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The rise of intellectual property, 700 B.C.–A.D. 2000: an idea in the balance

The concept of intellectual property – the idea that an idea can be owned – is a child of the European Enlightenment. It was only when people began to believe that knowledge came from the human mind working upon the senses – rather than through divine revelation, assisted by the study of ancient texts – that it became possible to imagine humans as creators, and hence owners, of new ideas rather than as mere transmitters of eternal verities.

Besides being distinctively modern, intellectual property is a dense concept, woven together from at least three complex strands of jurisprudence – copyright, patent, and trademark – each with its own sources in premodern custom and law, and each with its own trajectory into our own era.

Still, copyright, and the complementary concepts of authors' rights and literary property in continental law – the focus of this essay – are at the core of the modern concept of intellectual property. It was here in the eighteenth century that the language of "ideas" and "property" first came into contact with one another, and first forged a legal bond. And it was here, too, that the very idea of a property right in ideas was most sharply contested – at the outset, and to the present day.

"From the Heliconian Muses let us begin to sing…." Thus begins Hesiod's *Theogony*, and many other texts of the ancient Greek world. The poet spoke the words of the gods, not his own creations. Knowledge, and the ability to make it manifest to man, was assumed to be a gift, given by the muses to the poet. Alternatively, Plato thought that all ideas were held from birth in the mind, where they had transmigrated from earlier souls. Ancient Greeks did not think of knowledge as something that could be owned or sold. A scribe could be paid fees for his labor, an author awarded prizes for his achievement, but the gift of the gods was freely given. And thus the libraries of the ancient academies were not sold, but were instead transmitted as gifts to the teacher's most worthy successor. Socrates held the Sophists in contempt for charging fees for their learning.

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The rise of intellectual property, 700 B.C. – A.D. 2000

A tour of the other great civilizations of the premodern world – Chinese, Islamic, Jewish, and Christian – reveals a striking absence of any notion of human ownership of ideas or their expressions. In the *Lun-Yii*, or *Analects*, compiled in China in the fifth century B.C., the philosopher Confucius is recorded as saying, "I transmit rather than create; I believe in and love the Ancients." The measure of the greatness of a Chinese scholar was not to be found in innovation, but rather in his ability to render or interpret the wisdom of the ancients, and ultimately God, more fully and faithfully than his fellows. Wisdom came from the past, and the task of the learned was to unearth, preserve, and transmit it. Confucian thought despised commerce and thus also writing for profit; authors practiced their craft for the moral improvement of themselves and others. Reputation, and especially the esteem of future generations, was its own reward, even if it might, incidentally, bestow the worldly gifts of patrons upon its bearer.[1]

This is not to suggest that there was no commerce in books in China. In the land that invented movable type, a book trade flourished as early as the eleventh century. Still, Chinese authors had no property right to their published words. The contents of books could not be owned. Not even the particular expressions an author might employ could be claimed as his. Chinese characters were thought to have come from nature, and no human being could make a claim upon them that would exclude their usage by others. Only the paltry vessel – the paper and ink of a manuscript or a printed book that bore the ideas and expressions – could be bought or sold.[2]

Throughout the Islamic lands, too, there was no concept of intellectual property for many hundreds of years. All knowledge was thought to come from God. The Koran was the single great scripture from which all other knowledge was derived. A text that embodied the word of Allah, it belonged to no one. There were guardians of its true meaning, to be sure – the great Imams who formed schools at the sites of the most important temples. But the principle means of transmitting Koranic knowledge was oral recitation – from teacher to student, in an unbroken lineage from Muhammad himself to his disciples, and from these chosen few forward through the generations. The word "Koran" itself means "recitation," and oral transmission of the living word was always to be preferred over a written transcription. The book was merely an instrument, a lowly tool, to facilitate faithful memorization of the word, and manuscripts were continuously checked and rechecked against oral memory to ensure their accuracy and the authority of their lineage. The Islamic belief that oral recitation, rather than written transcription, best preserved the word of God and kept it pure across the generations meant that the technology of printing was very slow to penetrate into Islamic lands, and it was only widely adopted throughout the Middle East with the advent of the mass newspaper press in

1 William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law and Chinese Civilization* (Stanford, Calif.: Stanford University Press, 1995), esp. 25–29. I would like to thank the National Humanities Center in Research Triangle Park, N.C., for its support of the research and writing of this essay. I would also like to thank Thomas Laqueur and Robert Post for their comments and criticism.

2 Ibid.

the nineteenth century.[3]

To be sure, a certain notion of legal "authorship" did emerge from Islamic scribal practices. But a concept of intellectual property did not. *Sharī'a* law against "imposture" or "fraud" was used to prevent the unauthorized appropriation of the reputation or authority of a great teacher through false attribution of written texts.[4] But the teacher did not own the ideas expressed within his books. A thief who stole a book was thus not subject to the punishment for theft – the amputation of his hand. Islamic law held that he had not intended to steal the book as paper and ink, but the ideas in the book – and unlike the paper and ink, these ideas were not tangible property.[5]

The Judeo-Christian tradition elaborated a similar view of knowledge. Moses received the law from Yahweh and freely transmitted it to the people chosen to hear it. And the New Testament sanctified the idea of knowledge as a gift from God in the passage of the Book of Matthew in which Jesus exhorts his disciples, "Freely ye have received, freely give" (10:8). Medieval theologians interpolated this passage into the canon law doctrine "Scientia Donum Dei Est, Unde Vendi Non Potest" (Knowledge is a gift from God, consequently it cannot be sold).

Selling something that belonged to God constituted the sin of simony. University professors, lawyers, judges, and medical doctors were thus admonished not to charge fees for their services, although they might receive gifts in gratitude for the wisdom they imparted.[6]

Indeed, the language of gift-giving permeated all forms of knowledge exchange in the premodern period, and nowhere more so than in the dedicatory prefaces to books through which authors sought patronage in recompense for the symbolic offering of their works. Thus, even as books were increasingly bought and sold after the advent of print in Europe in the fifteenth century, and even as writers began to sell their manuscripts to printers for a profit, there remained a dimension of the book, its spiritual legacy, that lay beyond the grasp of market relations.[7] The author might lay claim to the manuscript he created, and the printer to the book he printed, but neither could claim to possess the contents that lay within it. The Renaissance elevated the poet, the inventor, and the artist to unprecedented social heights, but their "genius" was still understood to be divinely inspired rather than a mere product of their mental skills or worldly labors.

In the sixteenth century, Martin Luther could thus preach confidently in his *Warning to Printers*, "Freely have I received, freely I have given, and I want

3 Johannes Pedersen, *The Arabic Book*, trans. Geoffrey French (Princeton, N.J.: Princeton University Press, 1984; original publication: Copenhagen, 1946); William A. Graham, "Traditionalism in Islam: An Essay," *Journal of Interdisciplinary History* XXIII (3) (Winter 1993): 495–522; Francis Robinson, "Technology and Religious Change: Islam and the Impact of Print," *Modern Asian Studies* 27 (1) (1993): 229–251.

4 Sayed Hassan Amin, *Law of Intellectual Property in the Middle East* (Glasgow: Royston, 1991), 3.

5 The *Hedaya* 92 (1795), cited in Steven D. Jamar, "The Protection of Intellectual Property under Islamic Law," *Capital University Law Review* 21 (1992): 1085.

6 Gaines Post et al., "The Medieval Heritage of a Humanistic Ideal: 'Scientia Donum Dei Est, Unde Vendi Non Potest,'" *Traditio* 11 (1955): 195–234.

7 Natalie Z. Davis, "Beyond the Market: Books as Gifts in Sixteenth Century France," *Transactions of the Royal Historical Society*, ser. 5, 33 (1983): 69–88.

nothing in return." Well into the eighteenth century the idea of the writer as God's handmaiden held sway. Alexander Pope, in 1711, still conceived of the poet as a reproducer of traditional truths rather than an inventor of new ones, and Goethe could write fairly of the German poets of the early eighteenth century that "the production of poetical works was looked upon as something sacred. It was considered almost simony to accept or to bargain for payment of them."

This theologically informed moral revulsion to the idea of an individual profit motive in the creation and transmission of ideas continued to circulate in the United States well into the nineteenth century. Francis Wayland, the president of Brown University in the 1830s, wrote in his college textbook *The Elements of Moral Science* that "genius was given not for the benefit of the possessor, but for the benefit of others."[8] And an intellectual of no less stature than George Bancroft added a Hegelian twist to the Christian tradition, writing in 1855 that:

> Every form to which the hands of the artist have ever given birth, spring first into being as a conception of his mind, from a natural faculty, which belongs not to the artist exclusively, but to man.... Mind becomes universal property; the poem that is published in England, finds its response on the shores of Lake Erie and the banks of the Mississippi.[9]

The virtually universal proscription of private ownership of ideas in the premodern world did not, of course, mean that ideas flowed freely within premodern regimes. It fell to God's agents upon the earth to determine how much of the knowledge putatively transmitted from God was actually divine in origin, as well as how widely and by whom such knowledge should be circulated within their kingdoms, empires, and cities. Rulers forged alliances with religious authorities to control the production and circulation of ideas and information – both spiritual and technical – within their realms. Throughout the world, the early modern period witnessed the emergence of elaborate systems of prepublication censorship, state-licensed monopolies to control the burgeoning printing and publishing trades, and the use of royal letters of patent or "privileges" to give exclusive monopolies for the printing and publication of authorized texts. Technical inventions came to be regulated by a similar system of exclusive state licensing.

In China, as early as the Tang dynasty (A.D. 618–907), the legal code prohibited the transcription and distribution of a wide range of literature in order to protect the emperor's prerogatives and interests. The first known ordinance regulating publication was that of the Emperor Wen-tsing, in 835, forbidding the private publication of almanacs. An extensive regulatory apparatus was created around the industry of printing under the Sung dynasty (960–1179), and official government printing houses were established in the major cities. Exclusive state privileges were implemented for categories of sensitive literature, from astrological charts, prognostications, and almanacs to official promulgations, dynastic histories, and civil-service examination literature. Private printing houses could register a particu-

8 Francis Wayland, *The Elements of Moral Science* (London: The Religious Tract Society, n.d [1835]), 275.

9 George Bancroft, *Literary and Historical Miscellanies* (New York: Harper & Brothers, 1855), 412, 427.

lar work with Imperial officials and receive an exclusive privilege to print and sell it.

But privileges were not a form of property right in the modern sense. They were a grace, extended by the pleasure of the authorities, and they were revocable at any time. By the eighteenth century a comprehensive system of prepublication censorship and licensing, even of private writing, was in place throughout Imperial China.[10]

European monarchies, empires, and city-states created similar legal and institutional structures in response to the introduction of the new technology of printing in the 1450s. Less than a hundred years later, the Reformation rent western Christendom. With the spread of ideological division, regulation of the printed word intensified rapidly. Rulers granted commercial monopolies, or "privileges," in exchange for submission to state censorship and control. The earliest European initiative occurred in the Republic of Venice in 1469, where Johann Speyer was granted an exclusive monopoly on printing in Venetian territories for a period of five years.[11] The practice of granting exclusive privileges to print in a particular city, to print a particular text, or to print a particular category of texts (schoolbooks, laws, Latin texts, etc.) spread rapidly from Venice throughout the Italian states, and from there to France and England.

England presents an exemplary case. The first royal grant of a privilege to the book trade was the creation of the title of "King's Printer," which was given to one William Facques in 1504. This position afforded him the exclusive right to print royal proclamations, statutes, and other official documents. By 1557 the English crown reorganized the guild of printers and publishers known as the "Stationers' Company" and gave them a virtual monopoly over printing and publishing, both in London and in the kingdom as a whole. In 1559, as part of her attempt to resolve the religious controversies that wracked the realm, Elizabeth I issued an injunction against publication of any text unless it had been licensed by censors appointed by the crown. The Stationers' Company kept a registry of licensed books and the crown could, in principle, extend or revoke a license at will and limit it for whatever term it deemed appropriate. Rights to profit from a book derived not from property in ideas, but from a "privilege" extended by royal "grace" alone.[12]

These licenses were "copied" into the registry book of the guild and soon came to be treated by members of the guild as exclusive rights to print a particular "copy." Though created by royal prerogative, these "copy" rights were bought, sold, and traded amongst guild members, as though they were a form of perpetual property. By the 1570s, four prominent members of the Stationers' Company came to have a monopoly control, through "letters patents" that they claimed as their perpetual property rights, over the most lucrative books in print: Christopher Barker, the Queen's Printer, controlled the Bible, the New Testament, the Book of Common Prayer, and all statutes, proclamations, and other official documents; William Serres

10 Chan Hok-Lam, *Control of Publishing in China: Past and Present* (Canberra: Australian National University, 1983), 2–24.

11 Leonardas Vytautas Gerulaitis, *Printing and Publishing in Fifteenth-Century Venice* (Chicago: American Library Association; London: Mansell, 1976).

12 John Feather, *Publishing, Piracy and Politics: A Historical Study of Copyright in Britain* (London: Mansell, 1994).

had a monopoly on private prayer books, primers, and schoolbooks; Richard Tottel had a monopoly on common law texts; and John Day laid claim to alphabet books, the Catechism, and the Psalms in meter.

A similar process of consolidation of great publishing empires, founded upon monopolistic claims rooted in royal privileges, occurred throughout Christian Europe. By the middle of the seventeenth century, the Paris Book Publishers and Printers Guild, like its brethren in London, had used its strategic proximity to the royal court to achieve a monopoly on the most valued ancient and religious texts as well as the most lucrative contemporary publications.[13] Each of the more than three hundred German principalities and cities developed its own particular mechanisms to censor books, distribute privileges, and regulate guilds.

An author might sell a manuscript to a licensed publisher for a one-time fee, but the real material rewards for the composition of a book came from the anticipated royal or aristocratic patronage that might redound, indirectly, to the writer from its publication. Authors could not publish their own books, and unless they obtained a privilege in their own name, they were denied any profits from the sale of their books. These went to the publishers alone. State-licensed monopolies on texts, on technical inventions, and on the means of reproducing them successfully wedded the commercial interests of publishers, printers, and other technical entrepreneurs to the ideological needs of absolutist states to control the knowledge that circulated in their realms.

13 Henri-Jean Martin, *Livre, pouvoirs et société à Paris au 17ème siècle (1598–1701)* (Geneva: Droz, 1969).

Throughout the early modern world the development of commercial printing and publishing thus first occurred through a system of state-licensed monopolies, sanctioned by religious ideologies, that made no mention at all of intellectual property rights. The prevailing theories of knowledge and of political legitimacy made such rights inconceivable.

In the 1700s, cultural life in Europe underwent a dramatic transformation. A shift from intensive to extensive reading and the rise of a middle-class reading public led to an explosion of print commerce in the eighteenth century. In England, it is estimated that annual book production increased fourfold over the course of the eighteenth century. France, too, saw a marked increase in the literacy rate and a dramatic increase in the demand for modern secular literature.

Everywhere, observers noted the change. Whereas in 1747 Johann Georg Sulzer lamented that in Berlin "the general public does little reading," a half-century later Immanuel Kant recorded a literary world transformed: "This incessant reading has become an almost indispensable and general requisite of life." Kant's observations were confirmed by others: "People are reading even in places where, twenty years ago, no one ever thought about books; not only the scholar, no, the townsman and craftsman too exercises his mind with subjects for contemplation." Increasing literacy and the emergence of a large middle-class readership throughout Europe in the first half of the eighteenth century put unprecedented strains upon a system of publication that had been predicated on the notion that there was a fixed amount of divine or ancient

knowledge to be known, transmitted, and interpreted.[14]

These developments put enormous pressure on traditional notions of authorship. The increased demand for printed matter, and especially for modern secular literature (in particular, novels, theatrical works, and self-help manuals of various sorts), tempted an increasing number of young men (and women) to aspire to become writers. And they were writers of a new sort – oriented more toward the commercial potential of their contemporary readership than toward eternal glory. For the first time, in the eighteenth century, writers like Daniel Defoe in England, Denis Diderot in France, and Gotthold Lessing in Germany began to try to live from the profits of their pens rather than from elite patronage. And, not surprisingly, they began to make claims for better remuneration for their products. Older notions that a fixed "honorarium" or fee was an appropriate reward for the composition of a manuscript gave way to bolder assertions that the author deserved a share in the profits earned from his creative labor.

Rather than selling a manuscript to a publisher, authors increasingly sought simply to sell the "rights" to a single edition. With greater frequency, secular authors began to claim that they were the creators of their own works rather than the mere transmitters of God's eternal truths. As they came to view themselves as the originators of their work, they also began to claim that their creations were their own property, as susceptible to legal protection and as inheritable or saleable as any other form of property. Daniel Defoe wrote in 1710, "A Book is the Author's Property, 'tis the Child of his Inventions, the Brat of his Brain: if he sells his Property, it then becomes the Right of the Purchaser." Authors thus began to assert that their works were their own property, transmissible by contract to others if the authors desired, but that authors should no longer be constrained to sell their manuscripts in order to see them published.

The rise in public demand for printed matter also led to a dramatic expansion in the practice of literary piracy. Sensing unsatisfied market demand and acutely aware of the artificial inflation in the price of some books due to publishers' perpetual privileges, less-scrupulous printers and booksellers throughout Europe paid diminishing heed to the claims to exclusive perpetual privileges on the best-selling and most lucrative works. Cheap reprints, produced most frequently across national frontiers or in smaller provincial cities, began to flood urban markets. Publishers of pirate editions successfully represented themselves as champions of the "public interest," against the monopolistic members of the book guilds. Why, they argued, should any particular publisher have an exclusive claim on a work whose authors or heirs were no longer living – indeed, on many works composed before the invention of printing? Did not the greater good of making enlightening works widely available at a low cost eclipse the selfish interests of individual publishers?

By the middle of the eighteenth century, the traditional system of publication was everywhere in shambles. First in England, and then in France and Ger-

14 W. H. Buford, *Germany in the Eighteenth Century: The Social Background of the Literary Revival* (Cambridge: Cambridge University Press, 1965); Albert Ward, *Book Production, Fiction and the German Reading Public, 1740–1800* (Oxford: Oxford University Press, 1974); Roger Chartier, *The Order of Books* (Stanford: Stanford University Press, 1994).

many as well, calls for reform of the regulation of the book trade were coming from all parties involved. Readers wanted cheaper books. Government legislators sought to increase commerce and to encourage a more educated population within their realms. Foreign and provincial publishers – most notably in Scotland, Switzerland, and secondary French cities like Lyon – clamored against the perpetual monopolies of the London and Paris Book Guilds on the most lucrative books. Authors wanted their property rights in their compositions recognized as absolute and perpetual. And even the privileged guild publishers, especially in Hamburg, Leipzig, Frankfurt am Main, London, and Paris, hoped to see their traditional privileges recognized as perpetual property rights that could be defended against pirates in the courts.

Satisfying and sorting out these conflicting claims provoked a host of pressing new questions: Were ideas in fact a gift from God, as traditional authorities had claimed, or were they the property of those who made them manifest, as authors now asserted? Was a "privilege" a "grace," or was it rather the legal ratification of an anterior, natural right to property? Upon what basis could the governments of nations or cities restrict or confirm traditional privileges? Could a secular foundation be articulated for the regulation of the publication and circulation of ideas?

The reform of the publishing industry in Europe thus entailed a rethinking of the basis and purpose of knowledge. A variety of European thinkers entered into a momentous debate about the origins and nature of ideas. As a result, a series of philosophical (or, more specifically, epistemological) problems were shown to lie at the heart of what at first glance seemed merely to be questions of commercial policy.

One influential view – that authors have a natural property right in their ideas – was articulated first in England and associated with two key texts: John Locke's *Second Treatise* (1690) and Edward Young's *Conjectures on Original Composition* (1759).

In his *Treatise,* Locke famously wrote that "every Man has a *Property* in his own *Person*. This no Body has any right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his." Three generations later, the poet Edward Young, writing with the assistance of the novelist Samuel Richardson, asserted that the author contributed more than simply his labor to a book – he imprinted its contents with his original personality. According to Young, the labor of an author was thus of a higher order than the labor of an inventor, never mind the labor of a farmer, for the author not only worked upon nature, but produced something from himself, which bore the indelible stamp of a unique personality. While limits might be imposed upon patents for mechanical inventions, products of the mind – bearing the personhood of their author – ought to belong perpetually to their creator. Intellectual property, an invention of the eighteenth century, thus burst into the world claiming to be real property in its purest form.

Young's reflections, like those of John Locke before him, constituted a dramatic secularization of the theory of knowledge. If all knowledge was derived from the senses working upon nature, as Locke had argued in the *Essay Concerning Human Understanding* (1689), there was no role left for divine revelation. In the secular epistemology of Locke, inspiration is internalized and redefined as cognition. Young in turn applied Locke's

epistemology to argue that cognition emanates from the workings of a unique mind. The individual personality supplanted God as the divine font of knowledge.

The new British accounts of knowledge began circulating almost immediately on the Continent. Young's *Conjectures on Original Composition* was rapidly translated into German and went through two editions there in the two years after it first appeared in English. Meanwhile, in France, both Locke and Young were widely influential. In 1726, for example, the French jurist D'Hericourt seized upon Locke's critical passage to argue in court on behalf of perpetual book privileges for authors, asserting that products of the mind are "the fruits of one's own labor, which one should have the freedom to dispose of at one's will" and forever. One could own one's ideas just as one owned land that one had cleared with one's own labor. D'Hericourt concluded that a royal book privilege was not merely a grace accorded by the king, to be granted or revoked at his will, but rather a legal confirmation of an anterior natural property right, secured by the author's labor.[15] The author could sell or retain those rights as he or she wished. Once sold, they belonged to the publisher in perpetuity.

The same argument was taken up again by the encyclopedist Denis Diderot in 1763, after he was commissioned by the Paris Book Guild to write a *Letter on the Book Trade*. In Diderot's words, we can hear the resonance of both Locke and Young:

> What form of wealth *could* belong to a man, if not the work of the mind . . . if not his own thoughts . . . the most precious part of himself, that will never perish, that will immortalize him? What comparison could there be between a man, the very substance of a man, his soul, and a field, a tree, a vine, that nature has offered in the beginning equally to all, and which the individual has only appropriated though cultivating it?[16]

Like Young, Diderot argued that products of the mind are more uniquely the property of their creator than land acquired through its cultivation. Literary property should, therefore, be even less susceptible to social regulation than land.

It was Gotthold Lessing, the greatest writer of the German Enlightenment, who most forcefully developed the notion of the author's unique personality as a source of property rights in ideas. In a 1772 essay, *Live and Let Live*, Lessing proposed a reorganization of the German book trade that attacked the foundations of the old system. He challenged directly the traditional ban on profits received from writing:

> What? The writer is to be blamed for trying to make the offspring of his imagination as profitable as he can? Just because he works with his noblest faculties he isn't supposed to enjoy the satisfaction that the roughest handyman is able to procure? . . . Freely hast thou received, freely thou must give! Thus thought the noble Luther. . . . Luther, I answer, is an exception in many things.

From Lessing forward, German writers clamored insistently for recognition of their claims upon their writings as a form of unique, perpetual, and inviolable property.

15 Raymond Birn, "The Profit in Ideas: *Privilèges en librairie* in Eighteenth-Century France," *Eighteenth-Century Studies* 4 (2) (1971): 131–168.

16 Denis Diderot, *Oeuvres Complètes*, 15 Vols. (Paris: 1970), 5:331 (my translation).

A generation later, Johann Gottlieb Fichte, a philosopher and disciple of Kant, probed the complexities of the problem even more deeply. Fichte posed a difficult question: if creations of the mind were indeed "property," what exactly was immaterial property? Clearly it did not simply consist of a physical manuscript, since the author or the publisher could no longer claim such an object to be unique once it had been reproduced through printing. Literary property seemed to lack the singular physical form that characterized other forms of real property. But this was not the only difficulty with the idea of a property in ideas. After all, a great many people seemed able to share the same ideas, and it seemed intuitively just that as many people as possible should be permitted to express freely the same ideas independent of one another.

Fichte's solution to his puzzlement proved widely influential. For an idea to be regarded as a piece of real property, Fichte argued, it had to be assigned some distinguishing characteristic that allowed one person, and no other, to claim it as his own. That quality, he suggested in 1791 in his essay *Proof of the Illegality of Reprinting: A Rationale and a Parable,* lay not in the ideas per se, but rather in the unique "form" in which an author chose to express these ideas. Once published, the ideas in a book belonged to all – but the singular form of their expression remained the sole property of the author. Even ideas that had been "in the air" could become a piece of property through the unique way in which an author expressed them. Fichte's distinctions – between the material and the immaterial book, and between the content and form of ideas – were to be critical in establishing a new theory of copyright based on the natural right to property in the unique expressions of ideas, rather than in the ideas themselves.[17]

Not everyone shared the enthusiasm of Fichte and Diderot and Edward Young for the nascent concept of intellectual property. Some viewed the widespread movement toward securing an author's property rights as nothing more than a new metaphysics and a thinly veiled campaign to protect the monopolies of book publishers. In the 1770s, a zealous German mercantilist went so far as to defend the piracy practiced by some German book publishers:

> The book is not an ideal object. . . . It is a fabrication made of paper upon which thought symbols are printed. It does not contain thoughts; these must arise in the mind of the comprehending reader. It is a commodity produced for hard cash. Every government has a duty to restrict, where possible, the outflow of its wealth, hence to encourage domestic reproduction of foreign art objects.

In 1776, the French mathematician and philosopher Condorcet expressed even deeper reservations, for philosophical rather than commercial reasons. Writing in direct response to Diderot's *Letter on the Book Trade,* Condorcet disputed his Lockean line of argument: "There can be no relationship between property in ideas and [property] in a field, which can serve only one man. [Literary property] is not a property derived from the natural order and defended by social force; it is a property founded in society itself. It is not a true right; it is a privilege."

Ideas, Condorcet asserted, are not the creation of a single mind. Nor are they a

17 Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'" *Eighteenth-Century Studies* 17 (1984): 425–448.

gift from God to be regulated by royal authority. Ideas inhere in nature and are equally and simultaneously accessible to all. Ideas are intrinsically social: they are not produced by individuals alone; they are the fruit of a collective process of experience.

Moreover, Condorcet could see no social value in granting individual claims upon ideas. Since true knowledge was objective, particular claims on ideas could consecrate nothing more than mere style, what Fichte had called "form." Condorcet, as a man of science rather than literature, had little use for style. Style merely distorted nature's truths, and to encourage the individuation of ideas was simply to encourage pleasant fictions and personal gain rather than the pursuit of knowledge and the public good: "It is uniquely for expressions, for phrases, that privileges exist. It is not for the substance of things.... Privileges of this sort, like all others, are inconveniences that diminish activity by concentrating it in a small number of hands.... They are neither necessary nor useful, and ... they are unjust."

While Diderot, Lessing, and Fichte celebrated romantic originality, Condorcet sought to ground public literary culture in scientific rationalism. The model of publication based upon authors' property rights could, according to Condorcet, be replaced with the model of periodical subscriptions, like the *Journal des Savantes*. People could subscribe to useful publications and the authors could be remunerated as salaried employees or freelance writers for a nonprofit organization. More important than his specific policy suggestion was Condorcet's claim that if ideas, as social creations, were to be recognized as a form of property, it must not be on the basis of an individual natural right but rather on the basis of the social utility of a property-based regime.

Condorcet thus erected a second, alternative pillar for the modern notion of intellectual property: social utilitarianism.

The tension within Enlightenment epistemology left those policymakers concerned with the book trade on the horns of a philosophical dilemma. Did knowledge inhere in the world – or in the mind? To what extent were ideas discovered – and to what extent were they invented?

Condorcet argued that knowledge was objective and thus fundamentally social in character, belonging to all. Diderot, along with Young, Lessing, and Fichte, viewed ideas as subjective, originating in the individual mind and thus constituting the most inviolable form of private property.

Two strains of legal interpretation developed from these competing philosophical doctrines. Those legal thinkers who sided with the objectivist position of Condorcet elaborated the utilitarian doctrine that there was no natural property in ideas, and that granting exclusive legal rights to individuals for unique forms of their expression could only be justified because such an arrangement was the best legal mechanism for encouraging the production and transmission of new ideas, a manifest public good. Conversely, those who sided with Locke, Young, Diderot, Fichte, and the subjectivist camp argued that there was a natural right to perpetual property in ideas and that legal recognition of that right was simply the confirmation in statute of a universal natural right. The utilitarian position thus understood the public interest as the highest aim of the law, while natural-rights proponents argued that the sanctity of the individual

creator should be the guiding principle of any legislator.

Over the course of the eighteenth century, every European country witnessed a series of legal battles over which of these principles would prevail. Vested interests on both sides of the debate vied to capture the legislative advantage. The English were the first to take up the question after the lapsing of the Licensing Act in 1695, which had regulated the book trade and censorship. Intending to end prepublication censorship by suppressing the obligation to submit to prior licensing before publication, Parliament inadvertently also called the whole system of privileges into question. If a work were not registered prior to publication, no mechanism existed to protect literary privileges against pirate editions. The Stationers' Company clamored for recognition of their traditional privileges as perpetual property rights, while pirate publishers insisted that the lapsing of the act meant that all previously published works were now free for all to reprint.

Parliament finally filled the legal vacuum in 1710, when the so-called Statute of Anne definitively separated the question of censorship from that of literary property. The statute ruled that authors, and those who had purchased a manuscript from an author, would have an exclusive right to publish the work for fourteen years (the term that had previously been established for patents on mechanical inventions). This right could be renewed for an additional fourteen years. But after this period (of fourteen or twenty-eight years), the work became part of the public domain, and anyone was free to publish it. As a result, all of the monopolies held by the Stationers' Company on classical texts were abolished. In effect, the Statute of Anne – its full title, appropriately enough, was "A Bill for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners Thereof" – represented an uneasy compromise between the position of the Stationers' Company and the advocates of authors' natural rights on one side and the position of the pirate publishers and advocates of "the public interest" on the other.

Needless to say, neither side was entirely satisfied with this compromise. The contradictory philosophical assumptions it codified left plenty of room for subsequent court challenges. A series of cases that pitted London publishers against foreign rivals – *Tonson* v. *Collins* in 1760, and *Millar* v. *Taylor* in 1769 – led briefly to a recognition of perpetual property rights in the unique expression of an idea. But *Donaldson* v. *Becket* in 1774 reversed this decision, and definitively established as British law the compromise concept of a "limited property right" in the unique expression of an idea.

The *Donaldson* v. *Becket* decision was crucial in two respects. First, despite the dissenting voice of eighteenth-century England's most distinguished jurist, William Blackstone, it established the "encouragement of learning" as the highest aim of the laws regulating books. Second, even though copyright was acknowledged to be a natural right rooted in common law, the *Donaldson* v. *Becket* decision held that copyright in practice hinged on government legislation. In England, the utilitarian doctrine of a higher public good trumped the idea of intellectual property rooted in natural right.[18]

18 Mark Rose, *Authors and Owners. The Invention of Copyright* (Cambridge, Mass.: Harvard University Press, 1993).

Carla Hesse on intellectual property

In early America, both natural rights and utilitarian doctrines were debated within the British colonies, and colonies differed as to which theory formed the basis of their laws.[19] The Statute of Anne, as ratified by the *Donaldson* v. *Becket* decision, became the basis for the relevant clause in the Federal Constitution of 1787: "Congress shall have the power . . . to promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This article in turn became the basis of the United States Copyright Statute of May 31, 1790. The author or inventor was acknowledged as an individual with special claims upon his own ideas – but the public good dictated that those claims be limited. In America, as in England, there thus remained a persistent tension between a natural-rights justification for perpetual copyright claims, rooted in common law, and statutory limits that preempted, but did not abolish, those anterior rights.

A similar tension in French legal thinking provoked a parallel set of court battles. At the beginning of the eighteenth century, the French crown, hoping to strike a compromise between Parisian publishers and their provincial competitors, had declared that privileges were not a form of perpetual property, as the Parisian publishers claimed, but rather "a grace founded in justice"; as a result, privileges could be limited, renewed, or even revoked, at the king's will. This ruling permitted the crown officers administering the book trade considerable latitude in redistributing privileges. The ruling did little, however, to undermine the monopolies of the Paris Book Guild, or to forestall a growing flood of books illegally produced by provincial and foreign printers.

In 1777, the French crown, confronted with mounting criticism, was forced to revise the system of privileges. While still refusing to recognize the concept of "literary property," the king for the first time granted authors their own category of privileges (*privilèges d'auteur*). These new privileges were to be perpetual and inheritable, like any other form of personal property. However, once an author sold a manuscript to a publisher, the publisher's claim would be limited to ten years, with the possibility of a single renewal. This meant that the publisher's privileges were to be restricted at the same time as unlimited privileges were extended to authors. The Paris Book Guild, predictably enraged, refused to acknowledge the new law and essentially went on strike against crown officials until the Revolution in 1789.

The Revolution changed everything. "Freedom of the press" was declared and literary privileges abrogated. The royal administration of the book trade was abolished, and so were the Parisian book guilds. Authors were now widely celebrated not as private creators and possessive individuals, but rather as civic heroes, servants of public enlightenment.[20]

Hoping to establish the French book trade on a new, secular footing, the Abbé Sieyès in 1791 proposed passing a "Law on the Freedom of the Press" that he had written with the help of Condorcet,

19 See Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), esp. 180–202; and Jane C. Ginzburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America," *Tulane Law Review* 64 (5) (May 1990): 991–1031.

20 Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789–1810* (Berkeley: University of California Press, 1991).

among others. Like the English Statute of Anne, the Sieyès law recognized authors' texts as a form of property, originating with their creators, and susceptible to legal protection; yet at the same time, the Sieyès law reflected Condorcet's concern for the "public interest" by limiting exclusive claims upon literary property to the lifetime of the author, plus ten years.

In the heated climate of revolutionary Paris, the law proposed by Sieyès satisfied no one. Many journalists rejected any law that threatened to limit the free circulation of texts. Revolutionary pamphleteers denounced it as a resurrection of discredited feudal privileges. Veteran book publishers demanded a restoration of their former rights and privileges.

It was only in 1793, after the Paris Book Guild had ceased functioning as a lobbying group, and after the seizure of power by the Jacobins, that the National Convention was able to pass a slightly revised version of the Sieyès law, now touted as a "Declaration of the Rights of Genius." The law of July 19, 1793, became the basis for all subsequent literary property law in France. It ratified the compromise proposed by Sieyès in 1791 and, like the British *Donaldson* v. *Becket* decision of 1774, enshrined the concept of a limited property right as the best means to strike a balance between remunerating authors and protecting the public interest in the advancement of learning.

In these years, a great many German writers and intellectuals closely followed the debate over intellectual property in France. Since there was no unified German state until 1870, there was no centralized authority to regulate the book trade. Still, a number of individual German states did pass laws similar to the revised Sieyès law. In 1794, for example, the largest German state, Prussia, revised its general legal code to reaffirm the privileges of publishers, but also to extend similar privileges to authors.

During the Napoleonic period, when the French civil code was imposed on many German states, even more principalities followed the French model: Baden was the first German state to grant real copyright to authors (1806, 1810), and the phrase *Rechten des Urhebers* (authors' rights) was first used in Bavaria in 1813. Beginning with the Congress of Vienna in 1815, authors' rights were increasingly and more uniformly recognized in German law. It was not, however, until 1870 that Imperial Germany successfully adopted a uniform copyright law similar to those of the French and the English.[21]

It is no coincidence that the English phrase "intellectual property" should first appear in 1845, according to the *Oxford English Dictionary*. By then, a broad consensus had emerged that "copyright" should strike a balance between the interests of the intellectual property owner and the public good: authors and inventors could profit from their works and their ideas, but only for a limited span of time.

But this is by no means the end of the story. Because the modern laws regulating intellectual property rest on a largely unexamined set of contradictory philosophical assumptions, these laws have been uniquely vulnerable to challenge – not least by the continuing rise of new methods of distributing ideas and information across national boundaries. As a result, the philosophical tensions at the heart of modern concepts of intellectual

21 Reinhard Wittmann, *Geschichte des deutschen Buchhandels: ein Überblick* (Munich: Verlag C. H. Beck, 1991).

property have been played out on an increasingly global scale, reworking the balance between private rights and the public interest, often in dramatic new ways.

The industrial revolution created an international market for literary works and mechanical inventions – and so created a new need for a regime of international intellectual property rights. By the middle of the eighteenth century, French competition with Belgian and Swiss publishers had led to the first major international copyright treaties. In 1858, a Congress of Authors and Artists convened by Victor Hugo held its first meeting in Brussels in an effort to formulate a truly international basis for the universal protection of authors' rights. Unable to secure agreement on such a universal regime, the congress instead enunciated a doctrine of "national treatment," asking each nation to extend the legal protections it offered to domestic writers and inventors to foreign writers and inventors as well.

A generation later, in 1886, a series of conferences held in Berne led to the signing by ten European nations of the first international copyright treaty.[22] Despite the doctrine of "national treatment," the process of internationalizing copyright protection tended to strengthen universalist claims for protection of inviolable natural rights against statutory limits imposed by particular nations on utilitarian grounds. This progressive shift in the legal spectrum toward the enforcement of natural rights has led to a steady strengthening of private intellectual property right claims over the doctrine of the public interest. Thus, over the course of the nineteenth and twentieth centuries the private claims of holders of authorial rights or copyrights have been repeatedly extended from the initially modest ten to fourteen years after the author's death to the current terms of fifty and sometimes seventy-five years after the author's death in most countries with liberal copyright regimes.

Positions on copyright were clearly not the product of disinterested jurisprudential reflection. By the nineteenth century it became clear that nations that were net exporters of intellectual property, such as France, England, and Germany, increasingly favored the natural-rights doctrine as a universal moral and economic right enabling authors to exercise control over their creations and inventions and to receive remuneration. Conversely, developing nations that were net importers of literary and scientific creations, such as the United States and Russia, refused to sign on to international agreements and insisted on the utilitarian view of copyright claims as the statutory creations of particular national legal regimes. By refusing to sign international copyright treaties, the developing nations of the nineteenth century were able to simply appropriate the ideas, literary creations, and scientific inventions of the major economic powers freely.

The United States offers an exemplary case. As it evolved from being a net importer of intellectual property to a net exporter, its legal doctrines for regulating intellectual property have tended to shift from the objectivist-utilitarian side of the legal balance toward the universalist-natural-rights side. In early-nineteenth-century America the first great publishing houses in New York, Philadelphia, and Boston built fantastic fortunes on unauthorized, and unremunerated, publication of British writers. They

22 Peter Burger, "The Berne Convention: Its History and Its Key Role in the Future," *Journal of Law and Technology* 3 (1) (Winter 1988).

justified their practices on the utilitarian grounds that copyright was statutory and that it was in the American public interest to have great works available for the cheapest possible prices.[23] *Harper's Monthly,* for example, was created exclusively from unauthorized reproductions of copy from British magazines. In 1843 a copy of Charles Dickens's *A Christmas Carol* sold for six cents in the United States, while in England it cost the equivalent of two dollars and fifty cents.[24] The Reverend Isaac K. Funk, founder of Funk and Wagnalls, made his initial fortune by pirating Ernst Renan's *The Life of Jesus.* Against these large publishing and printing businesses a movement for American recognition of international copyright claims emerged by the 1830s, led largely by American writers and fellow advocates of a nativist American culture who felt that without international copyright indigenous writers could not compete with their British counterparts in the American literary market. They drew increasingly upon the rhetoric of authors' universal natural rights, and they appealed on patriotic grounds to Congress to act to encourage American letters by preventing cheap reprints of unauthorized British texts.

Not surprisingly, despite repeated petitions to Congress from distinguished writers in both America and England, this movement was repeatedly thwarted by the more intensive lobbying of the American publishing industry in the name of the public interest. Thus the Sherman and Johnson publishing house of Philadelphia sent the following protest to the Senate and the House in 1842:

> All the riches of English literature are ours. English authorship comes to us free as the vital air, untaxed, unhindered, even by the necessity of translation, into the country; and the question is, shall we tax it, and thus impose a barrier to the circulation of intellectual and moral light? Shall we build up a dam to obstruct the flow of the rivers of knowledge?[25]

Knowledge was there for the taking if the grab could be justified by the public good. A radical version of Condorcet thrived in mid-nineteenth-century America. By the 1870s the American debate became sharply focused. On one side, trade protectionists, printers' unions, and publishing houses whose fortunes were rooted in pirating British literature argued against any international agreement. On the other side, advocates of indigenous authors allied themselves with partisans of free trade and international copyright, claiming universal natural rights of authorship.

A critical shift in the political balance occurred in the 1880s as the older American publishing houses on the east coast began to see their profits eroding in the face of a new generation of mass penny-press publishers, expanding especially in the midwestern states, who undercut their costs and reached yet wider markets. In the face of this challenge the older houses reshaped their business strategies and their arguments about intellectual property. They now realized that they would be better positioned than the new generation of publishers to sign exclusive copyright agreements with foreign authors that would be enforceable within the United States. The signing of the Berne Convention in

23 Aubert J. Clark, *The Movement for International Copyright in Nineteenth-Century America* (Washington, D.C.: The Catholic University of America Press, 1960).

24 Sidney Moss, *Charles Dickens' Quarrel with America* (Troy, N.Y.: Whitson Pub. Co., 1984).

25 Cited in Clark, *The Movement for International Copyright,* 77.

Europe in 1886 added further momentum to a shift in the views of major publishing houses like Harper's and Scribner, who recognized the advantage of the movement for American adherence to some form of international agreement, at least with England. American theologians, including the Reverend Isaac Funk, now denounced the "national sin of literary piracy" (which had allowed him to make his fortune on his pirated *Life of Jesus*) as a violation of the seventh commandment.[26] And their voices resounded on the floor of Congress. Although Congress refused to sign the Berne Convention on the grounds that American law did not recognize authors' natural rights, in 1891 an international agreement with England for reciprocal copyright protection was finally signed by Congress.

By the opening of the twentieth century, as America came to be a full-fledged competitor in international commerce in intellectual property and a net exporter of intellectual property, American legal doctrine began to move toward an increasing recognition of unique authorial rights rooted in the sanctity of the personality of the creator, rather than simply in commercial privileges extended for utilitarian ends. The personality theory of intellectual property had been present in the Anglo-American tradition since the eighteenth century, but the single most important source for this shift in principle was the Supreme Court decision written by Justice Holmes in *Bleistein* v. *Donaldson* (188 U.S. 239) in 1903.[27] The case involved the commercial reproduction of images used in a circus poster. The argument of the defendant, Donaldson, was that the images were of such a generic nature as to contain insufficient originality to qualify as artistic creation susceptible to copyright protection. The Holmes court demurred, arguing that the courts were not to be put in the role of literary or artistic critics, that is, judges of the artistic merit of a work, and that moreover, any created image "is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."

Through the Holmes decision the rhetoric of authorial originality and natural rights – the Defoe, Diderot, and Lessing side of the Enlightenment debate – made its way into American jurisprudence at the very moment when America began to supplant Europe as the hegemonic global economic power. The course of twentieth-century American copyright law – from *Bleistein* v. *Donaldson* through United States adherence to the Berne Convention in 1988 to the Digital Millennium Copyright Act of 1995 – has been a story of the steady strengthening of the proprietary rights of intellectual property owners at the expense of public access and interest.[28] It is a history of the tipping of the balance in the founding principles of eighteenth-century intellectual property law away from the aim of public utility through "encouragement of learning" toward the enhancement of private commercial gain.

26 Henry Van Dyke, *The National Sin of Literary Piracy* (New York: Charles Scribner's Sons, 1888).

27 Robert C. Post, "Reading Warren and Brandeis: Privacy, Property, and Appropriation," *Case Western Reserve Law Review* 41 (3) (1991): 658–662.

28 James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, Mass.: Harvard University Press, 1996); and Jessica Litman, *Digital Copyright* (Amherst, N.Y.: Prometheus Books, 2001).

The tension between utilitarian interests and authors' natural rights has also played itself out in modernizing societies beyond the United States and Western Europe. Developing nations, which are net importers of cultural goods and technology, find themselves in the position of the United States in the nineteenth century. And the tendency has been for these nations to hold fast to the utilitarian claim that the national public interest should come before recognition of the natural right to property in international copyright, patent, or trademark claims asserted by exporting nations.

In Russia and China the eighteenth-century battles were fought in much the same terms, although with different actors. Theocratic authority gave way to secular power within a Marxian framework, which drew upon the Lockean notion that new ideas and inventions were the result of the mind working upon natural resources. This led to a labor theory of intellectual production that was assimilable to the Marxist notion of the labor theory of value. But Marx gave it a twist *à la* Condorcet. He argued that labor was inherently social rather than individual in nature, even in the case of mental labor, when the mind worked alone with its own resources. In his early manuscripts, Marx suggested that this was because the creating individual was the product of social experience – he owed his livelihood and education to the society that produced him. Because he worked with natural resources that should belong to all, his mental labors were social, and hence the products of them should belong to society as a whole. The people, in the form of the revolutionary people's state, were thus to lay claim to the right to exploit the creations of individual authors and inventors.[29] The early Bolsheviks thus famously "nationalized" a list of great Russian writers following the 1917 revolution. And Chinese authorities during the Cultural Revolution promulgated the following popular saying: "Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?"

The story of intellectual property in Russia and China, despite brief experiments with liberal property-based regimes in the early twentieth century, has essentially been a story of the devolution of a monopoly on ideas and inventions from theocratic regimes to communist states. In both the Soviet and Chinese communist regimes, however, there was an increasing recognition of the necessity to create nonproperty-based incentives for individual authors and inventors. A system of state-issued awards, prizes, and privileges became the socialist mechanism for encouraging creation and invention. The Soviet Union created a system of "Authors' Certificates" that recognized individual contributions to the public good, and the Chinese, after the Cultural Revolution, followed suit. While the state retained the power to exploit, or not exploit, the contributions of these individuals, the certificates made their bearers eligible for material rewards and for remuneration from the profits generated by their creations. In socialist coun-

29 John N. Hazard, *Communists and Their Law* (Chicago: University of Chicago Press, 1969), 243–268; Serge Levitsky, *Introduction to Soviet Copyright Law* (Leyden: A. W. Sythoff, 1964); Michael A. Newcity, *Copyright Law in the Soviet Union* (New York: Praeger Publishers, 1978); Alford, *To Steal a Book is an Elegant Offense.*

tries, the logic of utilitarianism – married to a state monopoly on the distribution of knowledge – led to a system of public patronage of authors and inventors rather than a recognition of their individual property rights.

Islamic states have followed yet another path. These states have remained theocracies, and so *sharī'a,* or Koranic law, remains the highest authority, even for secular potentates. Koranic property law traditionally applied only to tangible things that could be apprehended by the five senses. It is notoriously silent on the question of ownership of ideas.[30] In Islamic jurisprudence, however, where the Koran is silent, governments are permitted to make a new law, as long as it does not explicitly conflict with Koranic injunctions. As a consequence, in the twentieth century a body of intellectual property law has emerged in most Islamic states, based on Western legal codes.

These Western-style copyright laws have recently come under new scrutiny by Muslim jurists, and a lively debate has emerged between legal scholars as to whether any concept of ownership of ideas is compatible with *sharī'a*. Some scholars argue that the concept of "intellectual property" is inherently incompatible with the Koranic injunction against the ownership of anything intangible, suggesting that it will only lead to private monopolies of some individuals over knowledge. Others make the distinction between ideas and their tangible expression and defend the modern concept of copyright.[31]

Because these states remain essentially theocratic in nature, however, the law has preserved the state's right to censor all publications as it deems necessary, and to assert the broad discretionary power of the government to set limits on the terms and duration of an author's or inventor's rights in relation to his creations. In Iran, for example, the duration of private copyright claims is set at thirty years after the author's death. The state then retains an exclusive right on the creation for another thirty years before it is made accessible to the public at large. Moreover, Islamic states in general do not extend copyright protection to nonnationals, although some bilateral agreements have been signed between Arab nations. In the international arena, Islamic law has thus tended toward the utilitarian position that the state's interest is higher than any notion of the universal natural rights of authors or inventors.

In the closing decades of the twentieth century the outlines of a serious conflict over the nature and scope of intellectual property have emerged in the international arena. In general, developing nations – including not only China, Taiwan, Russia, and the Middle Eastern states, but African and South American nations as well – have employed the utilitarian argument, derived from Condorcet, that intellectual property is inherently social in nature and that the state has the right to limit the individual claims of its citizens as well as others in the name of the public good. This argument is used, as it was in nineteenth-century America, to justify these nations' refusal to recognize copyright and patent claims by nonnationals.

30 Steven D. Jamar, "The Protection of Intellectual Property under Islamic Law," *Capital University Law Review* 21 (1992): 1079–1106; Sayed Hassan Amin, *Law of Intellectual Property in the Middle East* (Glasgow: Royston, 1991).

31 See Simon Buckingham, "In Search of Copyright in the Kingdom," *Middle East Executive Reports,* 8 May 1988, and Mufti Taqi Usmani, "Copyright According to Shariah," *Albalagh, an Islamic E-Journal* (23 April 2001).

Conversely, the United States and Western Europe have witnessed a shift in their jurisprudential traditions away from the utilitarian side of the eighteenth-century intellectual property balance and toward an unprecedented strengthening of the doctrine of the universal natural rights of authors and inventors to the exclusive commercial exploitation of their creations and inventions. And since the 1970s the United States and Western European nations have been increasingly aggressive in using trade sanctions and international trade agreements to coerce developing nations to recognize precisely this view of intellectual property rights.[32]

32 Alford, *To Steal a Book is an Elegant Offense*; Zachary Aoki, "Will the Soviet Union and the People's Republic of China Follow the United States' Adherence to the Berne Convention?" *Boston College International and Comparative Law Review* 13 (Winter: 1990): 207–235; and Natasha Roit, "Soviet and Chinese Copyright: Ideology Gives Way to Economic Necessity," *Loyola Entertainment Law Journal* 6 (1986): 53–71.

The consequences of this evolution in Western, and especially American, intellectual property law are troubling for several reasons. Most immediately, in the global arena questions of patents on AIDS drugs, stem cells, and ethnobotanical practices are morally urgent. The dominance of the natural-rights view leads to immediate suffering and to the appropriation of local knowledge for international gain. The loss of a legal balance in the global arena risks giving monopolistic power to exporter nations. Equally important, it puts at risk the liberal political balance between individual gain and the public good that was the foundational aim of the intellectual property laws within Western democratic polities themselves. The cultural and scientific health of Western democracies in the future will depend on a public renewal of the animating mission of the Enlightenment concept of intellectual property: to dismantle commercial monopolies on the circulation of thought and to spread knowledge freely among our citizenry.