FROM DEFENDING THE 'OPPOSITE OF PROPERTY' TO THE FUNDAMENTAL RIGHT TO PROPERTY: THE CASE FOR THE APPLICATION OF HUMAN RIGHTS LAW AND PHILOSOPHY TO THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME

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Abstract: The international intellectual property (IP) regime has known important expansions, with far-reaching and sometimes nefarious consequences. While an important number of scholars have criticised this expansion, the dominant rhetoric to do so has been that of 'the opposite of IP', whereby scholars argue in favour of the public domain, which they describe as a natural resource subject to over-privatisation. While this critique has gained traction and drawn attention to the issue of IP expansionism, this article argues that it is ill-adapted to grappling with the human impacts of this expansion, such as the exploitation of indigenous traditional knowledge. As such, a human rights criticism of IP should be preferred in order to address these impacts and go beyond a western definition of property. While there may be a risk that a human rights approach to IP only reinforces IP rights through reliance on the fundamental right to property, this risk should not be overstated in modern human rights law, as shaped by the regional courts of human rights.

A. INTRODUCTION

In a 2005 Report, the Indian National Commission for Women showed that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[1] has let control of knowledge of seeds and biodiversity be transferred from rural women to global corporations, by characterising the former's farming knowledge as part of the public domain.[2] The result of this classification has not only been economic losses for rural farmers but also a subsequent increase in violence against women.

Unacknowledged or simply ignored, the human impacts of Intellectual Property (IP) regimes are far-reaching and sometimes pernicious: crises in access to medicine,[3] aggravation of poverty,[4] exploitation of indigenous peoples' resources[5] have all been attributed to the

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[1] WTO, Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C, 1869 UNTS 299, 33 ILM 1197 (15 April 1994)

[2] Indian National Commission for Women, *Impact of WTO on Women in Agriculture: A Report by the Research Foundation for Science, Technology and Ecology* (2005) i-ii.

[3] Peter Drahos, 'Public Lies and Public Goods: Ten Lessons from When Patents and Pandemics Meet' (2021) European University Institute Working Paper LAW 2021/5 <https://cadmus.eui.eu/handle/1814/71560> accessed 13 July 2023.

[4] Indian National Commission for Women (n 2).

[5] Keith Aoki, 'Neocolonialism, Anticommons Property, and Biopiracy in the (Not-so-Brave) New World Order of International Intellectual Property Protection' (1998) 6 Indiana Journal of Global Legal Studies 11, 47.

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current international IP regime. Yet where this regime is criticised by many scholars, the dominant school of criticism does not appear to grapple with these issues. Indeed, a foundational critique of IP stems from the public domain proponents, who conceptualise the public domain as a natural resource which is being replenished by IP rights, to the prejudice of further creativity.[6] While their critique of IP succeeds in attracting attention to the excesses of the current IP regime's expansionism, it remains utilitarian in nature, being rooted in its lack of efficiency for creative and research purposes.[7] It thus fails, at least in its basis, to address the negative human impacts of the IP regime, regardless of its economic or creative efficiency. This raises the question of how to proceed in advocating for limits on IP rights that would better apprehend its human impacts when the environmentalist imagery of the current critique is limited in this regard.

This article will argue that the failure of the environmentalist, or public domain, rhetoric stems from its very foundation, which perpetuates the harmful binaries of the IP regime: between private and public property, between manmade and natural, and between IP and public domain.[8] To escape from this paradigm and provide a more holistic criticism of IP, it proposes a human rights approach to IP. Both in rhetoric and in law, modern human rights law may provide a more flexible approach to property than the rudimentary binary between public and private property, and most importantly a deontological point of view in this area of law, taking account of the individual impacts of IP, however, varied they are.

To come to this conclusion, we will first apprehend the case made for the 'opposite of IP' by the public domain rhetoric. Having understood this rhetoric, we can then assess the accuracy of its binary framework, and the politics of using it. As the environmentalist rhetoric fails to address many contemporary socio-political issues of IP,[9] we shall address the possibility of using a human rights rhetoric to defend human welfare against the nefarious effects of IP. In particular, the risks of applying a human rights law perspective to IP will be addressed, in that a paramount right of the human rights regime is the right to property. Thus, the risk of human rights law fortifying IP rights and their expansion must be considered, but not overstated in modern human rights law, as the case law of the regional human rights courts shows.

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[6] James Boyle, *The Public Domain* (Yale University Press 2008); Yochai Benkler, *The Wealth of Networks, How Social Production Transforms Markets and Freedom* (Yale University Press 2006).
[7] Madhavi Sunder, 'The Invention of Traditional Knowledge' (2007) 70 Law and Contemporary Problems 97, 98.
[8] Mario Biagioli, *The Author as Vegetable: Environmental Imagery in Contemporary Intellectual Property*, (forthcoming).
[9] Laurence R Helfer, 'Towards a Human Rights Framework for Intellectual Property' (2007) 40 UC Davis Law Review 971, 973.

B. ANTI-IP

Criticism of Intellectual Property has previously been motivated by anti-monopoly sentiment,[10] the individualisation of creativity and innovation,[11] or the commercialisation of knowledge.[12] The public domain rhetoric differs from these criticisms in that it is founded on a positive affirmation of 'the outside of IP'.[13] In other words, it makes a claim for the rights of civil society to have access to knowledge and information to defend against the expansion of IP.[14]

To protect the public domain, its defenders must show that it is endangered by privatisation, thus going against the current of using private property to extract the most benefits out of a resource. The latter idea advocated in Garett Hardin's 'Tragedy of the Commons',[15] posits that when a resource is held in common, it is inevitably overused and lost because of its openness to everyone's exploitation for their own profit. On the other hand, if the resource is privatised, its owner will exploit it most efficiently, as this person will benefit from it is well maintained and not overused, thus steering clear of the 'tragedy of the commons'.[16] To defend the freedom of the commons in the public domain, its advocates must then argue that, at least in the intellectual realm, private property is not the most efficient way of exploiting resources.

1. *Patents and the threat of the anticommons*

The first counterargument to privatisation is that of the anticommons, as developed by Michael A Heller and Rebecca S Eisenberg.[17] In the realm of biomedical research, they expose the emergence of anticommons, where knowledge is fragmented into so many private rights that too many rightsholders have a right of exclusion to be able to exploit it efficiently. Where conducting research requires buying the rights from many IP holders, the transactional costs of doing so may disincentivise research. Opposing Garett Hardin's Tragedy of the Commons, where a resource is lost to overuse, the anticommons arises when a resource is lost to underuse.

This problem emerges in part through the extension of patentability,[18] the characteristics that make something capable of being patentable.[19] Because these factors have been interpreted

[10] Mark Rose, 'Nine Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain' (2003) 66 Law & Contemporary Problems 1, 75.
[11] Siva Thambisetty, 'Liza's Bucket: Intellectual Property and the Metamodern Impulse' (2020) LSE Law, Society and Economy Working Papers 19/2020, 13 <http://dx.doi.org/10.2139/ssrn.3743217> accessed 13 July 2023.
[12] Rose (n 10).
[13] James Boyle, 'Foreword: The Opposite of Property?' (2003) 66 Law & Contemporary Problems 1.
[14] Rose (n 10).
[15] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.
[16] ibid.
[17] Eileen M Kane, 'Patent Eligibility: Maintaining a Scientific Public Domain' (2006) 80 St John's Law Review 519.
[18] ibid.
[19] ibid.

as widely as to mean 'anything under the sun made by man',[20] patents can be accorded at various stages of the development of a biomedical product. For example, a patent can be granted for a gene fragment before a commercial use is defined for it, so that when this use is found, it may mobilise gene fragments belonging to different patent holders. Even more worrisome, patents over receptors may make the testing of pharmaceutical products at a pre-clinical stage more complex, as it would require purchasing rights to use these receptors.[21] The extension of the grasp of patents on the research process as much as the results of research, meant to make funding projects easier, may in fact suffocate innovation with transaction costs.[22]

2. *Copyright and lost culture*

While Heller and Eisenberg's argument is centred on biomedical research, the hindrance of IP to creators and inventors is felt more widely. James Boyle shows in his seminal book *The Public Domain* that a similar phenomenon is occurring in the sphere of copyright.[23] While the standard copyright term extends to seventy years after the death of the author, most works cease to be commercially produced twenty-eight years after their publication. This means that between these two dates, most works are locked up without serving anyone's benefit when they could be easily shared for the marginal cost of digitalising them. While being of little commercial value, they could inspire and encourage the next generation of creators and be useful sources of knowledge and documentation of the past instead of remaining private. Copyright surviving the author's death also has the consequence of creating orphan works, where even if someone wanted to publish a work again, they may not be able to locate the person having inherited the copyright on it.[24] While a few lucky artists will continue making profits from their creative works for their whole lifetimes and decades beyond, the cost of their enduring control on their works is the unavailability of most of the last century's culture.

While these arguments are a strong condemnation of overly intrusive IP rights, they are more difficult to defend in practice. A property title will always have a proprietor to defend it, but there is no right as strong as property to defend on the other side. An infringement procedure by its very nature is a protective procedure for property rights, in which the alleged infringer will generally be a fellow property holder who will defend the lack of infringement on the facts while agreeing to a wide interpretation of IP in general.[25] If we want the expansion of IP to be

[20] ibid.
[21] Michael Heller and Rebecca Eisenberg, 'Can Patents Deter Innovation? The Anticommons in Biomedical Research' (1998) 280 Science 698.
[22] ibid. See also Reach Through Licence Agreements (RTLA) in Heller and Eisenberg.
[23] Boyle (n 6).
[24] ibid, 9.
[25] ibid.

stopped, a name must be given to what we are defending from the grasp of IP, a value must be defined for it.[26]

3. *Inventing the public domain*

Following the example from the environmentalist movement,[27] critics of IP have endeavoured to make the public domain a positive category by comparing it to a natural resource, with comparisons ranging from buffalos,[28] to a quarry,[29] a public parc,[30] or a river[31]. As nature and its value were invisible in law before it was defined as the environment,[32] these comparisons of the public domain to nature cast it as a 'positive and important part of our cultural and social landscape'.[33] Cultural environmentalists thus skilfully use natural metaphors, found since the inception of IP,[34] to instruct a paradigm shift in seeing the public domain not as the residue left after anything useful has been privatised,[35] but rather a resource from which we all benefit.

James Boyle pushes the environmental comparison further by likening the expansion of IP to the enclosure movement of 16th and 17th century England,[36] whereby lands exploited in common by peasant communities were divided and enclosed to the profit of large landowners.[37] In his comparison, the public domain is compared to land that we once all held in common but is now being progressively encroached upon by the extension of patentable and copyrightable subject matter, and the extension of those rights once acquired.[38]

However, a crucial point in the cultural environmentalists' argument is that while private property may save natural resources from the Tragedy of the Commons,[39] there is no such need for intangibles. As intangibles are non-rivalrous goods, there can be no overuse of them. An idea will not be depleted by exploitation from multiple artists in the way that a field could be by multiple farmers. The argument for enclosure and private property based on overuse is thus rejected, tipping the balance in favour first of the public domain. Not only is there no need to preserve intangibles from the tragedy of the commons, but the exploitation of the

[26] Kane (n 17).
[27] Boyle (n 6).
[27] Rose (n 10), 8.
[28] David Lange, 'Reimagining the Public Domain' (2003) 66 Law and Contemporary Problems 463, 468.
[29] Boyle (n 6).
[30] Benkler (n 6).
[31] Thambisetty (n 11).
[32] Rose (n 10), 87.
[33] ibid.
[34] Biagioli (n 8).
[35] Boyle (n 6).
[36] ibid.
[36] ibid.
[37] Harriett Bradley, *The Enclosures in England, an Economic Reconstruction* (Batoche Books 2000) 7.
[38] Boyle (n 6), 63.
[39] Hardin (n 15).

commons may also be more productive given the aforementioned threat of the anticommons. The cultural environmentalists' rhetoric therefore emphasises that the public domain is not simply the ether out of which innovations are pulled out of, but rather a useful resource in which we all have a share.

As Mark Rose writes, 'rhetoric is crucial' in defending against the monopolising of culture[40] and the environmentalist rhetoric certainly shows promise in conceptualising value in not privatising culture. But by making the natural world what must be protected from privatisation, it cements a binary visualisation of a public domain as contrary to what is man-made, and therefore private property belonging entirely to one proprietor.[41] This is most evident in the way cultural environmentalists often sum up their case as being for 'the opposite of IP' or the 'outside of IP'. Their case is essentially adversarial, describing the intangible realm as a battleground between IP and the commons. However outrageous one might find the extension of monopolies over culture, pitching a battlefield between the public domain and IP may not be the saving grace for culture that it seems. Indeed, in the narrative of enclosure of the intangibles of the mind, it is doubtful that those robbed of their share in the commons would be helped by a renewed expansion of the public domain.

C. ANTI-ANTI-IP

1. *The fallacy of the binary*

a) In theory

With the affirmation that the public domain is the opposite of IP[42] comes a red thread of dichotomies which runs through the cultural environmentalists' case: between natural and artificial, between the open fields and private property, and, between the public domain and IP.[43] This tendency to think in binaries is not new when thinking about property, in fact, it is essential to Garett Hardin's thesis in the Tragedy of the Commons. Either property is held in common, and anyone can exploit it however they wish, or it is privatised, and owners of land can exclude others and thus control the exploitation of the land in a productive way.[44] But this is an oversimplification of human relationships, between ourselves and toward resources.[45] Elinor Ostrom authoritatively rebuked Hardin's thesis by showing the error of this binary: while

[40] Rose (n 10).
[41] Biagoli (n 8)
[42] Boyle (n 6); Benkler (n 6).
[43] Biagoli (n 8).
[44] Hardin (n 15)
[45] Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1988).

land left to everyone to do with as they wish may perish in a tragedy of the commons, it can still be held in common according to rules agreed to by the community, thus preserving it.[46] Hardin's error was in believing in only two alternatives, a *res nullius* where there are no rules, or private property. But a commons can be submitted to all sorts of regimes using some of the rules that characterise property while retaining enough freedom and collective governance to be a far cry from the definition of property centred on exclusion.[47]

Similarly, the public domain rhetoric works in Hardin's paradigm,[48] reinforcing the binary thinking of traditional property law, when there are many other ways to think about property.

b) In practice

In fact, many creative efforts even in the current system take place in proprietary frameworks that are neither entirely exclusive nor entirely open to the public.[49] Creative commons are the most prominent example of these types of regimes. While they tend to be designated as the opposite of property[50] in the usual binary rhetoric of the cultural environmentalists, Yochai Benkler's definition of the commons as a 'particular institutional form of structuring the rights to access, use, and control resources' shows that it is not free of rights. Creative commons exist for example in the development of open-source software. There, software is created through the pooled efforts of many individuals, without seeking to exclude each other from contributions or from the resulting whole.[51] However, the software is not outside of property but rather uses IP ingeniously to protect the project from appropriation, while maintaining free access to it. To do this, each participant retains copyrights in their participation but submits them to a universal licence that excludes the possibility of appropriating the software.[52] This type of licence, using IP only as a way to impose conditions of use rather than as a means of exclusion for economic

[46] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990). In this book, Ostrom takes an empirical approach to proving the possibility of governing resources as commons, with, e.g. a study of fishing rights in Alanya, Turkey according to rules consensually agreed to by the fishing community. Following these rules, each fisher has an allotted area for fishing, changing every day to give equal opportunities to all, over the year, migrating fish. This set of rules saved the fishing area from overuse, and from the tensions caused between fishermen by proprietary rights.
[47] Fabienne Orsi, 'Réhabiliter La Propriété Comme Bundle of Rights: Des Origines à Elinor Ostrom, Et Au-Delà?' (2014) XXVIII Revue Internationale de Droit Économique 371.
[48] Biagioli (n 8).
[49] Carol Rose, 'Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age' (2003) 66 Law & Contemporary Problems 89.
[50] Benkler (n 6), 72.
[51] ibid, 75.
[52] ibid.

purposes, has uses beyond software, as shown by the development of Wikipedia on this model.[53]

In another context, Geographical Indicators (GIs) offer an example of Intellectual Property that is not organised around the rights of a single property owner and is not exclusionary in the usual sense. TRIPs defines GIs as 'indications which identify a good as originating in the territory of a Member … where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin'.[54] Breaking from the usual binary between natural and man-made, the products protected by GIs need not prove inventiveness or any particular human intervention, rather human interventions are only a part of a process characterised by the location in which it takes place.[55] This being the case, no owner exists individually to control the GI, in fact, it is a non-exclusive collective right in which anyone can gain a stake by starting production in the relevant region and using the protected mark.

Despite the circumstance, this category of IP rights was originally aimed at protecting European wines,[56] it is becoming a popular choice in developing countries, helped by the fact that without the requirement of inventiveness and individual authorship, its regime is less marked by the western dictates of what represents an intellectual effort and what is simply natural.[57] That being said, GIs are not free of other issues, for example, the way they attribute the authenticity of a product to a location implies that it must 'sit still'. First, this can be a hindrance to the flexible and dynamic nature of culture even for traditional knowledge,[58] but it also has troubling political implications, when a single unchanging identity is claimed for a place.[59] Additionally, the protection afforded by a GI focused on preventing passing off, is far from enough to protect traditional knowledge from being appropriated by outsiders, as we shall see below (part II-3).

2. *The varied opportunities of property law*

The importance of GIs and creative commons is in showing how modular proprietary interests can be beyond the binary of IP or its opposite. Of course, the cultural environmentalists generally defend these types of frameworks of creation, Yochai Benkler notably advocates for

[53] ibid, 82-83.
[54] TRIPs Agreement (n 2) Art 22(1).
[55] Biagioli (n 8), 28.
[56] Sunder (n 7), 98
[57] ibid, 99.
[58] ibid, 115.
[59] Bronwyn Parry, 'Geographical Indications: Not All 'Champagne and Roses' in Lionel Bently, Jennifer Davis, and Jane Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge University Press 2008) 365.

a highly structural public domain inspired by creative commons.[60] But even he defends the commons as the opposite of property, which he defines only as a regime where 'one particular person has the authority to decide how a resource will be used', and can 'sell it, give it away, more or less as he or she pleases'.[61] As creative commons and geographical indicators show, this definition does not reflect the variety of ways in which proprietary rights can be organised. These examples show it is possible to conceive of property not as a monolith of rights built around exclusion, but as a framework of rules adapted to a recurring pattern of human affairs, to create the most utility and fairness in this pattern.[62]

This way of conceiving of property allows for different combinations of rights to be applied according to the type of object and the use made of it, as Carol Rose shows this in her analysis of Roman property.[63] The Romans conceived of four types of nonexclusive property. The regime at the far end of the spectrum of freedom is the *res nullius*, covering all things not yet appropriated and free to be so in the future. This is the regime, which is most evocative of an opposite to property, characterised by freedom. Its definition also applies to most of the public domain,[64] made up of ideas not yet privatised but free to become IP. But the Romans did not stop at private property or its opposite, they also had a regime for things open to all by nature, such as the ocean or the atmosphere, these resources not being capable of appropriation.[65] The most interesting degree of property developed by the Romans when discussing IP is *res universitatis*. This applies to property belonging to a group, it is not exclusive, but it is still subject to regulations. The non-exclusivity of the subject encourages exchange, crucial to the synergies of creativity, yet can be protected against behaviours that disrupt the functioning of the group.[66] Keith Aoki proposes a similar regime for the music of black blues artists.[67] Seeing the way these artists interact in their art, but seeking protection from unfair appropriation, Aoki proposes a commons regime that would let artists borrow from each other's songs while protecting their material from outside parties.[68] A last form of property

[60] Benkler (n 6)
[61] ibid, 60.
[62] James Boyle (n 13) 6. See also, for a similarly functional definition of property, Léon Duguit's definition as summed up by Orsi (n 49).
[63] Rose (n 49).
[64] It does not cover all the public domain as some parts of it cannot be appropriated, such as uses of art which fall in the category of fair use, or inventions that do not satisfy the requirements of patentability or fall in the category of prior art. See also Pamela Samuelson, 'Mapping the Digital Public Domain: Threats and Opportunities' (2003) 66 Law and Contemporary Problems 147.
[65] Rose (n 51), 93.
[66] ibid.
[67] Anupam Chander and Madhavi Sunder, 'Is Nozick Kicking Rawls's Ass?' (2007) 40 UC Davis Law Review 563, 569.

was the *res divini juris*, the things that remained unowned because they were holy. Although this regime appears outdated, Rose sees a potential application to the culturally iconic and widespread, ideas that are ubiquitous and ingrained in popular culture.[69]

If, as the Romans did, we define property functionally rather than as a natural right,[70] it is better understood as a bundle of rights[71] which can be divided between multiple actors. In the example of copyright submitted to a universal license, the right to alienate is kept by the creator, but the right to use is distributed to the public. If it is possible to define property flexibly as such, the question remains of why the public domain rhetoric should allow for these nuances rather than portraying its case as a duel between property and its opposite. Staying within this traditional binary to criticise IP certainly has the strength of simplicity, arguing for 'the opposite of IP' being concise yet hard-hitting. By remaining in the original paradigm of IP, it can also appeal to a conservative strand and thereby better gain approval.[72] However, the binary of property is not anodyne. As John Commons argued in his book *The Distribution of Wealth*,[73] property does not emanate from natural law, but from the state's agenda, as defining the strength, the distribution, and the legal protection given to the rights in the bundle of property determines how wealth is distributed.[74] As such, defining property around the central characteristic of exclusion, as is usual,[75] lets a certain distribution of wealth persist. Defending the opposite of propriety defined as such does not address this issue, and in fact may cement its distributive effects, as we shall see in the next section.

3. *The politics of the public domain*

Portraying the public domain as the opposite of property, as a *res nullius*, is not free of consequences. Indigenous peoples will be familiar with the term and its use in erasing non-Western rights. Indeed, it was commonly used in colonial times to claim that lands yet undiscovered by the powers of the West were open to appropriation, regardless of native people living there.[76] As such, international law has been marked from its earliest days by the instrumentalisation of the concept of imposing certain power relations. The concept of *res*

[68] Keith Aoki, 'Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)' (2007) 40 UC Davis Law Review 717, 741.
[69] Rose (n 49), 109.
[70] Orsi (n 47); Waldron (n 47).
[71] John Commons, *The Distribution of Wealth* (First published Macmillan and Co, 1893).
[72] Sunder (n 7), 102. Referring to James Boyle, 'A Manifesto on WIPO and the Future of Intellectual Property', 2004 Duke L & Tech Rev 0009 <https://law.duke.edu/scholarship/journals/> accessed 13 July 2023.
[73] Commons (n 73).
[74] Orsi (n 47), 377.
[75] ibid; Benkler (n 6).
[76] Marcelo Kohen and Mamadou Hébié, 'Territory, Discovery', in Anne Peters (Gen. ed.) *Max Planck Encyclopedia of Public International Law* (OUP 2011).

nullius has also been applied to the ocean depths until developing nations lobbied for the establishment of a regime requiring the exploitation of these depths to benefit all of humanity. They saw the danger of this resource being exploited unequally by the dominant powers of the international stage if it were left as a free-for-all.[77]

The neutrality of the law in a community with unequal powers inevitably favours the powerful, who will have better means of exploiting the resource. As such, a commons regime was created rather than total freedom.[78] The crucial difference between the two regimes is that in a *res nullius* regime, the object belongs to no one and is then alienable freely, whereas in the commons regime, the object belongs to all, and to protect everyone's equitable share in it, some rules may be imposed on its exploitation and use.[79] A commons regime can therefore be to the disadvantage of the powerful, who, holding the tools of appropriation and exploitation, will be limited in using them by rules maintaining some form of equal access to the resource.[80]

The public domain being as it stands submitted to no rules as to the fairness of appropriation, except for its manifestation in fair use and elapsed IP rights, its defence can be skewed in favour of the already powerful and preclude marginalised groups from its benefit. The public domain has indeed been used since its creation to exploit freely intangibles that do not fit the western model. These creative products will generally be described as unowned, because they were not invented by one romantic author, thereby not fitting into the narrative built by our current IP regime. [81] Such victims of the public domain can include folklore, religious artefacts and agricultural strains developed over generations by indigenous communities.[82]

The dichotomies threaded through the public domain rhetoric are thus also stitched through the appropriation of traditional indigenous varieties of seeds, dubbed the 'Great Seed Rip-Off' by scholars publicising the issue.[83] These seeds, developed over generations by indigenous groups can be easily appropriated by being treated as nature, or nonscience; as opposed to the same varieties slightly genetically altered, which can then be treated as artefactual, manmade, and as such patentable.[84] This logic does not simply apply to seeds, but

[77] Anupam Chander and Madhavi Sunder, 'The Romance of the Public Domain' (2004) 92 California Law Review 1356.
[78] Ibid.
[79] Chander and Sunder (n 77); See also Ostrom (n 47).
[80] ibid.
[81] Rose (n 49).
[82] Ruth L Okediji, 'Traditional Knowledge and the Public Domain' (2018) 176 CIGI Papers <https://www.cigionline.org/publications/traditional-knowledge-and-public-domain/> accessed 13 July 2023, 2.
[83] Aoki (n 5), 47.
[84] ibid.

also to medicinal plants and medical knowledge, which when fostered by traditional indigenous groups are part of the public domain, but when they are moulded to the forms of knowledge accepted in the West, become patentable. Patents acquired this way can even be enforced against the communities from whom the innovation originated, this flow of knowledge and power helped by the TRIPS agreement.[85] Because most scientists and artists believe, as they are encouraged to by a strong public domain rhetoric, that traditional knowledge is freely available to use,[86] 'curare, batik, myths, and the dance "lambada" flow out of developing countries.., while Prozac, Levis, Grisham, and the movie Lambada! flow in...'[87]

If rhetoric is crucial, the academics who defend the opposite of IP must be cognisant of the parties they advantage by building what Chander and Sunder call 'the Romance of the Public Domain'.[88] This new romantic approach to IP scholarship replaces the image of the romantic author. While a world where we are free to build on each other's works and learn from them without limits is an attractive prospect, we cannot forget that freedom is often exploited to exclude and exploit. Mark Rose reminds us in his history of copyright that before early IP law, literary works were not freely available, but rather controlled restrictively by guild publishing privileges, in a way that made the first iteration of copyright a liberalising force for culture.[89] Customary norms have historically regulated cultural commons in a xenophobic or backwards-looking manner, the exclusion of women from literary circles being a prime example.[90] Thus, if one is worried about the distributive fairness of IP, as the cultural environmentalists seem to be,[91] the public domain rhetoric is ill-suited to furthering a goal of fairness. Even when it is accompanied by descriptions of regulated commons rather than the total freedom of the *res nullius*, rooting for the argument in its opposition to property and comparisons to the natural world rather portray a libertarian case.[92]

IP is rife with the unfairness just described, as well as being the cause of crises in access to medicine[93] and restricted access to knowledge for the poor,[94] to cite a few of the issues a

[85] TRIPS Agreement (n 2). It helps by allowing transnational enforcement of patents, ironically defended by richer countries to defend against piracy of their IP in other countries, now being used to enforce patents over western cultural products shaped by traditional knowledge. See also Aoki ibid, and Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (South End Press 1996) 2-5.
[86] Okediji (n 85), 4.
[87] James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Harvard University Press 1997) 125.
[88] Chander and Sunder (n 77)
[89] Rose (n 10), 1.
[90] Rose (n 51), 107.
[91] Boyle (n 6); Benkler (n 6).
[92] Chander and Sunder (n 77), 1334.
[93] Drahos (n 3).
[94] Chander and Sunder (n 67), 569.

critic of IP would want to grapple with.[95] To inject ethical considerations into the criticism of IP without losing the crux of the public domain rhetoric and its criticism of exclusive IP rights, a human rights rhetoric may be better suited than environmental imagery.

D. INJECTING ETHICS INTO IP

1. *Human rights as a rhetorical tool*

Since the adoption of the Universal Declaration on Human Rights (UDHR)[96] and the birth of international human rights law as we know it, IP rights have been part of this body of law.[97] Indeed, article 27 of this declaration proclaims the right to protection of moral and material interests in one's scientific, literary, or artistic production,[98] which the International Covenant on Economic, Social and Cultural Rights (ICESCR)[99] turns into positive law in its 15th article. The potential overlap between human rights law and IP law has however remained of little importance for a long time,[100] as IP has largely ignored human rights law, with no reference to human rights in the major IP treaties.[101] But as IP has grown to cause potential violations of various rights, such as the right to food, health, or education,[102] it has come to the attention of human rights bodies that states should be reminded of the primacy of human rights law over economic policies.[103]

Despite the jurisdictional issues it may cause,[104] this primacy of human rights over economic interests shows the promise of a human rights rhetoric in IP. On a legal basis, it can be defended through the Vienna Declaration and Programme of Action which provides that 'human rights are the first responsibility of Governments'.[105] But it also stands that on a purely rhetorical basis, human rights have a lexical superiority to other considerations.[106] In a discussion about the goals and effects of IP, as in other areas of policy, human rights will

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[95] Sunder (n 7), 119. For the argument that a utilitarian criticism of IP is not enough.
[96] UNGA 'Universal Declaration of Human Rights' Res 217A(III) (10 December 1948) UN Doc A/810.
[97] Helfer (n 9), 978.
[98] UDHR (n 97).
[99] (1966), 993 U.N.T.S. 3
[100] Helfer (n 9), 975.
[101] ibid, 979.
[102] Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40 UC Davis Law Review 1039, 1125.
[103] UNCHR (Sub-Commission), 'Intellectual Property Rights and Human Rights' (2000) UN Doc E/CN.4/Sub.2/RES/2000/7.
[104] Helfer (n 9), 977.
[105] UNESC 'The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner' UN Doc E/CN.4/Sub.2/2001/13.
[106] For the concept of lexical priority, see John Rawls, *A Theory of Justice* (Oxford University Press 1999) 37–8. For its application to human rights and their value to specify minimum moral thresholds, see Simon Caney, 'Climate Change, Human Rights and Moral Thresholds' in Stephen Humphreys (ed.) *Human Rights and Climate Change* (Cambridge Universi

generally take precedence over other considerations such as economic productivity or innovation.[107] They thus present a promising way to give weight to considerations of the social impacts of IP law in its development and application. Still, many who defend these social considerations argue against the use of human rights rhetoric in IP.[108] Indeed, they see a risk in human rights law's aforementioned protection of IP entitlements, so that human rights rhetoric could be used to reinforce IP rights' inviolability despite its social impacts. There are two parts to this risk. First, IP is protected not only as a socio-cultural right but through the right to property, which has a stronger rooting in human rights than the right to health or education, considered to be second-generation rights.[109] Secondly, there is reluctance to turn to human rights law when it has historically been a western body of law, developed from the liberal theories of the Enlightenment which give an inviolable and absolute statute to property as a natural right.[110] Because of this, human rights law could be a vehicle for making IP rights even stronger, backed by this philosophy.[111]

To address the first objection, it should be reminded that the reach of human rights law has grown far beyond the post-war lists of rights which founded it, so that the European Court of Human Rights, created to protect primarily civil and political rights may enforce, e.g., a right to peaceful sleep,[112] or to a healthy environment.[113] While critics have called this an 'inflation of rights',[114] others see a mutation of human rights law as a framework for justification.[115] From this perspective, the value of rights is in letting courts submit public decisions and private actions that result from them to a test of proportionality.[116] This test is a way to balance whatever interest the state is pursuing in its action or inaction with the human impacts this has,[117] so that policies that harm the interests of individuals must be justified, first because they pursue a legitimate interest and secondly because they are adequate and proportionate means to pursue this interest.[118]

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ty Press 2010).
[107] Caney ibid.
[108] Helfer (n 9), 976.
[109] Yu (n 103), 1125.
[110] See below in this article, section III (2).
[111] Helfer (n 9).
[112] Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 3.
[113] *López Ostra v Spain*, European Court of Human Rights (9 December 1994).
[114] Möller (n 113), 2.
[115] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 Law & Ethics of Human Rights 141.
[116] ibid.
[117] Kai Möller, 'Justifying the culture of justification' (2019) 17 International Journal of constitutional Law 1078, 1082.
[118] ibid. This is a simplification of the proportionality test, taking the crux of the multiple variants of it around the world.

As well as a way of expanding the application of human rights law beyond textual limits, this approach also brings nuance into human rights litigation. The framework of justification means that human rights can indeed be infringed in certain controlled conditions, so rights, including the right to property, are not monoliths but rather can be adapted and moulded to conciliate with rival legitimate interests.

From the proportionality review and the 'inflation of rights', we can see that socio-economic rights will not be automatically defeated by the right to property. Bringing human rights rhetoric to IP would thus not eclipse social considerations even if they are not explicitly protected by human rights treaties. The proportionality review also shows human rights law's flexibility and potential in taking more varied forms of property into account than the monolithic definition we see in cultural environmentalists' rhetoric. Far from making property inviolable, human rights law has come a long way since its property-reinforcing past.

2. *Human rights as a paradigm shift: escaping the binary*

The philosophy of human rights law has always shown the imprint of the importance given to private property. From Locke's theory of natural rights being built around the right to property,[119] to the French Revolution's Declaration of the Rights of the Man and the Citizen[120] recognising the right to property as one of the foremost natural rights, on the same level as liberty, freedom from arbitrary detention and resistance to oppression.[121] Where above the argument was made that the public domain was born at the same time as IP, similarly human rights were born alongside private property as we know it.[122] If property came to be 'nine tenths of the law' as Mark Rose points out,[123] it is thanks to the natural rights doctrine. This was certainly Marx's criticism of liberalism and especially the French Declaration of Rights, seeing in it a way of reinforcing a social order where wealth was concentrated in the hands of property holders, their interests now protected by the law.[124]

The same criticism is thus perfectly natural when it comes to IP. As stated above, International human rights law protects IP rights,[125] and the European Court of Human Rights recognises the possibility of protecting IP through the right to property.[126] The Marxist

[119] John Locke, *Two Treatises of Government*, Peter Laslett (ed) (first published 1690 Awnsham Churhill, Cambridge University Press 1988) 286.
[120] National Constituent Assembly of France, Declaration of the Rights of Man and of the Citizen (26 August 1789).
[121] Ibid, article 2.
[122] Susan Marks, *A False Tree of Liberty, Human Rights in Radical Thought* (OUP 2019), 7-8.
[123] Rose (n 10).
[124] Karl Marx, *On the Jewish Question*, in Blaug Ricardo (ed), *Democracy: A Reader* (Columbia University Press 2016) 271-272.
[125] UDHR (n 97); ICESCR (n 100).
[126] *Anheuser-Busch Inc v Portugal* (2007) 44 EHRR 43.

criticism, reinforced with time by the view of human rights as a western concept, imposing individualistic values on the rest of the world,[127] makes a strong case against their mixing with IP. It is difficult to see, from this point of view, how the addition of another body of law resulting from the western individualistic tradition could solve the issues of apprehending traditional knowledge and collective forms of creativity fairly. With a tradition of strong property rights, adding a doctrine of individual liberties among which the right to IP could cause a phenomenon similar to the Lochner era of the Supreme Court of the United States, where constitutional rights were used to argue against the poor and vulnerable's protection. In this line of jurisprudence, the Supreme Court systematically struck down socio-economic regulations such as minimum wage requirements or child labour laws, on the basis that these regulations infringed on private contract and property rights.[128]

But just as the tide turned against the Lochner era judgements and the Supreme Court changed courses, human rights law has come a long way since its individualistic beginnings. First of all, developing countries have appropriated the philosophy of human rights and made it their own, most notably through the drafting of the American Convention on Human Rights (ACHR)[129] and the African Charter on Human and People's Rights (ACHPR).[130] Both conventions have come alive through the jurisprudence of their respective adjudicatory bodies, the conventions being overseen by their respective commissions,[131] and interstate or individual complaints on their application being justiciable before the American Court of Human Rights[132] and the African Court of Human and People's Rights.[133] Both have developed international human rights law in a direction where socio-economic rights are recognised as interdependent and a necessary complement to civil and political rights.[134] Additionally, the African Charter is

[127] For a summing up of these criticisms, see Michael Freeman, 'Universalism of human rights and cultural relativism' in Scott Sheeran and Sir Nigel Rodley (eds*), Routledge Handbook of International Human Rights Law* (Routledge 2013) 49-53.
[128] Lacroix J and Pranchère J-Y, *Human Rights on Trial: A Genealogy of the Critique of Human Rights* (Cambridge University Press 2018), 11.
[129] 1969.
[130] 1981.
[131] The American Commission on Human Rights was established by the third resolution of the Meeting of Consultation of the Ministers of Foreign Affairs of the Organization of American States in 1959. The African Commission of Human and People's Rights was created by the ACHPR and inaugurated in 1987.
[132] Established in 1969 by the ACHR.
[133] Established in 1998 by the Ouagadougou Protocol to the ACHPR.
[134] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) c/ Nigeria*, African Commission of Human and People's Rights (27 October 2001); *Villagrán Morales et al v Guatemala*, Inter-American Court of Human Rights Series C No 63 (19 November 1999) 191; *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Inter-American Court of Human Rights Series A No 112 (2 September 2004) 149.

a pioneer in recognising the collective rights of peoples in its text.[135] While these are regional evolutions, their impact should not be minimised considering the influence the regional human rights courts have on each other, and on the UN system of human rights.[136]

Combining the evolution of human rights law to represent more varied cultures and to protect a vast list of interests through the proportionality assessment, the right to property is not as sacred as it once was. This has made it possible, e.g., for the European Court of Human Rights to protect the right to housing as part of the right to a private and family life even when infringing on the right to property.[137] Even more important, in the Inter-American Court of Human Rights, a collective right of an indigenous community over their land was recognised, even without a property title, and enforced against a private property right.[138]

This case law serves to dislodge the primordial nature of property, by contrasting it with other human rights or even other relationships to the land than the purely materialistic one enforced by the traditionally western property right.[139] Most importantly for the point made in this article, it changes the conception of property to mould it to the specific human and social needs it applies to, without these being automatically overridden by economic interests.

Thus, not only is the Human Rights language a strong rhetorical tool to add social considerations to our analysis of IP, but it is also a more nuanced one than the environmental language. It permits different types of entitlement to resources and a deontological rather than utilitarian approach to policy.[140]

E. CONCLUSION

To sum, the public domain rhetoric has been an important shift in discussions on IP and a useful way of conceptualising value in the public domain. Its simplicity in arguing for an opposite to IP and calling on natural imagery has helped to shift attitudes away from seeing privatisation as the best way to encourage creativity and innovation.[141] Yet the utilitarian nature of the

[135] The African Charter was the first international human rights instrument to protect human and people's rights together, see Alioune Badara Fall, 'La Charte Africaine des Droits de l'Homme et des Peuples: Entre Universalisme et Régionalisme' (2009) 129 Revue Pouvoirs, Le Seuil 77, 86.
[136] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) University of Rich Law Review 99.
[137] *Moldovan and others v. Romania* [2005] ECHR 458.
[138] *Xákmok Kásek Indigenous Community v Paraguay*, Inter-American Court of Human Rights (24 August 2010); *Mayagna (Sumo) Awas Tingin Community v Nicaragua*, Inter-American Court of Human Rights Series C No 79 (31 August 2001).
[139] *Xákmok Kásek Indigenous Community* ibid, § 87.
[140] Caney (n 107).
[141] On the impact of James Boyle's work, see Sunder (n 7).

criticism[142] means that it fails to address the way the public domain can cause as much harm as IP to minorities and disadvantaged parties, as shown by the use of the public domain to exploit traditional knowledge.[143] Further, the case made for the opposite of property, symbolised by nature in the cultural environmentalists' case, is misleading when in fact the public domain they defend is structural and made up of the rules that characterise property law.[144] To defend a conception of the intellectual realm where cultural and scientific wealth is not concentrated in the hands of a few corporations regardless of the human impacts of this, this article joins the case made for the application of human rights law to IP.[145] As rhetoric, human rights give a strong vocabulary to bring human and social considerations to the same level of importance as economic or other interests states may pursue. Responding to the worry that human rights may also be used to defend IP rights against rival social considerations,[146] the jurisprudence of human rights courts shows that where the right to property is in play, it will firstly not automatically trump other rights, however far removed they may be from the text of human rights treaties.[147] Secondly, these bodies do not conceive of property as an absolute right, so that it can be limited by procedural rules, and types of property not recognised by the state may be recognised by human rights law.[148] As such, this body of law shows the possibility of adapting property regimes to non-materialistic or profit-driven approaches, escaping from the binary set by traditional IP law and the environmentalist rhetoric of many IP critics. It would thereby enable a more holistic critique of expanding IP rights, allowing for regulation to protect weaker stakeholders where needed, and the freedom of the public domain only insofar as it may benefit creativity in its many forms.

[142] ibid.
[143] Okediji (n 83); Chander and Sunder (n 77).
[144] Benkler (n 6). Notably defends a regulated commons.
[145] Laurence Helfer (n 9); Yu (n 103).
[146] Kal Raustiala, 'Density and Conflict in International Intellectual Property Law' (2007) 40 UC Davis Law Review 1021, 1032.
[147] *Xákmok Kásek Indigenous Community* (n 139).
[148] ibid.