

Chapter 2

Private-Public Dynamics: The Paradox of Intellectual Property Philosophy

As mentioned above, the history of domestic IPR protection in the West could be traced back to as early as Roman law which offered “maker’s marks” legal protection.¹ Contemporary international protection of intellectual property rights is based on an integrated international treaty framework, which goes back to the 1883 Paris Convention protecting industrial property and the 1886 Berne Convention protecting copyrights. The conclusion of the TRIPS Agreement marks its latest international effort. Under the TRIPS framework, protection of intellectual property has both domestic and international significance.

Despite the long history of intellectual property protection, the justification for intellectual property rights has been under fierce debate for many years. Various theoretical justifications have been framed in terms of different relationships between individual recognition and social welfare promotion.² Hughes argues that intellectual property could be justified with a theoretical synthesis merging Lockean labor theory with Hegelian personality theory [3, pp. 287–366]. Drahos, however, regards intellectual property rights as “liberty-inhibiting privileges” and suggests that “talk about rights in intellectual property should be replaced by talk about privilege” [4, pp. 200, 220]. The central tension of intellectual property rights is also variously categorized. Some suggest that intellectual property internalizes a tension between rights and privileges consonant with the confrontation between the public and the private [5, p. 5]. Others perceive the tension of intellectual property as either

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¹ See discussion *supra* 1.2 “A Brief History of Intellectual Property.”

² Bentley and Sherman [1, p. 4], WIPO [2]. According to WIPO, there are two reasons to protect intellectual property rights. One is to serve as statutory recognition of creators’ moral and economic rights in their creations, as well as the public’s rights of access; the other is to promote economic and social development. Bentley and Sherman argue likewise that there are two justifications for intellectual property. The “instrumental justification” argues that it promotes social welfare and prosperity, and another justification is motivated by an ethical and moral recognition of the productive labor of creation.

a confrontation between private control over knowledge and public need for diffusion of knowledge [6, p. 29] or an inherent tension between protection and limitation.³ From an economic perspective, Maskus suggests that intellectual property law reflects a tension between “static efficiency” requiring wide user access at marginal social cost and “dynamic efficiency” requiring incentives for innovation when social value surpasses development cost.⁴

In this chapter, we will examine the underpinning theories and theoretical issues of contemporary intellectual property philosophy. In the next section, we first provide a brief account of the nature of the IPRs and the reason why IPRs have come to be strongly protected under the contemporary legal system. We then go further to examine the application of Locke and Hegel’s property theories in intellectual property philosophy and its implications. Following the critical examination of the formation and alienation of intellectual property, this chapter discusses the theoretical issues arising from the self-others/private-public dynamics in intellectual property.⁵ The view that private-public dynamics is the key issue in contemporary intellectual property philosophy is the core thread that runs throughout the whole book in the rest of this book, which leads us further to the legitimacy issue in contemporary jurisprudence.

2.1 The Nature and the Theoretical Basis of Intellectual Property Rights

2.1.1 *The Nature of Intellectual Property Rights*

2.1.1.1 IPRs as Private Rights and Negative Rights

As to the nature of the IPRs, the Preamble of the TRIPS Agreement states that WTO members recognize that “intellectual property rights are private rights.”⁶ TRIPS’ reference to “private rights” was incorporated into the agreement at the insistence of

³ *United States v. Jean Martignon*, 346 F Supp. 2d 413, 416 (District Court for the Southern District of New York 2004). At footnote 2. In response to the debate about the purpose of the Copyright Clause (*U.S. Const. art. I, § 8, cl. 8*), the court acknowledged that there is an inherent tension between protecting an author’s right to his creative work and the public’s right of access to that work. See also Shuff and Holtz [7, pp. 555, 556].

⁴ Maskus [8, p. 29]. See also Harrison and Theeuwes [9, p. 143]. It is suggested that there will always be an inherent tension in protecting intellectual property between “the right to compensation to stimulate creative people and the need of society to have wide access to creations to build and expand on them.”

⁵ By taking recognition/formation of intellectual property rights as a legal construction and alienation of intellectual property rights as legal deconstruction, the chapter reveals the social relations between self and others or between private and public that have been constructed in contemporary intellectual property philosophy. The perspective taken in this critical examination has been influenced by poststructuralists, Foucault and Derrida in particular.

⁶ 4th Recital of the Preamble, TRIPS Agreement.

the Hong Kong delegation during the TRIPS Agreement negotiations [10, footnote 11, p. 144]. Indeed, in as early as the 1989 submission to the Group of Negotiation on Goods (GATT), Hong Kong delegation suggested that emphasis should be placed on civil remedies (as distinct from criminal and administrative remedies) on the grounds that IPRs are primarily *private rights*.⁷ As to the question of the types of procedures to be provided, Hong Kong suggested:

While participants should be free to decide to protect IPRs by means of civil, criminal, or administrative procedures or a combination of these, in accordance with their national legal systems, Hong Kong considers that emphasis should rest primarily on civil procedures, as they appear the most appropriate to protect *private rights*.⁸

Undoubtedly, the Hong Kong delegation's purpose of referencing to private rights was to clarify that the enforcement of IPRs is the responsibility of private right holders rather than of governments. Moreover, this enforcement responsibility shifting effect is well reflected in the TRIPS Agreement. In *China—Intellectual Property Rights*, the WTO Panel explains well how a common feature of Sections 2, 3, and 4 of Part III of the TRIPS Agreement reflects IPRs' private right nature:

The Panel also observes that a common feature of Sections 2, 3 and 4 of Part III of the TRIPS Agreement is that the initiation of procedures under these Sections is generally the responsibility of private right holders. This is reflected in the first sentence of Article 42 and the first sentence of Article 51, the reference to an “applicant” in Article 50.3 and 50.5, the reference to “request[s]” in Articles 46 and 48.1, and the option (not obligation) to make *ex officio* action available under Article 58. Viewed in context, the phrase “shall have the authority” does not require Members to take any action in the absence of an application or request. Therefore, a condition that authority shall only be available upon application or request seems to be assumed in much of Sections 2, 3 and 4 of Part III. This is consistent with the nature of intellectual property rights as private rights, as recognized in the fourth recital of the preamble of the TRIPS Agreement. Acquisition procedures for substantive rights and civil enforcement procedures generally have to be initiated by the right holder and not *ex officio*.⁹

Recognizing IPRs as private rights not only shifts the responsibility of enforcement to private right holders from the governments but also at the same time creates a barring effect from unwanted government actions. This is because the private right nature of the IPRs sets a limit to other third parties and even public authorities from illegitimate infringements, through which reveals the negative right nature of IPRs. In its examination of the nature of exclusive right conferred under Article 16.1 in *EC—Trademarks and Geographical Indications*, the Panel suggested that it is an exclusive right that “belongs to the owner of the registered trademark alone, who may exercise

⁷Enforcement of Intellectual Property Rights, Hong Kong Submission to Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (MTN.GNG/NG11/W/54, 7 December 1989), para. 6 (p. 2). Emphasis added.

⁸*Ibid.*, para. 9 (p. 2). Emphasis added.

⁹*China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights (China—Intellectual Property Rights)*, Panel Report (WT/DS362/R, 26 January 2009), para. 7.247.

it to prevent certain uses by ‘all third parties’ not having the owner’s consent.”¹⁰ The Panel further confirmed that Article 16.1 “only provides for a *negative right* to prevent all third parties from using signs in certain circumstances.”¹¹ Therefore, the Panel suggested that “the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of *negative rights* to prevent certain acts.”¹²

Of course, this negative right feature might put IPR protection in conflict with third party interests or even public interests. When this kind of situation comes, where to draw the line of balance between the private right holders’ interests and interests of others becomes a significant issue. In *China—Intellectual Property Rights*, when China invoked the sovereign exception under Article 17 of the Berne Convention to justify its denial of copyright protection to illegal and unconstitutional publications, the Panel rejected China’s claim. The Panel suggested:

The Panel notes that copyright and government censorship address different rights and interests. Copyright protects private rights, as reflected in the fourth recital of the preamble to the TRIPS Agreement, whilst government censorship addresses public interests.¹³

The Panel’s message is quite clear that the private right nature prevails in case of collision with public interests. This indeed reflects the birth defect of the TRIPS Agreement and will be further discussed later.¹⁴ At the moment, what we should keep in mind is that the private right recognition bears fundamental significance both in theory and in practice.

2.1.1.2 The Recognition of IPRs as Private Rights

It is probably the recognition of IPRs as private rights firmly places IPRs on the ground of being strongly protected under contemporary legal systems.¹⁵ This to some extent is because private property is as vital as, if not more vital than, life and liberty. In the US Constitution, for example, private property has been given the same significance as life and liberty and is protected from unfairly compensated appropriation from the government.¹⁶ Under this constitutional framework, patent

¹⁰ *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complaint by the United States) (EC—Trademarks and Geographical Indications (US))*, Panel Report (WT/DS174/R, 15 March 2005), para. 7.602.

¹¹ *Ibid.*, footnote 558 to para. 7.611. Emphasis added.

¹² *Ibid.*, para. 7.210. Emphasis added.

¹³ *China—Intellectual Property Rights*, Panel Report, para. 7.135.

¹⁴ For TRIPS’ birth defect, see discussion *supra* 1.3, and for further discussion and comment on the Panel’s decision, see discussion *infra*, “Conclusion: Ontology, Legitimacy, and Time.”

¹⁵ See *infra* discussion 2.1.2.1 “The Significance: The Birth of the Autonomous Self.”

¹⁶ *U.S. Const. amend., V.* states that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor

rights have been long recognized as private property rights and given constitutional protection. In the case of *James v. Campbell* in 1882, the US Supreme Court asserted that:

[T]he government of the United States when it grants letters-patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.¹⁷

The concept of patent rights as inviolable private property rights, even against governmental appropriation, was again reiterated in *Hollister v. Benedict & Burnham Mfg. Co.*¹⁸ The significance of the protection of patent rights as private property was not only reaffirmed in the case of *Diamond v. Chakrabarty*, but the scope of patentability was expanded. In this case, the US Supreme Court asserted that US Congress intended patentable subject matter to include “anything under the sun that is made by man.”¹⁹

Not only patent rights but copyrights and trademark rights have also been recognized as private rights and strongly protected under the modern legal system. The clear recognition of copyrights as private property rights can be found in the so-called “sweat of the brow” doctrine and its later development in the protection of databases [4, p. 208]. The case of *Jeweler’s Circular Pub. Co. v. Keystone Pub. Co.* is an excellent illustration. In this case, the Jeweler’s Circular compiled a directory of trademarks related to the jewelry business, and Keystone came up with a similar, but longer, directory afterwards. The court awarded in favor of the Jeweler’s Circular and stated that a person who by his labor produces a “meritorious composition” acquires that material as its author and thus obtains the “exclusive right” of multiplying copies of the material no matter whether the materials show literary skill or originality.²⁰ The “sweat of the brow” doctrine, however, was rejected by the US

shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

¹⁷ *James v. Campbell*, 104 U.S. 356, 357–8 (1882).

¹⁸ *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U.S. 59, 67 (1885). The Supreme Court stated that:

[T]he right of the patentee, under letters patent for an invention granted by the United States, was exclusive of the government of the United States as well as of all others, and stood on the footing of all other property, the right to which was secured, as against the government, by the constitutional guaranty which prohibits the taking of private property for public use without compensation.

¹⁹ *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

²⁰ *Jeweler’s Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83, 88 (2d Cir. 1922). The court stated that:

The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials ... show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work.

Supreme Court in *Feist Publications Inc.* which denied copyright to a white pages directory.²¹ Something that should be borne in mind however is that the Supreme Court reversed the “sweat of the brow” doctrine not because of any doubt about the exclusive private right nature of copyrights but rather because “originality” is necessary for something to be protected under copyright law.²² The Canadian Supreme Court too in recent cases denied the “sweat of the brow” doctrine on the same grounds that originality is required for something to be protected under copyright law.²³ The exclusive private rights nature of copyrights is also evident in the protection of “original” works of compilation. In *Key Publication Inc.*, a post-*Feist* case, the Court of Appeals for the 2nd Circuit asserted the copyrightability of a compilation of directories when a collection of preexisting data involves a particular arrangement and selection; this apparently results in an original work.²⁴ Similarly, the protection of databases in the EU under the “*sui generis* rights” doctrine under copyright law is also a good illustration of the private right protection given to copyrights [11, p. 178]. Indeed, this doctrine has been characterized as a “reinvention” of the “sweat of the brow” doctrine [4, p. 208].

Trademark rights too are recognized as private rights whose significance has been given constitutional protection. In *San Francisco Arts & Athletics* case, trademarks were clearly recognized as private property.²⁵ In this case, the Ninth Circuit Court affirmed the district court’s order of permanent injunction and stated that “the word ‘Olympic’ and its associated symbols and slogans are essentially property.”²⁶ This was further supported by the Supreme Court. According to the Supreme Court, the USOC through “its own efforts” has distinguished the word “Olympic” and made the word its own distinctive “goods in commerce” under US trademark law.²⁷ The Supreme Court also stated that public access or use of a word like “Olympic” must be balanced against a limited “property right” acquired by an entity for a word when the word acquires value “as the result of organization and the expenditure of labor, skill, and money” by the entity concerned.²⁸

²¹ *Feist Publications, Inc v. Rural Telephone Service Co Inc*, 111 S. Ct. 1282 (1991).

²² *Ibid.*, at 1291–1292. The *Feist* case however stated clearly that a factual compilation is copyrightable as long as it “features an original selection or arrangement of facts.” *Ibid.*, at 1290.

²³ *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004], 1 S.C.R. 339, 2004 SCC 13, para. 15; *Euro-Excellence Inc. v. Kraft Canada Inc.* [2007], 3 S.C.R. 20, 2007 SCC 37, para. 78.

²⁴ *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc. et. al.*, 945 F.2d 509, 512–514 (1991). For pre-*Feist* databases protection, see *West Publishing Company v. Mead Data Central, Inc.*, 799 F.2d 1219, 1227–1228 (8th Cir. 1986). The court asserted that, as the compiler’s arrangement and expression, West’s comprehensive pagination when linked to the compiled text is copyrightable.

²⁵ *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987). See *infra* discussion 3.3.1 for more details.

²⁶ *International Olympic Comm. v. San Francisco Arts & Athletics, Inc.*, 781 F.2d 733 (9th Cir. 1986), at 737.

²⁷ *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, at 534–535.

²⁸ *Ibid.*, at 532. This might imply that the ownership of private property sets some sort of limit on freedom of speech. You are free to express your ideas but cannot use other people’s “private

From the above brief introduction of how intellectual property rights have come to be strongly protected as private rights, we can clearly see that the contemporary intellectual property regime grounds itself firmly on traditional property right theory. In *CCH Canadian Ltd.*, for example, the Supreme Court of Canada directly built its discussion of the “sweat of the brow” doctrine on Lockean theory of “just desserts,” and at the same time its emphasis of originality signaled an implicit shift towards Hegel’s property theory.²⁹ Not surprisingly among theoretical debates, Locke and Hegel’s works have also created the most dominant discourses of justification for intellectual property. In the next section, this book will start its examination of the philosophy of intellectual property with a critical examination of Lockean and Hegelian theories of private property.³⁰

2.1.2 IPRs’ Theoretical Basis: The Significance and Limit of Property Rights

2.1.2.1 The Significance: The Birth of the Autonomous Self

Locke starts his analysis of property from a “positive community.”³¹ For Locke, “the earth and all inferior creatures” are given by God to “mankind in common.”³² What Locke needs then is a tool to enable individuals to distinguish something from the common into his/her own without obtaining the consent of the others. For Locke, this is “labor.” Locke states:

Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature has placed it in, it has by this labor something annexed to it that excludes the common right of other men. [14, sect. 27]

Starting from a commons which belongs to all, labor makes all the difference. It is labor that differentiates something from the commons and excludes the common rights of others and therefore transforms it into private property. The Lockean story of property is a labor-oriented theory.

property” such as the word “Olympic” to do so. See also Aoki [12].

²⁹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, at para. 15.

³⁰ See Hughes [3]. Hughes examines the justifications of intellectual property based on an analysis of Lockean “labor theory” and Hegelian “personality theory.” See also Balganes [13, p. 45]. Balganesh claims that “The most commonly advocated philosophical justifications for intellectual property are the Lockean labor theory and the Hegelian personality theory.” However, Drahos examines the contemporary theory of intellectual property beginning with interpretations of Locke, Hegel, and Marx’s writings on property. See Drahos [4, p. 1].

³¹ “Positive community,” according to Drahos, “is defined in terms of a commons [sic] which belongs to all.” Drahos [4, p. 46].

³² Locke [14, sections 25, 27]. The references are to the numbered sections of Locke’s text.

In contrast to Locke's labor-oriented theory of property, Hegel's is a free will-oriented property theory. He starts from "negative community" instead of positive community.³³ He begins analysis with an absolute, infinite free will. For Hegel, "the basis of right is, in general, mind; its precise place and point of origin is the will."³⁴ But the will is wholly abstract, undetermined, and infinite and thus needs something external, "pure, and simple...something not free, not personal, without rights" to render it objective. In this regard, Hegel's theory of property is a story of "I own, therefore I am."

... A person must translate his freedom into an external sphere in order to exist as Idea.... this sphere distinct from the person, the sphere capable of embodying the freedom, is likewise determined as what is immediately different and separable from him.³⁵

I as free will am an object to myself in what I possess and thereby also for the first time am an actual will, and this is the aspect which constitutes the category of *property*, the true and right factor in possession. [15, para. 45]

Property for Hegel then is "the first embodiment of freedom." Instead of labor, free will makes all the difference. Although for Hegel "occupancy"—possibly analogous to Locke's "labor"—is necessary to ensure the embodiment of "free will" in a thing to make it "my property," it is free will that is ultimately most important.³⁶

While Locke's property theory is labor oriented, Hegel's is a free will oriented property theory. However, the difference in approach does not prevent them from sharing points of view on the significance of private property. Specifically, they share with each other views on the significance and limit of private property rights. Both Lockean and Hegelian theories of property are stories of the birth of an autonomous self. Instead of "I think, therefore I am," both Locke and Hegel imply "I own, therefore I am" [16, p. 36]. For Locke, the rights to private property are the foundation of his analysis of the governance framework and the thesis of separation of powers. Property is also the starting point and foundation of Hegel's analysis of the *Philosophy of Right*. For Hegel, property is "the embodiment of personality," and a person can only "exist as Idea" through "translat[ing] his freedom into an external sphere" [15, paras. 51, 41].

Furthermore, for both Locke and Hegel property rights come from a separation: a breakup or dissolution of the relationship between the self and others. This separation depends on a limit or a boundary—for Locke this is labor and for Hegel the infinite, abstract, free will—demarcating the self from others. The separation of the self from others went through different routes but reached the same ends for Locke

³³According to Drahos, "negative community is defined in terms of a commons belonging to no one, parts of which may be appropriated." Drahos [4, p. 46].

³⁴Hegel [15, para. 4]. The references are to the numbered paragraphs of Hegel's text.

³⁵Hegel [15, para. 41]. In the addition of para. 41, Hegel argues that "The rationale of property is to be found not in the satisfaction of needs but in the supersession of the pure subjectivity of personality. In his property a person exists for the first time as reason."

³⁶Hegel [15, at the addition to para. 50]. Hegel argues "[That t]he first person to take possession of a thing should also be its owner is an inference from what has been said. The first is the rightful owner, however, not because he is the first but because he is a free will, for it is only by another's succeeding him that he becomes the first."

and Hegel. For Locke, it is labor that “in the beginning” removed something from the common and made it private property. Thus, labor here then is a boundary between the self and others, between private and common. In this very beginning—the founding moment—labor, which is the self, something not common, was injected into the common. The injection of labor not only changes part of the common into private domain and extracts or detaches a part from a whole but also separates the self from others and causes the dissolution of the relationship between the private from the public. This injection produces something that the *self* can defend against *others*—a limit of the *self* that excludes *others* and is a basis for rights. In this regard, property rights and rights in general all come from a separation and dissolution of the relationship between the self and others.

Hegel’s theory of property travels along much the same theoretical route to sketch the formation of private property. Hegel also grounds his framework of private property on a private, unique, fingerprint-like element: “abstract, infinite, free will.” However, instead of starting with an idea of a “common,” Hegel starts with *res nullius*, something that belongs to no one. “Will” for Hegel serves exactly the same function as does Locke’s “labor.” The “will” is also a limit delimiting the *self* from *others*, an instrument separating something from *res nullius* and giving rise to a *right*, something independent from any other entity’s consent. The formation of property for Hegel is also a separating injection, a process that separates the self from the others.

This separation of the self from others through acquisition of private property has two intertwined theoretical implications for our examination, which travel far beyond this current study and penetrate contemporary jurisprudence. On the one hand, upon the separation of the self from others, the self gains its true autonomy and makes possible the defense of singularity, which protects the self from being subsumed and consumed by the collective, the common.³⁷ This separation thus challenges and prevents the collective from becoming an authoritative totality that limits and erases the individuality and autonomy of the self.³⁸ It is also this separation that makes possible the independence of individuals from the family’s paternalistic power as well as makes possible the development “from status to contract” of modern law [17, p. 100]. On the other hand, this separation of the self from others raises the possibility of self-alienation. As the self gains its true independence, the self becomes self-sufficient and alienated from others. When this property perspective is applied to intellectual property, creations and innovations are then viewed as highly individual intellectual endeavors, from which arises the flawed ontology of contemporary intellectual property philosophy.³⁹

³⁷As for *singularity* (the oneness) as opposed to totality, we mean the property of an individual as being independent and enjoying the right of being different.

³⁸For *totality* (the wholeness) as opposed to singularity, we mean the modification of a collective that clears out every difference or oneness of individuals through internalized totalizing power to set up an oppressive whole. For the jurisprudential significance of the defense of the singularity against the totality, see *infra* discussion 2.3.3 “Constant Deconstruction as Justice.”

³⁹See *infra* further discussion 5.2.2 “The Self-Sufficient Ontological Myth of Intellectual Property Philosophy.”

As the separation has significant implications for defending the singularity against totality and facilitating the social movement “from status to contract,” the association of private property with the separation of the self from others justifies the inviolability of private property. Thus, both Lockean and Hegelian theses indicate that private property rights that separate the self from the public are at the heart of our society. This belief is well attested in our social institutions. Bentham argues, for example, that “[p]roperty and law are born together, and die together” [18, p. 113]. In his examination of the evolution of social institutions, F. A. Hayek emphasizes the importance of “several property”—which Hayek uses to mean individual property—by insisting that “several property is the heart of the morals of any advanced civilization, the prior development of several property is indispensable for the development of trading, [and] the adoption of several property marks the beginning of civilization.”⁴⁰ Not only are rights to private property essential to the evolution of social institutions, but rights to private property also serve as the foundation of individual freedoms. Hayek argues that “freedom of individual decision is made possible by delimiting distinct individual rights, such as the rights of property.” Private property is thus argued to be the precondition of the development of liberal, democratic social political institutions [16].

2.1.2.2 The Limit: The Needs of Others and the Needs of Deconstruction

However, one thing that should not be forgotten (but has been) is that, however important they might be, private property rights should have their own limit. Both Lockean and Hegelian theses implicitly or explicitly imply limitations on owning private property. Locke, for example, sets a clear limit on private property rights:

The same law of nature that does by this means give us property does also bound that property, too. ... (God has given us all things) [a]s much as any one can make use of to any advantage of life before it spoils, so much he may by this labor fix a property in; whatever is beyond this is more than his share and belongs to others. [14, sect. 31]

This clearly indicates Locke’s limit on property rights, which sets the measure of property nature by the extent of people’s labor and the convenience of their life. So anyone can claim land, gather fruit, or hunt animals as their private property for their convenience of life. However, if people allow their private properties to perish without due use, e.g., the fruits they picked rotted before they could use them, then this is punishable. Locke calls this the “common law of nature” [14, sect. 37]. Most importantly, any property beyond this limit belongs to others, which means that the limit of private property rights comes from the needs of others.

For Hegel, the modifications of property are determined in the course of the free will’s relation to the thing from *taking possession*, to *use*, then to *alienation*, upon which the free will that was put into external thing is “back from the thing into

⁴⁰ Hayek [19, pp. 30–31, 34]. “Several property” is a word Hayek borrowed from Henry Maine to described private property.

itself” [15, *para.* 53]. While acquisition is positive and use is negative, alienation is a negation of the negative, which demonstrates the final and infinite judgment and authority of the free will on property. This is true inasmuch as only an infinite judgment or authority of the free will has over the property will give the self the right to alienate it. Moreover, only through the alienation of property can the will become truly free, as the self does not depend on the property any more. Therefore, the modifications of property set a limit, though in a different sense, on private property rights. To truly own a thing as property is to alienate it. As Hegel insists, it is the “prerogative and the principle of the organic” that the property we take possession of must be destroyed or alienated in order to preserve the self.⁴¹ More importantly, Hegel indicates that private property also has “a bearing on the anticipated relation to others” [15, *para.* 51]. While taking possession separates property from others, alienation returns property to others. This Hegelian modification of property in relation to others to some extent endorses the Lockean implicit limitation of private property rights from the needs of others.

The TRIPS Agreement to some extent confirms this reading of the limitations of private rights. First of all, TRIPS’ philosophy is to achieve a balance between rights and obligations in IPR protection. TRIPS Agreement states its objective clearly that:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a *balance of rights and obligations*.⁴²

For this purpose of balancing rights and obligations, TRIPS Agreement allows members to adopt measures “necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development” and measures to prevent right holders’ IPR abuse or anticompetition practices, as long as these measures are TRIPS consistent.⁴³

Furthermore, for the purpose of the balance of rights and obligations, TRIPS provides exceptions to the exclusive rights conferred by a copyright, trademark, industrial design, or patent, respectively. To balance the exclusive rights conferred by a patent to the rights owner, for example, the TRIPS Agreement states:

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.⁴⁴

According to the Panel in *Canada—Pharmaceutical Patents*, this patent exception clause of Article 30 of the TRIPS Agreement “was obviously based on the

⁴¹ Hegel [15, at the addition of *para.* 59]. See also *infra* discussion 2.3.1 “Alienation as Violence: the Second Violence.”

⁴² Article 7, TRIPS Agreement. Emphasis added.

⁴³ Articles 8(1) and 8(2), TRIPS Agreement.

⁴⁴ Article 30, TRIPS Agreement.

text of the Article 9(2) of the Berne Convention.”⁴⁵ The Panel further suggested that Berne Article 9(2) “also served as the model for three other exceptions clauses in the TRIPS Agreement—Articles 13, 17 and 26.2, providing respectively for similar exceptions from obligations on copyright, trademarks and industrial designs.”⁴⁶ Under Berne Convention, authors of literary and artistic works enjoy the “exclusive right of authorizing the reproduction of these works, in any manner or form.”⁴⁷ This exclusive right, however, is subject to certain exceptions. According to the Berne Convention:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.⁴⁸

While Article 13 of the TRIPS Agreement was closely modeled after the Berne copyright exception clause to the extent of being almost identical, Articles 17, 26.2, and 30 made minor change to bring in the concerns of legitimate interests of third parties. TRIPS’ Patent exception clause, for example, states that WTO members’ provision of patent exceptions should “tak[e] account of the legitimate interests of third parties.”⁴⁹ According to a WTO Panel, in the context of trademark exceptions, the relevant third parties include consumers.⁵⁰ Although recognizes IPRs as private rights, TRIPS’ philosophy balancing rights and obligations and emphasis of IPR protection for public interests and legitimate interests of third parties does confirm the intrinsic limitation of property rights as shown in both Lockean and Hegelian property theories.

However, two aspects in the application of traditional property theory to an intellectual property regime pose problems: the physical limitation of tangible property and needs of others as the limit of private property rights. This does not mean, however, that contemporary intellectual property laws do not acknowledge limits. Many forms of intellectual property law do recognize limitations, e.g., fair use and duration in copyrights and compulsory licensing in patent rights. However, as intellectual property can be duplicated infinitely and reach every corner of the

⁴⁵ *Canada—Patent Protection of Pharmaceutical Products (Canada—Pharmaceutical Patents)*, Panel Report (WT/DS114/R, 17 Mark 2000), para. 7.71.

⁴⁶ *Ibid.*, footnote 420 to para. 7.71.

⁴⁷ Article 9(1), Berne Convention.

⁴⁸ Article 9(2), Berne Convention.

⁴⁹ Article 30, TRIPS Agreement, as cited in text attached to footnote 44 above.

⁵⁰ *EC—Trademarks and Geographical Indications (US)*, Panel Report, para. 7.676. This indeed is the only jurisprudence in relation to the interpretation of the “third parties” in the context of IPR exceptions so far. The Panel stated (emphasis added):

The parties to this dispute agree that “third parties” for the purposes of Article 17 include consumers. The function of a trademark is to distinguish goods and services of undertakings in the course of trade. That function is served not only for the owner, but also for consumers. Accordingly, the relevant third parties include *consumers*. Consumers have a legitimate interest in being able to distinguish the goods and services of one undertaking from those of another, and to avoid confusion.

world, contemporary philosophy provides almost no limit for private intellectual property rights. Neither is the complete alienation of intellectual property necessary, as the contemporary licensing system allows right owners to retain control while they are realizing their creations through the use of others. Therefore, the implicit limitation of private property from the needs of others is not well reflected in intellectual property law. The trademark protection of USOC’s exclusive right of the word “Olympic,” for example, does not leave room for the needs of others in terms of freedom of speech. Copyright protection of the “sweat of the brow” and originality of compilation to some extent make copyright into a “private tax on basic information exchanges” [4, p. 208].

More importantly, the possibility of self-alienation arising from the separation of the self from others in property acquisition *does* transfer into the domain of intellectual property when we apply traditional property theory. The autonomous yet self-isolated character of private rights contributes to the self-alienation tendency of the legal voluntarism in the contractual legitimacy theory.⁵¹ More importantly, once private rights become self-sufficient, there arises a challenge to the self-realization of others through acquisition of private rights. This further reveals to us the private versus public contention inherent to intellectual property rights. In the next section, this book will discuss relevant problematic intellectual property philosophy in detail, from the formation and the alienation of intellectual property rights to the problem of intellectual property philosophy in reality.

2.2 Formation of Intellectual Property: The Circular “Founding Violence”

2.2.1 *Historical Construction: From Privileges to Rights*

It is worth mentioning again that, from a historical perspective, intellectual property rights used to be grants of privilege by the sovereign [20, pp. 468, 476]. The development of intellectual property rights as private rights has been a process of social construction, turning “creations of the mind” from granted privileges into private rights. Up until the early seventeenth century, patents and copyrights “were awarded by the state (or Monarch) as privileges or indulgences based on individual grants” [20, p. 479]. At the international level, even until the second half of the nineteenth century, there was still a “tension between free trade and its limitation represented by intellectual property,” but later on it was marked by “the full development of the discourse justifying IPRs as an acceptable and legitimate form of monopoly,” which was embodied in TRIPS much later [20, p. 483]. What is central in the TRIPS Agreement is “fictionalization,” which provides a powerful construction of a

⁵¹ See *infra* discussions 5.3 “The Self-Sufficient Legitimacy Deficit of Modern Law” and 5.4 “Critique Through ‘Selective Adaptation’ and a New Theory of Legitimacy.”

“metaphorical link between property in knowledge and the legal mechanisms that have been developed to protect material property rights” [21, p. 18]. The justifications of intellectual property are not outside of time, nor “transhistorical” [21, p. 41]. Rather, it is a historical construction process.

This construction is a process in the disadvantaging of others, the public. Drahos makes it clear that from a historical point of view, “[i]ntellectual property rights are a distinctive form of privilege that rely on the *creation* of a common disadvantage” [4, p. 213. His emphasis]. According to Drahos, trademarks in traditional common law are meant to indicate information of origin, serving “consumer and public interests,” as trademarks’ commercial existence depend on the investment of “meaning and recognition” from consumers in the market [4, pp. 204–205]. However, the influence of proprietarianism has gradually made the protection of the interests of traders the dominant purpose of trademark law, and “statutory privilege now comes to serve private interests and private use” [4, p. 206]. The protection of copyrights and patent rights has gone through a similar process [4, pp. 206–210]. The continual process of reference of trademarks, copyrights, and patent rights to the “aggregated term of rights” is a process of relocation of intellectual property rights “in the language of private property [that] has obscured their origins in public privilege” [4, p. 213].

Therefore, the historical development process of how intellectual property has come to be protected as private rights is a gradual construction process through which independently granted privileges became legal rights, and the “creations of the mind” became intellectual property.⁵² Intellectual property rights are created, as opposed to being natural rights. In *White-Smith Music Publishing Co.*, Justice Holmes pointed out that copyright property is different from the traditional notion of property and is a right that “hardly can be conceived except as a product of statute, as the authorities now agree.”⁵³ Justice Frankfurter endorses this reading. In *Commissioner v. Wodehouse*, Justice Frankfurter argues that the “illumination of the intrinsic and legal nature of property rights in a copyright” is “scant.”⁵⁴ Therefore,

⁵² Mainly see Sell and May, article “Moments in Law” and book *Intellectual Property Rights: A Critical History*. See also Khor [22]. Khor argues that intellectual property rights are not natural rights but rather granted privileges as rewards for inventions.

⁵³ *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1, 19 (1908). Justice Holmes argues that:

The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is in vacuo, so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time...

⁵⁴ *Commissioner of Internal Revenue v. Wodehouse*, 337 U.S. 369, 419 (1948). Dissenting opinion of Mr. Justice Frankfurter (joined by Mr. Justice Murphy and Mr. Justice Jackson).

the making of “creations of the mind” into private property is a historical construction, “as the authorities now agree.”⁵⁵

The historical construction of intellectual property as private rights is an inescapable social construction, which at its heart is an attempt of replacing subjectivity with transcendental objectivity. Recall that according to the present analysis of Lockean and Hegelian theories of property, private property was realized through objectification of the self—subjectivity—into an external object. Abstract and subjective will is injected into an objective thing through the demarcation of private property. Thus, in the formation of private property, the objective object, outside of the subject—the self, the will—becomes the source of subjectivity and even hides the subjectivity of private property. The formation of private property then is a process of replacing subjectivity with objectivity, and private rights thus become objective and transcendental. Replacing “transcendental subjectivity with transcendental objectivity,” as Gary Peller argues, is a socially constructed process, and no private intent or consent—in our case, private intellectual property rights—can escape its socially constructed nature [23, pp. 1221–1222, 1273]. Furthermore, the historical construction from privileges to rights, and replacing subjectivity with transcendental objectivity, is an ontological pursuit of immortal totality.⁵⁶ Therefore, the move from privileges to rights—replacing subjectivity with transcendental objectivity—is a social construction process.

2.2.2 *The Circular Construction of Intellectual Property Rights*

What kind of construction, then, makes “creations of the mind” a type of private property? If we look at this issue and assume that the formation of the private property is the realization of the autonomous self and its separation from the public, we find immediately a circularity in construing “creations of the mind” as private property. Since the mind *is* the self, making an idea or knowledge private property is to ground the realization of the self on the self: a circular construction.

In *Philosophy of Right*, Hegel does talk about something we call “intellectual property” nowadays: the “product of mind.” In his discussion of property alienation, Hegel argues that something alienable must be a thing “external by nature” to “me.” Therefore, goods or “substantive characteristics” that constitute one’s “own private personality and the universal essence of” one’s “self-consciousness are inalienable and my right to them is imprescriptible.”⁵⁷ Thus, Hegel states, it is “in perplexity” in

⁵⁵ See *infra* discussion 2.2.2 about Cohen’s thesis.

⁵⁶ For further analysis, see *infra* discussion 5.2.3 “Author Function and the Enlightenment’s Obsession with Origin.”

⁵⁷ Hegel [15, paras. 65, 66]. He goes on to give examples of things inalienable, such as intelligence, rationality, morality, ethical life, and religion. Only slavery or serfdom would alienate those personalities. Those personalities are themselves free mind rather than something owned by free

law whether certain “attainments” like “mental aptitudes, erudition, artistic skill, even things ecclesiastical, and inventions” are “things”; also in confusion is whether the artist, scholar, or inventor “from the legal point of view [is] in possession of his art, erudition, ability to preach a sermon, sing a mass, &c” [15, *para.* 43, remarks]. For Hegel, these sorts of attainments—we might call them “creations of the mind” nowadays—need to be expressed into an external embodiment before they can be owned as property and be alienated as things. Hegel clearly states:

Attainments, eruditions, talents, and so forth, are, of course, owned by free mind and are *something internal and not external* to it, but even so, by expressing them it may *embody them in something external* and alienate them, and in this way they are put into the category of “things.” [15, *para.* 43, remarks. Emphasis mine]

Therefore, it is clear that, for Hegel, some personal traits can be separated from the self and others cannot. What is also clear is that those personal “attainments” that can be separated from the self only become property and alienable once they are “expressed” into an external embodiment; otherwise, they are neither property nor even “things.” Misreading or confusion occurs if we take “creations of the mind” to be property before they have been “expressed” into an external embodiment. Here comes the circular construction of the contemporary conception of intellectual property: when “creations of the mind” become private property on which self-realization depends, the self depends on the self instead of something external for self-realization.

Some realist critiques go even further to argue that property rights in general are a circular social construction: we protect private property because it is a private right owned by the owner, but at the same time it is our protection that makes the person the owner of the private right. The circular nature of rights philosophy was discussed by F. Cohen in his essay *Transcendental Nonsense*. In his examination of legal protection of trade names, Cohen argues that there is a “vicious circle” inherent in the legal reasoning around this question. He states that:

[O]ne who induces “consumer responsiveness to a particular name” through advertisements creates “a thing of value; a thing of value is property; the creator of property is entitled to protection against third parties... The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected.” [24, p. 815]

Singer has a similar view that all property is produced by a public regulatory system, and the boundary between public and private is a problem of “whose interests market regulations should protect, and what distribution of power the rules in force should foster” [25, pp. 465, 482]. Therefore the value of a property depends on how much the regulatory system wants to protect, or how much “as the authorities

mind. Once these personalities are taken away, mind is no longer free, and self is not self either. This becomes clear in Hegel’s discussion against suicide. The right to commit suicide is self-contradictory for Hegel, since “I, as this individual, am not master of my life, because life, as the comprehensive sum of my activity, is nothing external to personality, which itself is the immediate personality.” Hegel [15, at addition of *para.* 70].

now agree.”⁵⁸ Cohen thus argues that “the hypostatization of ‘property rights’ conceals the circularity of legal reasoning” [24, p. 817]. Tracing this to its root, we can find a similar circular logic in positivist legal theory, which argues that we obey law because what we obey is law—orders from the sovereign—regardless of the fact that what makes something sovereign is the fact that we obey it; there is no *prima facie* notion of sovereignty itself. Laws thus become something “out there” and rights become something static, or owned by someone. What was traditionally claimed to be the tension of law between the fact that we obey the law and the legitimacy of the law we obey—Habermasian tension “between facts and norms”—is concealed [26]. Fact is the norm and the norm is derived from fact—thus closing a perfectly circular argument.

As it is a circular construction, it explains itself; law therefore becomes a seamless system and gains its integrity upon its detachment from social relation. Thus, transcendental property theory becomes self-sufficient and systematic.⁵⁹ By making “creations of the mind” private property, the self achieves self-realization through itself, and intellectual property is then justified by nothing but itself. In making “creations of the mind” into a type of private property, we then find a force that both establishes and justifies itself: a “founding violence.”⁶⁰

2.2.3 The Injection of the “Founding Violence”

What happened, then, in the very beginning which allowed the circular construction of intellectual property rights or property rights in general? It is worth bearing in mind that the reason Locke sets up the labor-oriented property theory to defend the birth of the autonomous self is to build up his social contract theory to explain governmental legitimacy.⁶¹ To examine the circular construction of intellectual property

⁵⁸ See *supra* 2.2.1, discussion of Justice Holmes’ opinion in *White-Smith Music Publishing Co.*

⁵⁹ There are some counterarguments against Cohen’s thesis however. See, for example, Waldron [27, p. 16]. Waldron offers a critique of Cohen’s thesis. He argues that technical legal vocabulary is not just “word-jugglery,” rather something that functions to integrate legal concepts and doctrines together and sustains the *systematicity* of law. However, this actually is not a valid critique as it fails to capture Cohen’s real thesis. To my understanding, Cohen will never deny that law gains its systematicity through the mediation of technical legal concepts. Rather, it is this systematicity that makes law self-sufficient and lifts law out of social relations that is the real target of Cohen’s functional approach.

⁶⁰ “Founding violence” is a Derridean concept, which means a force to establish a regime that cannot be justified by any other laws but itself. See *infra* 5.3.1 for a discussion of Founding Violence’s mechanism of repetition.

⁶¹ Locke [14, sect. 34] onwards. In this treatise, Locke discusses the legitimacy and limit of government, in which property is the key that separates people from the state of nature and also sets the limit of government power. But Lockean social contract is an agreement between the sovereign and the people, which is different from Hobbes or Rousseau’s thesis. See also discussions below regarding the merits and limits of the contractual legitimacy theory at 5.4.1 and 5.4.2 where the

rights, it might be helpful if we trace the issue further, down to the original legal construction: Rousseauian social contract theory.

For Rousseau, we as free individuals are looking for a collective association under which each individual, “while uniting himself with the others, obeys no one but himself, and remains as free as before” [28, p. 60]. The solution he found is a social contract, a paradoxical imagination. For example, in his discussion of legislation, Rousseau argues that the legislator of a constitution must be someone who understands human passions “without feeling any of them,” someone who has no affinity with human nature yet knows it very well, and someone who is concerned about our happiness yet whose happiness is independent of ours [28, p. 84]. Rousseau notices these contradictory problems and worries that ordinary people might not understand the language of these legislators. To solve this problem, Rousseau argues:

For a newly formed people to understand wise principles of politics and to follow the basic rules of statecraft, the effect would have to become the cause; the social spirit which must be the product of social institutions would have to preside over the setting up of those institutions; men would have to have already become before the advent of law that which they become as a result of law. [28, p. 86–87]

This exactly shows the circular construction of the social contract theory. In this social contract, people are both the subject of law and object of law. Modern law thus is founded on itself, since people are both the source and the destination of law. Law is valid because of itself, and we command ourselves in the same way that self-realization depends on the self in the circular construction of intellectual property rights. Since law is founded on itself without resorting to any other justification, this is a force that founds itself without any justification, a violent force. Since it happens at the very beginning of the formation of law or formation of intellectual property rights, it is a Derridean *founding violence*.

Derrida’s analysis of founding violence starts with a deconstruction of the relation between the force of law and violence. He argues that law was founded in the very moment when justice and force were put together to “make sure that what is just be strong, or what is strong be just” [29, p. 11]. Derrida insists that this very moment produces a “mystical foundation of the authority of laws,” and force is indispensable to the formation of law.⁶² The force that is inscribed into law at the very founding moment, serving as the “origin of authority, the foundation or ground, and the position of the law,” is a violence grounded on nothing else but itself. Since there is no law before that moment that could legitimize or illegitimize the founding force, it is neither legal nor illegal; the force belongs to non-law but defines

dissertation reveals how the circular and paradoxical Rousseauian social contract theory creates the legitimacy deficit problem of modern law.

⁶²Derrida [29, pp. 12–14]. Derrida argues that there exists an original sin of law in this very moment of formation, a moment when law was neither legal nor illegal and exceeded “the opposition between founded and unfounded.”

the law.⁶³ In this regard, the force is the limit of the legal system, the founding violence and original sin of the law. Similarly, what happens in the very beginning of the formation of intellectual property rights or property rights in general is the injection of a founding violence. The historical construction of intellectual property from privileges to rights is the exercise of this founding violence of law.

2.3 Alienation of Intellectual Property: The Violence Against Founding Violence

If construing “creations of the mind” as intellectual property inevitably injects a founding violence into that property, is justice still possible? What does alienation mean to the founding circular construction? For example, if making the word “Olympic” a trademark also affects people’s freedom of speech and if copyrighting a white pages directory limits people’s use of the related information, then how should a legal system resolve this conflict? Here we are at the heart of intellectual property philosophy confronted with the puzzle of justice. In this section, we will examine the theoretical implications of the alienation of intellectual property and discuss how alienation as a force against the founding violence allows for the possibility of justice.

2.3.1 *Alienation as Violence: The Second Violence*

The analysis above of the injection of the founding violence during the formation of intellectual property indicates that immediately after their formation, the intellectual property rights are restless and the founding violence remains. The isolated self is craving to return to the social, and intellectual property is longing for alienation, through which rights can get back to their context. Locke does not really deal with the alienation of property, though he is aware of the limit of private rights from the needs of others.⁶⁴ In this regard, Lockean theory of property is an incomplete story.⁶⁵ However, in Hegel’s depiction of a dynamic unity of property from *possession*, to *use*, to *alienation*, alienation is central to his theoretical framework of property.

⁶³ The characteristic of the force being neither legal nor illegal, and being something non-law but that defines law, makes the force self-evident—a force that cannot be proved nor disapproved—which leads further to the self-sufficient legitimacy deficit. See *infra* discussions for more detail, 5.2.2 on the self-sufficiency ontological myth of intellectual property, and 5.3.3 on modern law’s self-sufficient legitimacy deficit.

⁶⁴ See *supra* discussion 2.1.2.2.

⁶⁵ Hughes [3, p. 329]. He argues that “a labor theory of intellectual property is powerful, but incomplete,” and that the Hegelian personal expression thesis is an ideal support for that incompleteness.

Alienation is a vital stage in Hegel's theory of property. Firstly, alienation is the path to true possession of property and real expression of the self, the free will. For Hegel, alienation as "an expression of my will" is "seen to be a true mode of taking possession" [15, addition of *para.* 65]. Hegel argues that "to take possession of the thing directly is the first moment in property. Use is likewise a way of acquiring property. The third moment then is the unity of these two, taking possession of the thing by alienating it."⁶⁶ In this regard, only alienation shows that we are the true owner of the property and demonstrates that we are using it. Mere possession without alienation means that we are used by the property rather than using it.

Secondly, alienation brings the property back to the social relation that was cut off in the very founding moment of the property. Remember that at the very founding moment, labor or free will delimited and separated a thing from others to create the private property for the defense of the autonomous self. For Hegel, through alienation not only does the alienator realize his/her identity, but the alienee will also achieve the reification and objectivization of his/her abstract free will via the acquisition of the alienated property. Only through alienation are property rights brought into social existence. Hegel argues:

A person by distinguishing himself from himself relates himself to another person, and it is *only as owners that these two persons really exist for each other*. Their implicit identity is realized through the transference of property from one to the other in conformity with a common will and without detriment to the rights of either. [15, *para.* 40. Emphasis mine]

Hegel's analysis of alienation brings our attention to something central to property rights: property rights exist only through alienation. The acquisition of a *res nullius* or something part of a commons did not create property rights for Robinson Crusoe when he lived alone on an isolated island, because his "rights" did not exist in relations, and no alienation occurred. This indicates that, on the one hand, realization of the property rights of an owner—the alienator—needs the engagement of alienees; on the other hand, objectivization of the free will of an alienee depends on the full alienation of the property. A complete story of property is a story of the relationship between owners and buyers. Traditional rights philosophy, by focusing right owners and suggesting self-sufficiency of property rights, covers up and suppresses the second half of the story.

When it comes to alienation of intellectual property, what he calls the "product of mind," Hegel is very cautious and even suspicious of it. In general, Hegel advocates the dissemination of science and knowledge rather than protection of private ownership. He argues that the "purpose of a product of mind" is for people other than the author to learn to understand it and make it a possession of their own knowledge.⁶⁷ To "guarantee scientists and artists against theft and to enable them to

⁶⁶Hegel [15, at addition of *para.* 65]. Hegel explains that "Taking possession is *positive* acquisition. Use is the *negation* of a thing's particular characteristics. Alienation is the synthesis of positive and negative; it is negative in that it involves spurning the thing altogether; it is positive because it is only a thing completely mine which I can so spurn."

⁶⁷Hegel [15, *para.* 69, remarks]. Hegel states:

The purpose of a product of mind is that people other than its author should understand it and make it the possession of their ideas, memory, thinking, etc. Their mode of expression,

benefit from the protection of their property” is the “primary” but “purely negative” “means of advancing the science and arts” [15, para. 69, remarks]. Starting from here, Hegel reaches a very important conclusion about alienation of intellectual property and its copies:

What is peculiarly mine in a product of my mind may, owing to the method whereby it is expressed, turn at once into something external like a “thing” which *eo ipso* may then be produced by other people. The result is that by taking possession of a thing of this kind, its new owner may make his own the thoughts communicated in it or the mechanical invention which in contains, and it is ability to do this which sometime (i.e. in the case of books) constitutes the value of these things and the only purpose of possessing them. But besides this, the new owner at the same time comes into possession of the universal methods of so expressing himself and producing numerous other things of the same sort. [15, para. 68]

What we buy from the author or publisher is the embodiment of an expressed “creations of the mind”—a capital asset, rather than the way of expression, the “creations of the mind,” which for Hegel remains personal and is never alienable.⁶⁸ However, by selling a copy of a product of mind, the author may still retain the authorship, using the product of mind as a method of personal expression, but it is no more than just a right to signature to claim the fame of being the inventor. The author is a carrier of privileges rather than owner of rights. The new owner of the copy, however, “has complete and free ownership of that copy *qua* a single thing” [15, para. 69]. An alienated copy of a product of mind is “not merely a possession but a capital asset” which comes with the “power to produce facsimiles.” This is against the licensing mechanism of contemporary intellectual property regime and obviously proposes a principle of exhaustion of rights—rights are exhausted when alienation occurs. In this regard, Hegel does not really respect copyrights or intellectual property in general in a modern sense.⁶⁹

Alienation thus for Hegel is the negation of the free will’s attachment to the externality (the property) and is the return of the free will to itself. The free will injected into the external object in the very founding moment of property then is

whereby in turn they make what they have learnt into a “thing” which they can alienate, very likely has some special form of its own in every case. The result is that they may regard as their own property the capital asset accruing from their learning and may claim for themselves the right to reproduce their learning in books of their own.

⁶⁸ Recall that Hegel argues that some personal traits can be separated from the self only when they are expressed into an external embodiment, and the other personal traits can never be separated from the self. See *supra* discussion 2.1.2.1.

⁶⁹ Hegel’s “disrespect” for copyrights can also be found in his discussion of the legitimacy of new intellectual work building on someone else’s work. He states:

To what extent is such repetition of another’s material in one’s book a plagiarism? There is no precise principle of determination available to answer these questions, and therefore they cannot be finally settled either in principle or by positive legislation. Hence plagiarism would have to be a matter of honour and be held in check by honour.

He further argues that copyright law only works in a very restricted sense. He insists that “copyright legislation attains its end of securing the property rights of author and publisher only to a very restricted extent, though it does attain it within limits.” Hegel [15, para. 69, remarks].

separate from its original embodiment. Labor, for Locke, or free will, for Hegel, that functioned as the limit or boundary demarcating the self from the others was dissolved and the limit of the property rights was transgressed. Through alienation the invasion of the self of the first owner into the others that formed the property is thus nullified. This is the new violence—the violence against the founding violence.

2.3.2 *Alienation as Justice: The Violence Against Founding Violence*

Here seemingly rises a contradiction between arguing that property is an expression of free will and at the same time proposing property's complete alienation, a nullification of free will. Hughes argues that Hegel's theory of property "suffers from internal inconsistency in its somewhat incoherent account of alienation," a "paradox of personality and alienation" in intellectual property in particular.⁷⁰ Hughes thus proposes a limited alienation—actually incomplete alienation—of intellectual property copies, in which the creator retains control of alienated products against any unintended or unauthorized change.⁷¹ However, Hughes' argument is flawed, building on a misreading of Hegel.

Alienation in Hegel's theory of property serves as the realization of the identities of the alienator and alienee.⁷² From the first owner's point of view, alienation must be complete in order for the free will to return back to itself (its original embodiment); from the point of view of the alienee, alienation must also be complete in order for him/her to actualize his/her free will. In the case of incomplete alienation, the alienee then will be always subject to the restriction of alienator. The abstract self of the alienee's realization through property ownership will never be possible. The product I bought—the book—is never my own because within it there remains the otherness—the author's ownership. As Hughes indicates, "[b]y using a restriction, [e.g. covenant, servitude, or easement,] a person retains the specific stick(s) in the bundle of property rights which will 'contain' his continuing personality stake" [3, p. 346]. Restraint on alienation of this kind, in order to maintain control of alienated products, is usually unacceptable. In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, the US Supreme Court dismissed the action of Miles Medical, a manufacturer of proprietary medicines who adopted restrictive agreements to control the

⁷⁰ Hughes [3, p. 339]. Hughes argues that there is a "paradox of alienation" under Hegel's theory of property. Furthermore, since the selling of an idea might just be "alienation of personality," Hughes argues that Hegel considers the complete alienation of intellectual property to be morally wrong—comparable to slavery or suicide. See Hughes [3, p. 347].

⁷¹ Hughes [3, p. 350]. He argues that "[t]he personality theory provides a better, more direct justification for the alienation of intellectual property, especially copies," and proposes two conditions for intellectual property alienation: "first, the creator of the work must receive public identification, and, second, the work must receive protection against any changes unintended or unapproved by the creator."

⁷² See *supra* analysis 2.3.1.

entire trade of its product throughout its wholesale dealers and retail dealers.⁷³ The Supreme Court stated:

Thus a general restraint upon alienation is ordinarily invalid. The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand.⁷⁴

Hegel's discussion of intellectual property alienation indicates that incomplete alienation, in which the creator retains control of an alienated product, is undesirable.⁷⁵ In his analysis of the use of property, Hegel argues that when we are using property:

... I and the thing meet, an identity is established and therefore one or other must lose its qualitative character. But I am alive, a being who wills and is truly affirmative; the thing on the other hand is something physical. Therefore the thing must be destroyed while I preserve myself. This, in general terms, is the prerogative and the principle of the organic. [15, addition to *para.* 59]

In order to “destroy” the property to preserve the “I,” we have the choice either to consume it or alienate it. For Hegel, only true possession gives the right of alienation, and to achieve the true possession, complete alienation is necessary. Otherwise, the realization of this “true possession” will never be completed, and the alienee's possession of the property will be incomplete as well. If the alienation is incomplete, not only is it impossible for the first owner to realize his/her identity, but it is also impossible for the alienee to achieve objectivization of his/her abstract free will through acquisition of property. Incomplete alienation simply means that a new will is injected into the same object and thus brings in the otherness, the boundary demarcating the private property dissolve, and neither the alienator nor the alienee is really free and autonomous.

Hughes' misreading occurs in forgetting to take into consideration that dialectics is the soul of Hegel's philosophy. Contrary to Hughes' “internal inconsistency” assessment, alienation as the violence against the founding violence forms a circle and completes Hegel's theory of property, a dynamic unity of property from possession, to use, to alienation.⁷⁶ Most importantly, this unity is a dynamic, never-ending circle driven by the negating force of constant alienation. In a dialectical point of view, “I” as the self today is neither the self yesterday nor the self tomorrow either. In this regard, the self today is the negation of the self yesterday but will be negated by the self tomorrow. For the self to continue, the negating force should never be stopped. Similarly, alienation as the negating force serves the same purpose for property. Once alienation stops, property does not exist. To return to Hegel's

⁷³ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

⁷⁴ *Ibid.*, at 404.

⁷⁵ See *supra* discussion 2.3.1, where we reveal that Hegel's discussion of alienation of the “product of mind” suggests an exhaustion of rights doctrine which is clearly against the contemporary licensing mechanism.

⁷⁶ Hegel says, “[p]hilosophy forms a circle...it circles back to itself.” Hegel [15, at addition to *para.* 2].

conception of the self, the self will be restless because it has no means to express itself. Therefore, the self truly exists only in a constant alienation chain of property. Alienation not only realizes the first owner's ownership, bringing externalized free will back to the self through nullifying the possession, but also relates the self to another person—the others, the social—where the self gets back to social relation like a fish back to its river. Once alienation is incomplete or the constant circle of alienation stops, the self is either restless or dissolved. Therefore, alienation needs to be complete and is only perceivable in a constant and dynamic process. This brings us to Derridean constant deconstruction.

2.3.3 *Constant Deconstruction as Justice*

Not only does Hegelian dialectics of property find that complete alienation is necessary, but from the point of view of the function of legal force in property rights, only complete alienation is just. As Hegel argues, “just as force exists only in manifesting itself” [15, addition to *para.* 61]. Complete alienation, as a manifestation of the offsetting force counter to the force injected into the property at its founding moment, is a new violence against the founding violence which makes justice. Through its injection to form the property, the free will is actualized into others which are temporarily away from the self, and the unity of “I” is uncertain at this stage of possession of the property. This uncertainty comes from the founding violence remaining in the property, which is the fundamental characteristic of the founding legal force. Alienation as a deconstruction force against the force of the founding violence nullifies the relation between the owner and the property. Free will thus returns into the self, the uncertainty dissolves, and the unity of the self is back on track again. In this regard, alienation as the deconstruction force against the founding force is just. Hegel meets with Derrida at this point, both suggesting that complete alienation as constant deconstruction is just.

As we reviewed above, property rights in general and intellectual property rights in particular are socially constructed relations. Since property rights are constructed, they are deconstructible [29, p. 15]. As Derrida argues, “law (*droit*)—in our case the property rights—is essentially deconstructible” because “it is founded, constructed on interpretable and transformable textual strata ... or because its ultimate foundation is by definition unfounded” [29, p. 14]. Derrida argues that “[d]econstruction is justice” [29, p. 15].

If we take the above as it stands, law in general or intellectual property rights in particular are deconstructible, and deconstruction is justice. This has a very important implication. Laws or property rights themselves are not justice. Justice is only a possible trait of the laws such as the squareness of a table.⁷⁷ We can perceive the

⁷⁷ This is inspired by Yu-Lan Feng who uses the metaphor of the perceptible table and imperceptible squareness to explain that philosophy as knowledge transcends our experience and *Li* is something that “can only be thought but not sensed.” See Feng [30, p. 337].

squareness of the table similarly to how we can perceive the justice of laws, but neither does squareness ever become the table itself nor does justice ever become laws. We thus need to perceive the justice of property rights in a process of alienation, the deconstruction of the founding violence of property. Derrida argues that:

[D]econstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of *droit* (authority, legitimacy, and so on). It is possible as an experience of the impossible, there where, even if it does exist (or does not yet exist, or never does exist), *there* is justice. [29, p. 15]

Just as deconstruction is justice, alienation as the deconstruction of property rights—the violence against the founding violence inscribed into the property in the very beginning of its formation—is justice. If we look at the function of founding violence, this will become clearer.

The function of the founding violence is to constantly repeat itself throughout the legal system.⁷⁸ As Derrida argues, the founding violence—the force inscribed into law in the founding moment—is “revolutionary,” “the violence in progress.” The “revolutionary instant” is ungraspable and “belongs to no historical, temporal continuum” [29, pp. 35, 41]. It is obvious then that the force inscribed into law in the founding moment is a dynamic power, arising over and over again.⁷⁹ Margaret Davies puts it more clearly, saying that founding violence as the limit of law is dynamic and maintained through repetition, the constant reification of the force.⁸⁰ This has a very important implication for our analysis. If the founding violence functions through the repetition of the force, this means that the founding construction of the legal system, of property rights, and even of intellectual property rights is a constant repetition.⁸¹ The constant repetition of the founding construction of intellectual property is indeed the manifesto of the author function that is rooted in the self-sufficient ontology. Furthermore, this constant construction requires constant deconstruction. Deconstruction of property rights in general means alienation,

⁷⁸ The repetition of the founding violence indeed also creates modern law’s obsession with origin. See also discussion 5.3.1 below on modern law’s constant return to origin.

⁷⁹ Derrida [29, p. 36]. He points out, for the founding moment, “[I]t is, in *droit*, what suspends *droit*. It interrupts the established *droit* to found another. This moment of suspense, this *épokhè*, this founding or revolutionary moment of law is, in law, an instant of non-law. But it is also the whole history of law. *This moment always takes place and never takes place in a presence*.” His emphasis. See also Fitzpatrick [31, p. 81]. Fitzpatrick endorses this reading that the founding violence pertaining to law is “an incessant violence.”

⁸⁰ Davies regards the moment of a “decision” as the founding moment of a legal system. She argues that the founding decision of the legal system which “establishes its limits and coerces conformity” is homogeneous with the juridical decision, where the founding decision is repeated continually “in order for the limits of law to be maintained.” She thus proposes to perceive law as repeatability, as a “process which can never be reduced to a static system of norms.” Thus she reaches her thesis of the function of the founding violence through constant repetitions. Davies [32, pp. 100, 107].

⁸¹ The constant repetition of the founding construction of intellectual property is indeed the manifesto of the *author function* of the intellectual property regime which is rooted in the self-sufficient ontology. See *infra* discussions 5.2.2 and 5.2.3 for more details.

the violence against the founding violence.⁸² When alienation occurs, the founding construction of the alienator is deconstructed and at the same time the founding violence of the alienee occurs, the repetition of the founding violence. Therefore, for property rights justice is only available through constant alienation.

Since the founding violence functions through constant repetition, in order to be just, the deconstruction of the founding violence—alienation—must be complete. Incomplete alienation interrupts the constant repetition of the deconstruction and thus will render justice impossible. Complete alienation of intellectual property, as the negation of the authenticity of the author, is thus the defense of the singularity against the totality, the return of the oppressed and otherness, the justice.⁸³ As we revealed above, the acquisition of private property upon the separation of the self from others is the birth of true autonomy, the triumph of singularity.⁸⁴ However, the self's power over property through incomplete alienation stretches far and consumes others and turns into a totalizing power. Once the self is taken over by the totalizing power of property, both the singularities of the self and of others are defeated.

2.4 The Paradoxical Dynamics in Function

2.4.1 *Domestic Paradoxical Dynamics: Biting the Hand that Feeds*

Building on a critical reexamination of Locke and Hegel's property theories, the book so far has revealed to us the dynamics of legal force in intellectual property, from founding violence to violence against the founding violence. The circular construction of "creations of the mind" into self-sufficient private rights as the founding violence defends our autonomy at the cost of self-alienation, which renders self-realization impossible. However, alienation as a force realizing the ownership while at the same time nullifying its authenticity provides a possibility of achieving justice within the intellectual property regime. Complete alienation brings the private-public dynamics into justice, which can be justified from the Hegelian perspective as well as from the Derridean deconstructionist perspective.

However, the contemporary intellectual property regime covers up the self-others confrontation of the founding construction which makes intellectual property rights self-sufficient. The self thus remains restless because of self-alienation; and as for the others, the public is unsettled as well when the intellectual property regime is

⁸² Deconstruction of property rights in contemporary intellectual property regime would mean the practice of compulsory licensing and the principle of exhaustion of rights. See *infra* discussion in 2.4 on exhaustion of rights and compulsory licensing issues under TRIPS.

⁸³ For the definitions of *singularity* and *totality* in the context of this paper, see *supra* discussion 2.1.2.1.

⁸⁴ See *supra* discussion 2.1.2.1.

indifferent to public concerns. The force inscribed into intellectual property at the very founding moment gains injustice as the will of its own and corrupts the right owners through making them indifferent to public interests. The autonomous self as the foundation of property rights has been lost in the history of intellectual property, becoming merely legend and myth. The examples discussed below, both domestic and international, will disclose the myth.

Monsanto Canada Inc. v. Schmeiser was a patent right infringement case heard in the Supreme Court of Canada in 2004.⁸⁵ Monsanto Canada developed and patented a glyphosate-tolerant gene and cell in 1993. Canola containing these kinds of genes and cells is resistant to Roundup herbicide. Monsanto's Roundup, a glyphosate herbicide, can kill all other plants, which makes controlling weeds a lot easier. The Schmeiser family had farmed and grown Canola in Saskatchewan for years and usually saved and developed its own seeds. Most of the farmers around Schmeiser's fields obtained licenses from Monsanto to plant Roundup-resistant Canola in the 1990s, but Schmeiser did not switch to Monsanto seeds. In 1997, Schmeiser found that Canola plants in several of his fields were Roundup resistant; he then saved the seeds and planted them in all of his Canola fields. It was discovered in 1998 that 95–98 % of his Canola were Roundup resistant. Monsanto brought an action for patent infringement against Schmeiser which was allowed by the Trial Court and Court of Appeal and the case was then brought by Schmeiser to the Supreme Court. The Supreme Court of Canada ruled against Schmeiser, saying that planting seeds containing patented genes and cells deprived Monsanto of "the full enjoyment of its monopoly" and thus constituted patent infringement.

What Monsanto claimed for protection were the modified genes and the cells that make up the glyphosate-resistant Canola. The realization of this patented right depends on licensed farmers' Canola. In this case, no one knows how the Roundup-resistant Canola came into Schmeiser's field. When Schmeiser claimed that this was unsolicited "blow-by" and grounded their appeals on "the ancient common law property rights of farmers to keep that which comes onto their land," it was disallowed. The Supreme Court of Canada simply says that "the issue is not property rights but patent protection. Ownership is no defense to a breach of the *Patent Act*."⁸⁶ The Supreme Court states that:

Monsanto's patent gives it a monopoly over the patented gene and cell. The patent's object is production of a plant which is resistant to Roundup herbicide. Monsanto's monopoly enabled it to charge a licensing fee of \$15 per acre to farmers wishing to grow canola plants with the patented genes and cells. The appellants cultivated 1030 acres of plants with these patented properties without paying Monsanto for the right to do so. By cultivating a plant containing the patented gene and composed of the patented cells without licence, the appellants thus deprived Monsanto of the full enjoyment of its monopoly.⁸⁷

This is obviously rights-centered and one-sided talk which upholds the self-sufficiency of intellectual property rights. The story focuses solely on the right owner.

⁸⁵ *Monsanto Canada Inc. v. Schmeiser* [2004], 1 S.C.R. 902, 2004 SCC 34.

⁸⁶ *Ibid.*, at para. 96.

⁸⁷ *Ibid.*, at para. 72.

However, without Schmeiser's Canola, Monsanto's "creations of the mind," the patented genes and cells, cannot be realized. Monsanto's patented genes and cells got into Schmeiser's Canola without invitation. This is clearly an invasion of property, intended or not. From Schmeiser's point of view, the self, the unity of his property, was dissolved with the presence of the otherness—Monsanto's patented genes and cells. In this case, the presence of Monsanto's patented genes and cells within Schmeiser's Canola, invited or not, is lawful from Canada Supreme Court's perspective. With the lawful presence of the otherness within, is the self still self? If the cells are not mine, am I still myself and am I still autonomous?

This case reveals that an ironic situation will occur if we take rights as something self-sufficient and recognize incomplete alienation. As a matter of fact, the "creations of the mind" and "the full enjoyment of its monopoly" need to be realized through others, and incomplete alienation renders the incompleteness of the others. The autonomy of the licensee is dissolved. This reminds us that if we take rights to be static and without context or relation, then that very autonomous self—that we establish as the foundation of our social institution and that we try to protect by delimiting property—might be at risk.

As mentioned at the very beginning of the chapter, moreover, the justification of intellectual property rights becomes groundless without resorting to traditional property theory. Intellectual property, however, gains the live of its own upon the successful construction of its self-sufficiency and transcends traditional property rights. As indicated in the *Monsanto Canada* case, the hand that feeds eventually gets bitten due to the fundamental paradox of the intellectual property philosophy.

2.4.2 *International Paradoxical Dynamics: IPRs Versus Public Health*

Similarly, IP philosophy's fundamental paradoxes reveal themselves in various controversial issues such as compulsory licensing and exhaustion of rights in international framework. As we discussed above, the first paradox of intellectual property philosophy—the circular construction of intellectual property—suggests the self-sufficiency of IPRs and thus mandates exclusive rights of control by the right owners. The compulsory licensing practice then might revoke a legal issue of infringement of private property rights and has thus become a hot issue in international trade.⁸⁸ The *Brazil—Measures Affecting Patent Protection* case between the USA and Brazil, which involves confrontation between private rights and public health concerns, is related to the compulsory licensing issue.

⁸⁸ *Compulsory License*, called also *Statutory License*, refers to a license to use patented or copyrighted content under reasonable and nondiscriminatory conditions defined by law. For example, a radio station with this kind of license may play copyrighted music without permission from its right's owner but must pay the owner reasonable usage fees in accordance with law.

As concerned with controlling the HIV/AIDS situation, Brazil's 1996 Industrial Property Law contained a "local working" requirement provision targeting foreign pharmaceutical companies, which stated that "a patent shall be subject to compulsory licensing if the subject matter of the patent is not 'worked' in the territory of Brazil."⁸⁹ Driven by the big drug companies, the US government brought the case to the WTO Panel in June 2000, challenging Brazil's patent law. Mainly under the pressure from international society, in July 2001, the US government withdrew the case from the WTO based on Brazil's commitment "to hold prior talks" with the USA with "sufficient advance notice to permit constructive discussions" when Brazil deems it is necessary to grant a compulsory license on US companies' patents.⁹⁰

The debate related to the principle of exhaustion of rights in international trade, on the other hand, is related to our discussion of the fundamental paradox in intellectual property alienation. This principle holds that once an owner's goods enter the market, the owner's right to protection is exhausted, and the owner is no longer able to control the further use of or even resale of the product [33, pp. 810–811]. This doctrine allows parallel importation. When a product is sold both in areas A and B at a different price but B's price is higher, the principle of exhaustion of rights allows whoever retains the product in area A to sell it in area B. The exhaustion of rights would make the intellectual property rights owner unable to control the destination of the products. To the extent that the exhaustion of rights ensures the true separation of the right owners' control over the products and gives the retainers full control of the products, the exhaustion of rights avoids the fundamental paradox of intellectual property's incomplete alienation.

However, international practice of exhaustion of rights doctrine is quite diverse. International exhaustion of intellectual property rights, while it is recognized by US Supreme Court for copyrights and applies to patented goods under Japanese law, applies to copyrights and trademark rights but not patent rights under Swiss law [34, p. 389]. Regarding the exhaustion of intellectual property rights, the WTO stands in an ambiguous position. The TRIPS states:

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.⁹¹

According to this provision, the TRIPS Agreement recognizes the exhaustion of rights principle and accepts parallel importation based on principles of National Treatment and Most-Favoured-Nation (MFN) Treatment.⁹² However, parallel importation is always a controversial issue in international trade. In 1997, since public health was under a fierce challenge from HIV/AIDS, South

⁸⁹ *Brazil—Measures Affecting Patent Protection*, WT/DS199/1-4 (2001).

⁹⁰ *Ibid.*

⁹¹ Article 6, TRIPS Agreement. See also Article 51 of the TRIPS Agreement.

⁹² Footnote 13 to Article 51, TRIPS Agreement. In requiring member states to adopt procedures to protect a right holder against counterfeit importation, it provides that "[i]t is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit."

Africa promulgated the Medicines and Related Substances Control Amendment Act. This act provides that “the Minister may prescribe conditions for the supply of more affordable medicines in certain circumstances so as to protect the health of the public,” in particular the conditions by which any medicine sold by the patent holder or with the holder’s consent may be imported by a third party into South Africa [35, p. 45]. The US government and big international pharmaceutical companies tried to force the South African government to change the legislation. In late 1999, under fierce criticism from international civil society and NGOs, the US Clinton Administration removed South Africa from its “Special 301” list and issued an Executive Order offering a flexible policy about HIV/AIDS and TRIPS for South African countries [35].

The controversies relating to exhaustion of rights and compulsory licensing in one way or the other are related to international concerns of the tensions between promoting public health and protecting IPRs. The indifference of the intellectual property regime to the public concerns about the health situations in developing and least developed countries has triggered fierce attacks on IPR protection. This has finally facilitated the birth of an international declaration concerning the relation between TRIPS and public health. In November 2001, the Fourth Session of the WTO Ministerial Conference held in Doha adopted the Declaration on the TRIPS Agreement and Public Health (hereafter Doha Declaration). The Doha Declaration states that the TRIPS Agreement should be implemented in a manner supportive “to promote access to medicines for all.” The Doha Declaration in particular addresses the compulsory licensing issue and the exhaustion of intellectual property rights issue. The declaration insists that each member “has the right to grant compulsory licenses” and is “free to establish” its own legal framework for the exhaustion of intellectual property rights as long as it does not violate MFN and national treatment requirements.⁹³ Under the mandate of the Doha Declaration, the Council for TRIPS was instructed to find an “expeditious solution” to less developed countries’ ineffective use of the compulsory licensing due to insufficient or no manufacturing capacities.⁹⁴ This effort resulted in the WTO General Council’s adoption of the 2003 waiver allowing generic copies made under compulsory licenses to be exported to countries lacking production capacity.⁹⁵ In 2005, WTO General Council decided to make the temperate 2003 Waiver permanent through a TRIPS Amendment.⁹⁶ However, members’ low acceptance to the TRIPS Amendment even after several times of deadline extension indicates the amendment will not come into effect in the near future.⁹⁷

⁹³WTO Ministerial Conference, “Declaration on the TRIPS Agreement and Public Health,” adopted on 14 November 2001 at Doha, Qatar (WT/MIN(01)/DEC/2, hereafter, Doha Declaration).

⁹⁴Para. 6, Doha Declaration.

⁹⁵WTO General Council, “Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health,” WT/L/540 and Corr. 1 (1 September 2003).

⁹⁶WTO General Council, “Amendment of the TRIPS Agreement,” WT/L/641 (8 December 2005).

⁹⁷Although three extensions of the deadline for acceptance were made in 2007, 2009, and 2011 to set the acceptance deadline until December 31, 2013, only about half of the membership accepted

The controversies around the exhaustion of rights and compulsory licensing issues in the international context to some extent echoes our critique of the contemporary intellectual property regime as a self-sufficient and one-sided framework. The Doha Declaration and relevant efforts endorse our critique of the poverty of contemporary intellectual property philosophy. The fragmentation of international practice in relation to relevant issues under TRIPS clearly illustrates the paradoxical dynamics between private and public in intellectual property philosophy. The South Africa Case and the Brazil Case we mentioned above demonstrate that rents-seeking private interest groups can disguise themselves as victims of property right violations and thus construct the confrontation between the private and the public into rights talk. These two cases also show that intellectual property rights protection is a function of authorship constituting “the privileged moment of *individualization*” of ideas, knowledge, and the sciences [36, p. 101]. This “individualization of knowledge creation” constructs scarcity of knowledge at the cost of the public interest.⁹⁸ Rights narratives cover up this ideological construction. In our two final case studies, the eventual seeming victory of the public came from the mercy of the “right owners” instead of being a legal victory. The core of the confrontation is the paradoxical dynamics between the private and public, the tension between the individualization of and public control of knowledge. Through licensing—the incomplete alienation of the intellectual property—the private (the right owners) maintains his/her presence in others and thus takes over the public. The moral dilemma of those cases between private rights protection and public health concerns is rooted in this fundamental paradox.

In the next two chapters, the book examines how this private-public dynamics reveals itself in China’s intellectual property regime and how this dynamics influences China’s adaptation to TRIPS. Building on that examination, the book further discusses the private-public dynamics’ theoretical implications for our reconstruction of the legitimacy theory of contemporary jurisprudence.

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the amendment which is far below the requirement of two-thirds of members’ acceptance. See “Member Accepting Amendment of the TRIPS Agreement,” available online at http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (accessed on 18 December 2013).

⁹⁸ Sell and May [20, p. 473]. They argue that common elements which are shared among different intellectual properties are “the construction of scarcity, temporal limitations, and the individualization of knowledge creation.” See also Picciotto [37, p. 224]. Picciotto regards intellectual property rights as “artificially created scarcity.”

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