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**Intellectual Property:  
The Global Spread of a Legal Concept**

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**Abstract:**

Although intellectual property law is a distinctively Western, modern, and relatively young body of law, it has spread all over the world, now encompassing all but a very few outsiders such as Afghanistan, Somalia, and Vanuatu. This article presents three legal transfers that contributed to this development: first, from real property in land and movables to intellectual property in the late 18th century in Western Europe; second, from Western Europe, in particular from the United Kingdom and France to the rest of the world during the colonial era in the 19th and early 20th century; third, from the protection of new knowledge to the protection of traditional knowledge, held by indigenous communities in developing countries, on 5 August 1963. This story illuminates how legal transfers in a broad sense – including, but not limited to legal transplants - drive the evolution of law.

## I. Introduction

According to Alan Watson »at most times, in most places, borrowing from a different jurisdiction has been the principal way in which the law has developed. This is as true today when one state in the U.S.A. will take over what has been worked out in another, or when England follows New Zealand, or Scotland, Sweden or France, as in the centuries of the reception of Roman law and earlier.« (Watson 2001: 98).

In Watson's view, such legal transplants should be at the center of comparative law (Watson 2001: 141). Watson's writings triggered an intense debate (Ewald 1995; Deipenbrock 2008: 343-361). Are legal transplants possible,<sup>1</sup> or are they only »a meaningless form of words« because a rule receives its meanings from the legal culture in which it is embedded (Legrand 2001: 55)? Or do »transplantations« (Kahn-Freund 1974: 1), »irritants« (Teubner 1998: 11) or »transfers« (Frankenberg 2010: 563-579) exhibit certain effects, and the question to be answered is, which effects? Irrespective of their divergent views on legal transplants, all these scholars take a comparative perspective. For them, »transfer« means a rule or legal concept that moves across borders of nation states or regions. They think in terms of time and space.

The main point of this article is that there are other types of legal transfers that also play a role in the evolution of law. These borrowings and adaptations do not concern spatial shifts, but the application of one legal rule, concept, or principle to another set of facts. These kinds of analogies happen within one jurisdiction or within one region sharing similar societal and legal ground.

Such a transfer lies at the heart of the following story: the global spread of intellectual property (IP) rights. Copyrights in works of art and patents in technical inventions are nowadays known all over the world, excluding only very few outsiders such as Afghanistan, Somalia, and Vanuatu (Peukert: Colonial Legacy, forthcoming). This is an amazing fact, considering that this distinctively

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<sup>1</sup> For an optimistic view, see Bentham, *The Works of Jeremy Bentham*, p. 378 et seq.

modern, market-based regulation of innovative and creative behavior is only some 300 years old.

No doubt, there are many non-legal reasons for this »successful« diffusion. In particular, IP rights are an attractive tool to leverage economic and political power. However, there are also specifically legal reasons and preconditions for this legal development, among them legal transfers. The transfers I will describe may not be the most important factors in the global spread of IP, but they contributed to the enormous rise of this field of law by providing legal tools to effectively articulate, but at the same time also obscure, the desired regulatory result.

I will describe three transfers in a broad sense: First, from real property in land and movables to intellectual property in the late 18<sup>th</sup> century in Western Europe. Second, from Western Europe, in particular from the UK and France, to the rest of the world during the colonial age in the late 19<sup>th</sup> and early 20<sup>th</sup> century. Third, from the protection of new knowledge to the protection of traditional knowledge, held by indigenous communities in developing countries, when colonialism drew to a close in the 1960s, or, to be more precise, on 5 August 1963.

## **II. Three transfers in the history of IP law**

Obviously, only the second part of this story concerns legal transplants pursuant to comparative lawyers such as Watson or Legrand. Not so our first transfer – the application of the idea of ownership in tangibles, like this desk or land, to intangibles, such as inventions and works of art.

### *1. From property rights in tangibles to intellectual property rights*

The most prominent copyright and patent acts in history were enacted in the course of revolutions heralding the modern age: the 1709 English Statute of Anne, considered the world's first copyright act, and more clearly even the US and French copyright and patent acts of the early 1790s. Seen from this perspective, IP legislation appears to be a legal innovation. Clearly defined

statutory rights of authors and inventors replaced the system of feudal privileges. This move from privilege to property signals a new *Grundnorm* in the use of knowledge: Instead of keeping innovation and creativity under control for the sake of mercantilism and censorship, the new laws aimed at encouraging learning and the progress of science and useful arts. Since then, innovation and creativity have been considered worthy of protection in and of themselves. This change was fundamental indeed. In particular, the justification of any private property had to be detached from god's and the sovereign's will and grounded in the individual. This was accomplished most forcefully by Locke's labor theory of ownership (Hesse 2002: 26).

Although this natural law theory, as well as the principles of first appropriation or possession, had been developed for the use of land, they proved to be a very good fit for inventions and creative products of the mind. Who if not the original author or inventor should be the proprietor of her work of art, her technical invention? Thus, rights in intellectual property could be justified by simply applying the already existing property theories (Kohler 1880: 98-99; Peukert 2008: 734 et seq.). From a legal doctrinal point of view, they were mere adaptations, not original innovations (Sacco 1991: 343, 398 »Of all the legal changes that occur, perhaps one in a thousand is an original innovation.«).<sup>2</sup>

Nevertheless, this extension of the idea of private ownership was not an easy or quickly accomplished move. The major obstacle for this transfer concerned the subject matter of this new type of ownership. What exactly is it that an author or inventor owns?

In that respect, Roman law did not provide an answer. *Dominium* or *proprietas* covered only corporeal property, defined in the Corpus Iuris as by its nature tangible, for instance land, a slave, gold, and other things. »Res incorporales«, that which cannot be touched, meant rights, such as the right of inheritance, or obligations.<sup>3</sup> Roman law had not developed a concept of »intangibles« or intellectual property in the sense of works of art or inventions.

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<sup>2</sup> On English patent law: Phillips, *The English Patent*, p. 41.

<sup>3</sup> See Inst. 2, 1, 33; 2,2; Peukert, *Gemeinfreiheit*, p. 43-44.

Thus, before the transfer from real property to intellectual property could be accomplished, an object of ownership had to be constructed first. Here, on this semantic, non-legal level, the decisive »innovation« took place.

Feudal privileges had always regulated commercial activities. They referred to the printing of books<sup>4</sup> or the *working* or *making* of new manufacture.<sup>5</sup> The goods at stake were tangibles: books, machines, and other products.

This activity-centered approach was still prevalent in England and the U.S. throughout 18<sup>th</sup> century. On the one hand, the 1709 Statute of Anne, considered the world's first copyright act, already called the »author« of a book a »proprietor«. On the other hand, the statute granted the author the »sole right and liberty« of »printing... Books« – an activity relating to a tangible.<sup>6</sup> Thus the (still later) terminology of copy-rights:<sup>7</sup> rights in copies, rights to copy. The concept of a »work« as a distinct entity, detached from its incorporation in a book, was still absent.<sup>8</sup>

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<sup>4</sup> See, e.g., French Royal letters patent, Paris (1701), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org), Art. I (»That no Bookseller, Printer or other person may cause to be printed or reprinted anywhere in the Kingdom any Book, without having previously obtained permission to do so in Letters bearing the great Seal.«).

<sup>5</sup> See Statute of Monopolies, Westminster (1624), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org) (»the sole working or makinge of any manner of new manufacture«, not extending to »letters Patentes or Grauntes of priviledge heretofore made or hereafter to be made of for or concerning printing, Nor to any Comission graunte or letters pattentes heretofore made or hereafter to be made of for or concerneing the digging makeing or Compounding of salt peter or gunpowder«).

<sup>6</sup> Statute of Anne, London (1710), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org); Patterson, *Copyright in Historical Perspective*, p. 4.

<sup>7</sup> The term »copyright« was used for the first time in British legislation in the Copyright Act of 1801, 41 Geo.III, c.107, Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org).

<sup>8</sup> The same is true for Germany, where privileges were related to the right to reprint and to the sale of reprinted books (for example Saxonian Statute, Dresden (1773), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org); see also Prussian Statute Book (Allgemeines Landrecht für die Preussischen Staaten) (1794), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org), Paragraph 996: »Das Verlagsrecht besteht in der Befugnis, eine Schrift durch den Druck zu vervielfältigen, und sie auf Messen, unter die Buchhändler und sonst, ausschließend abzusetzen. Paragraph 997: Nicht bloß Bücher, sondern auch Landkarten, Kupferstiche, topographische Zeichnungen, und musikalische Kompositionen, sind ein Gegenstand des Verlagsrechtes.«), and where the discussion about what we now call »Urheberrecht« was about the lawfulness of reprinting books (»Büchernachdruck«); see, e.g. Pütter, *Der Büchernachdruck nach ächten Grundsätzen des Rechts geprüft*. The first mention of the term »geistiges

This objectification only occurred during the second half of the 18<sup>th</sup> century. At that time, the romantic movement in literature and art established the »author« as the central figure of cultural production and natural owner of her concrete *work product* (Woodmansee 1984: 425-448; Jaszi 1991: 455). Still this was not enough. Ownership in this work product would result only in exclusive rights in the manuscript and possibly in a prohibition of identical copies. But how was one to deal with alterations of a text? Did these modifications also encroach upon the copy-right? Since these adaptations were created by third parties, the original author could not claim ownership on the basis of her labor (John Locke) or her speech to the public (Kant 1785).

Instead, she had to claim that she owns »the« work in the sense of a free-standing abstraction that embraces more than the literal expression embodied in the corresponding manuscript (Jaszi 1991: 455, 473 et seq.).<sup>9</sup> That artifact has to have an existence and scope of protection of its own. It is the work that requires *Werktreue* and *Texttreue*. The work became a structurally integrated whole that is only symbolically represented in books and scores and valued solely according to autonomous criteria of the fine arts. The word »work« is a typical *Kollektivsingular* of the late 18<sup>th</sup> century describing both a process (working an invention, producing a creative work) and a result (the original work) on a high level of abstraction, allowing modern societies and capitalist markets to operate (Koselleck 2010). Thus, romantic aesthetics together with shifts in cultural production brought about not only the one and only true owner (that is, the author), but also the distinct object that any clearly defined property right and market order requires.<sup>10</sup>

The French revolutionary acts on patents and authors rights of 1791 and 1793 were the first to adopt this concept. They had to avoid any echoing of former royal privileges. Therefore, they replaced monopoly rights in commercial

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Eigentum« (intellectual property) dates back to 1784; see Bosse, *Autorschaft ist Werkherrschaft*.

<sup>9</sup>Also, on British and US 19<sup>th</sup> century case law on the question of copyright infringement by alterations to the original text or picture: Barron, *Commodification and Cultural Form*, p. 58, 70.

<sup>10</sup> For musical works, see Goehr, *The Imaginary Museum of Musical Works*, p. 120 et seq.

activities with individual property rights. Inventors and artists were both called »auteur«. They were granted a property right (*propriété*) in their invention or work.<sup>11</sup> Jean Le Chapelier, a deputy of the National Assembly, justified this new type of *propriété* proclaiming that »The most sacred, the most legitimate, the most unassailable, and the most personal of all properties, is the work, the fruit of the mind of a writer«. <sup>12</sup>

From revolutionary France, this variation of classical property law slowly traveled to other European countries. The *Badisches Allgemeines Landrecht* of 1809, a modified »Code Napoleon«, introduced this idea to Germany – an imposed legal transplant.<sup>13</sup> It was only in an 1837 Directive for reciprocal copyright protection within the German Confederation that the protection related to »works of art«. <sup>14</sup> British copyright law in the first half of the 19<sup>th</sup> century also still operated on the basis of granting the sole and exclusive liberty of printing books,<sup>15</sup> »representing ... dramatic entertainment«<sup>16</sup> or »otherwise multiplying copies of any subject to which said word is herein applied«. <sup>17</sup> It adopted the notion of an abstract »work of art« only in 1851 via the Anglo-French Copyright Treaty.<sup>18</sup> With the »Paris Convention for the Protection of Industrial Property/propriété industrielle« of 1883<sup>19</sup> and the »Berne Convention for the

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<sup>11</sup> See Art. 1 French Literary and Artistic Property Act, Paris (1793), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org) (»Les auteurs d'écrits en tout genre, les compositeurs de musique, les peintres et dessinateurs qui feront graver des tableaux et dessins, jouiront, durant leur vie entière du droit exclusif de vendre, faire vendre, distribuer leurs ouvrages dans le territoire de la République, et d'en céder la propriété en tout ou en partie.«), Art. 1 French Patent Act 1791, reprinted in Kurz, *Weltgeschichte des Erfindungsschutzes*, 2000, p. 243-5.

<sup>12</sup> Le Chapelier's report, Paris (1791), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org).

<sup>13</sup> See Art. 577d Baden Civil Code, Karlsruhe (1809), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org) (»Vom Schrift-Eigenthum«).

<sup>14</sup> See Art. 1 Directive for reciprocal copyright protection within the German Confederation, Berlin (1837), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org); Bosse (supra note), at 111, 113.

<sup>15</sup> Copyright Act, London (1814), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org).

<sup>16</sup> Dramatic Literary Property Act, London (1833), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org).

<sup>17</sup> International Copyright Act, London (1844), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org).

<sup>18</sup> Anglo-French Copyright Treaty, London (1851), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org) (»desirous of extending in each country the enjoyment of copyright to works of literature and of the fine arts which may be first published in the other...«).

<sup>19</sup> <http://www.wipo.int/treaties/en/ip/paris/>, 30.10.2012.

Protection of Literary and Artistic Works« of 1886,<sup>20</sup> the commodification of technical inventions, designs, trademarks, and works of art had become the internationally dominant paradigm.

As a consequence of our first transfer, intellectual property is subject to the same principles that apply to real property. All property rights are guaranteed by the one fundamental right to property.<sup>21</sup> They all grant the owner a transferable exclusive right to use the good and to exclude others from it. Any limitation of these rights requires justification. Finally, the normative arguments in favor of IP rights are the same as those for classical property rights: Thou shalt not steal – be it a car or a digital file. Otherwise, self-determination in economic matters, freedom in general, and efficiency will be lost (Demsetz 1967: 347-359).<sup>22</sup>

Nevertheless, until this very day, legal doctrine in France and Germany struggles with the question whether author's rights and industrial property rights are properly qualified as »propriété« (Bouchet-le Mappian 2009), or »Eigentum« (Jänich 2002). Different from private property in land and movables, IP rights are also a highly contentious political issue. These ongoing debates are at least in part due to a blind spot created by our first legal transfer. The extension of property theory obscures the fundamental differences between tangibles on the one hand and intangibles on the other. To his already cited, famous praise of intellectual property as the most sacred type of property, Le Chapelier added: »Yet it is a property of a *totally* different kind than other properties.« Unfortunately, this indeed important qualification of the property analogy did not receive attention. I will come back to this blind spot in my conclusions.

## *2. From Western Europe to the rest of the world*

By the end of the 19<sup>th</sup> century, inventions and works of art had become tradable commodities. The problem was, though, that the respective IP rights were limited to the territory of the state granting them: German patents or copyrights

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<sup>20</sup> <http://www.wipo.int/treaties/en/ip/berne/>, 30.10.2012.

<sup>21</sup> See Art. 17 Charter of Fundamental Rights of the EU.

<sup>22</sup> For a critique, see Peukert, *Güterzuordnung*, p. 732 et seq.



were valid only in Germany, not in France, and vice versa. Publishers, producers of technology, and not least colonial empires, however, wanted to also control non-European markets. As a consequence, IP law was transplanted to the rest of the world – this time indeed in the sense of Watson and Legrande.

Many writings about the current global IP system suggest that the territorial diffusion of this body of law effectively happened only in the mid 1990s via the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which forms part of the Marrakesh Agreement Establishing the WTO.<sup>23</sup> It is certainly true that the Washington Consensus managed to justify and push for a new, global »gold standard« of IP protection, which is now binding for 153 WTO members. However, the globalization of IP occurred much earlier, namely during the colonial era. It was the imperial expansion of European influence that was primarily responsible for the inclusion of the rest of the world in the IP system as we know it today (Okediji 2003: 315-385; Rahmatian 2009: 40-74).

There were two possibilities of implementing IP protection in the colonies (Peukert: Colonial Legacy, forthcoming). One was to simply codify in national law that the British or French legislation applied to these territories. From the early 19<sup>th</sup> century onwards, the British introduced copyright law in all of the colonies and territories under their rule, mandates included (Bently 2011: 161, 171-81). In 1857, France formally extended its revolutionary act on author's rights of 1793 to its colonies. Whereas patent law was generally less widely and less aggressively dispersed via empire, by 1864, already seventeen British colonies had adopted patent laws, among them India and New Zealand (Bently 2011: 161, 171-81).

The other route of IP law to the colonies led via international treaties. All international IP treaties, be it the 19<sup>th</sup> century Berne and Paris Conventions, the UNESCO Universal Copyright Convention of 1952, or even the UNESCO 1961 Rome Convention on the Protection of Performers, Producers of Phonograms

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<sup>23</sup> [http://www.wto.int/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.int/english/docs_e/legal_e/27-trips_01_e.htm), 30.10.2012. See, for example, Shi, Globalization and Indigenization, p. 455.

and Broadcasting Organizations, include provisions on the applicability of the respective treaty to »Certain Territories«.<sup>24</sup> These provisions, which can be traced back to a proposal of the British delegation to the original Berne Convention, state that »any country may declare in its instrument of ratification or accession ... that this Convention shall be applicable to all or part of those territories ... for the external relations of which it is responsible«. All colonial powers, in particular France and the United Kingdom, but also Spain, the Netherlands, Japan, and not least Germany, made extensive use of this rule (Peukert: Colonial Legacy, forthcoming).

The aim of these colonial transplants was to protect business interests in the metropolitan areas, in particular those of London or Paris book publishers who wanted to control the colonial markets and were in fear of the global diffusion of communication technologies (Drahos/Braithwaite 2002: 74). In contrast, self-governing British dominions like Australia and Canada and former colonies like the U.S. adopted British legislation with modifications only (Peukert: Colonial Legacy, forthcoming). These were more or less voluntary, cost-saving borrowings, reacting to at least some local regulatory demand, which could already rely on the powerful »intellectual property« narrative.<sup>25</sup> Whereas these latter borrowings quickly gained significance in the recipient countries, the imposed imperial transfers, in particular to African colonies, only addressed the colonial elites controlling book printing and other public communication like newspapers and radio.<sup>26</sup> Oral literature and other creativity not fixed in tangible media, however, did not qualify for international copyright protection during the colonial period (Peukert: Colonial Legacy, forthcoming). Exactly this mode of

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<sup>24</sup> See Art. 31 Berne Convention; Art. 24 Paris Convention; Art. XIII of the 1952 UNESCO Universal Copyright Convention (UCC, [http://portal.unesco.org/en/ev.php-URL\\_ID=15241&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15241&URL_DO=DO_TOPIC&URL_SECTION=201.html), 30.10.2012); Art. 27 of the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ([http://www.wipo.int/treaties/en/ip/rome/trtdocs\\_wo024.html](http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html), 30.10.2012).

<sup>25</sup> For the British Empire: Bently, The 'extraordinary multiplicity' of intellectual property laws, p. 161, 171-81; for U.S. copyright: Bracha, The Adventures of the Statute of Anne, p. 1427; for Palestine, see Birnhack, Hebrew authors and English copyright law in Mandate Palestine, p. 201-240.

<sup>26</sup> On these differences see generally Rheinstejn/v. Borries/Niethammer, *Einführung in die Rechtsvergleichung*, p. 124 et seq. (reception, transplant, oktroy); Friedman, Borders, p. 65; Miller, A Typology of Legal Transplants, p. 839; Berkowitz/Pistor/Richard, The Transplant Effect, p. 163; see also Watson, *Society and Legal Change*, p. 99 et seq.

creativity, however, was prevalent in many colonies, particularly in Africa. It only entered the global copyright stage in the 1960s under the topic of »folklore«.<sup>27</sup>

Nevertheless, the imperial IP dictate had long-term consequences. First, the transplantation of IP models from Western Europe to the rest of the world established a one-size-fits-all model for the regulation of innovation and creativity. This approach neglects the fundamentally different socio-economic circumstances in industrialized and colonized, later developing countries – again a blind spot created by a legal transfer (Umahi 2011). Second, at the time of independence, most of the then developing countries already formed part of the global IP system. It was not necessary to persuade them to accede to the international IP unions in the first place. They were already members of the club. They only had to be prevented from leaving. This was accomplished in part by our third and final legal transfer: from the protection of new inventions, designs, and original works of art to the protection of traditional knowledge.

### *3. From the protection of innovation to the protection of traditional knowledge*

With the independence of the former colonies, the United International Bureaux for the Protection of Intellectual Property (French acronym BIRPI) in charge of administering the Berne and Paris Unions – the predecessor of WIPO – feared that the international IP system might implode. As the »guardian« of the Berne Union, BIRPI was concerned about »a constant and big geographical shrinking, to the prejudice of the interests of authors« (Masouyé 1962: 84, 86).<sup>28</sup> The head of the copyright division of BIRPI, Claude Masouyé, identified an »exotic time« and wondered »whether politically, economically, socially, it is good or evil« that one »must record the contemporary phenomenon of the decolonization« (Masouyé 1962: 84, 144).

The most important legal question arising with the wave of independence was whether the new states were still bound by the IP treaties. BIRPI argued that

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<sup>27</sup> See *infra*, II.3.

<sup>28</sup> Critical: Lazar, *Developing countries and authors' rights*, p. 17-28 (»neo-colonialism«); Drahos/Braithwaite, *Information Feudalism*, p. 75-84; Okediji, *The international relations of intellectual property*, p. 323-34.

this was the case absent an express declaration to the contrary (Ronga 1956: 21-6). However, even the diehards of the colonial IP system had to accept that the then developing countries were at least free to exit. One could assume that the reception of a transplanted foreign law ends when the power of the imposed legal system ceases (Sacco 1991: 398).

Not so with regard to IP law. In the end, only four newly independent countries denounced membership in the Berne Copyright Union, namely Indonesia in 1960, Syria in 1962, Upper Volta in 1969, and Mauritius in 1971 (Ricketson/Ginsburg 2006: para. 17.59). Most African least-developed countries during the 1960s formally acceded or simply declared – following a suggestion of the International IP Bureau at Geneva – the uninterrupted continuity of their colonial obligations under the Berne and Paris conventions (Ricketson/Ginsburg 2006: para. 17.60). In addition, two regional patent offices were established for the West African, francophone countries and the East African, mostly anglophone countries in 1962 and 1976, respectively. These patent offices grant unified patents and other industrial property rights for a total of 33 countries. The treaties establishing this unified system implement a highly protectionist IP agenda (Deere 2009: 35 et seq.).

What we have before us are post-colonial structures with the aim of stabilizing the status quo ante. The purpose of the two African regional patent offices was to replace the French and British IP institutions with as little effect on the availability of IP protection as possible (Deere 2009: 242, 249). In March 1960, BIRPI sent letters to the soon-to-be independent colonies explaining that continuity must normally be assured (Masouyé 1962: 84, 122). Ever since the early 1960s, BIRPI and later WIPO in collaboration with European copyright societies, patent offices, and rights holders' organizations have organized seminars in the former colonies to advise in IP matters, submitting model drafts for »appropriate IP legislation« (Johnson 1970: 91, 94-103). This seemingly technical assistance created a local IP elite having a strong individual interest to push a pro-IP agenda irrespective of the general effects of this policy for a developing country (Kunz-Hallstein 1982: 689, 697 (a »whole new generation of

Third World copyright experts shares the view that copyright is favourable to development«)).

In spite of these efforts, the 1967 diplomatic conference on a revision of the Berne copyright convention became a highly politicized event that nearly blew up the small IP world. The newly independent countries did not threaten to leave, but they claimed special treatment. What they eventually got was a protocol setting out very limited, practically irrelevant compulsory licenses in favor of their educational sector.<sup>29</sup>

But even after this frustrating experience, no former colony decided to leave. The reasons for this are manifold (Peukert: *Colonial Legacy*, forthcoming). First, IP policy was not high on the political agenda of the newly independent states. These issues did not justify international turmoil. Moreover, both the Western and the Soviet Bloc formed part of one IP community. It therefore did not matter with which party of the cold war a new state sided (Lazar 1971: 7). Second, the system exhibits a powerful network effect. If the newly independent countries wanted protection for their nationals in the former metropolitan markets, they had to become part of the Union and grant reciprocal protection to Western right-holders on their territory.<sup>30</sup> Last but not least, only few observers stressed the importance of access to knowledge for development. The IP narrative, according to which a high level of protection is good, but more protection is better, was prevalent, even among participants from the developing countries. Critical thinking was blurred by the claim that the rich creativity in former colonies deserved the same legal protection as works originating in the Global North (N'Diaye 1975: 59, 84), a claim that neglects the fundamentally different modes of creativity operating in Western cultural markets and e.g. sub-Saharan oral literature and music (Gana 1995: 109, 125-37).

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<sup>29</sup> See Art. 21 and Appendix to the Berne Convention; Art. V<sup>bis</sup> to V<sup>quater</sup> UCC; Peukert, *Colonial Legacy*, with further references.

<sup>30</sup> See Art. 5 Berne Convention; Art. 2 Paris Convention; Ntahokaja, *Réunion africaine d'étude sur le droit d'auteur*, 250, 251.

A further issue was that of protecting »folklore«, nowadays termed »traditional cultural expressions«, or more broadly »traditional knowledge«.<sup>31</sup> It can be traced back to the very first copyright seminar in post-colonial Africa. Upon a recommendation of the U.S., UNESCO had in 1960 agreed to support a copyright assistance program for newly independent countries.<sup>32</sup> On the basis of this UNESCO mandate, copyright arrived at post-colonial Africa on 5 August 1963, when 30 African and 15 high-profile participants from Europe and the U.S. gathered for the first »African seminar on copyright« in Brazzaville, capital of the Congolese Republic, which had gained independence from France in 1960.<sup>33</sup>

The seminar started with an introduction to the global copyright system by Eugen Ulmer, at that time professor of law in Munich and a central figure of the international copyright debates in the 1960s. Ulmer opened his lecture with the two essential ideas of the »droit d'auteur«: »la propriété immatérielle« (see our first transfer) and encouraging creative activities. He then argued that his topic is an important issue for the newly independent African states. In particular, he stressed the necessity to protect national music and »folklore«. Ulmer's suggestion was quickly adopted by the local participants. Five days later, the participants of the seminar unanimously recommended that special laws should be adopted to protect the cultural heritage of the African nations from being exploited without consent of the communities »owning« them (Ntahokaja 1963: 259).

Ulmer's proposal was a brilliant maneuver. At the 1960 General Conference of UNESCO, African countries had indeed emphasized the need to rediscover and preserve African heritage and culture. However, they did not claim a new kind of legal protection for this purpose (Johnson 1970: 96.). Ulmer succeeded in linking the desire to preserve African culture with notions of protection and copyright. On the one hand, Ulmer advertised Western author's rights as a tool

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<sup>31</sup> <http://www.wipo.int/tk/en/>, 30.10.2012.

<sup>32</sup> UNESCO, Die Beschlüsse der 11. Generalkonferenz über das Programm der UNESCO in den Jahren 1961 und 1962.

<sup>33</sup> See, also on the following details, the report of Ntahokaja, Réunion africaine d'étude sur le droit d'auteur, p. 250, 251.

to foster progress. On the other hand, he extended the concept of copyright to »folklore«. He thereby exemplified the responsiveness of the international copyright system. In addition, he set the framework for further discussions, which could only be concerned with »protection«, be it of »original works« or »folklore«. In essence, Ulmer offered a deal: If you, developing countries, join the global copyright club and protect our cultural products, we will protect your »folklore«.

The question of how to properly protect TK has been discussed ever since. There are many model laws and more and more national acts on the protection of traditional knowledge, but no international treaty requiring protection in the industrialized countries themselves, where exploitation of TK does in fact take place (Sherkin 2001: 43). In that respect, Ulmer's suggestion did not produce the promised result.

In another respect, it did. The prospect of a special regime protecting TK was very attractive. African delegates considered the protection of »folklore« a matter of great urgency and importance (Kunz-Hallstein 1982: 701-3). Developing countries in South America and Asia joined this view.<sup>34</sup> The mere fact that the protection of TK was being discussed had integrative effects. It kept the former colonies – or better to say their expert representatives – at the negotiation table. At home, these representatives could argue that the Western IP community cared about the concerns of indigenous communities in developing countries.

As a result of all these efforts, only five out of the 48 least-developed countries did not already belong to a regional or international IP system when the TRIPS agreement entered into force in 1995. In Africa, this concerned the two Portuguese colonies Mozambique and Angola and the East-African French colony Djibouti, which could apparently not be integrated in the West-African francophone bloc (Peukert: Colonial Legacy, forthcoming).<sup>35</sup> The colonial legacy of the global IP system also delivers an explanation for the amazing fact that

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<sup>34</sup> Folklore Committee, Report, Copyright 1967, p. 52.

<sup>35</sup> The two further countries are Burma and Salomon Islands.

today all least-developed countries do protect copyrights, patents and many other IP rights, although they are under no obligation to do so under WTO law: The extended transition period for LDCs to apply the bulk of TRIPS obligations will not end until 2013, and it might well be further extended.<sup>36</sup>

From this perspective, the TRIPS Agreement is only an episode in a whole series of steps to integrate developing countries into the global IP system. The same holds true for the ongoing debate about the protection of traditional knowledge. One could even ask whether this discourse is only a fig leaf obscuring the post-colonial transfer of IP laws.

### **III. Conclusions**

#### *1. Legal transplants and legal analogies*

I have described three legal transfers which contributed to the spread and stabilization of the global IP system. These three incidents can be classified into two categories.

The first category concerns legal transplants in the sense of Watson, Legrande, and others. In that respect, our story suggests drawing a distinction between the diffusion of hard rules, in our case statutorily defined property rights, and the transfer of legal principles. Constitutions or general principles like »Treu und Glauben« will be re-contextualized in their new environment (Teubner 1998). Exclusive property rights leave less room for reinterpretation and »bricolage«. Instead, they operate very much the same way in different economic and social environments, if only someone claims this exclusive protection. For example, the complaints about copyright piracy as articulated by India's Bollywood and Nigeria's Nollywood film producers very much resemble the complaints articulated by Hollywood (Jedlowski, forthcoming).

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<sup>36</sup> See Art. 66(1) TRIPS and No. 1 Decision of the Council for TRIPS of 29 November 2005, Extension of the Transition Period Under Article 66.1 for Least-Developed Country Members, WTO Document IP/C/40; Ministerial Conference, Decision of 17 December 2011, WTO Document WT/L/845 (»We invite the TRIPS Council to give full consideration to a duly motivated request from Least-Developed Country Members for an extension of their transition period under Article 66.1 of the TRIPS Agreement, and report thereon to the WTO Ninth Ministerial Conference.«).



The second category of legal transfers concerns the application of a legal principle to another set of facts. At least in the field of IP law, such extended employment of a legal concept forms the most important mechanism to generate legal variants. The transfer of the property idea from tangibles to intangibles was a slow, endogenous evolution of Western private law, reacting to social change. The transfer of the property idea from innovation to traditional knowledge, instead, was an exogenous, politically motivated suggestion, which did not respond to nor try to induce social change.<sup>37</sup>

This second category bears some resemblance to an analogy drawn by a court. However, courts extend the application of specific *rules* to similar cases. In doing so, they normally stress that the established rule applies »mutatis mutandis« in different circumstances, thereby limiting the impact of this variation. In contrast to this, the transfers we have studied concern general legal principles: property and ownership. On their normative basis, »new« legal principles like that of intellectual property are developed. Once accepted, these variations exhibit their own normative dynamic. They do not disclose the transfer and the problematic blind spots that come with it.

## *2. Legal transfers conceal differences*

This observation leads to my second conclusion: Every legal transfer, be it across borders or with regard to legal concepts, tends to conceal differences.

The application of legal principles developed for real property to intellectual property neglects the categorical differences between the two subject matters. Land and movables are rivalrous and exclusive goods. A meadow can be used only by a limited number of farmers. Without individual or communal property rights, there is a risk of a tragedy of the commons: the meadow will be overused and eventually destroyed (Hardin 1968: 1243-1248). Inventions and works of art, instead, are a non-rivalrous, non-exclusive resource. You cannot overuse

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<sup>37</sup> On these differences, see Sacco, *Legal Formants*, p. 390 et seq.

and destroy »a« musical composition or »an« invention. Explicit knowledge is not a scarce resource. The more it is distributed and used – for example via the internet – the more positive externalities it generates. This is why knowledge in the public domain – think of Bach’s Goldberg Variations – is efficiently used and preserved. This is why »information wants to be free«, but not so land and movables (Lemley 2005: 1031-1076; Peukert 2012: 51 et seq.).

In order to make these differences visible again, it is necessary to deconstruct the first transfer I have described: the idealistic notion that »a« work of art is a commodity just as a desk or a hard copy of a book is. Correct is instead the older notion of copy-rights: IP rights regulate activities, for example the copying of texts, the use of computers, and the realization of personal creativity. IP rights do not allocate goods, but possibilities for action. This is why they have to be limited for the sake of individual freedom (Peukert 2012: 56 et seq.).

The second transfer – the transplantation of IP law from Western Europe to the rest of the world – disregards the fact that knowledge exporters and importers have fundamentally different needs.<sup>38</sup> Developing countries require, first of all, easy access to knowledge in order to acquire innovative capacity, which again is essential for development. Producers and exporters of knowledge and knowledge-intensive goods, on the other hand, strive to protect their competitive advantage to the maximum extent possible. Indeed, none of the now developed countries applied a highly protectionist, effective IP system at the time of its economic and technological take-off (Chang 2001). The U.S. is generally considered to have been the worst pirate country of the 19<sup>th</sup> century, refusing as it did to grant copyright protection to European authors.<sup>39</sup> Big multinationals of today, whether Unilever, Philips or the Swiss pharmaceutical industry, clearly benefited from pirating foreign inventions during the 19<sup>th</sup> century, when countries like the Netherlands or Switzerland did not provide for patent protection (Schiff 1971; Kurz 2000: 393 et seq.). Nowadays, unauthorized

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<sup>38</sup> This is a generally accepted view; see Weinstock, *The Development Agenda*; Maskus, *Incorporating*, p. 497 et seq.

<sup>39</sup> US Supreme Court in *Golan v. Holder* 565 U.S. (2012), slip op. p. 4 (»the Barbary coast of literature«, »buccaneers of books«).

imitation as an effective strategy for development has been ruled out throughout the world.<sup>40</sup>

Finally, our third transfer – from the protection of innovation to that of traditional knowledge – fails to acknowledge that knowledge orders in liberal, differentiated societies and knowledge orders in segmented or stratified traditional societies operate on fundamentally different assumptions. For example, it does not make sense to ask who the individual *author* of traditional knowledge is, because the common feature of all types of traditional knowledge – ranging from technical know-how to cultural forms of expressions, signs, and genetic resources (Lucas-Schloetter 2008: 339 et seq.) – is an association with a cultural tradition as exercised by a certain community.<sup>41</sup> TK covers manifold factual situations: individual creativity resulting in individual ownership under local customary law; simultaneous group innovation; as well as the combination and adaptation of preexisting knowledge, again by individuals or groups (Brahya 2008: 296 et seq.). Indigenous communities furthermore reject the idea of a public domain, which is central to the Western IP paradigm. They claim that the use of their traditional knowledge has always been regulated under local norms.<sup>42</sup> They thereby refuse to have their traditional knowledge orders be reframed and re-regulated according to Western legal principles. And indeed, sacred knowledge is not meant to fuel public discourse. Nor is traditional knowledge detached from religious and other belief systems. Nor can anyone in this realm claim to have uttered something »new«, which she is then entitled to own exclusively and transfer to anyone she likes.

In spite of these differences, the discussion about traditional knowledge has been framed in terms of Western IP protection ever since Ulmer referred to the protection of folklore in Brazzaville. However, such a characterization of TK is ill

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<sup>40</sup> Overview and critique: Peukert, *Immaterialgüterrecht und Entwicklung*, forthcoming.

<sup>41</sup> Composite Study on Traditional Knowledge, WIPO/GRTKF/IC/5/8, para. 71(e).

<sup>42</sup> See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, WIPO/GRTKF/IC/9/4, 9 January 2006, Annex, p. 40.

conceived.<sup>43</sup> Only in the last couple of years have alternative, non-IP-style proposals gained some recognition. They suggest a defensive, customary-law protection for sacred and other indigenous knowledge. This approach does not aim at commodifying traditional knowledge, but at preserving the diverse cultural conditions in which this knowledge is produced. The normative basis is indigenous self-determination, not property (Coombe 2003 («cultural public domain»); Fikentscher 2005: 3-18; Teubner/Fischer-Lescano 2008: 17 et seq.; Peukert 2011: 195, 220 et seq.).

Taken as a whole, our story teaches another general lesson: Every transfer carries with it the transfers of the past, including their deficiencies. The former colonies not only adopted legislation that did not suit their needs. They also subscribed to the highly problematic assumption that intellectual property rights are just a special case of classical property rights. An IP-style protection of traditional knowledge adds yet another layer of blind spots.

Thus, contrary to the assumption that legal convergence by way of transplants signals a movement towards more «efficient» rules (Mattei 1994: 3, 8.), the more formal convergence legal transfers produce, the more dysfunctionalities threaten to occur. The 18<sup>th</sup> century property analogy is still effective, but it brought about too many exclusive rights, a tragedy of the anticommons. The 19<sup>th</sup> century colonial transplant exported this problem to developing countries, making economic catch-up more difficult or even impossible. And the 20<sup>th</sup> century analogy between IP and traditional knowledge worked *only* as a political dodge. What these transfers indicate is not a particularly just or efficient body of law, but one that is backed by sufficient exercise of economic and/or political power, be it that of publishers and other producers of creative content or colonial empires.

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<sup>43</sup> See Composite Study on Traditional Knowledge, WIPO/GRTKF/IC/5/8, para. 24 («However, many participants in the Committee have highlighted that these conventional IP mechanisms may not be fully consistent or adequate for the protection of TK, given the distinctive characteristics of TK as subject matter for IP protection»); Munzer/Raustiala, *The Uneasy Case for Intellectual Property Rights*, p. 37.

These conclusions have little in common with Alan Watson's largely positive assessment of legal transplants (Mattei 1994: 3, 8.). The reason may be that he chose a very different example for his studies, namely the spread of Roman law. This, however, seems to be a rather peculiar model because it concerns a body of law that regained significance long after the original – Roman – empire had dissolved. I suspect that most legal transfers we observe today originate from existing jurisdictions. These legal orders not only exhibit persuasive prestige. They also represent economic and political power.

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