6. Human rights and the philosophical foundations of intellectual property

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1. INTRODUCTION

Some claim that intellectual property rights have their roots in natural law, most famously as the Lockean labour-desert theory, which sees property rights as commensurate with 'the sacrifice actually incurred.'[1] According to this view, property is justifiable as a (just) reward for work done to create new works from the existing stock of public domain works and ideas, or on a significant, industrially useful improvement on the existing stock technological knowledge. Locke's original theory turned on the labour sacrifice of a particular landowner. He did not advocate for specific rights in intangibles.[2] Indeed, applying his theory to intangibles raises interesting questions. For instance, if one were to adopt a natural law-based justificatory theory for intellectual property, then one might ask whether the protection of intangibles should be commensurate with the author's or inventor's efforts. Alternatively, one might ask what *kind* of value (societal, economic, etc.), should be rewarded and then measured according to which set of metrics? How would temporal elements be factored into the equation (i.e., what is the value now and 20 years hence?), as would the transaction costs of this determination. And the list goes on.

As possible normative counterweights to Lockean-derived narratives, the various 'personhood' and deontological theories – also anchored in natural law – provide an alternative basis for at least some forms of intellectual property. According to one version of such theories, 'to achieve proper self-development [...] an individual needs some control over resources in the external environment [which] take the form of property rights.'[3] In what may seem Kantian terminology, some see creations as

* Parts of this chapter are adapted from 'Intellectual Property and Human Rights: Learning to Live Together', in: Paul Torremans (ed.), *Intellectual Property and Human Rights, Enhanced Edition of Copyright and Human Rights* (Wolters Kluwer, 2008), 3–24.

[1] Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (Cambridge, MA: Harvard University Press, 1998), 111.

[2] Wendy Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993), 102 *Yale Law Journal*, 1533. To return to the source, *see* John Locke, *Two Treatises of Government* (2nd ed., Cambridge University Press, 1967), 269–78.

[3] Margaret Jane Radin, 'Property and Personhood' (1982), 34 *Stanford Law Review*, 957.

expressions of personality and embodiment of a personal message that deserves protection *as such*.[4] This may indeed be linked to Kant's notion of personal autonomy. Without going into the details of each 'version' of those theories in this short chapter, personhood theories range for self-actualization to dignity of the authorial act of 'public' creation. At bottom, the argument is that, as René Cassin put it, 'human beings can claim rights by the fact of their creation.'[5] More importantly for our purposes, natural law roots are something that intellectual property thus ostensibly shares with traditional human rights theory.[6]

My focus in the next pages is on the error one may be making in talking about 'intellectual property' writ large, as a single normative block as it were. I will explore the vanishing difference between copyright and 'industrial property,' and how that change impacts natural law and specifically human rights claims. Article 27 of the *Universal Declaration of Human Rights*,[7] which saw the light of day 238 years after the *Statute of Anne*, is an interesting mirror for copyright's sleeping beauty, namely a solid justificatory theory beyond the practicalities of trade. Article 27 protects *both* 'the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' *and* users' right 'freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.' The objective of protection embraces at least indirectly the moral desert theory (protection of interests resulting from scientific, literary or artistic production), while the objective of access is expressed teleologically as a tool to allow everyone to enjoy the arts and to share in scientific advancement and its benefits. By providing a *purpose* to certain exceptions, human rights may both serve as guidance to courts[8] and compensate for the excessively economic focus of trade law, as embodied in particular in the three-step test interpreted by the WTO Dispute-Settlement Body.[9]

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[4] Immanuel Kant, *Metaphysics of Morals, Doctrine of Right*, (Cambridge University Press, 1996), para. 31; Georg W. Friedrich Hegel, *Elements of the Philosophy of Right*, (Cambridge University Press, 1991), paras 43, 69.

[5] Quoted in Michel Vivant, 'Authors' Rights, Human Rights?' (1997), 174 *Revue Internationale du Droit D'auteur (RIDA)*, 60, 86. One could add Lakanal's amplification: 'Of all properties, the least disputable, the one whose growth can neither undermine republican equality nor offend freedom, is unquestionably that of productions of genius.' Ibid., 62.

[6] Since at least Aristotle's *Nicomachean Ethics*, it has been argued that human rights underpin a moral order whose legitimacy precedes contingent social and historical conditions. According to this view, human rights are 'naturally' universal.

[7] UN General Assembly, *Universal Declaration of Human Rights* (UDHR), 10 December 1948, 217 A (III).

[8] Daniel Gervais, 'The Role of International Treaties in the Interpretation of Canadian Intellectual Property Statutes', in: Oonagh Fitzgerald (ed.), *The Globalized Rule of Law: Relationships Between International And Domestic Law* (Irwin Law, 2006), 549–72.

[9] *United States – Section 110(5) of the US Copyright Act*, Document WTR/DS/160/R (WTO Dispute Settlement Panel, 2000).

2. COPYRIGHT AND AUTHORS' RIGHTS

2.1 Copyright as a Distinct Form of Intellectual Property

Authors' rights were born in a normative cradle resembling modern human rights. Beginning with the signing of the first Berne Convention in 1886,[10] the seed of an international harmonization of copyright was planted and, significantly, it specifically limited formalities.[11] The participants in this endeavour, unlike in the common law world, followed a conception, a component of which is the recognition of the moral rights of authors in their works. They espoused a *jus naturalis* justification for copyright protection, one that fundamentally conflicted with the imposition of mandatory formalities because rights derived as natural consequence of the act of creation should not require compliance with State-prescribed formalities.[12] Similarly, human rights do not need to be registered or applied for.

Authors' rights are thus special among intellectual property rights. They have their own Convention (Berne). They are also different from neighbouring rights protected under the 1961 Rome Convention[13] and from industrial property, for which the Paris Convention[14] provided rules – mostly about how to secure international protection by registration. Indeed, that is a striking difference between Paris and Berne. Paris is mostly about applications for and *registration* of patent, design and trademark rights. It fails to provide even a definition of what is protected (terms such as 'patent' and 'trademark'). It provides only a minimal set of rights (Article 6*bis* for well-known marks; Article 10*bis* for unfair competition) and a few restrictions on exceptions (for example the rules on patent compulsory licensing for failure to work). By contrast, Berne at least indirectly defines a work (by enumeration in Article 2(1) and by implication, by equating it with the notion of intellectual creation); rights (reproduction, public performance, adaptation, communication to the public etc.); exceptions and restrictions of various kinds (on subject matter in Article 2 and Article 2*bis*; a right of quotation in Article 10; a now famous 'three-step test' for exception to the right of reproduction etc.[15]); and a prohibition on formalities in Article 5(2), which seems to run directly counter to the formality-happy world of industrial property. Article 27 UDHR[16] and Article 15 of the *International Covenant on Economic, Social and*

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[10] As measured by the number of signatories (166 countries as of 24 April 2013) and giving consideration to the fact that Berne has been incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, UNTS, Vol. 1869, 299.

[11] For a brief history of the Convention and its various revisions, *see 1886–1986 Berne Convention Centenary* (WIPO 1986), 19–23.

[12] *See* Jane C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990), 64 *Tulane Law Review*, 991, 994.

[13] *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, Rome, 26 October 1961.

[14] *Paris Convention for the Protection of Industrial Property*, 20 March 1883, as amended on 28 September 1979.

[15] *See* Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (4th ed., Sweet & Maxwell 2012), 282–7.

[16] J.A.L. Sterling, *World Copyright Law* (2nd ed., Sweet & Maxwell 2003), 43.

Cultural Rights,[17] as well as regional instruments such as Article 13 of the *American Declaration on the Rights and Duties of Man*,[18] are consonant with Berne, but perhaps less so with Paris.

2.2 Copyright as a Trade Right

By contrast, in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) copyright is 'one of many.' Put differently, the TRIPS version of authors' rights, together with related rights and industrial property rights, are treated as equals. This is due to the great levelling effect of TRIPS and the treatment of all intellectual property rights, including copyright, as 'trade-related rights'.

This trade connection has at least three important consequences. First, not surprisingly with the move to trade calls for a return to formalities (from countries such as the United States that does not – or not explicitly – espouse a human rights justification for copyright) have emerged. Second, unlike human rights, trade law is essentially pragmatic and results-based, something illustrated by notions of WTO law such as 'nullification or impairment' of benefits or the doctrine of 'reasonable expectations.' Third, trade remedies are generally predicated on a showing of *actual* adverse impact on trade. Hence, the protection of intellectual property by trade rules does not mesh well with its ideological defence whether as a 'property' (showing harm is not a *sine qua non* to obtain a remedy against a trespasser) or as a human right.

There are several signs of the normative impact of this international 'tradification' of copyright. Article 9 of the TRIPS Agreement incorporates most of the substantive provisions of the Berne Convention (Paris Act, 1971) into TRIPS. It also states, however, that WTO 'Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.' By excluding the enforceability of moral rights, the TRIPS Agreement split the authors' right in two. In doing so, it also rejected one of the most visible signs of personhood theories bases for authors' rights.[19] In TRIPS, authors' rights or, perhaps more justly one should say 'copyright' – are seen as a statutory entitlement, enforced through trade rules, and just one set of rights among many others designed to allow for limited market control.

Human rights and intellectual property were natural law cousins owing to their shared filiation with equity. Market optimization is not part of that family. Consequently, the policy debate has palpably shifted. It has become not one of fairness to authors but rather of how much revenue it is fair for those companies (not authors) to make. This may explain part of the resistance of various user and consumer groups

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[17] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 16 December 1966, UNTS, Vol. 993.

[18] Audrey R. Chapman, 'Approaching Intellectual Property as a Human Right (obligations related to Article 15(1)(c))' (2001), XXXV *Copyright Bulletin*, 4, 11. The *American Declaration of the Rights and Duties of Man* was adopted by the Ninth International Conference of American States of the Organization of American States in Bogota, Colombia, 2 May 1948.

[19] Indeed, a US scholar recently referred to personhood or deontological theories as 'moral rights'. *See* Jeanne C. Fromer, 'Expressive Incentives in Intellectual Property' (2012), 98 *Virginia Law Review*, 1745, 1753.

to copyright rules and their insistence that music or videos are too expensive. At a higher level of analysis, it also supports the related perception that copyright works are public goods. Because copyright claims were transplanted in the soil of trade, natural rights-based views – and with them the perceived fairness of rewarding successful creators – are no longer as convincing. For many user groups and for developing countries implementing TRIPS and 'TRIPS Plus' rules, it has become a mere numbers game. As Thomas Friedman quipped, 'This is the age of the finance minister. [...] The game of nations is now geo-monopoly.'[20]

Not surprisingly, social norms reflect the same shift. They do not necessarily reflect an understanding of, say, downloading an MP3 file as *malum in se*, as a human rights justification would suggest, but rather as a *malum prohibitum*. As a result, many have suggested that the prohibition itself (copyright as an exclusive right) should be revisited – if not the norm itself, then the way it is used and enforced.

Quite independently of where one draws the line of what constitutes a human right, that trade rules do not qualify as human rights is beyond cavil. There is a cost to be paid in choosing a trade horse to cross the enforcement river.[21] Applying rather loosely a Rawlsian analytical framework, one could say that one loses deontological pull. Since the move to trade, the ship of copyright policy is anchored more than ever in utilitarian waters. Economic analysis is the sextant that can ensure that it avoids the Charybdis of rent-seeking and the Scylla of free-riding. A unified theory of copyright to navigate those shoals, one that applies to paintings, academic books, *Fifty Shades of Grey*, Radiohead and Windows 8, might seem somewhat murky to the purist. But, after all, isn't this the world of trade, one in which bananas and jute have been traded for educational services and gambling?

Human rights may compensate for an evolution (of copyright policy) that has not always been well thought through. As Peter Drahos noted:

> the development of intellectual property policy and law has been dominated by an epistemic community comprised largely of technically minded lawyers. In their hands intellectual property has grown into highly differentiated and complex system of rules. The development of these systems has been influenced in important ways by the narrow and often unarticulated professional values of this particular group.[22]

Human rights also bring *values* to the copyright system. The emphasis on culture in human rights instruments, allow one, for example, to acknowledge the limits of economic analysis and theory as a policy-making machine. Copyright's 'mission to foster cultural play' should be read against the backdrop of Article 27(1) UDHR and Article 15 of the ICESCR, both of which recognize the right to participate in cultural life.[23]

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[20] Thomas L. Friedman, quoted in John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd ed., MIT Press, 1997), 4.

[21] Costas Douzinas, *The End of Human Rights* (Hart Publishing, 2000), 7.

[22] Peter Drahos, 'The Universality of Intellectual Property Rights: Origins and Development', (text of presentation at WIPO, November 1998), available at: http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf.

[23] Yoram Dinstein, 'Cultural Rights' (1979), 9 *Israel Yearbook on Human Rights*, 58, 76.

Copyright and culture need new works to be created, though for different reasons (the former to justify its existence, the latter to grow), and to be created those new works need access to existing works. Conceptually, this can be framed as a 'freedom to create,' which, to a certain extent at least, is the freedom to copy. Whether *copying* constitutes copyright *infringement* is a matter of degree. Professor François Dessemontet suggested a useful list of factors to be taken into account: (a) whether the work copied from fades away in the new work; (b) whether the first work is recognizable and the degree to which it is; (c) the proportionality of 'newness' (presumably assessed quantitatively but also, and perhaps mostly, qualitatively) to the amount that is borrowed.[24]

2.3 Using Human Rights to Reconcile the Sources of Copyright

Can one reconcile human rights and natural law, the new and old sources of legitimacy for intellectual property? An answer might be found in the normative guide we met – and dismissed – in the opening paragraphs of this chapter. According to Locke, divine power imposed on each individual moral duties that could be discerned by reason, and this was what should guide the work of judges. Those duties are, in general, reciprocal: what I owe to others, they owe to me in return. Locke placed these duties in two categories: those dealing with liberty and those giving the right to make claims. One of the four great duties he describes was the duty not to impede others from profiting from what they have created or adapted from the public domain through their own efforts.[25] That is the premise used to justify copyright: a new work is created from the 'public domain' – therefore from ideas and existing works. The rights are derived from intellectual efforts by sovereign moral agents warranting non-interference claims.[26] This is close to the rights flowing from the creative process recognized in international human rights instruments.

Natural law, as described by Locke, thus offers an interesting perspective, one that *can* be reconciled with an exegesis of Article 27 UDHR and Article 15 of the ICESCR. Human rights, first and foremost, restore a degree of authorial dignity to copyright: '[H]uman beings have fundamental interests, which should not be sacrificed for public benefit, and [...] society's well-being does not override those interests. Protecting those interests is deemed vital for maintaining individual autonomy, independence, and security.'[27]

Could one not refocus policy efforts accordingly, to operationalize the (supposed) value attached to creation in the traditional conceptual edifice of copyright, recognizing that copyright works (arguably with the huge exception of software[28]) have special

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[24] François Dessemontet, 'Copyright and Human Rights', in: Jan J.C. Kabel, *Intellectual Property and Information Law* (Kluwer Law 1998), 113, 119–20.

[25] Wendy Gordon, *supra* note 2, 1542–3.

[26] Adam D. Moore, *Intellectual Property and Information Control* (Transaction Publishers, 2001), 108.

[27] Orit Fischman Afori, 'Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law' (2004), 14 *Fordham Intell. Prop. Media and Entertainment Law Journal*, 497, 499.

[28] The entry of software in the house of copyright was to have major practical repercussions, but one must acknowledge that the conceptual shock was enormous, since it brought into the

status because of their cultural resonance? The 'decentering' of copyright away from creators reduces the moral imperative of users, whose sympathy for large distribution multinationals (assuming for the sake of this discussion that this is a widespread perception of how the music and film industry are structured) is far from infinite. Conversely, copyright perceived as a right vested in and benefitting creators may have a different resonance, as the relative success of examples of 'pay as much as you feel this is worth' models used by a number of creators tend to show.[29]

In providing a teleological framework for exceptions, human rights can also guide courts in interpreting whether a particular use should be covered by an exception whose interpretation is unclear.[30] The UDHR in particular would allow exceptions that demonstrably augment access where such access (enjoyment) is not commercially reasonable or possible, and the right to reuse and thereby participate in the cultural life of the community. This seems to justify both consumptive use exceptions where commercial access is undesirable or impracticable, including exceptions such as those contained in the Appendix to the Berne Convention for access in developing countries, and exceptions for transformative uses (such as but not limited to parody), the principal element of the United States fair use doctrine.[31]

3. PATENTS

Patents are different. Patents are rights to prohibit (even in the absence of a viable market). Would a patentee's refusal to make available a patented product constitute only a potential abuse of patent rights or is it also (or instead) a violation of human rights? Human rights claims to a patented invention are harder to anchor in personhood theories. The translation of one's genius in an invention could be analogized to the genius incorporated in a copyright work.[32] Patents may also allow one to 'self-actualize', but the primary focus remains economic.[33] If patents are to be linked to natural law, it must likely be by deriving from Lockean claims, which seem weaker in that context. The different nature of an invention (compared to a copyright work), the relative lack of cultural significance, and the judgment that there is a different

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copyright family works created without any claim to artistic or aesthetic merit but rather on a purely functional basis. Another conceptual leap caused by the admission en masse of software was that the work being protected (i.e., the code) was not designed to be perceived by anyone. Its role is to make a computer function.

[29] A famous example was the release of Radiohead's 2007 'In Rainbows' album. *See* Josh Tyrangiel, 'Radiohead Says: Pay What You Want', TIME, 1 October 2007, available at: www.time.com/time/arts/article/0,8599,1666973,00.html.

[30] As was done, e.g., by French courts. *See JDI* 1989, 1005 note Edelman; (1989) 143 *RIDA* 301, note Sirinelli.

[31] Except, arguably, between *Sony Corp. of America v. Universal City Studios, Inc.*, (184), 464 U.S. 417 and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* (2005) 125 S. Ct. 2764.

[32] *See* Radin, *supra* note 3.

[33] *See* Robert Merges, *Justifying Intellectual Property* (Harvard University Press, 2011), 68–100.

embodiment or level of 'personality' involved, all militate against natural law claims.[34] Indeed, the contribution to culture and self-actualization is generally completely absent of the discussions concerning patents. At bottom, patents are seen as economic tools. When they must confront rights – such as the right to health – their posture is thus different from copyright.

Would property claims not solve that dilemma? Such claims are weaker in that context. This may be because patents are rights to exclude. Using Hohfeld's terminology, from exclusion arise 'privileges' but not necessarily 'rights'.[35] The main reason that rights to exclude are necessary is so that that those who use or want to use property are able to determine who has what, that is, whose consent is needed to use the property in any particular circumstance. The owner acts as a 'gatekeeper' and may have the 'privilege' to use the property without the details of the privilege necessarily being defined. The law does not give unrestricted control to any property owner. This is rather far removed from a natural right approach of any stripe. An author should have more than a 'privilege' to use a work seen as an extension of her personality. While this chapter provides insufficient space to discuss the issue, the Lockean property rights justification strikes me as incomplete if it focuses the discourse on the right to exclude others. Human rights are more 'positive' in recognizing the value of the use (of a new cultural expression for example) and, from that perspective, the right to exclude becomes not the core but rather a (necessary) incident.

Patents face an uphill battle that copyright does not. The battles with AIDS and public health activists advocating flexibility on behalf of developing countries has left policy scars on pharmaceutical companies, and impressions on public opinion. Their claims are based on the right to health and security, but also on the more controversial right to development.[36] Clearly, fighting not only human rights, but also *Doctors without Borders* and Nelson Mandela against a backdrop of dying children to defend a 'trade-related' right is a difficult public relations battle, one which should never have been waged. An ethical, human rights approach to public health dictates limits on patent rights when no market is possible though no one should force patent holders to produce at or below cost.[37] There are legitimate concerns on the part of patent holders

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[34] *See* Roberta R. Kwall, 'Originality in Context' (2007), *Houston Law Review* 871, 874; and Justin Hughes, 'The Philosophy of Intellectual Property' (1988), 77 *Georgetown Law Journal*, 287, 351.

[35] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913–1914), 23 *Yale L. J.*, 16. Others may use liberties rather than privileges; *see* Anthony Maurice Honoré, 'Ownership', in: Anthony Gordon Guest (ed.), *Oxford Essays In Jurisprudence* (OUP, 1961). For discussion of 'liberty' and private property, *see* Jeremy Waldron, *The Right to Private Property* (Clarendon Press-Oxford, 1988), 27–28.

[36] Ruth Okediji, 'The Limits of Development Strategies at the Intersection of Intellectual Property and Human Rights', in: Daniel Gervais (ed.), *Intellectual Property, Trade and Development* (OUP, 2007), 355–84; and Robert J. Gutowski, 'The Marriage of Intellectual Property and International Trade in the TRIPS Agreement: Strange Bedfellows or a Match Made in Heaven?' (1999), 47 *Buffalo Law Review*, 713, 715.

[37] The problem of HIV infection and other severe diseases affecting least-developed countries does not lié entirely with patents, far from it. In several African countries where patent protection would be available, antiretroviral drugs are not patented. Many others have until 2016

about diversion and re-exportation, and those must be adequately addressed. It can be done. The solution adopted by the WTO[38] demonstrates one instantiation. There may be others.

4. CONCLUSION

Human rights can inform the interpretation of the scope of intellectual property rights. They can also, and perhaps more importantly, provide a framework for an adequate design of exceptions and limitations as part of a comprehensive copyright policy overhaul.[39] That purpose, solidly anchored in human rights, could then be relevant in the application of the three-step test. They can also support adequate limits on patent rights especially where no significant market impacts can be shown to exist.

It has been suggested that human rights could also have an impact – though perhaps not directly – on the WTO dispute-settlement system. True, the WTO Appellate Body found that the WTO Agreement 'is not to be read in clinical isolation from public international law.'[40] This principle was reflected in this and subsequent decisions, which relied on general principles enunciated in the case law of other international tribunals, namely the International Court of Justice, the European Court of Human Rights cases and the Inter-American Court of Human Rights, in interpreting the provisions of the WTO Agreement.[41] This could of course extend to TRIPS but it is unlikely to amount to what would be non-negotiated amendments to the Agreement. At the multilateral level, human rights should inform ongoing policy debates. The potential for judicial rebalancing using human rights seems more likely to impact national and regional jurisdictions than multilateral fora.

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to adopt pharmaceutical patent protection under WTO rules. Problems often lie elsewhere, such as in the absence of a capacity of production and the lack of distribution networks.

[38] Reference is made here to Article 31*bis*, adopted in 2005 and pending ratification, and the *Declaration on Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health,* Decision of the WTO General Council of 30 August 2003 (WTO Document WT/L/540 and Corr.1 of 1 September 2003).

[39] *See* Daniel Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008), 5:1/2 *Univ. Ottawa L. and Tech. J.*, 1–41.

[40] *US – Standards for Reformulated and Conventional Gasoline*, WTO Document WT/DS2/AB/R, paragraph III. B (Appellate Body report, 1996).

[41] *Idem supra* note 38; and *Japan – Taxes on Alcoholic Beverages*, Document WT/DS8/AB/R, part D, footnote 19 Appellate Body report, 1996.