, and the publisher could benefit from this duration that depends on the lifespan of the author if the contract allows this. Spouses, children or extended family members benefiting for someone else's work are anathema to a meritocracy.

The right of copyright constitutes of a bundle of economic and moral rights. A moral right is for example that copyright holders decide whether to publish a work or not. For different reasons family members have stopped or stifled the publication of some works.

Footnote 30 (continued)
Times" provision of Article 1 Sect. 8 Clause 8 U.S. Constitution, because it did not create perpetual copyright but restored the original copyright term that had been granted under U.S. law.).

[31] *Supra* note 25.

[32] *Supra* note 25.

[33] Macaulay (1841), who called the incentive a "tax on readers for the purpose of giving a bounty to writers,".

[34] Maca Macaulay (1841) 262.

[35] Macaulay (1841) 262.

In the U.S., the small category of visual artists that fall within the definition of the Visual Artists Rights Act of 1990,[36] generally those with inherent permanence, such as paintings, sculptures, drawings, prints, engravings, can explicitly benefit from the moral rights of attribution and integrity. The U.S. argued that it complies to the moral rights conform Article 6*bis* Berne Convention with a bundle of economic rights.[37] But there seems to be no meritocratic reason why visual arts get preferential treatment for visual art but not literary, artistic and musical works.

After the Statute of Anne,[38] there is still an oftentimes asymmetric power relationship between author and publisher. Once the publisher is the assignee he or she is the copyright holder, and has a veto-right to distribute the work, which might not always be in the interest of the author.

It seems that the incentive of copyright incentivizes more the copyright holder than the author. The author is oftentimes not famous at the moment when he or she assigns the right to the publisher, so that there is no proper reward for the expressive work to the creator.

Non-author copyright holders should benefit from a copyrighted work, if they deserve it, but arguably less than the author, especially if the author has put his or her heart and soul into the work. Such a copyright holder still needs to be rewarded for the investment and risk he or she took in printing, publishing and vending the work.

"Generally speaking, the author of a work is the person "who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection."[39] However, works prepared by an employee within the scope of his or her employment, or nine types of commissioned works by independent contractors when parties agree in writing, are considered works made for hire.[40] This is expedient for businesses, but to negate acknowledgment of the actual author who created the work is not meritorious.

To see whether a work is a work made for hire because of employment, *Community for Creative Non-Violence v. Reid* provides a checklist to see whether a work falls within the scope of employment.[41] When an employee created the work during working hours, at the location of the employer, with the tools of the employer, and especially if the instructions are very specific, the argument that it is not meritorious

[36] Visual Artists' Rights Act of 1990 is codified in 17 U.S.C. § 106A.

[37] Anonymous (2) 513.

[38] *Supra* note 25.

[39] *Community for Creative Non-Violence v. Reid*, 490 US 730, 737 (1989).

[40] § 101 ("A 'work made for hire' is—
(1) a work prepared by an employee within the scope of his or her employment; or.
(2) a work specially ordered or commissioned for use as a contribution to a. collective work, as a part of a motion picture or other audiovisual work, as a. translation, as a supplementary work, as a compilation, as an instructional text, as. a test, as answer material for a test, or as an atlas, if the parties expressly agree in. a written instrument signed by them that the work shall be considered a work. made for hire.".

[41] *Community for Creative Non-Violence v. Reid*, 490 US 730, 751–752.

becomes weaker. Historically, painters such as Rembrandt and Rubens taught a lot of pupils in their respective workshop. When a pupil finished a painting, after many very specific instructions of the master, the painting was often not artistically attributed to the pupil but to the school of the master.[42] Similarly, Jeff Koons, the U.S. conceptual and appropriation artist, does not create any work himself in his workshop. For this he has 48 employees on his payroll,[43] who execute his concepts and make them into a work. Every time a work is finished Koons automatically becomes the author, under the work made for hire doctrine.

This author has argued elsewhere, that if one keeps giving ever fine-grained instructions, that there will come a moment when the instruction-giver or prompter becomes the author.[44] If one tells a forensic sketch artist your fine-grained description of a suspect, if a certain threshold was crossed, one arguably becomes the author of the portrait, instead of the forensic sketch artist.[45]

It is arguably not meritocratic to allow a generative AI to produce products, that are AI-assisted works that do not remunerate the authors of the copyrighted works in the training data.[46] This author has argued that users of generative AI, can only get rights over the part that they have created, if we can distinguish between human creation and AI-generation, which is theoretically already possible.[47] In contrast, in 2023, the Beijing Internet Court, which accepted the protection of the AI-generated image called "Spring Breeze Brings Tenderness,"[48] because it held that there was sufficient human intervention in the creation of the "work," and is based on sufficient originality and intellectual achievement.[49] The plaintiff in this case, Li Yunkai, contended he used around 20 positive and 120 negative prompts. This effort already constituted "intellectual achievement."[50] Sweat of the brow may be anathema to copyright law doctrine, but it looks suspiciously like it.

Because of the formality prohibition imposed by Article 5(2) Berne Convention, there are a lot of "orphan works," where it is not clear whether they are under copyright or not, and if so, who is the copyright holder. This increases the potential risk, cost and complexity of navigating copyright law so that it becomes prohibitively burdensome for new meritorious creators to have access to these works for use, adaptation, or re-publication, even if doing so would be in the public interest. A similar barrier to entry is that copyright holders might have too much control over

[42] Burk (8) 305.

[43] Jeff Koons, LLC information, https://rocketreach.co/jeff-koons-llc-profile_b47cc4c1fc4f91cc.

[44] Friedmann (forthcoming 2024).

[45] Friedmann (forthcoming 2024).

[46] Friedmann (forthcoming 2024) *passim*.

[47] Friedmann (2024A).

[48] "Chūnfēng sòng láile wēnróu" (春风送来了温柔). *Li Yunkai v Liu Yuanchun* ("Spring Breeze Brings Tenderness") Beijing Internet Court (5). *Li v Liu*, Beijing Internet Court, Nov. 27, 2023, with English translation, Jiaying Zhang & Yuqian Wang, transl., Robert Brauneis, supervision, George Washington University Center for Law and Technology, PATENTLYO, https://patentlyo.com/media/2023/12/Li-v-Liu-Beijing-Internet-Court-20231127-with-English-Translation.pdf.

[49] Friedmann (forthcoming 2024) 31.

[50] Friedmann (forthcoming 2024) 44.

derivative works. Thus, copyright holders can prevent others from building upon existing works to create new, potentially superior or innovative products, which goes counter to the meritocratic idea of improving and building upon previous knowledge and creations.

2.2 Trademark

In contrast to copyright rights and patents, trademark rights can be continued in perpetuity as long as the trademark is in use and properly maintained. This can allow established companies to keep a competitive edge indefinitely, regardless of whether their products remain superior, potentially hindering merit-based competition. On the other hand, one can argue that it safeguards the intergenerational goodwill, reputation and fame.[51]

Because of the tyranny of time, if you were born first, you have the biggest choice and the opportunity to select and register a trademark, or, like in the U.S., first use it and then register the trademark.[52] Thus, both the first-to-file and the first-to-use system operate on a first come, first served basis. Intergenerationally, there might be a marginal unfairness, which however can be corrected by some creativity. Professors Barton Beebe and Jeanne Fromer have argued that the number of effective trademark names is finite, and that the effective trademarks run the risk of being depleted.[53] However, in many jurisdictions there is a wide variety of the forms of trademarks; from word marks, to logos, colour marks, three-dimensional marks, sound marks, and at least in the U.S., scent marks as well. And if one combines two or more of these marks for one brand, the brand can distinguish its source in a unique way from the source of other brands.[54] Marketing efforts, such as massive repetitive advertising, can condition any consumer in connecting a particular trademark indicating a particular source designating a certain good or service. *Abercrombie & Fitch v Hunting World*[55] makes clear that generic and descriptive trademarks are inherently non-distinctive, weak trademarks, but that descriptive trademarks could acquire distinctiveness by educating the public over a certain period of time. This would make the consumers associate the first "descriptive" meaning of the trademark with a second "source-indicating" meaning of the trademark. To focus on weak, descriptive trademarks as an example of effective trademarks that are being depleted seems highly conditional on the degree of recognition and acknowledgment as a source-indicator.

Trademark law can create significant barriers for new entrants if consumers perceive the trademark as synonymous with a certain category of goods or services. If this happens and consumers and competitors are starting to equate the name of the

[51] Friedmann (206) 680.

[52] Lanham Act, 15 U.S.C. §§ 1051 et seq., was enacted by U.S. Congress in 1946, USPTO, November 25, 2013.

[53] Beebe and Fromer (4).

[54] See also, Friedmann (19) 679.

[55] *Abercrombie & Fitch Co. v. Hunting World*, 537 F.2d 4 (2nd Cir. 1976).

trademark as the category of goods or services, the trademark has become generic, and can no longer be protected under trademark law.[56]

The concept of trademark dilution protects famous trademarks from uses that blur their distinctiveness or tarnish their reputation, even without consumer confusion. This can restrict the use of similar marks by other businesses, even if they are not direct competitors. This author holds that this is not a problem at all, and elsewhere he has advocated for truly unique trademarks,[57] despite the fact that territorialism (that the trademark is only valid in one national or regional jurisdiction, undermined by just a few exceptions[58]; and thus that the same trademark can be used in different jurisdictions) and specificity (that the same trademark can be used by two different companies as long as they assign the trademark for different classes of goods and services) have deep roots within all the trademark systems. But the problem with trademark dilution is that it only provides this enhanced protection to trademarks that are already famous.

> Often the argument is made that because if a trademark is not famous or has no reputation there is nothing to dilute. A glass of wine can be diluted by adding water. However, fame, notoriety or reputation of a trademark is unlike wine. The difference between a trademark that is considered famous and one that is, for example, famous in a smaller market is relative. To withhold the protection against trademark dilution by tarnishment only for famous brands seems to be arbitrary and perverse. Why should it be possible to tarnish a trademark that is only famous in a small market? Besides, each trademark that is not recognized as famous has the potential to reach that stage at some moment. One can also argue that to reward a trademark with extra protection once it has become famous or gained a reputation it becomes effective and cannot be seen as an ex-ante incentive.[59]

Then again, famous trademarks are a more visible target, but since fame is a dynamic phenomenon, there is no good explanation why a trademark on its way to fame is not protected against trademark dilution. Compare this with the sensible principle in copyright law where the moral right of attribution and integrity[60] protects the reputation or honour of each author, regardless of his level of reputation.[61] Therefore, to provide only enhanced protection to unique trademarks would solve the problem, but would make a universal trademark register necessary and this

[56] § 14, 15 U.S.C. § 1064(3).

[57] Friedmann (19) *passim*.

[58] Art. 6*bis*, Well–Known Marks; Art. 6*quinquies*, Protection of Marks Registered in One Country of the Union.
in the Other Countries of the Union, Paris Convention for the Protection of Industrial Property (as amended on September 28, 1979).

[59] Friedmann (18) 299.

[60] All Berne Union members need to comply to Art. 6*bis* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, 828 U.N.T.S. 221.

[61] Friedmann (18).

becomes increasingly feasible, since many trademark offices around the world have already started to cooperate.[62]

The most undeserving trademark holders are trademark squatters. This is one of the most challenging issues related to China's first-to-file system.[63] Trademark squatters exploit the system by either registering trademarks without the intent to use them instead seeking to profit by selling the rights, or using them themselves taking advantage of the reputation of the often-famous trademark or suing for infringement and blocking the genuine foreign trademark holder. This behaviour can stifle genuine competition and innovation and is contrary to meritocratic principles.

2.3 GIs; Spatial Dynamism and Cultural Change

Article 22(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights defines 'geographical indication' as an indication used on a product that originates from a particular geographical area 'where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.' The GI provides a collective monopoly to those farmers who happen to live in the geographical area. Only the first-generation farmers deserve credit for the grant of a GI for their products due to certain quality, reputation or other characteristics of the product. Later generation farmers supervised by a joint trade association, such as *Comité interprofessionnel du vin de Champagne* (CIVC) deserve some credit for upholding the set standard, overcoming quality uncertainty for consumers, as described by the economist George Akerlof.[64] The joint trade associations of GIs seem to favour the protection of tradition, stability of meaning, quality and authenticity over experiments and innovation. This prevents vintners to provide improved and innovative products that would have been rewarded in a more meritocratic system. There is merit in both stability of meaning and innovation for consumers, so these opposite values need to be balanced out. There have been examples of vintners that could use the GI, but choose not to do so, since it included that they could not expand the range of grapes, which would be beneficial to the taste.[65]

[62] EUIPO. TMview provides access to trademark applications and registrations across multiple national and regional trademark offices.

WIPO Global Brand Database, includes international trademarks registered through the Madrid System, as well as national and regional trademark data from participating offices. This database helps users search for trademarks across multiple jurisdictions in one place.

ASEAN TMview is a regional initiative under the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC). It provides access to trademark data from ASEAN member states.

USPTO, JPO, KIPO, Collaborative Search Pilot program.

Trademark Clearinghouse is a global database of verified trademarks, used primarily in the context of new generic top-level domains (gTLDs).

[63] Friedmann (20) 212.

[64] Akerlof (1).

[65] Professor Tomer Broude provides a great example: When innovative vintners wanted to improve the taste of Chianti Classico by using non-Tuscan grapes they had to do so outside of the restrictions of the geographical indication system. Subsequently, the joint trade association observed the market success of these "Super Tuscans" and allowed the new way of production to be part of the geographical indications system. Broude (7).

If a product is not from that geographical area, the GI cannot be used. The function of GIs is to stabilize the "unique" meaning of product, place and expertise to use that product from that place in the mind of the consumer. Of this triad, "place" is the most important concept, since it is inextricable connected to the controversial term "*terroir*," [66] which, in theory, is the natural environment in which a particular product is harvested, including factors such as the soil, topography, and climate. However, the borders of each *terroir* are often arbitrarily drawn according to the scope of the geographical area, which are echoes of historic events that might have nothing to do with the natural environment. This means that farmers that happen to live in the geographical area can use the GI, but not the farmers that grow the same produce just an inch outside the borders of the geographical area, which is arguably still in the same "terroir" and natural environment. This can lead to economic disparities: regions with recognized GIs can economically thrive from the exclusivity and premium pricing associated with their products, but regions without GIs or with less well-known GIs might struggle to compete, even if their products are of comparable or superior quality. In conquering the hearts of consumers, marketing is imperative. Farmers outside the geographical area, that want to use the name "Champagne" for their sparkling wine that they have produced according to the *méthode champenoise* cannot call it "Champagne." This would be violating several multilateral treaties, [67] regional regulations and national laws that prevent the use of this name. Even if the farmers migrated from the Old World to the New World and have the knowledge and experience of producing the product according to the traditional method of the place of origin, and they make explicitly clear where the product is actually produced, they cannot use the same name as the GI, even if that name has become generic outside of the "country of origin." [68] This protection goes far beyond guaranteeing consumer information and avoiding confusion. Instead, these monopolies based on geographical areas create barriers to entry. Farmers that buy a piece of land within the geographical area can benefit from that GI, without any investment in its reputation and quality. Then again, one can argue that purchasing that land for a premium within the geographical area, is the investment which flows to those who have built up its reputation and quality.

[66] "Terroir has become a buzz word in English language wine literature. This lighthearted use disregards reverence for the land which is a critical, invisible element of the term. The true concept is not easily grasped but includes physical elements of the vineyard habitat—the vine, subsoil, siting, drainage, and microclimate. Beyond the measurable ecosystem, there is an additional dimension—the spiritual aspect that recognizes the joys, the heartbreaks, the pride, the sweat, and the frustrations of its history." Wilson (68) 55.

[67] Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (as amended on September 28, 1979).

Agreement on Trade-Related Aspects of Intellectual Property is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (as adopted on May 20, 2015).

[68] Hughes (33) 302.

Climate change necessitates a more flexible use and interpretation of the geographical treaties, laws and regulation.[69] The climate change leads to spatial dynamism (the south of England which has a similar climate and soil as the Champagne region, becomes slowly more optimal for growing the grapes necessary for Champagne) and this might lead to cultural change.[70]

2.4 Cultural Heritage Rights

One can argue that the process of protecting Cultural Heritage Rights (CHRs), which are collective rights and encompass Intangible Cultural Heritage (ICH), Traditional Knowledge (TK), Traditional Cultural Expressions/Folklore (TCE), Genetic Resources (GR) is a daunting task. This process started in 1967 with the addition of Article 15.4 to the 1967 amendment to the Berne Convention for the Protection of Literary and Artistic Works, which provides a mechanism for the international protection of unpublished and anonymous works.[71] According to the Guide to the Berne Convention of the Paris Act 1971, the aim of this addition at the Stockholm Conference of 1967 was providing international protection of folklore.[72] The term "folklore" was not literally used in the Berne Convention 1967. The provision was confirmed in the Paris Revision of 1971.[73] It seems that WIPO now prefers the term Traditional Cultural Expressions (TCE).

(CHRs) are interconnected concepts, each playing a role in the preservation and transmission of cultural identity, heritage, and biological diversity.

ICH refers to practices, representations, expressions, knowledge, and skills that communities, groups, and sometimes individuals recognize as part of their cultural heritage: for example, oral traditions, performing arts, rituals, and traditional craftsmanship.[74] ICH is closely linked to TK and TCE as it often encompasses these elements.

TK consist of knowledge, innovations, and practices of indigenous and local communities developed from experience gained over centuries and adapted to the local culture and environment: for example, knowledge about agriculture, medicine, biodiversity, and ecological management.[75] TK is often part of a community's ICH and is closely related to GR since TK frequently involves the use and understanding of biological resources.

TCE encompasses tangible and intangible cultural heritage, including music, dance, art, designs, names, signs, symbols, performances, ceremonies, architectural forms, handicrafts, and narratives passed down from generation to generation.[76]

[69] Friedmann (24C).
[70] Friedmann (24C).
[71] WIPO 69.
[72] WIPO (70) 95.
[73] WIPO (70) 95.
[74] UNESCO (61) adopted on October 17, 2003, and entered into force on April 20, 2006.
[75] Traditional Knowledge, WIPO.
[76] Traditional Cultural Expressions, WIPO.

TCEs are a specific aspect of ICH that also overlap with tangible cultural heritage when they are expressed through physical forms like art and artifacts.

GR refers to any material of plant, animal, microbial, or other origin containing functional units of heredity of actual or potential value.[77] Genetic resources are often associated with traditional knowledge in the context of indigenous and local communities. GRs are connected to and associated with TK because many communities have developed a deep understanding of local GRs, which is crucial for agriculture, medicine, and cultural practices.

CHRs, refers to physical artifacts produced, maintained, and transmitted intergenerationally within a society, including buildings, monuments, books, works of art, and artifacts. CHRs often embody or represent elements of ICH and TCE in material form. For example, a traditional dance (ICH) may be performed in a historical building (TCH), and the costumes worn during the dance may be handmade artifacts (TCH) that carry traditional patterns and designs (TCEs).

There is also a link between CHRs and GR: TCH often physically embodies the TK and practices associated with GR, such as in cultural landscapes or traditional artifacts.

ICH, TK, TCK, GR, and TCH are intertwined with Indigenous Rights. In 2007, the non-binding UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly.[78] Articles 11.1 [79] 12.1 [80] and in particular 31.1 UNDRIP are relevant to abovementioned alphabet soup:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions .[81]

Creating the necessary coherent legal instruments to protect this shape-shifting subject matter by WIPO and UNESCO is difficult to grasp and time consuming. Importantly, the developing countries were much more enthusiastic about this endeavour than the developed countries, who wanted to rely on existing IP rights which are, however, oftentimes unsuitable to protect CHRs. One can argue that the

[77] Genetic Resources, WIPO.

[78] UNDRIP (58) adopted by the General Assembly on Thursday, 13 September 2007.

[79] Art. 11(1) UNDRIP (58): "… right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.".

[80] Art. 12(1) UNDRIP (58): "Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.".

[81] Art. 31.1 UNDRIP.

developed countries used their agreement as bargaining chip for their willingness of the developing countries to agree with the TRIPs Agreement and the WIPO Internet Treaties.[82] The developed and developing world first could agree on the traditional collective right of GR that are adjacent to patent law. Taking strides in seven-league boots: the Convention on Biological Diversity (CBD), adopted in 1992, [83] forged a link between GR and access to benefit-sharing. The Nagoya Protocol builds upon CBD by ensuring fair and equitable benefit-sharing derived from GR with the countries and communities of origin.[84] Article 15.5 CBD, and Article 6 Nagoya Protocol both deal with prior informed consent, which ensures that countries and communities have control over access to their GRs and associated TK.

In late 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established.[85] Fast forward, twenty-four years later, this resulted in a diplomatic conference which concluded the WIPO Treaty on Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources (Treaty 2024).[86] It is remarkable that Treaty 2024 does not explicitly refer to access to benefit-sharing and prior informed consent. Article 3.3 Treaty 2024 states that "in cases where none of the information in Articles 3.1 [the country of origin of the genetic resource or if that is not known to the applicant, the source of the genetic resource] 3.2 [Indigenous Peoples or local community that provided the TK associated with GRs or if that is not known to the applicant, the source of the TK associated with GRs] is known to the applicant, each Contracting Party shall require the applicant to make a declaration to that effect, affirming that the content of the declaration is true and correct to the best knowledge of the applicant." The degree of due diligence is unclear. This could lead to applicants gaming the system. The IGC's mandate also includes negotiating international legal instruments to protect TK and TCEs. However, the instruments for TK [87] and TCE [88] respectively, have not yet been finalized or adopted as binding treaties.

TK, often in combination with GR, such as the active ingredients of traditional medicines, or in the case of TCE for example a particular song that have been used for hundreds or even thousands of years by an indigenous people, community or tribe, have been frequently recorded and used for commercial purposes.

The Neem tree (*Azadirachta indica*), which has been named in Sanskrit "*Sarva Roga Nivarini*," [89] the curer of all ailments, has been used in India for thousands

[82] WIPO Copyright Treaty, December 20, 1996; WIPO Performances and Phonograms Treaty, December 20, 1996.

[83] UNEP (1993) CBD was adopted in 1992 Rio Earth Summit and entered into force on December 29, 1993..

[84] UNEP (60). Nagoya Protocol, adopted on October 29, 2010, in Nagoya, Japan, and entered into force on October 12, 2014.

[85] WIPO GA (72). WIPO General Assembly, Twenty-Sixth (12th Extraordinary) Session, Geneva, September 25 to October 3, 2000.

[86] WIPO Diplomatic Conference (73), May 13 to 24, 2024.

[87] WIPO Draft GRTKF (74).

[88] WIPO Draft TCE (75).

[89] Risuleo (53).

of years for its medicinal properties. Various parts of the tree, including the leaves, seeds, and bark, have been used in traditional Indian medicine (Ayurveda) to treat a wide range of ailments, such as skin disorders, infections, and as a natural pesticide. In 1993, the U.S. Department of Agriculture and W.R. Grace, a multinational corporation, were granted a patent on a method of extracting neem oil for use as a pesticide.[90] The Indian government, along with environmental and activist groups, challenged the U.S. patent, arguing that it was an example of biopiracy. In September 1995, a coalition of 225 agricultural, scientific, and trade groups as well as over 100,000 individual Indian farmers, led by the organization called the Foundation on Economic Trends, filed a legal petition with the USPTO[91] to no avail. However, in 2005, the Indian government and environmental and activist groups were more successful in their protest: the European Patent Office (EPO) revoked the European patent [92] after concluding that the method lacked novelty, as it was based on existing TK.[93]

A problem with commodifying and commercializing TK and TCE without the consent of the traditional rights holder, for example the country of origin, indigenous people or local community, is that the traditional rights holder is missing out on the revenue of the derivative product, that might also be distorted and adulterated. “When cheap knockoffs flood local and export markets, the original artisans may cease working altogether. Traditional skills, methods, and designs, as well as lost the cultures they reflect, are thus permanently lost."[94]

The right holder might even need to pay for the continuation of the use. Another problem is that the traditional rights holder is losing control over the use of the TK or TCE, even though she might want to keep a certain manifestation of TK or TCE secret or sacred.

Existing IP can only protect TK or TCE to a certain degree. Indigenous peoples or local communities might not be aware of what IP can do for them, and if they are, they might not be able to afford the registration and management of IP. IP’s role will by definition be limited by its scope and duration. The latter is for example limited to fifty years or seventy years after the death of the author, or 20 years in the case of patent law, after that the work ascends to the public domain. Therefore, copyright and patent law cannot be a long-term solution for TK or TCE that is hundreds or thousands of years old.

Collective and certification marks, that are also used for the protection of GIs in the U.S., [95] are better equipped, since trademarks can be protected in perpetuity, if the trademark is continued to be used and the renewal fees are paid every decade.

[90] “Hydrophobic extracted neem oil-a novel fungicide,” US Patent US5356628A, Dec. 20, 1990.

[91] Marden (43) 286.

[92] “Method for controlling fungi on plants by the aid of a hydrophobic extracted neem oil,” EP0436257A1, Dec. 20, 1990.

[93] T 0416/01 (Method for controlling fungi on plants/Thermo Trilogy Corporation) March 8, 2005, ECLI:EP:BA:2005:T041601.20050308.

[94] Kremers (38) 18.

[95] 15 U.S.C. § 1054, see definitions of Certification and Collective Marks in 15 U.S.C. § 1127.

As mentioned above, developed countries have been reluctant to develop TK or TCE for a long time. They were and are more familiar with IP rights that are private rights, and only were made into international treaties after countries had extensive experience at the national level.[96] The following counterarguments can be made that access to folklore is of relevance to the developing world as to the developing countries since it fosters the dissemination and hence conservation of their cultural heritage. Some have argued that CHRs are more about human rights than IP or the patent system.[97] In addition, the requirement of fixation for copyright law and prior art for patent law, that will only be recognized if it is written down in some countries' patent examination procedures, is incompatible to oral verbal works.[98] Some have argued that there was no need for CHRs related to inventions, since re-examination procedure is already available at the USPTO and deemed a sufficient remedy.[99]

In 1999, the USPTO held in the Report on the Official Insignia of Native American Tribes:

> Providing additional procedural or statutory protection for the official insignia of Native American tribes is unnecessary and might risk violation of U.S. international treaty obligations if it offers exclusive trademark protection to a particular indigenous group .[0100]

A trademark organization suggested that changes to U.S. law, such as retroactive cancellation, special statutory protection could violate various of the U.S.' international obligations, such as Article 6*quinquies* Paris Convention for the Protection of Industrial Property.[0101] However, there have been developments since then that indicate a shift in approach. In 1998, the Trademark Law Treaty Implementation Act (TLTIA) was enacted, which included provisions specifically designed to protect the official insignia of Native American tribes.[0102] This act allows federally recognized Native American tribes to register their official insignia as trademarks, which provides a level of protection under U.S. trademark law. The USPTO established a database where the official insignia of these tribes can be listed, which could help to prevent their unauthorized use as trademarks.[0103]

To grant U.S. indigenous populations *sui generis* IP that would not be available to other U.S. citizens would be perceived as unconstitutional.[0104] From a meritocratic

[96] Kremers (38) 61.
[97] Kremers (38) 66.
[98] Kremers (38) 26.
[99] Kremers (38) 66.
[0100] USPTO (63) 45, para. 4.
[0101] Article 6*quinquies* of the Paris Convention for the Protection of Industrial Property mandates that trademarks registered in a member country must be accepted for filing and protected in other member countries, except in specific cases like when the trademark is deemed to infringe on public order, morality, or is deceptive. It ensures that a trademark enjoys priority and protection across member states, provided it meets basic criteria and is not subject to exclusion. *See*, *supra* note 101, 31–32.
[0102] USPTO (62) Sec. 302.
[0103] USPTO (65).
[0104] Kremers (38) 68.

perspective it is problematic that one can take credit and obtain enhanced protection for being born in a tribe, community or group while the rest of the population is excluded from this protection.

Similar to GIs, CHRs often restrict the use, modification, and commercialization of cultural artifacts and expressions. This can limit the ability of individuals and organizations to innovate, adapt, or build upon these cultural elements, even if their adaptations might have significant merit.

In the same vein as trade secrets, CHRs can lead to practices where cultural artifacts are kept within specific communities, regardless of their cultural or artistic value for the whole population. This arguably stifles the sharing and evolution of cultural expressions.

Certain indigenous peoples, tribes, communities, groups with resources can protect their CHRs better than others, which will lead to economic disparities. While CHRs aim to protect, preserve the cultural identity and integrity of specific communities, these aspects can sometimes conflict with the meritocratic ideal of rewarding the best and most innovative contributions regardless of their origin or the cultural context in which they arise. Paradoxically, protecting CHRs might contribute to the commercialization and homogenization of culture into commodities. Certain aspects of cultural products will be emphasised or exaggerated to distinguish them from other cultures, so that they will be better positioned for external consumption.[0105] Therefore, the custodians of CHRs need to prevent Disneyfication of their culture, which would erode its authenticity.

2.5 Patent

It becomes more difficult to invent great inventions over time, since many fundamental science questions have been solved. Then again, once the great inventions have been made, there will be great opportunities for incremental improvements of existing inventions and to build upon existing inventions with new inventions.

Canada, the Philippines, and the U.S., all had first-to-invent patent systems, while the rest of the world's jurisdictions had a first-to-file patent system. These countries changed to a first-to-file regime, in 1989, 1998 and 2013, respectively.[0106]

The first-to-file system has the advantage of an uncomplicated and clear filing date, no interferences, or determining the priority of the invention, [0107] and it led to international patent conformity.[0108] But from a meritocratic perspective, one could argue that granting a patent to the first person who rushed into the patent office to file is less than desirable. This could lead to situations where the genuine inventor, often an independent inventor, small business or startup, who made an actual technical contribution is not recognized. Instead, it would favour those with sufficient resources to prioritize speed over quality of the invention.

[0105] *Cf* what Broude had to say about Geographical Indications, *see*, Broude (7) 671.
[0106] IFIA.
[0107] Frost (26) 928.
[0108] Frost (26) 929–930.

One can argue that when the U.S. still had a first-to-invent system, it already had elements of a first-to-file system.[0109] A first-to-invent system implies that the inventor is he or she who first conceived and reduced the invention to practice: thus, when an inventor has created a physical embodiment of the invention; test it in a real-world situation; that the invention is complete and operative. But since the "Telephone cases," [0110] a constructive reduction to practice was sufficient. In other words: a patent application that describes the invention in sufficient detail that a person skilled in the art could make and use the invention without undue experimentation. The Milburn rule confirmed that disclosure and not claims of a patent application determine its effect as a reference.[0111] The 2013 Leahy-Smith America Invents Act (AIA) [0112] transitioned the U.S. from a first-to-invent to a first-inventor-to-file system simplifying the determination of patent priority based on filing dates rather than invention dates.

Inventing was historically considered an individual activity, [0113] therefore, the "hired-to-invent" doctrine, does not automatically make the employer the inventor. The hired-to-invent doctrine merely obligates the inventor to assign the invention to his or her employer [0114] The U.S. patent system also allows for an invention to be made by two or more persons jointly.[0115] Each joint inventor holds an undivided interest in the patent. Thus, each joint inventor can independently exploit the patent, including licensing it, without the consent of the other joint inventor or inventors unless otherwise agreed upon in a contract 116.[0116] This makes joint inventorship prone to potential disputes between the joint inventors. The USPTO and courts use strict criteria before they are willing to acknowledge joint inventorship: substantial contribution; contribution to the conception; [0117] and some degree of cooperation. One can observe similar problems with joint authors that are also able to independently exploit the work.

The cost and complexity of examining patents is often high and obtaining and enforcing patents can be prohibitive for individual inventors and small companies [0118] Therefore, some inventors whose inventions deserve it to be patented, were not patented. At the same time, there are many patent owners who do not deserve to have a patent because of low quality: for example, there is a lack of novelty, inventive step, insufficient disclosure, or utility of the invention. However, one can measure quality also in other ways. One can assess it on the basis of the degree of obscurity,

[0109] Frost (26) 935.
[0110] *Dolbear v. American Bell Telephone Co.*, 126 U.S. 1 (1888).
[0111] *Alexander Milburn Co. v. Davis-Bournonville Co.*, 270 U.S. 890 (1926).
[0112] USPTO (64). The transition provisions were phased in on March 16, 2013.
[0113] Lemley (40).
[0114] *U.S. v. Dubilier Condenser Corp*, 289 U.S. 178 (1933).
[0115] 35 U.S.C. § 116.
[0116] 35 U.S.C. § 262.
[0117] *In re Verhoef*, 888 F.3d 1362, 1366–67, 126 F.2d 1561, 1564–65 (Fed. Cir. 2018).
[0118] Lemley (39) 1497.

legal quality (the quality of the application documents, and the quality revealed in the patent examination process) and the commercial value of the invention.[0119]

"Patent trolls," more neutrally known as "non-practicing entities" (NPEs), [0120] acquire patents not to produce or market innovations but to extract settlements from companies through litigation. NPEs often file numerous lawsuits, many of which are settled out of court. This practice can clog the legal system and force companies to settle rather than endure costly litigation. This practice can drain resources from productive enterprises and discourage innovation, counter to meritocratic principles. NPEs, especially in combination with patent thickets, where overlapping patents make it difficult for innovators to navigate the landscape without infringing on existing patents, can lead to entry barriers and chilling effects to innovation. Then again, NPEs are a way for individual inventors and small entities who lack the resources to commercialize their inventions or enforce their patents, to still be rewarded for their invention. Some commentators have argued that NPEs can help create a more efficient patent market by facilitating the transfer of patents from inventors to entities better positioned to enforce or commercialize them.[0121] Lemley and Feldman argued that NPEs cannot be justified based on commercialization theories because they do not contribute to the development, commercialization, or dissemination of new technologies.[0122]

2.6 Trade Secrets

Trade secrets and non-compete agreements (NCAs) are both tools that businesses use to protect their proprietary information and competitive advantage. What trade secrets, and some secret and some sacred CHRs have in common is that they protect information by keeping it confidential rather than disclosing it to the public. This is in contrast to most IP rights. This secrecy can hinder the dissemination of knowledge and innovation, as others cannot build upon or improve the hidden information, even if they have the capability and merit to do so. This also can lead to duplication of research work, which could be spent on other research and deprives society from other potential products and services. Trade secrets can create significant barriers to competition which can only be overcome by reverse-engineering. This happened for example in the 2011 case *Dyson v Vax*.[0123]

Companies that hold valuable trade secrets have a competitive advantage that can be difficult for others to overcome, even if those others, given the chance, would be able to build upon this information and provide superior products or processes.

Strongly related to trade secret laws are non-compete agreements (NCAs), which can restrict the mobility of employees by limiting their ability to use knowledge gained from previous employers in new positions. This can stifle the transfer of skills

[0119] He (31).
[0120] Allison, Lemley and Schwartz (2017) 237.
[0121] Crane (11) 286–287.
[0122] Lemley & Feldman (41) 188–192.
[0123] *Dyson v Vax* [2011] EWCA Civ 1206. *See also*, Cornwell (10).

and expertise, reducing opportunities for merit-based advancement and innovation across the industry. To counter this, the U.S. Federal Trade Commission issued a Non-Compete Clause Rule in April 2024.[0124] This rule would ban nearly all forms of NCAs, including most existing non-competes, and require employers to notify their employees that their existing non-compete obligations were no longer enforceable. In *Ryan LLC v FTC*, Ryan LLC, joined by the Chamber of Commerce, sued the FTC at the U.S. District Court of the Northern District of Texas. On 3 July 2024, Judge Ada Brown issued a preliminarily injunction enjoining the FTC Non-Compete Clause Rule.[0125] On 20 August 2024, Judge Brown concluded that the FTC lacks substantive rulemaking authority with respect to unfair methods of competition, [0126] that the FTC "has exceeded its statutory authority in promulgating the Non-Compete Rule. "The role of an administrative agency is to do as told by Congress, not to do what the agency thinks it should do."[0127]

One can argue that the Non-Compete Rule is a necessary requirement to continue to protect trade secrets. And on its turn, protecting trade secrets is a vital aspect of IP strategy because it provides a way to safeguard valuable information that may not be eligible for patent protection, allows for indefinite protection without public disclosure, and offers flexibility in how IP assets are managed.

3 Merits-Based IP and More Equality

In the solutions suggested below, there are two objectives: IP can be made more meritocratic, by applying incentives that are not only effective, but could lead to more equality within society; although there should be unequality between humans and AI, according to this author.

One can argue that most IP rights, except for trademarks that are being used and renewed, trade secrets and CHRs, will ultimately end up in the public domain, the IP heaven and big equalizer of most IP rights. One can argue that every limitation in the term of protection would be helpful in this respect.

3.1 Meritocratic Copyright Law

One can argue that a truly meritocratic copyright does not provide protection after the death of the author. This would only postpone the work's ascent to the public domain, it might not have provided more than a marginal incentive to the author, instead it provided benefits to those undeserving and makes the access to the work more difficult during the duration.

[0124] Federal Trade Commission (27). 16 CFR Parts 910 and 912.
[0125] *Ryan LLC v. Federal Trade Commission*, No. 3:2024-cv-00986—Document 153 (N.D. Tex. 2024).
[0126] Ryan LLC v. Federal Trade Commission, No. 3:2024-cv-00986-E – Document 211 (N.D. Tex. 2024) 14.
[0127] *Ryan LLC v. Federal Trade Commission*, No. 3:2024-cv-00986 – E—Document 211 (N.D. Tex. 2024) 22.

A resale right, also known as a *droit de suite*, is that the author continues to receive a percentage of each subsequent sale of its work. This makes it possible that an author can benefit from higher sales figures that are paid for his work once the author has become more famous and recognized. Smart contracts in combination with non-fungible tokens (NFTs) would make this possible in a contractual way.[0128]

In the U.S., the author can regain control over the copyright thirty-five years after it was transferred or licensed [0129] This is another mechanism to ensure that authors who became famous later in their career can capitalize on that fame. The right to terminate a copyright transfer or license is non-waivable, which means that even if one signed a contract stating otherwise,[0130] one still has the right to terminate the transfer under specific conditions. This right is intended to give authors a second chance to benefit from their work.

Fair use provisions need to be expanded and clarified to encourage transformative uses of copyrighted material.[0131] This would allow creators to build upon existing works in innovative ways, fostering a culture of creativity and improvement.

Clear guidelines and a streamlined process for the use of orphan works (works for which the copyright owner cannot be located) need to be established. This would make it easier to access and build upon these works, fostering innovation and merit-based use.

It would be even better if we would reconsider the prohibition of the imposition of any mandatory formalities of Article 5 Berne Convention. *A fortiori*, one can argue that this provision is outdated, since it would solve an important problem for the creative and culture sectors of society. It would help both authors and AI service developers: if the authors had to register each work at the Copyright Office, and this should be done digitally of course, and as convenient as registering for a social media site. It would also streamline enforcement and make the burden of proof very easy. This would create a more accessible and affordable mechanism for resolving copyright disputes.

AI service providers would get access to the Copyright Register, which would provide them with the necessary metadata (name, address, conditions of licensing the work) that would enable them to start remunerating authors that were used in the training data. The authors could also make clear in the metadata of their works at the Copyright Office if they do not want to be used in the training data. This system would also provide the AI service providers with more works in their training data. On its turn, the Copyright Office should have access to the databases of the AI service providers, so that it can compare the works that were applied for registration with the content that was generated and recorded in the databases of the AI service providers.[0132] This way, a distinction can be made between human creation, and AI

[0128] Chen and Friedmann (2023).

[0129] 17 U.S. Code § 203.

[0130] 17 U.S. Code § 203(a)(5) "Termination of the grant may be effected notwithstanding any agreement to the contrary …".

[0131] Friedmann (21).

[0132] Friedmann (forthcoming 2024).

generation.[0133] The Copyright Office should only provide a copyright for the part that was created by the author. This distinction is important, since AI has the potential to replace authors works, and therefore their utility, and dilute human culture. To try to prevent that, or at least slow that down, this author has advocated preferential treatment for human authors.[0134]

Mandatory registration will make it possible for the Copyright Office to experiment and try to optimize incentives for authors and access to the public domain. For example, if the author is not using her work a particular period of time, for example 5 years, [0135] it will ascend to the public domain. This would prevent the hoarding of copyrights and encourage the dissemination and use of creative works. Or, if the author is remunerated with a large amount of money, let us say 1 million U.S. dollars, the work will ascend to the public domain. This way, the author is incentivized to create new works.

In 1903, the Supreme Court of the U.S., affirmed in *Bleistein* "aesthetic neutrality:" [0136] that copyright law should not distinguish between a work of a talented person and that of a not so talented person; between high and low art; between emotional and rational content. Justice Holmes in *Bleistein*, choose for aesthetic neutrality not out of fear of elitism, or ableism, but he argued that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." [0137] The result of aesthetic neutrality, however, is that copyright is fully democratized. Mandatory registration will not undermine this democratization.

Finally, professors Balganesh and Burk have convincingly argued that *Naruto* could have been interpreted more generously by the court. Since David Slater followed the crested black macaques and then created a scene where he expected the monkeys to experiment with his camera, which they did, Slater could be called the author.[0138]

3.2 Meritocratic Trademark Law

The processes for registering and renewing trademarks could be made easier for small and new businesses to obtain protection. This would help level the playing field and ensure that merit-based businesses can protect their brand identity.

One could require proof of intent to use the trademark in commerce, or periodic proof of continued use and relevance. This would prevent that trademarks will be kept on stock or bad faith filings that are done to extract settlement from genuine brand owners. Trademark squatters should be strictly penalized.

[0133] Friedmann (2024B).
[0134] Friedmann (2024D) 1–2.
[0135] Macaulay (1841) 266.
[0136] *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903).
[0137] *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903).
[0138] Friedmann (forthcoming 2024) 44.

Provisions for fair use, including the use of trademarks in parody, commentary, and comparative advertising should be strengthened. This would allow for greater freedom of expression, competition, and the ability to challenge established brands based on merit. Descriptive and generic terms remain available for use by businesses, preventing them from being monopolized as trademarks. This would promote fair competition and prevent companies from gaining an unfair advantage through the trademarking of common language.

In this author's opinion, there is no depletion problem of effective trademarks. It is a matter of creativity to find new trademarks, especially in combination with logos.

Unique trademarks would be preferable, to maximize consumer clarity, but it seems that a transition towards this is difficult due to path dependencies in the jurisdictions.

The transparency in the trademark and also domain name registration processes, should be increased by making search databases of existing trademarks and domain names more accessible and user-friendly. This could be done if we couple the search databases of the trademarks and domain names.[0139] This would help businesses avoid unintentional infringements and disputes, and promote informed decision-making based on merit.

3.3 Meritocratic GIs and CHR

There is not much leeway regarding GIs or CHRs to make it more meritocratic. There is a little bit of flexibility in the GI treaties, which the member states should make use of. [0140] The benefit sharing mechanisms of CHRs are still in their infancy, and if they are in place, they are often imprecise and arbitrary. For example, some members of the tribe that have registered can participate in the benefit-sharing scheme, but those who were unaware of this scheme cannot. This leads to benefits based on the place (GIs) or community (CHRs) that one was born into. No "thought-action-habit-character-destiny" causality can be derived from this. Rewarding people based on their origin is fundamentally not meritocratic. But given these starting points, one can make both GIs and CHRs at least relatively more transparent and inclusive, and increase the access to legal information, and ensuring that decisions regarding the protection and use includes all stakeholders.

It would be best if the stakeholders of GIs and CHRs keep an open mind about balancing stability and innovation. Policies should aim to protect against consumer confusion and the integrity of cultural expressions while allowing for creative and transformative uses that respect the original culture.

[0139] Gangjee (28) 325.

[0140] Friedmann (24).

3.4 Meritocratic Patent Law

The meritocratic value of patents has come under scrutiny, particularly as the complexity and cost of obtaining and enforcing patents can create barriers to entry for smaller inventors and startups. The transition from first-to-invent to first-to-file systems in countries like the U.S. has simplified patent processes, but it also raised questions about whether the fastest, rather than the most innovative, are being rewarded.

Moreover, the proliferation of low-quality patents, often lacking novelty or inventive step, undermines the meritocratic foundation of patent law. These patents, although legally valid, do not reflect a true contribution to the field and can be used strategically by NPEs to extract settlements rather than to foster genuine innovation. This behaviour, while legally permissible, stifles competition and innovation, contradicting the meritocratic principles that patent law is supposed to uphold.

Patent law could benefit from reforms that emphasize the quality of patents over the quantity. Stricter examination procedures to ensure that only genuinely innovative and useful inventions are granted patents would better align the system with meritocratic ideals. Additionally, reducing the cost and complexity of the patent process for small entities and independent inventors could help level the playing field. This could contribute to a more meritocratic patent law that to could serve as a more just innovation engine.

3.5 Meritocratic Trade Secrets Law

Limits on the duration of trade secret protection after a reasonable period in which the trade secret owner had a competitive edge are very controversial, and hard to enforce (for example: when did the trade secret owner start to have the trade secret?). A better way to promote the dissemination of valuable knowledge are licensing agreements.

Support mechanisms for small enterprises and individual innovators can be provided to protect their trade secrets. This could include legal assistance, subsidies for security measures, or educational resources on best practices for maintaining confidentiality. Collaborative innovation projects where companies can share certain trade secrets in a controlled manner to foster industry-wide advancements. This can help spread valuable knowledge while still protecting the interests of the original holders.

Policies can be implemented that balance the protection of trade secrets with employee mobility. For example, non-compete clauses could be limited in scope and duration to ensure that employees can use their skills and knowledge in new positions without unfairly harming their former employers.

4 Conclusion

Authors, such as Adrian Wooldridge, [0141] and Toby Young, [0142] the son of Michael Young who coined the term meritocracy, argued that a true meritocracy is the situation where all are given equality of opportunity, by providing education; the exclusion of class privilege and wealth, the prohibition of discrimination on the basis of race, sex and other irrelevant characteristics.[0143] Open competition instead of patronage and nepotism would determine who will land which job. One can argue that this efficient job market allows for the optimal allocation of talent and optimizes economic value. A meritocratic system should operate independently of an individual's socioeconomic background or inherited wealth.

IP provides in some cases an unfair advantage to people who do not have anything to do with the creation of the IP. Therefore, they take unfairly credit for something.

If IP protects dominant corporations and cultural products, this could lead to cultural homogenization and runs counter to the meritocratic ideal of rewarding the best ideas regardless of their origin.

In the pursuit of a more equitable society, IP law must navigate the delicate balance between rewarding individual merit and ensuring broader societal equality. The current IP framework, with its historical roots and modern applications, often struggles to maintain this balance, particularly as new challenges arise with the digital transformation of society and the advent of AI. A key aspect of this challenge lies in the spatial dynamism and cultural change associated with IP rights, particularly in the context of GIs and CHRs. The protection of these rights often depends on specific locations and cultural identities, which can inadvertently reinforce existing inequalities. For instance, farmers within a designated geographical area may benefit from a GI, while those just outside its arbitrary borders may not, despite producing goods of comparable quality. Similarly, CHRs may protect the cultural expressions of certain communities while excluding others, creating disparities based on geography and cultural affiliation rather than individual merit.

As cultural landscapes shift and evolve, it is crucial that IP law adapts to these changes. Policies must balance the need to protect tradition and authenticity with the imperative to allow for innovation and inclusivity. By recognizing the dynamic nature of culture and the arbitrary lines that often define legal protections, one can work towards a more flexible and fair IP system that respects both the heritage of the past and the creativity of the future.

Ultimately, the goal is to create an IP system that incentivizes and rewards genuine creativity and innovation while also providing opportunities for all individuals, regardless of their starting point, to contribute to and benefit from the cultural and economic wealth generated by these creative endeavours.

[0141] Wooldridge (76).
[0142] Young (78).
[0143] Economist (14); Economist (13).

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