

# Introduction

**Susy Frankel**

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Much of the debate around the parameters of intellectual property protection and the extent of how flexible the law should be, at both national and international levels, relates to policies and views about what the law is supposed to achieve. Also relevant to the debate is whether the law reflects its underlying justifications and whether those justifications come to fruition or whether other outcomes are occurring. Put differently, are intellectual property laws and their application achieving their objectives and purposes?

The different objectives and rationales that underpin national regimes are variously reflected in international agreements, which also have their own object and purpose. The international agreements embody many objectives and the various rules for minimum standards for intellectual property protection are the vehicles to achieve those objectives. National regimes, which are collectively called intellectual property, also make up aspects of the 'object and purpose' of international treaties, to quote the words of Article 31 of the Vienna Convention on the Law of Treaties. The object and purpose of intellectual property include copyright's role in encouraging creativity based on utilitarianism and natural rights; patent law's connection to innovation policy and the encouragement of invention; and trade mark law's business and consumer information-supporting functions.

The significance of these broad and often disputed rationales will vary among jurisdictions and may well be reshaped through the operation of the international treaty framework, in particular the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which expressly connected intellectual property and trade and placed that relationship at the centre of the international intellectual property regime. Many of the rationales for intellectual property in a trade-related environment are also linked to productivity and competition concerns that are reflected in the World Trade Organization (WTO) and its various parts. The part known as TRIPS explicitly includes a range of objectives and principles. Broadly, TRIPS added explicit trade-related concerns (including both export

and development interests) to the existing international and underlying domestic policy rationales of intellectual property. Subsequent to TRIPS, trade and investment agreements have emerged that often aim to increase protection and enforcement and reduce TRIPS flexibilities. In sum this creates a range of objects and purposes that are all relevant to the interpretation of the international regime, in one way or another.

The relevance of intellectual property as a set of discrete rules is arguably both expanding and shrinking. It is practically trite to point out that there are complexities in how intellectual property interacts with changing technologies and other areas of law in many fields. It is, therefore, more important than ever to analyse how the object and purpose of intellectual property applies to new and fast-changing areas such as big data, biotechnology and social media.

The relevance of the object and purpose of intellectual property might be assessed by looking at who is involved in the creation, use and dissemination of intellectual property and the outcomes of rights and uses for those actors. The chapters in this book address these themes and are from scholars based around the world, reflecting the global nature and diversity goals of the International Association for the Advancement of Teaching and Research of Intellectual Property (ATRIP).

The book is divided into four parts. Part I addresses 'Cultural Objectives and Development Goals'. As intellectual property has become a global regime its relationship to cultural objectives, such as protecting local culture and development goals, has become of greater concern. It is well established that a one-size-fits-all intellectual property regime can fly in the face of development and run roughshod over localised cultural concerns. Exactly how to have an effective intellectual property regime that calibrates competing interests remains elusive, for some countries, and can be somewhat inconsistent in the domestic regimes of others. Chapter 1 addresses issues about cultural policy in the Australian trade marks register. The three authors of this chapter, Megan Richardson, Julian Thomas and Jill Klein, bring perspectives from law, media studies and marketing to analyse how the Australian trade marks register shapes cultural policy and makes particular decisions about what is protectable as trade marks and what is not. The chapter argues that the legal treatment of identifying labels for commodities such as wine and coffee in Australia is a product of a cultural trade mark law policy dating back to the height of the British Empire and endorsed in the post-war 'White Australia' period. The authors question whether the Australian trade marks register should passively reflect inherited cultural tensions and propose instead that the rules governing trade mark registration should be part of a thoroughly modern cultural and economic trade mark law policy. In Chapter 2 Jessica

Lai looks in-depth at how Manuka is used in patenting. The chapter uses an empirical analysis of New Zealand registered patents to discuss what has or has not been appropriated from Māori interests and also asks whether the Māori Advisory Committee in the New Zealand Patent Office has served its purpose with respect to those applications. Marsha Cadogan, in Chapter 3, uses a constructivist critique of intellectual property to analyse its relationship with development. Using examples from the Caribbean Cadogan illustrates the issues that divide intellectual property from development. The final chapter in this part, Chapter 4, explores ownership and licensing of traditional knowledge in Africa. Enyinna Nwauche explains the overlapping domestic and regional regimes for the protection of traditional knowledge associated with genetic resources. Together these four chapters demonstrate how the object and purpose of intellectual property is increasingly informed by drivers that arise because of cultural survival and development concerns resulting from the impact of globalised intellectual property rights.

In Part II the international and regional frameworks of design protection are discussed from three different angles. In Chapter 5, Margo Bagley demystifies the complexities of the international design regime. The chapter, 'Designing disclosure: disclosure of cultural and genetic resource utilisation in design protection regimes' shows how the intersection of design and genetic resources is increasing not only because of the allure of exotic cultural expressions, but also because of the burgeoning use of biotechnology in design. The chapter explains how these have become issues in the Design Law Treaty negotiations at the World Intellectual Property Organization (WIPO). There is very little international agreement about the scope for design law and in Chapter 6, Anna Tischner illustrates the variation of approaches to design in the European Union. She analyses how the identification of the object of design protection has become problematic because of the context of communication related to the subject matter of the design protection and the complicated system of both formal and informal protection. In Chapter 7 Genevieve Wilkinson discusses the object and purpose of international trade mark protection. To illustrate her arguments she uses the plain packaging of tobacco disputes and human rights claims..

Part III focuses on the European Union and innovation and enforcement. In Chapter 8, Žaneta Pacud discusses pharmaceutical protection and analyses the goals of various parts of the law, including supplementary patent certificates and data exclusivity. The chapter shows the complexities of the regime and provides an understanding of how some of the detail reflects competing goals and the differing needs of actors in the regime. Helen Yu, in Chapter 9, examines how regional actors and strategic uses

of intellectual property can attract and retain investment and intellectual capital, while optimising socio-economic value from publicly funded research. She debunks the claim that increased innovation will of itself lead to local development and shows how investment in capacity, infrastructure and resources are often needed to achieve development goals. In Chapter 10, Christoph Ann discusses the legal uncertainty that comes with latent patent invalidity. He questions whether European patent law can meet its purpose if patents are unreliable. Drawing on empirical studies from Germany, the chapter discusses particular questions such as if patents are unreliable then why should start-ups, for example, seek them. This part concludes with Chapter 11, where Ana Nordberg and Knud Wallberg map EU-wide enforcement measures. They discuss legal interpretation and the issues about harmonising enforcement rules. The chapter considers whether harmonisation is desirable when a variety of laws address the same subject matter, such as 3D printing and synthetic biology. The discussion reveals a contest between functional pluralism and systemic coherence, which leads the authors to conclude that emerging technologies do not necessarily require legal coherence, but systemic coherence can play an important role in legal responses to global technology-induced business models and social phenomena.

The object and purpose of aspects of copyright law and policy is the focus of Part IV. The digital world has evoked a never-ending discussion about the purpose(s) of copyright law. In Chapter 12, Valentina Moscon uses Europe's debate about online news protection to challenge the utility of using neighbouring rights to address various subject matter issues that arise from copyright's application. The chapter's analysis reveals that neighbouring rights are inadequate to address the concerns relating to news and the author proposes a more holistic approach to capture several purposes. In Chapter 13 Chongnang Wiputhanupong discusses derivative works and their interpretation in the United Kingdom and the United States. She uses this discussion to explain the approach in Thailand. This chapter enlightens readers about the decisions of the courts of Thailand and demonstrates how assumptions about derivative works from one jurisdiction do not necessarily transpose across borders. The final aspect of copyright, which is discussed in Chapter 14, is the variation of collective management goals and structure. Maria Letizia Bixio compares the various models found in Europe and assesses their impacts and effects on competition and the goals of remunerating authors.

Each of the chapters in this volume addresses different aspects of the objects and purpose of intellectual property law. They show how the diversity of goals means that there is always likely to be a diversity of laws. While supporting that diversity is a common theme among the chapters,

they also show the problems that too much variety can sometimes cause. By focussing on the object and purpose of intellectual property those who make and interpret law and policy can find ways to progressively develop an understanding of what diversity supports the policy goals of national, regional and international rules and what variations can undermine them. This alone is unlikely to produce international agreement on all aspects of the law, but it provides a set of tools to discuss disagreement in ways that could lead to results rather than polarised positions, which seem to characterise the international intellectual property regime.