

## ARTICLES

### THE HIDDEN THOUGH FLOURISHING JUSTIFICATION OF INTELLECTUAL PROPERTY LAWS: DISTRIBUTIVE JUSTICE, NATIONAL VERSUS INTERNATIONAL APPROACHES

by

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*Traditionally, there are three main theoretical justifications for intellectual property: law and economics theory, personality theory, and Lockean labor theory. This traditional discourse, however, misses almost entirely a different theoretical basis—that of distributive justice. Distributive justice, stemming from John Rawls’s theory of justice, as a stand-alone justification for intellectual property laws, is presently almost entirely over-*

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looked if not actively suppressed. In this Article, I argue that intellectual property laws, when initially designed, embodied distributive justice principles. Only later, with encouragement from interested parties, it became an economic interpretation adopted as the “only” proper interpretation. While scholars, such as Professor Amy Kapczynski, have described the solid interaction between distributive justice principles and intellectual property regimes as either “externalist” (contradicting values without any overlaps) or “internalist” (built into intellectual property norms, such as fair use), this Article suggests a new, third approach. I claim that the interoperation given by policy makers modified the intellectual property laws within the spectrum between internalist and externalist. This Article presents the argument that intellectual property laws, when “created,” incorporated distributive principles. Subsequently, when national courts and policy makers adopted the law and economics approach, they modified intellectual property laws by employing efficiency reasoning in the interpretation of those laws, preferring the law and economics justification to a distributive justice approach, resulting in less egalitarian outcomes. I further argue that the means to achieve distributive justice goals embrace not only general laws that were primarily and explicitly designed to reduce inequality in society, such as progressive tax laws and social welfare programs, but also specific laws, such as intellectual property laws.

This Article then argues that, in contrast to the national discourse regarding intellectual property, contemporary international intellectual property tools currently being enacted or negotiated by the World Intellectual Property Organization (WIPO), have explicitly adopted distributive justice as their main goal.

Three important international tools are discussed in this Article. The first is the Marrakesh Treaty, WIPO’s International Instrument on Limitations and Exceptions for Visually Impaired Persons. The second is the ongoing negotiations concerning an international tool regarding traditional knowledge. The third is a new WIPO initiative called Search-Sharing Innovation in the Fight Against Neglected Tropical Diseases, which creates a global consortium through which member states and private and public entities can share knowledge, promote research, and make products available royalty-free to the less developed countries, thereby giving them access to information and medicines. In the international intellectual property context, the distributive justice concept is crucial to individuals, groups, and countries, as it allows access to knowledge and other humanitarian aid, benefitting millions of people. Unless distributive justice principles are adopted, those who need this access, mainly in developing countries, will be left behind in the wake of the world’s rapidly advancing developments. This Article argues that, by shifting from this national law and economics perspective to a distributive justice perspective (as is being implemented in those international tools), U.S. policy

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*makers can attain positive outcomes from the intellectual property regime for the entire population by better allocating intellectual property benefits and extending access to knowledge to broader groups. I conclude that the international point of view could serve as inspiration to U.S. lawmakers to rethink U.S. intellectual property laws. This is true especially considering twenty individuals hold more capital than half of the entire population and the inequality of ownership of resources increases progressively.*

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## I. INTRODUCTION

The discourse concerning the theoretical justifications of intellectual property tends to focus on three main substantive theories: the law and economics theory, which examines intellectual property rules according to their cumulative efficiency and ability to promote total welfare, personality theory, which focuses on the personality of the creators and inventors, and Lockean labor theory, which justifies the property interest as

the fruits of the creator's labor.<sup>1</sup> Distributive justice—although discussed by some scholars—is considered to be neither a substantial nor a major justification of intellectual property; it is rather seen as an exception or postscript to the mainstream theoretical justifications.<sup>2</sup>

National legal systems (and other authoritative bodies) justify intellectual property rights under various theories. In the United States, for example, intellectual property laws are based mainly on the utilitarian-economic-efficiency justification of the law and economics approach, as they are meant to “promote the Progress of Science and useful Arts.”<sup>3</sup>

French and German intellectual property laws, in contrast, treat copyrighted works, and even inventions, as an extension of the personality of the author, according to the personality theory or based on the Lockean labor theory of creations as the fruits of the author's bodily efforts and the expression of his soul.<sup>4</sup> As scholars have observed, international intellectual property laws attempt to reconcile these multiple theories; the language of international intellectual property tools reflects the notion that international intellectual property laws are motivated at least by both natural law and utilitarian considerations.<sup>5</sup> Intellectual property laws, in different jurisdictions, have evolved through different avenues of interpretation, influenced by other theories, such as the personality theory and the Lockean labor theory.<sup>6</sup> In the general discourse on intellectual property, no country, however, bases its legal tools solely on the theory of distributive justice *per se*.

Why should we theorize about intellectual property regimes and explore the rationales for intellectual property laws worldwide? I argue that intellectual property laws were created to achieve certain goals that policy

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<sup>1</sup> See William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 169–75 (Stephen R. Munzer ed., 2001) (describing various theories underlying intellectual property); Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 288–89 (1988) (same).

<sup>2</sup> On distributive justice and intellectual property, see ERIC RAKOWSKI, *EQUAL JUSTICE* 86–87 (1991) (discussing rules for distributing benefits); J.W. Harris, *Who Owns My Body*, 16 *OXFORD J. LEGAL STUD.* 55, 66 (1996); William M. Landes, *Copyright Protection of Letters, Diaries and Other Unpublished Works: An Economic Approach*, 21 *J. LEGAL STUD.* 79 (1992) (developing a plan to implement Rawls's theory on the veil of ignorance and the entitlement of authors to rights in unpublished works).

<sup>3</sup> U.S. CONST. art. I, § 8, cl. 8; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *J. LEGAL STUD.* 325, 326 (1989).

<sup>4</sup> MARTIN SENFLEBEN, *COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW* 8 (2004); Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 *CARDOZO ARTS & ENT. L.J.* 81, 83 (1998).

<sup>5</sup> SENFLEBEN, *supra* note 4, at 8–9.

<sup>6</sup> Modern American intellectual property law is based on economic reasoning whereas the EU intellectual property law is based on personality and labor theories. Hughes, *supra* note 1, at 288.

makers thought were worth achieving.<sup>7</sup> The underlying justifications of the current intellectual property regimes not only created new norms (in the form of the current intellectual property laws), but also continuously shape them by giving rise to the preferred interpretation of intellectual property laws, as well as defining and redefining their boundaries. This interpretation today serves as the basis for understanding the intellectual property regime. It is therefore important to identify the justifications underlying the legal norms. I claim that the three dominant theoretical justifications mentioned above, although they are perceived to be an integral part of the discourse on intellectual property, are not exclusive.<sup>8</sup>

In accordance with John Rawls's theory of justice, this Article presents another theory: distributive justice. Rawls posits that, absent the awareness of the advantages of their own status or social position, while acting under the veil of ignorance, policy makers should adopt norms and rules of fairness, open-access, and equality. These are principles that are well embodied in the distributive justice approach. Written from the distributive justice perspective, this Article will examine the correlation between actual intellectual property norms and the appropriate design of the intellectual property regime.

Scholars who have discussed distributive justice in their writings have focused on various specific aspects of the interconnections between intellectual property and distributive justice. Elizabeth Rosenblatt, for example, discussed "negative space," a term she used for areas which she claims are not protected by intellectual property law. Such areas include cuisine and stand-up comedy. Creation and innovation in these areas thrive without any significant formal protection. Rosenblatt argued that, for a full understanding of these negative spaces, we must go beyond utilitarianism incentives and efficiency considerations, and delve into distributive justice.<sup>9</sup> Others have found a distributive justice justification of copyright to be important for specific fields within intellectual property, such as education and archives.<sup>10</sup> A more common approach discussed by scholars explains the exceptions and limitations of intellectual proper-

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<sup>7</sup> Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 446 (2013) ("[B]y pinpointing the theoretical justification we can understand to what extent the laws achieve or fail to achieve these aims and how the laws should evolve to reflect those goals."); *see also* Fisher, *supra* note 1, at 194–99 (discussing the importance of theoretical discussion).

<sup>8</sup> ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 151–53 (2011) (stating that efficiency "is not capable of serving as a stand-alone foundation" for explaining intellectual property laws).

<sup>9</sup> Rosenblatt, *supra* note 7, at 442, 447–52 (claiming that "some of these unprotected areas even seem to benefit from the lack of protection").

<sup>10</sup> Margaret Chon, *Intellectual Property "from Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 805–08 (2007).

ty—mainly fair use or the limitation of the exclusion period—by the distributive justice approach.<sup>11</sup>

In this Article, I propose a different view of distributive justice and intellectual property: reviewing legal intellectual property norms in light of the distributive justice discourse paints a slightly different picture than the one existing today and could adjust the current improper implementation of intellectual property norms in practice. I argue that intellectual property laws were initially designed on the basis of some distributive justice principles and that only later, with the encouragement of interested parties, was a law and economics interpretation adopted as the only proper interpretation.

Unlike other writers, I argue not only that the theory of distributive justice is an integral part of the discourse in all areas of intellectual property (not just in specific areas, as other scholars claim), but also that the original American intellectual property laws were designed in the light of distributive justice principles, which still serve as one of the most important bases for understanding the field. The distributive justice theory has been abandoned over the years in favor of other justifications, but it should be restored to its prior significance.

The first Part of this Article describes the three main traditional justifications of intellectual property: law and economics, personality, and labor theories. The discussion continues with an explanation of distributive justice principles, providing a general overview, as well as an in-depth discussion of the theory as it was understood and framed by John Rawls. Once this theoretical groundwork is laid out, the third Part of the Article investigates theory in practice, examining the suitability of intellectual property laws under distributive justice principles, including those on an international level. The fourth Part examines how the intellectual property regime interacts with distributive justice, reviewing the so-called “externalist” and “internalist” perspectives and then proposing a third approach. The discussion culminates in the fifth Part by reviewing several important international tools that have adopted a distributive justice approach to the regulation of intellectual property, including the Marrakesh Treaty facilitating access for visually impaired persons (VIP), and tools governing traditional knowledge (TK), including those that broaden access to medicines for developing countries.

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<sup>11</sup> Most notable is Peter S. Menell, *Intellectual Property: General Theories*, in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS 129, 160 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (Distributive justice theory can influence the limitation of rights flowing from ownership of intellectual property, such as fair use or the expiration of the exclusive period, when property passes into the public domain, as opposed to the exclusive period when that part of the population unable to afford to pay for use is excluded from enjoying the intellectual property products.); see also Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229 (2014) (explaining the distributive analysis of copyright).

## II. TRADITIONAL JUSTIFICATIONS OF INTELLECTUAL PROPERTY

A. *The Law and Economics Approach*

Intellectual property laws in the U.S. today are understood in accordance with one particular institutional approach—the law and economics approach. This approach focuses on promoting the production (and distribution) of scientific and cultural goods via utilitarian laws designed to promote economic efficiency. In general, this approach aims to maximize the total social welfare of the public from an economic perspective.<sup>12</sup>

The economic approach attempts to solve the problem of intellectual property assets as intangible market products, which “free rider users,” who enjoy the product without paying or getting permission, can easily copy without rewarding the authors and inventors, therefore resulting in a lack of incentive for authors and creators to create, invent and share the intellectual property products.<sup>13</sup> Because copying by free riders costs less than the investment necessary to create and develop products, the absence of protection against free copying threatens to remove the incentives for authors and inventors to enrich our world by conceptualizing their great ideas into intellectual property products.<sup>14</sup> Consequently, one of the purposes of intellectual property laws is to provide the necessary incentive to creators and inventors by granting exclusive rights in intellectual property products to them in order to exclude others from using their products without permission and without paying for them.<sup>15</sup> According to Richard Posner, the public, authors, and inventors have (theoretically) “signed” a social contract in which the public (society) gives authors and inventors exclusive rights over their works for a limited duration—enough to give authors and inventors an incentive to create

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<sup>12</sup> Margot E. Kaminski & Shlomit Yanisky-Ravid, *The Marrakesh Treaty for Visually Impaired Persons: Why a Treaty Was Preferable to Soft Law*, 75 U. PITT. L. REV. 255, 259, 265 (2014); see U.S. CONST. Art. I, § 8, cl. 8; Fisher, *supra* note 1, at 169–70 (discussing incentive theory); Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 970, 977–79 (2012) (“Giving full scope to distributive justice and other values thus requires us to telescope out from the internalism that characterizes the field, and to countenance a broader role for commons-based production and government procurement.”); Landes & Posner, *supra* note 3, at 326.

<sup>13</sup> Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1057 (2005). On the economic approach to copyrights, see Patrick R. Goold, *Corrective Justice and Copyright Infringement*, 16 VAND. J. ENT. & TECH. L. 251, 271 (2013).

<sup>14</sup> On the impact of commercial piracy, see Gary M. Hoffman et al., *Commercial Piracy of Intellectual Property*, 71 J. PAT. & TRADEMARK OFF. SOC'Y 556 (1989).

<sup>15</sup> DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 1C (1992).

and develop.<sup>16</sup> However, once the exclusivity period expires, the rights are transferred to the public and become part of the public domain.<sup>17</sup> Following this mechanism, the market price of the product reflects its social value.<sup>18</sup>

Although the law and economics approach to intellectual property is dominant in the U.S., many scholars have found its prevailing influence troublesome.<sup>19</sup> Professor Amy Kapczynski, for example, not only mentions that the intellectual property regime is *alleged* to be more efficient than other approaches, but she also identifies intellectual property thoroughly with the utilitarian-efficiency approach. Kapczynski claims that the price of intellectual property products gives us a decentralized way to link social welfare to the production of information. She further claims that, by looking beyond economic justifications of intellectual property, we discover different institutional approaches to scientific and cultural production that are not less efficient. She argues that the prevailing approach to intellectual property is in conflict with the values of distributive justice because reliance upon price may yield not only unjust distribution of existing information resources but also unjust production of future information resources.<sup>20</sup> This conclusion might lead us to consider paying less attention to the law and economics approach to intellectual property and more to alternative theoretical justifications.

### B. *The Personality Approach*

According to the personality approach—which is anchored in Hegel’s philosophy—the justification for allocating private property rights is based on the process of imposing one’s stamp on the external world through acts upon external property. This process contributes funda-

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<sup>16</sup> RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 40 (6th ed., 2003).

<sup>17</sup> Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 360–62 (1999).

<sup>18</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 39–40 (2003); Fisher, *supra* note 1, at 169–70 (copyists make creators unable to bear their investment); Hughes, *supra* note 1, at 303 (the dominance of the instrumental argument on U.S. intellectual property laws); Aleksei Kelli & Heiki Pisuke, *Intellectual Property in an Innovation-Based Economy*, 33 REV. CENT. & E. EUR. L. 223, 225 (2008); Shlomit Yanisky-Ravid, *Introduction to INTELLECTUAL PROPERTY IN THE WORKPLACE: THEORETICAL AND COMPARATIVE PERSPECTIVES* xviii–xxi (Shlomit Yanisky-Ravid ed., 2013) (in Hebrew) (on file with author) (proposing a new model of allocating rights and benefits of intellectual property products developed in workplaces).

<sup>19</sup> Andreas Rahmatian, *A Fundamental Critique of the Law-and-Economics Analysis of Intellectual Property Rights*, 17 MARQUETTE INTEL. PROP. L. REV. 191, 192–97 (2013).

<sup>20</sup> Kapczynski, *supra* note 12, at 972–80 (2012) (giving full scope to distributive justice and other values thus requires us to go beyond the internalism that characterizes the field and to countenance a broader role for commons-based production and government procurement).



mentally to the development and flourishing of individual personhood. Personhood and freedom may be expressed through work with assets.<sup>21</sup> Recognition of the significance of the right to control property, which constitutes a key component in the development of personhood, nourished the concept that creators and inventors have a natural right to control the use of the intellectual products that are part of their personhood. In other words, the process of creating and developing intellectual property works significantly fosters both intellectual and emotional components of the human personality. From this perspective, it is justified that initial ownership of intellectual property products remains with their creator.<sup>22</sup>

Professor Margaret Radin adds an additional layer to the development of this theory by dividing property into fungible and nonfungible assets. Radin develops the personality theory by forming a connection between property and personhood, stating that personal assets, in which one's personhood is embedded, should be protected more vigorously than exchangeable assets to which a person has a weaker connection.<sup>23</sup> Moral rights in intellectual property, especially the right of attribution, are justified by the personality approach.<sup>24</sup>

### C. *The Lockean Labor Approach*

The Lockean labor theory justifies an intellectual property regime from a different angle. The author or inventor, as a persona, maintains ownership of one's body and soul, including one's intellect and personhood, from which flows the right to the fruits of one's labor. Intellectual property products are imbued with the effort and personality of their creative authors and inventors. Therefore, according to Locke, granting rights to the authors and inventors in their inventions, artistic works, or other intellectual products is justified. Authors and inventors invest in creating and developing their work. Their work represents a resource that they own. In other words, the outcomes of people's efforts must become their own possessions. The assumption is that labor is not only physical but also intellectual: a person's intellect is his or her own as much as is his or her body, and thus, rightly, the fruits of the soul be-

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<sup>21</sup> HEGEL, PHILOSOPHY OF RIGHT 40–45 (T.M. Knox trans., Oxford Univ. Press 1952) (1821); Fisher, *supra* note 1, at 171 (summarizing the main points of the connection between personality theory and intellectual property); Hughes, *supra* note 1, at 331 (discussing the personality approach); Yanisky-Ravid, *supra* note 18, at II–IV.

<sup>22</sup> Fisher, *supra* note 1, at 169; Hughes, *supra* note 1, at 330; Yanisky-Ravid, *supra* note 18.

<sup>23</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 986 (1982) (The more *personal* property is, the more nonfungible and nontransferable it becomes.); *see also* Fisher, *supra* note 1, at 169; Hughes, *supra* note 1, at 336–37; Yanisky-Ravid, *supra* note 18.

<sup>24</sup> Yanisky-Ravid, *supra* note 18, at II–IV.

come that person's possession. The labor approach is subject to Locke's limitation that the acquisition must leave sufficient materials ("building blocks") to others.<sup>25</sup>

In summary, the traditional approach to intellectual property defines, interprets, creates and recreates intellectual property laws according to these three theoretical rationales: the law and economics theory, the personality theory, and the Lockean labor theory. However, this traditional discourse misses almost entirely a different theoretical basis—that of distributive justice. The next Subsection will present and explain the distributive justice philosophy and its implications for intellectual property laws.

### III. DISTRIBUTIVE JUSTICE

#### A. Preface

The principles of distributive justice are not necessarily consistent with either economic-utilitarian considerations, which focus on the efficient solution,<sup>26</sup> or with personhood considerations and possession of assets (as the fruits of someone's work).<sup>27</sup> Rather, distributive justice is concerned with the allocation and re-allocation of social resources, including capital and other goods as well as power and rights, in their broadest sense, among individuals or groups in society, based on principles of jus-

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<sup>25</sup> JOHN LOCKE, *TWO TREATIES OF GOVERNMENT* 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); MERGES, *supra* note 8, at 32–33 (discussing the Lockean labor approach as the preferred approach to understanding intellectual property); see Fisher, *supra* note 1, at 170 (discussing labor theory); Hughes, *supra* note 1, at 297–98 (same); Yanisky-Ravid, *supra* note 18, at IV–V. *But see* Hughes, *supra* note 1, at 298–99 (seeing instrumentalist and normative bases in the Lockean labor approach); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1203–04 (1967) (arguing that labor theory is an ethical foundation of property ownership).

<sup>26</sup> POSNER, *supra* note 16, at 32–39 (explaining that the law and economics approach establishes rules of distribution by type according to the principles of justice aimed at maximizing welfare); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 571–73 (1982) (Kennedy discusses reasons for preferring the theory of efficiency over distributive justice. The two theories bring contradictory results: the efficiency approach aims to improve both groups whereas the distributive approach prefers one group (the weak) over another in distributing resources.).

<sup>27</sup> Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1234–39 (1996) (stating that copyright laws contradict theories about distribution of justice).

tice.<sup>28</sup> The theory of distributive justice determines the appropriate principles of resource allocation by which distribution will be made.

The term “distributive justice” is broad, and varies according to the different moral perspectives of what is the desired “fairness.” This latter term can include various theories, among them, Marxist and other political models, as well as John Rawls’s theory of justice.<sup>29</sup>

William Fisher identifies a series of social policies, most of which might fairly be described as having a distributive approach. Examples include: consumer welfare, the creation of a “cornucopia of ideas including . . . access to ideas,” “sociability (community) [,] and respect.”<sup>30</sup> As explained by Professor Rosenblatt: “These interests may frequently be at odds with each other and, in some cases, among themselves, but to achieve an intellectual property system that promotes distributive justice, they all must be considered and balanced.”<sup>31</sup>

The terminology of distributive justice is sufficiently broad that it could also include the economic theory as determinative of the allocation principles.<sup>32</sup> Nevertheless, the distributive justice approach differs from the law and economics approach in several significant ways. First, the economic theory, unlike the distributive justice approach, does not aim to achieve social justice, in general, or equality, in particular.<sup>33</sup> Secondly, the distributive justice approach considers the users, and not merely the profiting stakeholders, as central and important players whose interests should be protected.<sup>34</sup>

One of the most desirable concepts underlying the establishment of the distributive rules is bound to the principle of equality.<sup>35</sup> Aristotle—

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<sup>28</sup> G. A. Cohen, *Where the Action Is: On the Site of Distributive Justice*, 26 PHIL. & PUB. AFF. 3, 3 (1997) (referring to distributive justice “as just distribution of benefits and burden on society”).

<sup>29</sup> Fisher, *supra* note 1, at 175 (describing a “Social Planning Theory” of intellectual property based on political philosophy theorists, including Jefferson, Marx, and the legal realists).

<sup>30</sup> Rosenblatt, *supra* note 7, at 458 (citing Fisher, *supra* note 1, at 192) (discussing those values in relation to the incentive to create).

<sup>31</sup> *Id.*

<sup>32</sup> Michael F. Reber, *Distributive Justice and Free Market Economics: A Eudaimonistic Perspective*, 2 LIBERTARIAN PAPERS 1, 7 (2010).

<sup>33</sup> Mahasweta M. Banerjee, *Applying Rawlsian Social Justice to Welfare Reform: An Unexpected Finding for Social Work*, 32 J. SOC. & SOC. WELFARE 35, 42–43 (2005); *see also infra* Section IV.B. For a perspective on how different policies have different distributive, and, therefore, social justice implications in laws pertaining to national security, see Daphne Barak-Erez, *Distributive Justice in National Security Law*, 3 HARV. NAT’L SECURITY J. 283 (2012).

<sup>34</sup> Rosenblatt, *supra* note 7, at 457–59 (noting the governmental duty to foster the ability of people to shape their social environment).

<sup>35</sup> *See* THOMAS NAGEL, EQUALITY AND PARTIALITY 12, 68–69 (1991); JOSEPH RAZ, THE MORALITY OF FREEDOM 193, 198, 206 (1989); Frank I. Michelman, *Possession vs.*

well-known advocate of the principle of equality—argued that “[f]or in distribution all men allow that what is just must be according to merit or worth of some kind, but they do not all adopt the same standard of worth.”<sup>36</sup> In other words, things should be distributed so that individuals get their share based on merit. Over the years, many criteria have been proposed for distribution (of rights, power, goods, capital, benefits), including need, effort, and achievement. From a legal standpoint, a decision regarding which of these criteria is (or should be) most important has not been made.<sup>37</sup>

The distributive justice approach contradicts the starting point of the extreme-radical-libertarian perspective, which rejects the intervention of the state in redistribution of goods even when the outcome is problematic.<sup>38</sup> The assumption underlying our distributive justice analysis is that, in certain cases, the state authorities, including the legislature and the courts, should indeed determine the proper distribution. Furthermore, whereas the libertarians’ concerns are focused on government misusing its power, the distributive justice advocate is more concerned with the concentration of resources and power in the hands of a small number of groups or individuals.<sup>39</sup>

Professor Robert Merges, in his book *Justifying Intellectual Property*, describes distributive justice in the context of intellectual property as built mainly on the insights of Locke, Kant, and Rawls.<sup>40</sup> Merges rejects the argument that Rawls’s attention to distributive justice cannot be reconciled with the property theories of Locke and Kant, arguing that viable intellectual property protection is well embedded within the range of fair institutional structures that can reasonably be found within the original Rawlsian position.<sup>41</sup>

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*Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319–20, 1329 (1987).

<sup>36</sup> ARISTOTLE, THE NICHOMACHEAN ETHICS OF ARISTOTLE 145 (F.H. Peters trans., Kegan Paul, Trench, Trubner & Co., Ltd. 15th ed. 1893) (350 B.C.E.).

<sup>37</sup> See, e.g., *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 404, 413–15 (1985); *Geduldig v. Aiello*, 417 U.S. 484, 495–96 (1974); *EEOC v. Mo. State Highway Patrol*, 748 F.2d 447, 455 (8th Cir. 1984); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 175 (1982).

<sup>38</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150–53, 160, 175–82 (1974); Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 335–36 (2006).

<sup>39</sup> CHARLES E. LINDBLOM, POLITICS AND MARKETS 170–88 (1977); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 748–51, 753 (1986); Frank Michelman, *Tutelary Jurisprudence and Constitutional Property*, in LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 127, 139, 149–57 (Ellen Frankel Paul & Howard Dickman eds., 1990); Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 342–44 (1996).

<sup>40</sup> MERGES, *supra* note 8, at 102.

<sup>41</sup> Robert P. Merges, *Foundations and Principles Redux: A Reply to Professor Blankfein-Tabachnick*, 101 CALIF. L. REV. 1361, 1379–81 (2013).

*B. John Rawls's Theory of Justice*

Professor John Rawls's theory of justice addresses the principles of just and appropriate distribution rules, which should serve as the basis for the allocation of benefits, rights, capital, power or goods, including intellectual property rights, when established by the sovereign (or other policy makers).<sup>42</sup> The theory aligns with distributive justice, and its goal is to promote social justice.<sup>43</sup> Rawls's theory specifically seeks to establish the principles of justice to be used as the foundations, or for shaping the infrastructure, of the laws of the state, to serve as the basis of all social arrangements among individuals, as well as between governments and individuals in general.<sup>44</sup> Rawls questions which fundamental principles should guide rule makers and form the basis for the distribution of goods on all sides with regard to intellectual property products. To demonstrate and articulate the principles of justice—the basis of the rules and norms to be determined by the policy makers—Rawls describes the following theoretical exercise: envisioning an imaginary gathering of an assembly of people.<sup>45</sup> The role of this visualized assembly is to determine the principles of justice underlying the rules established by the sovereign. This imaginary group, if conducted in the way Rawls directs, will accurately mirror distribution rules.<sup>46</sup>

The main characteristic that distinguishes this assembly from any other is that, in its original form, its members are behind a “veil of ignorance.” The defining feature of this “original position” is that all the assembly members are completely unaware of their own social affiliations, i.e., whether they are associated with a powerful and influential group or with a weak one.<sup>47</sup> Moreover, the members are unaware of the wealth of society as a whole (whether it is rich or poor), the group's status, any professional and economic situations, or its intelligence quotient. Members do not know what talents they have, whether they will be employers or employees, inventors, creators, or investors. In addition, the members of the initial assembly have only general knowledge (limited knowledge) in areas such as economics, statistics, and sociology. Knowledge is necessary to adjust the concept of justice to the society in which they live. The members are aware of available options, but as mentioned, ignorant as to which are or are not applicable to them. Thus, this veil of ignorance

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<sup>42</sup> JOHN RAWLS, A THEORY OF JUSTICE 6–7 (rev. ed. 1999).

<sup>43</sup> MERGES, *supra* note 8, at 102–03 (discussing Rawls's theory as one which resembles distributive justice in regard to intellectual property).

<sup>44</sup> JOHN RAWLS, JUSTICE AS FAIRNESS—A RESTATEMENT 7, 25 (Erin Kelly ed., 2001).

<sup>45</sup> RAWLS, *supra* note 42, at 10.

<sup>46</sup> *Id.* at 10–12.

<sup>47</sup> *Id.* at 10. Rawls described the “original position of equality” as “correspond[ing] to the state of nature in the traditional theory of the social contract.” *Id.* at 11, 102.

makes all members essentially equal, as none are aware of their actual status. Their decisions, therefore, are fair and freely made, without pressure from coalitions and power groups.

Rawls claims that the veil of ignorance prevents the establishment of principles and rules that suit only a personal cause<sup>48</sup> or are tailored to the characteristics of a single individual.<sup>49</sup> The principles of justice are a result of equal and fair negotiations without aggression or coalitions.<sup>50</sup>

Rawls believed that in the initial situation described above, a decision based on two fundamental principles of justice (described below) will be unanimous. In his opinion, even though these principles are the product of an imaginary exercise, under hypothetical conditions, these are the principles we should adopt in our real lives. These principles of justice—if we could agree to abide by them, behave in accordance with them, and accept any limitations on them—would enable truly free, equal, and fair negotiation, which in turn would lead to equal outcomes.<sup>51</sup>

The first principle of justice is: “[E]ach person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.”<sup>52</sup> This principle requires equal allocation (distribution) of basic rights, and fairness in transferring them. When freedoms collide, one party’s freedom should be limited for the sake of the others.

According to Rawls, the restriction of freedom should, as much as possible, be mutual and equal.<sup>53</sup> The members of the imaginary assembly who determine the rules are risk averse and afraid of proving to be the weaker party, once the veil of ignorance is removed. Hence, this principle works in favor of the weaker party, which is, in many cases, the limited party.

The second principle of justice determines equal opportunities for all: “[S]ocial and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”<sup>54</sup>

The strong (dominant) party in society has the benefit of access to economic and social advantages even without a rule ensuring equal op-

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<sup>48</sup> *Id.* at 11.

<sup>49</sup> *Id.*

<sup>50</sup> See generally STEVEN J. BRAMS & ALAN D. TAYLOR, FAIR DIVISION: FROM CAKE CUTTING TO DISPUTE RESOLUTION (1996); STEVEN J. BRAMS & ALAN D. TAYLOR, THE WIN-WIN SOLUTION: GUARANTEEING FAIR SHARES TO EVERYBODY (2000) (describing the same principle of choosing a rule without knowing the effect on the one who chooses inspired mathematical theories about fair distribution of resources—the “mathematics of fairness”).

<sup>51</sup> RAWLS, *supra* note 42, at 17.

<sup>52</sup> *Id.* at 53.

<sup>53</sup> *Id.* at 130 (stating that people prefer equality).

<sup>54</sup> *Id.* at 53.

portunities for all. Therefore, in my opinion, this rule supports and protects the weakest and most deprived group in the society. Equal opportunities ensure a shelter for those who “sleep under the bridge.”<sup>55</sup> The implementation of this rule would result in regulation of socioeconomic inequality in favor of those most deprived.

Since, in the initial situation, people are unaware of their positions in the real world and—according to Rawls—are also risk averse, they are braced for the worst. Assuming that each member wants to assure himself or herself a dignified life, each will—absent awareness of his or her own status—promote the weak parties or make sure that the weak groups will have opportunities to advance. Powerful parties are rewarded in any event with a substantial amount of goods. Therefore, according to Rawls, in the imaginary initial state, members behind the veil of ignorance will always seek to ensure the allocation of sufficient basic goods to the entire public, in order to protect themselves from suffering disastrous alternatives.<sup>56</sup> Rawls emphasizes, in this context, the importance of affording reasonable advantages to all parties and making key positions and status levels open to everyone.<sup>57</sup>

According to Rawls’s theory, the distribution of resources will promote the weakest segments of society.<sup>58</sup> The appropriate principles for the determination of the rules of distribution (in legislation and judicial rulings) are the principles of freedom and equal opportunities. These principles emphasize a perspective that supports the weak.

Though Rawls’s theory has been widely criticized over the years, I argue that the proper bases for distributive justice can be structured within the principles he presented and can be applied in the field of intellectual property.<sup>59</sup> Moreover, Rawls himself noted, on the occasion of the publication of the 1999 edition of his book:

Despite many criticisms of the original work, I still accept its main outlines and defend its central doctrines. Of course, I wish, as one might expect, that I had done certain things differently, and I would now make a number of important revisions. But if I were

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<sup>55</sup> Mark R. Rank, *Toward a New Understanding of American Poverty*, 20 WASH. U. J.L. & POL’Y 17, 30–32 (2006).

<sup>56</sup> For criticism of Rawls, see NOZICK, *supra* note 38, at 183–203, and AMARTYA SEN, *THE IDEA OF JUSTICE* 52–58 (2009); Cass R. Sunstein, *Introduction to BEHAVIORAL LAW AND ECONOMICS* 8 (Cass R. Sunstein ed., 2000).

<sup>57</sup> RAWLS, *supra* note 42, at 53–54 (The first principle is more important than the second one.).

<sup>58</sup> *See id.* at 53; Sunstein, *supra* note 56, at 8.

<sup>59</sup> *See e.g.*, BRIAN BARRY, *THE LIBERAL THEORY OF JUSTICE—A CRITICAL EXAMINATION OF THE PRINCIPAL DOCTRINES IN A THEORY OF JUSTICE BY JOHN RAWLS* (1973).

writing *A Theory of Justice* over again, I would not write, as authors sometimes say, a completely different book.<sup>60</sup>

In summary, Rawls imagines a mental exercise that demonstrates how equitable rules are determined when the designers of the norms (legislators or policy makers) are behind a neutral “veil of ignorance” that shields their self-awareness with respect to status or advantages and disadvantages.<sup>61</sup> Behind this veil of ignorance, decisions will be made unanimously, adopting two principles of justice: the principle of maximally equal freedom and the principle of equal opportunities for all, as well as encouraging the disadvantaged and the weakest groups in society. Accordingly, proper allocation should embody the concept of encouraging and protecting the weak (e.g., in the intellectual property context, individual authors).

It is my premise that Professor Rawls’s theory of justice could easily be used as the moral foundation of distributive justice principles applied to intellectual property rights.<sup>62</sup> The theory’s principles should ensure equality and fairness among all relevant parties, if the rules chosen reflect the values of mutual equality and are not designed only (or primarily) to serve the interests of the stronger parties as against the other parties. A rule can be considered just and fair if it is chosen by the parties as such, at a time when the parties were unaware of their status or the expected impact of the rule on them. The theory assumes, as detailed above, that legal norms should be set behind the veil of ignorance, where those who set the rules do not know their status in the realm within which the rule will apply to them. Such virtual negotiations to determine the rules would preserve equality, unlike in the real world, where power and influence override equality.

The theory is quite well suited to this discussion as it deals with the inherent complexity of labor laws and intellectual property laws, particularly with regard to the inequality between creators or inventors and strong enterprises.

To be truly just, intellectual property rules should be determined in relation to the distribution of goods. Goods can be divided among humans, and are something humans strive to create, but the term “goods” in this context is used in a broader sense. It includes, among other things, capital, money, property, benefits, governmental power, influence, rights, and jobs. Moreover, this term also includes fundamental

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<sup>60</sup> RAWLS, *supra* note 42, at xi.

<sup>61</sup> *Id.* at 11.

<sup>62</sup> *Id.* at 6–7; RAWLS, *supra* note 44, at 7. See generally JOHN RAWLS, THE LAW OF PEOPLES (1999) (providing more background on Rawls’s “public reasons” theory).



freedoms, including freedom of movement, freedom of occupation, freedom of trade, opportunities for personal development, etc.<sup>63</sup>

The Rawlsian principles are consistent, in my opinion, with the assumption that individuals in society are interested in ensuring rules of distribution that are based on fair and appropriate criteria that protect the public from being adversely affected by powerful parties. To adhere to such criteria, however, the distribution principles promulgated by the Anglo-American intellectual property legal system must be exchanged for principles ensuring that even the most deprived party will benefit more than under any other system.<sup>64</sup>

Rawls's theory is suitable as a basis for rules governing the distribution of rights in intellectual property law, since (i) it actually implements the principles of equality that are lacking in the Anglo-American intellectual property regime, and (ii) could prevent injustice between groups with conflicting interests regarding the distribution of intellectual property privileges and compensation. This is very important, since, ordinarily, one party has more power and influence than other parties, as will be discussed in the last Part of this Article.

#### IV. DOES THE INTELLECTUAL PROPERTY REGIME INTERACT WITH DISTRIBUTIVE COMPONENTS?: THE THREE APPROACHES

##### A. *Three Approaches to Intellectual Property Laws and Distributive Justice*

There are three approaches to distributive justice within the intellectual property regime. While they were initially discussed in the context of national law, they are also relevant to international intellectual property tools.

The first approach, the *externalist* perspective, is described by Professor Amy Kapczynski, who argues that intellectual property laws are controlled by only one approach, which is law and economics (economic efficiency). Within this interpretation, the intellectual property legal regime is totally detached from any distributive justice approach. Indeed, from the externalist perspective, the intellectual property legal system and distributive justice are not only separate, but they also contradict each other and do not overlap.<sup>65</sup> Intellectual property laws are perceived,

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<sup>63</sup> Nik J. de Boer, *Fundamental Rights and the EU Internal Market: Just How Fundamental Are the EU Treaty Freedoms? A Normative Enquiry Based John Rawls' Political Philosophy*, 9 *UTRECHT L. REV.* 148, 166–67 (2013).

<sup>64</sup> RAWLS, *supra* note 42, at 13.

<sup>65</sup> Kapczynski, *supra* note 12, at 973–74, 978–79. Areas such as science, internet entertainment, Wikipedia, and free software are generated by a “common based approach” or with governmental funding to develop public domain products, both of which are totally different from the exclusive approach of intellectual property. Intellectual property is not just a problematic way to distribute scientific and cultural goods but is also a problematic way to produce them. A system based on price will

under this approach, as promoting inequality, whereas the main goal of distributive justice is to achieve equality.

The second approach, the *internalist* perspective, sees distributive justice as a new tool to interpret certain specific parts of intellectual property law, in particular, “fair use.”<sup>66</sup> This internalist approach focuses on how broad the scope of exclusive intellectual property rights should be, and, mirroring that question, how narrow the exceptions and limitations of intellectual property laws should be.<sup>67</sup> This approach finds a means of distributive justice in intellectual property laws, but only in a limited manner, specifically aimed at a few anecdotal situations. Intellectual property laws in general are still perceived from the internalist perspective as stemming from traditional reasoning, such as the economic, labor, or personality approaches.

In contrast to either of the above approaches, this Article proposes a different concept for the interconnection between intellectual property laws and distributive justice. I disagree with the externalist perspective that intellectual property laws are created separately from distributive justice principles. I also disagree with the internalist approach that intellectual property policy is a retrospective tool for distributive justice, limited to only a few specific fields within the realm of intellectual property. I suggest a third approach: that intellectual property laws have reflected distributive justice principles from the very beginning. I argue that intellectual property and distributive justice not only do not contradict each other, but they also were “born” together and can “get along” in harmony and synergy. The now-prevalent understanding of intellectual property, which essentially adopts the law and economics interpretation of intellectual property laws, emerged only later on, influenced by certain groups with specific interests.

Unlike the small group of scholars who write about distributive justice and intellectual property, mainly from the second, internal, perspective, I claim that intellectual property laws embody distributive justice principles. Intellectual property laws, however, have been subsequently changed by external policy makers, in accordance with other perspectives and goals that they promoted.<sup>68</sup>

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probably prioritize the wealthy and leave out the poor. *Id.* See also Rosenblatt, *supra* note 7, at 447–52 (discussing “negative spaces” which are areas that are not controlled by intellectual property rules). Both Kapczynski and Rosenblatt challenge the conclusion usually taken for granted that intellectual property protection is necessary to encourage authors and inventors to invest in the creation process.

<sup>66</sup> Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1537–39, 1567 (2005) (stating that poor artists who do not profit from their works should more easily benefit from the fair use doctrine); Menell, *supra* note 11, at 1600.

<sup>67</sup> Kapczynski, *supra* note 12, at 975.

<sup>68</sup> *Id.* at 995.

*B. Intellectual Property Laws Were Created (Equal) in Light of Distributive Justice Principles*

Copyright law and patent law cannot be indifferent to allocation rules. In my opinion, intellectual property laws were initially designed in the light of the more egalitarian allocation concepts that characterize distributive justice.<sup>69</sup> Unlike general distributive tools, however, intellectual property laws promote equality only within the intellectual property context and not among the entire population.

Intellectual property laws create a legal regime that deals with distributive dilemmas concerning intellectual property rights. Ownership of property (including intellectual property) is a source of economic power, as well as cultural, political, and social influence.<sup>70</sup> This power endangers the freedom of subordinates. Thus, providing compelling forces on certain owners of intellectual property clearly has a distributive dimension.<sup>71</sup> If property rights represent freedom, security, independence, and privacy, then the allocation of property rights literally means allocation among members of society in accordance with these values.<sup>72</sup>

I further argue that the more powerful the existing forces in the market, the greater the probability that the market will change the perception of what should be the right justification and, hence, the preferred method of allocating intellectual property. Therefore, the dominance of the economic approach did not precede the establishment of intellectual property laws, but, rather, came later, serving the interests of specific groups.

The allocation of ownership rights by intellectual property laws is one of the clearest examples of a distributive justice mechanism. Pursuant to the United States Constitution, U.S. intellectual property laws originally allocated ownership rights in intellectual property products to inventors and authors.<sup>73</sup> Accordingly, the creators and inventors were initially entitled to intellectual property rights in their works. Considering the fact that, today, approximately 80 to 90 percent of all inventions

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<sup>69</sup> MERGES, *supra* note 8, at 103.

<sup>70</sup> Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PA. ST. L. REV. 417, 422–27 (2008).

<sup>71</sup> Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927); Michael Robertson, *Property and Ideology*, 8 CAN. J.L. & JURISP. 275, 283–84 (1995); Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1046 (1996).

<sup>72</sup> C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 748–51 (1986); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 903–04 (1987) (adoption of the libertarian view of intellectual sovereignty blocks any proposals to change the distribution of resources in society on behalf of the value of freedom).

<sup>73</sup> U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have 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 . . . .”).

in the United States are the work of employee-inventors, it is rather surprising that these inventors, the dominant portion of inventors in the United States, have found themselves excluded by the current dominant understanding of intellectual property rights (i.e., according to the dominant economic discourse) and denied rights and other benefits, even though it is they who were originally entitled to the intellectual property rights by the United States Constitution and by intellectual property laws.<sup>74</sup> Today, however, the typical employee-inventors have transferred all these intellectual property rights to their employers—before even having the chance to invent—by a contractual tool which courts fully recognize.<sup>75</sup>

In the context of employee-inventors, international tools leave the allocation of intellectual property rights between employee inventors and their employers to national laws.<sup>76</sup> The beneficiaries of this intellectual property rights allocation have been supported by United States courts, which validate contracts transferring intellectual property rights to firms, employers, or other economically oriented entities, thereby diluting—to the point of destruction—the rights of authors and inventors, especially in the case of employee-inventors and creators.<sup>77</sup> This is contrary to the original intellectual property norms and the distributive principles that were embodied within them.

The reason for this reallocation is deeply rooted in the law and economics discourse.<sup>78</sup> One of the most important foundations of intellectual

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<sup>74</sup> William P. Hovell, *Patent Ownership: An Employer's Rights to His Employee's Invention*, 58 NOTRE DAME L. REV. 863, 863 (1983) (“Eighty-four percent of American patents are awarded to employed inventors . . .”); Henrik D. Parker, Note, *Reform for Rights of Employed Inventors*, 57 S. CAL. L. REV. 603, 603 (1984) (“[T]echnological innovation is one of the United States’ most important economic resources, this country cannot afford to allow other countries to continue carving out increasingly larger shares of the market for technology.”).

<sup>75</sup> Shlomit Yanisky-Ravid, *Rethinking Innovation and Productivity Within the Workplace Amidst Economic Uncertainty*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 143, 145 (2013) (arguing that “[i]mproving the productivity of these employed inventors, in order to generate more innovative ideas and pursue worthy ones to the point of economic viability, has to become a critical factor in the modern commercial era, and even more so now in a time of recession”).

<sup>76</sup> See generally Sanna Wolk, *Remuneration of Employee Inventors—Is There a Common European Ground? A Comparison of National Laws on Compensation of Inventors in Germany, France, Spain, Sweden and the United Kingdom*, 42 INT’L REV. INTELL. PROP. & COMPETITION L. 272 (2011) (comparing national laws regarding employees’ inventions and inventors’ compensation in Germany, France, Spain, Sweden and the United Kingdom).

<sup>77</sup> Yanisky-Ravid, *supra* note 18; Shlomit Yanisky-Ravid, “*For a Mess of Pottage*”: *Incentivizing Creative Employees Toward Improved Competitiveness*, CORNELL HR REV. 1, 1, 4 (May 19, 2013), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1042&context=chrr>; Yanisky-Ravid, *supra* note 75, at 149–50.

<sup>78</sup> Yanisky-Ravid, *supra* note 18, at v–x.

property laws is the *incentive* for creation and development. The law and economics approach to intellectual property offers these incentives to firms and employers.<sup>79</sup> As a result, there is no longer an incentive for inventors and creators when, instead of receiving rights in the product they have developed, they are totally deprived of the benefits from the product.

In summary, the allocation rules under intellectual property laws should be based upon the principles of equality, as originally envisioned, and, if they were, would be more efficient in distributing welfare justly.

### C. *Exceptions and Limitations*

Intellectual property laws established side by side, intellectual property rights (e.g., copyrights, patents) and, on the other hand, exceptions and limitations to these rights (e.g., fair use, limitation on period of exclusivity), mainly distributing the ownership rights in intellectual property products to a broader group of users. The exceptions and limitations afford users in some cases (such as for fair use) a free license to use the product, without asking permission or paying for such use. These integral provisions, based on distributive justice reasoning, are a part of intellectual property laws that expand the number of users who can enjoy the products of creativity.<sup>80</sup> Intellectual property laws were developed and are still evolving under the strong influence of international conventions, mainly controlled at present by the World Intellectual Property Organization (WIPO).<sup>81</sup> As Professor Kaminski and I stated previously: “International instruments addressing copyright were designed to promote harmonization among countries by establishing uniform ways of protecting the rights of authors in their literary and artistic works.”<sup>82</sup> Important international tools include the Berne Convention for The Protection of Literary and Artistic Works (Berne Convention), the WIPO Copyright

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<sup>79</sup> Yuval Feldman, *An Experimental Approach to the Study of Social Norms: The Allocation of Intellectual Property Rights in the Workplace*, 10 J. INTELL. PROP. L. 59, 66–67 (2002).

<sup>80</sup> See, e.g., 17 U.S.C. § 107 (2012); see also Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 43 (2001); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109–10 (1990); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 668 (1993).

<sup>81</sup> *WIPO-Administered Treaties*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/treaties/en/> (last visited Dec. 22, 2016); see also Margot E. Kaminski, *An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement*, 21 ALB. L.J. SCI. & TECH. 385, 388–89 (2011) (The international framework for intellectual property protection spans many different forums, from WIPO to the World Trade Organization (WTO) to individual bilateral agreements to plurilateral agreements like the Anti-Counterfeiting Trade Agreement (ACTA).).

<sup>82</sup> Kaminski & Yanisky-Ravid, *supra* note 12, at 263, 265.

Treaty (WCT), the Agreement on Trade Related Aspects of Intellectual Property Rights by the World Trade Organization (TRIPS), and others.<sup>83</sup>

On the one hand, international copyright laws grant the owners of certain intangible works exclusive rights; on the other hand, those rights are granted for a limited time.<sup>84</sup> A natural tension exists within intellectual property laws, between the rights of authors and the rights of users of their work, arising from the notion that copyright law benefits society as a whole. From this perspective, copyright law internalizes the distributive justice perspective, by, for example, allowing free licenses in certain conditions to use the intangible products. Furthermore, intellectual property laws include explicit provisions for exceptions and limitations, because the international tools take into consideration the interests of society as a whole, not just of individual owners, thereby actually implementing a distributive justice approach.

This tension in copyright between the divergent interests of authors and users is the foundation of limitations and exceptions to copyright laws. On an international level, limitations and exceptions are preserved in a three-step test, articulated in several international intellectual property agreements.<sup>85</sup>

The three-step test is an abstract formula that permits unauthorized reproductions of copyrighted works “in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”<sup>86</sup> The three-step test on limitations and exceptions was formulated to allow countries to create or preserve their own domestic systems for limitations and exceptions, which substantially differ from country to country.<sup>87</sup>

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<sup>83</sup> See, e.g., WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121 [hereinafter WCT]; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 245; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 29 [hereinafter TRIPS]; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 886 U.N.T.S. 67 [hereinafter WPPT] (addressing copyrights in phonograms, which might be relevant for people with print disabilities); International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention].

<sup>84</sup> See WCT, *supra* note 83, art. 29; TRIPS, *supra* note 83, at 239; Berne Convention, *supra* note 83, art. 1.

<sup>85</sup> WCT, *supra* note 83, art. 10; TRIPS, *supra* note 83, arts. 9–12; WPPT, *supra* note 83, art. 16(2); Berne Convention, *supra* note 83, art. 9; see also Kaminski & Yanisky-Ravid, *supra* note 12, at 266.

<sup>86</sup> Berne Convention, *supra* note 83, art. 9; Kaminski & Yanisky-Ravid, *supra* note 12, at 266.

<sup>87</sup> SENFTLEBEN, *supra* note 4, at 1 (“A country’s specific system of limitations, in general, seems to be a sacrosanct feature of domestic copyright laws . . .”); see also

The United States has adopted “fair use” as its version of exceptions and limitations. A few scholars have already argued that fair use is substantially distributive justice. This mechanism of fair use permits unlicensed use (e.g., copying, exhibiting) of protected copyrighted product. The doctrine contains four subtests: the purpose of the use, the nature of the copyrighted work, whether or not the copying is transformative, and the effect of copying on the market value of the original.<sup>88</sup> In essence, fair use allows more users to enjoy the work without asking for permission and without paying. Similarly, compulsory licensing may reflect another mechanism of distributive justice, provided by patent law.<sup>89</sup>

#### *D. Law and Economics Has Become the Dominant Understanding of Intellectual Property*

Over the years, the utilitarian-economic-efficiency theories of the law and economics approach have been widely cited as the dominant justification for the exclusive allocation of intellectual property rights to financial stakeholders, whereas, originally, intellectual property rights were allocated to authors and inventors. This shift, allocating rights almost solely to firms, was primarily caused by courts upholding contracts, such as employment agreements, that transferred all intellectual property rights to the employer or financial backers on grounds of economic justifications. It is uncertain whether this process led to the desirable results of achieving the “original” goals of intellectual property law.<sup>90</sup>

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World Intellectual Prop. Org. Standing Comm. Copyright & Related Rights, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, SCCR/15/7 (Feb. 20, 2007), [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_15/sccr15\\_7.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr15_7.pdf) (“The nature and scope of exceptions and limitations to rights has been largely left to national policy makers to determine within broad permissive areas.”).

<sup>88</sup> 17 U.S.C. § 107 (2012); see also Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 551–55, 597 (2008) (A survey discussing the way courts implement the fair use doctrine. On the first subtest, courts surveyed based their judgments in favor of the fair use doctrine); Shaffer Van Houweling, *supra* note 66, at 1540–42, 1567 (arguing that fair use needs to be shaped so that poor artists can enjoy protected works).

<sup>89</sup> Michael Botein & Edward Samuels, *Compulsory Licenses in Peer-to-Peer File Sharing: A Workable Solution?*, 30 S. ILL. U. L.J. 69, 70 (2005); Jon Matthews, *Renewing Healthy Competition: Compulsory Licenses and Why Abuses of the TRIPS Article 31 Standards Are Most Damaging to the United States Healthcare Industry*, 4 J. BUS. ENTREPRENEURSHIP & L. 119, 123–24 (2010); Jennifer E. Sturiale, *Compulsory Licensing of Intellectual Property as Merger Remedy: A Decision-Theoretic Approach*, 72 LA. L. REV. 605, 625–27 (2012).

<sup>90</sup> Parker, *supra* note 74, at 603 (“[T]echnological innovation is one of the United States’ most important economic resources . . . .” However, “[t]he United States is in danger of losing its position as technological leader of the world. American innovation has decreased. The United States has a declining patent balance and is less patent productive per dollar than are many foreign countries.”); Yanisky-Ravid, *supra* note 75, at 149, 190–95 (suggesting “a new model of rights

Furthermore, it is apparent, from the most recent decisions, that courts have played a major role in the validation of this pro-corporate policy through enforcement of preinvention assignments of all intellectual property rights from authors and inventors by contract.<sup>91</sup> Originally, the U.S. Constitution as well as U.S. intellectual property statutes allocated rights to authors and inventors.<sup>92</sup> Technically, if not de facto, this allocation of intellectual property rights still exists. Nevertheless, instead of considering the integral role of inventors and authors, we find continued strengthening of a pro-corporate approach.<sup>93</sup> This recent policy choice is part of a phenomenon that began years after the enactment of intellectual property laws, as was already noted by Professor Robert Merges.<sup>94</sup> In this Article, I argue for adoption of policies that embrace the original goals of intellectual property laws, which allow for more distributive means. Corporations should hold intellectual property rights in circumstances where this is justified, but the “goals and justifications” of the current U.S. policy of unlimited transferability of intellectual property rights “are neither constitutionally based nor theoretically sound.”<sup>95</sup>

To conclude, the research embodied in this study suggests a desirable new policy for the allocation of rights according to distributive justice principles. Application of this approach is evident recently at the international level, as shown by several WIPO tools to be discussed in Part VI, *infra*.

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allocation, one which would arguably enlarge the ‘whole pie’ in a manner that would benefit the public at large” because this area is so important to the U.S.).

<sup>91</sup> For court decisions, see Yanisky-Ravid, *supra* note 75, at 151–52 n.29.

<sup>92</sup> U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 107.

<sup>93</sup> Feldman, *supra* note 79, at 6667.

<sup>94</sup> Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CALIF. L. REV. 2187, 2215–17 (2000) (Merges describes the “corporatization” of patent law: “In 1885, only 12% of patents were issued to corporations; by 1998, only 12.5% of patents were issued to independent inventors.” He goes on to explain that “[t]he rules governing ownership of employee inventions” changed in ways that favored corporations, and “[c]ourts demonstrated an eagerness to enforce [employment] contracts” signing ownership over to the corporation. The shift toward a preference for corporations can be seen in the “emergence of a default rule in favor of employers” and in criticism of the tendency to favor the employed inventors); *see also* Catherine L. Fisk, *Removing the ‘Fuel of Interest’ from the ‘Fire of Genius’: Law and the Employee-Inventor, 1830–1930*, 65 U. CHI. L. REV. 1127, 1141–42 (1998) (explaining that the change over the years from innovation based on one inventor, to the research and developments of a team of employee inventors, justifies the allocation of rights to employers).

<sup>95</sup> Yanisky-Ravid, *supra* note 75, at 147, 187–89 (arguing for employed inventors rights as a tool to improve innovation).



## V. FROM THEORY TO PRACTICE: ARE INTELLECTUAL PROPERTY LAWS AN APPROPRIATE TOOL FOR DISTRIBUTIVE JUSTICE?

The main question that this Subsection confronts is whether the goal of distributive justice should be achieved via intellectual property laws. Distributive justice uses both general laws that were primarily and explicitly designed to reduce inequality in society, such as progressive tax laws and social welfare programs, and specific laws, such as intellectual property laws. The following Subsection will address the question of whether a general legal tool or a specific legal tool such as intellectual property is the most appropriate distributive tool.

### A. *The Appropriate Distributive Tool*

An important preliminary question in this context is whether the redistribution of resources in society should be made using the legal and financial rules that are ordinarily used for these purposes, nationally or internationally, such as social security systems, or by employing specific private laws, such as, in our case, intellectual property laws.

Scholars—who support the redistribution of resources in society by using a general system of legal rules designed to promote equality, such as taxation, welfare, and social security (as opposed to the use of intellectual property or other specific laws)—raise several arguments. First, proprietary distribution using, for example, intellectual property laws, targets only certain groups in the population (e.g., authors and inventors) rather than all individuals in the society.<sup>96</sup> Second, the responsibility for fair and equal distribution should be borne by government authorities, as opposed to private parties governed by law. Third, distribution must be made according to the rules that were initially designed for this purpose.<sup>97</sup>

Other scholars support using specific legal regimes for redistribution, such as property laws; in my opinion, intellectual property laws should be used as well. Professor Hanoch Dagan, for example, argues that in order to achieve economic efficiency, property rules must internalize the distributive justice values.<sup>98</sup> He disagrees with the claim that authorities are the only ones responsible for distribution and redistribution. The author agrees that private property principles can promote equality and protect the interests of weak parties, be they individuals or nations. In fact, those who fear the social gaps between politically and economically powerful parties and weak parties need to consider the principles of distributive justice within the concepts of property laws. Dagan argues

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<sup>96</sup> Goold, *supra* note 13, at 255–56.

<sup>97</sup> See Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 669 (1994).

<sup>98</sup> HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 113 (2011).

that property law is not as invasive as tax laws, in the sense of their interference with the freedom of the individual.<sup>99</sup>

I further argue that, although the common methods of achieving social equality are through taxation and social security, these methods have certain disadvantages, which exist at both the collection phase and the distribution-redistribution phase. During the collection phase, there is an unequal burden of tax on different socioeconomic groups of society. The majority of the burden is borne by the middle class rather than by the upper class.<sup>100</sup> In the distribution phase, waste of resources is inevitable, due to the costs of organizing the mechanism of distribution.

I contend that intellectual property laws are designed and used as a tool for distribution of resources. The allocation of intellectual property rights to the creators or inventors is an example of the distribution of resources.

### B. *Mixed Tools*

Another approach posits that distributive justice can be achieved through both general legal regimes and specific legal regimes. Professor Daphna Lewinsohn-Zamir is in favor of using private-law legislation, alongside existing systems, for redistribution of resources, pursuing a more egalitarian allocation.<sup>101</sup> This approach rejects the economic argument that taxes and other payment transfers are the ideal redistribution method whereas private laws are more expensive and less effective.<sup>102</sup>

This proposed approach, which recognizes intellectual property as a distributive tool, adopts several values in order to achieve the “good

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<sup>99</sup> *Id.* at 132–34, 140–41. While Dagan does not specifically compare property laws with tax laws, he argues that property laws are not included in the “cases in which law’s coerciveness . . . undermines its normativity.” *Id.* at 134. For examples of the libertarian discussion of the connection between distributions, property, and justice, see J. E. PENNER, *THE IDEA OF PROPERTY IN LAW* 103–04, 178, 206–07 (1997) (stating that there is no connection between the concept of property and distribution of justice); Michelman, *supra* note 39, at 149–50 (arguing that as measures to decentralize power in society, the libertarian values of property rights, privacy, and security always involve both ownership and distributive dimensions).

<sup>100</sup> Deborah A. Geier, *Integrating the Tax Burdens of the Federal Income and Payroll Taxes on Labor Income*, 22 VA. TAX REV. 1, 3 (2002).

<sup>101</sup> Lewinsohn-Zamir, *supra* note 38, at 329–32.

<sup>102</sup> *Id.* at 334, 339–40; Aanund Hylland & Richard Zeckhauser, *Distributional Objectives Should Affect Taxes but Not Program Choice or Design*, 81 SCAND. J. ECON. 264, 266 (1979); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 822–26 (2000) (asserting that the drawback of the tax system is the double inefficiency in the process of collecting the tax and, during the process, dividing it among governmental entities).

state,” including autonomy and freedom, understanding, achievements, and strong, meaningful and joyful social relationships.<sup>103</sup>

When we promote welfare through intellectual property laws, the advantages of distributing benefits through private laws become more apparent. If we want to ensure objective welfare and not just increased revenue, private laws might be more appropriate in allocating rights, powers, and revenues than tax laws and welfare-payment transfers. Moreover, payment transfer per se—to individuals, or developing nations—could negatively affect internal incentives for productivity. Receiving allowances involves a negative stigma that might affect the motivation to produce.<sup>104</sup> If we expand the definition of “good” beyond the narrow perception of the outcome, we can include in this term the distribution of other components such as intellectual property rights. On a humiliation-reward scale, taxes and payment transfers are closer to the negative end of the scale, while using intellectual property laws may be closer to reward, the positive end of the scale. Private laws convey positive messages of eligibility and entitlement, and intellectual property legal systems consider and strengthen the interactions among individuals. Private laws, then, may increase recipient esteem, whereas receiving payment transfers or taxes is perceived as a sign of failure (i.e., as a form of charity and not as a right).<sup>105</sup>

Professor Lewinsohn-Zamir concludes that private laws (e.g., intellectual property laws) may play an important and significant role in distribution. In her opinion, both methods could and should be used concurrently.<sup>106</sup>

I agree that private laws are not the only rules that can be employed to achieve equality through distribution of rights and goods; however, the importance of international tools should also be considered.

### C. *International Tools for Distribution of Justice*

One cannot discuss distributive justice without referring to international tools and vice versa, especially in the global and cyber era. One of the initial purposes of international tools is to achieve a better balance between developed countries and developing countries in the flow of capital, access to knowledge, economic growth, workforce quality, and many other important factors.<sup>107</sup>

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<sup>103</sup> Lewinsohn-Zamir, *supra* note 38, at 345–46.

<sup>104</sup> *Id.* at 357.

<sup>105</sup> *Id.* at 358–60.

<sup>106</sup> *Id.* at 397.

<sup>107</sup> Ali Imam, *How Patent Protection Helps Developing Countries*, 33 *AIPLA Q. J.* 377, 379 (2005); see Nora Maija Tocups, *The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries*, 29 *BULL. COPYRIGHT SOC'Y U.S.* 402 (1981).

Important treaties have been designed and have served as a means to achieve these goals. For example, the Montreal Protocol<sup>108</sup> and the Kyoto Protocol<sup>109</sup> regarding the reduction of gas emissions, both impose lower levels of obligations on developing countries.<sup>110</sup> Even within the international tools for intellectual property, we can find the implementation of these concepts, as will be discussed in detail below. For example: TRIPS is the world's most comprehensive and arguably most important international agreement nowadays concerning intellectual property; its implementation is required for membership in the World Trade Organization (WTO).<sup>111</sup> However, recognizing that less developed countries may not have the legal infrastructure necessary for a smooth or rapid transition to a fully compliant intellectual property policy, TRIPS included varying implementation deadlines, requiring developed countries to comply by January 1, 1996 but allowing developing nations significantly more time—in some cases until as late as January 1, 2016.<sup>112</sup> Furthermore, in 2001, the Doha Declaration on the TRIPS Agreement and Public Health clarified the scope of TRIPS, furthering the WTO's flexible stance with respect to balancing private intellectual property rights and public interests to promote access to essential medicines for all.<sup>113</sup>

## VI. INTERNATIONAL INTELLECTUAL PROPERTY TOOLS ADOPTING THE DISTRIBUTIVE JUSTICE APPROACH

Shifting from the national perspective to the international view reveals a different reality. Interestingly and surprisingly, WIPO has changed its policy during the last several years towards adopting a balanced approach that considers the distributive justice point of view as part of its

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<sup>108</sup> Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 29 [hereinafter Montreal Protocol].

<sup>109</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.

<sup>110</sup> *Id.* at art. 10(c); Montreal Protocol, *supra* note 108, art. 5; Ilan Benshalom, *Rethinking International Distributive Justice: Fairness as Insurance*, 31 B.U. INT'L L.J. 267, 285–86 (2013).

<sup>111</sup> TRIPS, *supra* note 83, art. 1(1).

<sup>112</sup> *Id.* at arts. 65–66; *see also* WTO, *Frequently Asked Questions About TRIPS in the WTO*, [https://www.wto.org/english/tratop\\_e/trips\\_e/tripfq\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm) (last visited Dec. 22, 2016).

<sup>113</sup> *See* World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002), [https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm). The WTO's clarification notwithstanding, some have argued that TRIPS represents a shift away from international intellectual property policy's focus on protections as incentives to authors toward an issue of profit in the realm of trade. *See* Rochelle Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law Is Reconceptualizing Intellectual Property*, 36 MICH. J. INT'L L. 557, 557–60 (2015).

agenda. Contemporary tools currently being enacted or negotiated by WIPO adopt distributive justice as a main goal.

The law and economics approach to intellectual property narrowed the venue for implementing distributive justice by favoring ownership rights and expanding property rights. Exceptions and limitations balanced the interests of the users against the owners. In the context of international intellectual property laws, there are some recent developments that reflect (or are influenced by) the distributive justice approach. These developments try to take into account the entire set of circumstances and values, where access to knowledge, and other human rights values, “overrule” ownership rights in intellectual-property products.

Distributive justice enhances distribution of two sets of values: sharing and distribution of knowledge, and helping mankind promote human rights values, such as helping people with disabilities or those who cannot afford education, or preserving cultural artifacts and historical data. Therefore, open access—to books, art, music, and even medicine—has become a fundamental right in our world. International tools can enhance accessibility and better distribution of tangible and intangible assets to millions of users around the globe, especially in developing countries.<sup>114</sup>

Three main international tools are discussed in this Part: the first is the Marrakesh Treaty, WIPO’s International Instrument on Limitations and Exceptions for Visually Impaired Persons (VIPs); the second is the ongoing negotiations for an international tool addressing traditional knowledge (TK); and the third is the new WIPO initiative regarding research and sharing innovation in the fight against Neglected Tropical Diseases (NTDs).

*A. The Marrakesh Treaty: Access to Knowledge and Printed Materials by Visually Impaired Persons (VIP)*

One of the best examples of the implementation of the distributive justice concept in intellectual property tools is the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted by the Diplomatic Conference, on June 27, 2013.<sup>115</sup> This treaty represents the new realm of an

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<sup>114</sup> Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2907–08 (2006) (favoring exceptions and limitations in intellectual property treaties).

<sup>115</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, VIP/DC/8 REV [hereinafter Marrakesh Treaty]. The Treaty went into effect on Sept. 30, 2016, upon ratification by 20 countries. For a list of all current ratifying countries, see *Contracting Parties > Marrakesh VIP Treaty*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=843](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=843) (last visited Dec. 22,

exceptions and limitations tool applied in the service of a distributive justice goal. The paucity of copyrighted written works accessible to VIPs represents a human rights issue of global proportions. According to estimates of the World Health Organization (WHO), there are 285 million people with print disabilities; but in developed countries only 5% of books are available in accessible formats.<sup>116</sup> In developing countries, where approximately 90% of visually impaired persons live, the percentage of books that are available in accessible formats is significantly lower, probably less than 1%, resulting in “book famine.”<sup>117</sup> By providing specific limitations and exceptions to copyright, the Marrakesh Treaty allows VIPs global access to printed materials (and, consequently, to the knowledge embodied therein). The Marrakesh Treaty permits visually impaired persons to transfer printed materials into other accessible formats, such as Braille or audio, without seeking permission or paying licensing rights to the owner (i.e., the publisher). Before the treaty went into effect, converting material in this way or trading these audio or Braille versions across borders was considered a copyright infringement. Therefore, the treaty achieves distributive justice through the international exceptions and legal tools. I argue that the Marrakesh Treaty, then, is especially significant because WIPO created a new-egalitarian-Rawlsian-international instrument.<sup>118</sup> This was a significant shift from WIPO’s previous stance of excluding nonstakeholders from using the intellectual property product without either license or permission.

Furthermore, although the Marrakesh Treaty applies only to a single field, it represents a step towards a distributive justice approach to the evolution needed in a long list of areas. This approach to distributive justice applies to other domains in addition to visual impairment, such as people with other disabilities, as well as to justice in such services as those involving food supplies (e.g., generic resources of crops) and education.<sup>119</sup>

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2016). The Treaty seeks to honor the underlying policy of the fair use doctrine and distributive justice. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1688–89 (1988).

<sup>116</sup> Lida Ayoubi, *The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons*, 13 N.Z. J. PUB. & INT’L L. 255, 255 (2015).

<sup>117</sup> *Id.* at 256; *Visual Impairment and Blindness*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs282/en/> (last updated Aug. 2014).

<sup>118</sup> *Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/dc2013/en/> (last visited Dec. 21, 2016). The negotiations successfully concluded with adoption of the treaty in June 2013, granting accessibility for persons with print disabilities by providing specific limitations and exceptions to copyright.

<sup>119</sup> Keith Aoki, *Food Forethought: Intergenerational Equity and Global Food Supply—Past, Present, and Future*, 2011 WIS. L. REV. 399, 401–04, 411 (“[P]overty is the primary cause for hunger. Almost 40 percent of the world’s population earns less than \$2 per

By granting rights to people who did not have them previously, the Marrakesh Treaty enables them to participate in cultural, educational, economic, and other aspects of society.<sup>120</sup> As previously mentioned, internationally speaking, the distributive justice impact of the treaty is even stronger due to the fact that the treaty also permits cross-border distribution of accessible formats to VIPs.<sup>121</sup>

The negotiation among representatives of the stakeholders was not a trouble-free process.<sup>122</sup> Nonetheless, the Treaty adopted a hard-law form and represents WIPO's first international exceptions and limitations tool, in contrast to all the former tools creating intellectual property rights.<sup>123</sup> By adopting the distributive justice perspective, the Treaty may fix a market failure resulting from the fact that publishers have not supplied enough accessible materials to visually impaired persons around the globe,<sup>124</sup> especially in developing countries.<sup>125</sup>

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day" making food difficult to secure. The food supply should be given a more distributive and corrective justice based treatment by international organizations, such as the WTO. This article suggests creating a decentralized food production system. "Distributive justice premised on the idea of greatest good for the greatest number provides justification for a roughly egalitarian redistribution of access to basic goods" and benefits).

<sup>120</sup> Marrakesh Treaty, *supra* note 115, art. 4(2) ("Authorized entities shall be permitted, without the authorization of the copyright holder, to make an accessible format copy of a work, obtain from another authorized entity an accessible format copy, and supply those copies to beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, when all of the following conditions are met: (i) the authorized entity wishing to undertake said activity has lawful access to that work or a copy of that work; (ii) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person; (iii) such accessible format copies are supplied exclusively to be used by beneficiary persons; and (iv) the activity is undertaken on a non-profit basis . . .").

<sup>121</sup> *Id.* at art. 5.

<sup>122</sup> N. Cameron Russell, *The Treaty for the Visually Impaired and Print Disabled—A Trojan Horse for Copyleft?*, in LEGAL CHALLENGES OF NEW TECHNOLOGY: CYBERSPACE, PRIVACY AND MORE (Shlomit Yanisky-Ravid et al. eds., forthcoming 2017) (on file with author) (arguing that the obstacles in the negotiations reflect some political forces).

<sup>123</sup> Kaminski & Yanisky-Ravid, *supra* note 12, at 260, 263; see *International Treaties and Conventions on Intellectual Property*, in WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE (2004).

<sup>124</sup> Aaron Scheinwald, *Who Could Possibly Be Against a Treaty for the Blind?*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 445, 494–97 (2012).

<sup>125</sup> Kaminski & Yanisky-Ravid, *supra* note 12, at 283, 289–91.

B. *Traditional Knowledge (TK)*

The term “traditional knowledge” (TK) is generally used to describe the intellectual and intangible concepts which are the result of a specific cultural heritage, such as the customs and methods of indigenous tribes and local traditional communities.<sup>126</sup> Conceptualizing and defining the phrase traditional knowledge has not been an easy task. TK encompasses information and intellectual property that identifies a specific community that have developed over time and been considered as a collective asset embodying local cultural and environmental experience. TK is transferred by cultural means and sustains the community and its culture. Further, it helps maintain the genetic resources the community needs for survival.

From an intellectual property perspective, as opposed to the heritage value of the knowledge, TK “embraces both the substance of the knowledge itself as well as traditional cultural expressions” such as folklore, in addition to inventions and other intellectual property products, such as traditional cultural marks.<sup>127</sup> TK ranges from cultural expressions to medical, agricultural, social, ecological, biological, and other domains.<sup>128</sup> Examples include plants used in healing or bodily processes

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<sup>126</sup> World Intellectual Prop. Org. Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, *Questionnaire on Recognition of Traditional Knowledge and Genetic Resources in the Patent System*, WIPO/GRTKF/IC/Q.5 (July 2004), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=30774](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=30774) (broadly describes a category of subject matter that is comprised of intellectual and intangible products of a specific cultural heritage, including customs and methods of traditional communities. Such communities would include indigenous peoples and local communities); *see also* World Intellectual Prop. Org. Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, *The Protection of Traditional Knowledge: Draft Gap Analysis: Revision*, WIPO/GRTKF/IC/13/5(b) Rev. (Oct. 13, 2008), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=109672](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109672) (The term “traditional knowledge” as used by WIPO includes the fields of genetic resources and traditional cultural expressions.).

<sup>127</sup> World Intellectual Prop. Org. Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, *Traditional Knowledge: Policy and Legal Options*, WIPO/GRTKF/IC/6/4 (Dec. 12, 2003), <http://www.wipo.int/portal/en/index.html>.

<sup>128</sup> World Intellectual Prop. Org. Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, *The Protection of Traditional Knowledge: Revised Objectives and Principles*, WIPO/GRTKF/IC/17/5 (Sept. 15, 2010), [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=20207](http://www.wipo.int/meetings/en/details.jsp?meeting_id=20207) (specific examples of TK include the knowledge developed through creative pursuits in the context of traditional society or culture, such as customary practices or culture-specific skills); *PCT Notable Inventions: Hoodia Appetite Suppressant*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/pct/en/inventions/hoodia/> (last visited Dec. 22, 2016) [hereinafter WIPO, *Hoodia*]; *see also PCT Application*, WORLD INTEL. PROP. ORG. (July 2015), <http://patentscope.wipo.int/search/en/search.jsf> search for application WO/1998/046243 [hereinafter WIPO, *Application*].



(e.g., hoodia), folk dances and songs, spices (e.g., turmeric) and foods characteristic of the community, and crafts (e.g., weaving and pottery).

At present there is no consensus in the international community as to the definition of TK. WIPO, however, offers the following definition: “Traditional knowledge is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.”<sup>129</sup>

TK as an intellectual property concern has become especially significant in light of the profit the pharmaceutical industry sees in traditional medicinal knowledge and the potential of biodiversity.<sup>130</sup> Being aware of the unfair enrichment resulting from commercial use of TK by entities coming from developed countries (usually without compensating the indigenous communities)—WIPO took action.

The mission of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, established by WIPO, is to create international tools to protect traditional cultural expressions and other forms of TK and to consider intellectual property tools that may be applicable in this context, such as benefit sharing in genetic or cultural resources.<sup>131</sup> To that end, WIPO has led negotiations with representatives of countries for many years. By doing so, WIPO expressed an international distributive justice approach one more time.

Another hurdle WIPO faced involved policy issues. Although the policy issues concerning TK are diverse and cover a broad range of concerns, WIPO divides intellectual property issues roughly into two key themes: defensive protection and proactive protection.<sup>132</sup> The former protects the owners of TK against third party actions that could result in illegitimate or unfounded intellectual property rights in TK. An example of this type of measure already in place is the amendments to the WIPO-

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<sup>129</sup> *Traditional Knowledge and Intellectual Property*, WORLD INTEL PROP. ORG., <http://www.wipo.int/tk/en/tk/> (last visited Dec. 22, 2016).

<sup>130</sup> WORLD INTEL. PROP. ORG., *Background Brief #6: Intellectual Property and Traditional Medical Knowledge* (2016), [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/background\\_briefs-e-n6-web.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/background_briefs-e-n6-web.pdf); *Traditional Knowledge and Intellectual Property*, *supra* note 129. However, TK that has ancient roots and is often preserved orally is not protected by conventional intellectual property systems.

<sup>131</sup> *Traditional Knowledge*, WORLD INTEL PROP. ORG., <http://www.wipo.int/tk/en/> (last visited Dec. 22, 2016).

<sup>132</sup> World Intellectual Prop. Org. Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, *Defensive Protection Measures Relating to Intellectual Property, Genetic Resources and Traditional Knowledge: An Update*, WIPO/GRTKF/IC/6/8 (Dec. 15, 2003), [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=21094](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=21094); *IP Infringement Online: The Dark Side of Digital*, WIPO MAG. (April 2007), [http://www.wipo.int/wipo\\_magazine/en/2011/02/article\\_0007.html](http://www.wipo.int/wipo_magazine/en/2011/02/article_0007.html).

administered patent systems (the International Patent Classification System and the Patent Cooperation Treaty Minimum Documentation). The latter, proactive protection is, for example, provided by databases some countries and communities are developing to document TK as prior art so as to prevent property rights from being asserted in the first place.

In an attempt to offer practical assistance to TK stakeholders, WIPO has developed a toolkit for documenting TK, available at WIPO's website. Moreover, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is in the process of negotiating the possible adoption of an international legal instrument.<sup>133</sup>

There are at least three ways to allocate intellectual property rights in TK to indigenous people. One way is contractual, by paying consideration. Another is through assigning trademarks, geographical identification—like rights, copyright-like moral rights such as attribution, and other common intellectual property tools.<sup>134</sup> The third set of solutions may also include some voluntary agreements.<sup>135</sup> Any of these (or other) solutions face legal and political obstacles, such as the challenge of proprietizing public domain knowledge and products and the problem of identifying beneficiaries (i.e., whether rights belong to the country, the tribe, certain castes, etc.).<sup>136</sup> The idea of protecting TK that has not been rooted in a specific treaty has influenced the market toward adopting a distributive justice attitude.<sup>137</sup>

Provisions regarding TK do already exist in some international treaties and other instruments. Article 8(j) of the Convention on Biological Diversity refers to “knowledge, innovations and practices of indigenous

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<sup>133</sup> See World Intellectual Prop. Org., *Intellectual Property Needs and Expectations of Traditional Knowledge: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998–1999)*, 235 (2001), [http://www.wipo.int/edocs/pubdocs/en/tk/768/wipo\\_pub\\_768.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf).

<sup>134</sup> See, e.g., Javier Garcia, *Fighting Biopiracy: The Legislative Protection of Traditional Knowledge*, 18 BERKELEY LA RAZA L.J. 5 (2007); Deepa Varadarajan, *A Trade Secret Approach to Protecting Traditional Knowledge*, 36 YALE J. INT'L L. 371 (2011); Weerawit Weeraworawit, *Formulating an International Legal Protection for Genetic Resources, Traditional Knowledge and Folklore: Challenges for the Intellectual Property System*, 11 CARDOZO J. INT'L & COMP. L. 769 (2003).

<sup>135</sup> See, e.g., V. Geingos & M. Ngakaeja, *Intellectual Property as a Lever for Economic Growth: The African Experience, Part II*, WIPO MAG., Nov.–Dec. 2003, at 6–10; David Reid, *New Medicines from Traditional Knowledge*, in LEGAL CHALLENGES OF NEW TECHNOLOGY: CYBERSPACE, PRIVACY AND MORE (Shlomit Yanisky-Ravid et al. eds., forthcoming 2017) (on file with author); WIPO, *Hoodia*, *supra* note 128. The PCT application is available at WIPO, *Application*, *supra* note 128.

<sup>136</sup> Garcia, *supra* note 134, at 10–16 (describing the difficulties in American and Mexican legislation); Varadarajan, *supra* note 134, at 394–96; see also Weeraworawit, *supra* note 134.

<sup>137</sup> Varadarajan, *supra* note 134, at 396–98, 419–20 (suggesting the trade secret law norms for traditional TK).

and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity;<sup>138</sup> the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization refers to “traditional knowledge associated with genetic resources;”<sup>139</sup> the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, is related to intangible cultural heritage;<sup>140</sup> the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, is related to the protection and promotion of the diversity of cultural expressions;<sup>141</sup> and the Article of the International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agricultural Organization deals with protection of TK relevant to plant genetic resources for food and agriculture.<sup>142</sup> TK is also promoted and protected through vari-

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<sup>138</sup> Convention on Biological Diversity, art. 8(j), June 5, 1992, 1760 U.N.T.S. 79 (“Each Contracting Party shall, as far as possible and as appropriate: . . . [s]ubject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”).

<sup>139</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, preamble and art. 5, Jan. 20, 2011, U.N. Doc. UNEP/CBD/COP/10/27. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity was adopted at the 10th Conference of Parties of the CBD.

<sup>140</sup> Convention for the Safeguarding of the Intangible Cultural Heritage, art. 2(1), Oct. 17, 2003, 2368 U.N.T.S. 35 (defining “intangible cultural heritage” as “the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage”).

<sup>141</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. 4(3), Oct. 20, 2005, 2440 U.N.T.S. 311 (defining “[c]ultural expressions” as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.” It recognizes the importance of TK as a source of intangible and material wealth, and in particular the knowledge systems of protection and promotion).

<sup>142</sup> International Treaty on Plant Genetic Resources for Food and Agriculture, art. 9.2, Nov. 3, 2001, 2400 U.N.T.S. 303 (The Treaty provides that “[t]he Contracting Parties agree that the responsibility for realizing Farmers’ Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers’ Rights, including: (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture.”).

ous laws and international declarations, like the United National Declaration on the Rights of Indigenous Peoples.<sup>143</sup>

*C. Access to Medicines: WIPO Re:Search Project and More*

For pharmaceutical firms, the intellectual property regime, in general, and patents, in particular, represent the guarantee of a return on the enormous investment necessary for the development of new drugs. This system allows the pharmaceutical industry to essentially dictate their licensing terms and conditions, which leads to high prices for patented drugs. These costs result in many people—particularly those in developing countries—being unable to afford these drugs. As a practical matter, then, this represents an often insurmountable obstacle, thereby depriving these people full access to these medications and, consequently, to the good, or at least improved, health they can procure.<sup>144</sup>

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<sup>143</sup> World Intellectual Prop. Org. Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, *List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found*, WIPO/GRTKF/IC/17/INF/9 (Nov. 5, 2010), [http://www.wipo.int/edocs/mdocs/sct/en/wipo\\_grtkf\\_ic\\_17/wipo\\_grtkf\\_ic\\_17\\_inf\\_9.pdf](http://www.wipo.int/edocs/mdocs/sct/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_9.pdf); *Laws and Legislative Measures*, WORLD INTEL. PROP. ORG., [http://www.wipo.int/tk/en/legal\\_texts/](http://www.wipo.int/tk/en/legal_texts/) (last visited Dec. 22, 2016).

<sup>144</sup> Krista L. Cox, *The Medicines Patent Pool: Promoting Access and Innovation for Life-Saving Medicines Through Voluntary Licenses*, 4 HASTINGS SCI. & TECH. L.J. 291, 293–94 (2012); Amir H. Khoury, *The “Public Health” of the Conventional International Patent Régime and the Ethics of “Ethicals”: Access to Patented Medicines*, 26 CARDOZO ARTS & ENT. L.J. 25, 32–33 (2008); Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J. L. & MED. 345, 358 (2008); see also Dean Baker, *Current Drug-Patent System Is Bad Medicine*, ALJAZEERA AM. (Nov. 24, 2014), <http://america.aljazeera.com/opinions/2014/11/drug-patents-pharmaceuticalindustrygenericsindia.html>. The extremely high cost of developing drugs (\$2.6 billion) is the inefficient result of the patent system and not the other way around. “Patent monopolies create absurd problems in paying for drugs that would be relatively cheap in a free market.” *Id.* The patent system is heavily relied upon by the pharmaceutical companies to protect their extensive development costs. At the same time, patent protection contributes to “bloated development costs . . .” *Id.* As a result, many people are deprived of access to medicine because patents prevent less expensive generic drugs from being developed. Licenses controlling drug manufacture as well as use, further make access to affordable medication prohibitive by enabling pharmaceutical companies to collect their investments back via licenses and extremely expensive prices, all protected by the patent systems. Consequently, many people, especially but not only in developing countries, lack full access to medications and hence health. See also Bruce Lehman, *The Pharmaceutical Industry and the Patent System*, at 2–3 (2003), [http://users.wfu.edu/mcfalta/DIR0/pharma\\_patents.pdf](http://users.wfu.edu/mcfalta/DIR0/pharma_patents.pdf) (“[T]he WTO Council recently affirmed that the TRIPS Agreement permits such compulsory licenses in health emergencies, even in cases where the compulsory license is for an imported product.”).

WIPO usually implicitly supports this policy and encourages developed countries to adopt an intellectual property regime.<sup>145</sup> However, an interesting shift in WIPO's policy is reflected in its new projects emphasizing access to medicine.<sup>146</sup> WIPO has decided to consider public domain islands within its policy, thus embracing a distributive justice point of view as part of its official agenda. Adopting this new policy enables WIPO to reconsider its role as an international organization and its goals of promoting innovation in coordination with the latest developments, making the agency more relevant.

Another excellent example is the WIPO Re:Search project on sharing innovation in the fight against NTDs, such as malaria and tuberculosis.<sup>147</sup> According to WIPO,

More than 1 billion people are affected by NTDs each year . . . ten million people die from NTDs annually. Millions more are so incapacitated by such disease that they are unable to work, care for themselves, or care for their children. These diseases predominantly affect the poorest people in the least developed countries.<sup>148</sup>

Free market solutions are inefficient and insufficient. Lack of investment in drug development results from lack of incentives, so medicine and healing are neither common nor accessible, notwithstanding the enormous number of patients. To address the essential need for "new and better drugs, diagnostics and vaccines,"<sup>149</sup> WIPO created the WIPO Re:Search project based on international distributive justice values. Through the project, organizations share "intellectual property, compounds, expertise, facilities, and know-how royalty-free . . ." The open environment promotes cooperation among researchers from leading pharmaceutical firms and enables them to develop medical solutions for diseases, mainly in developing countries.<sup>150</sup>

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<sup>145</sup> See Sisule F. Musungu & Graham Dutfield, *Multilateral Agreements and a TRIPS-Plus World: The World Intellectual Property Organization (WIPO)* (Quaker United Nations Office, TRIPS Issues Papers No. 3, 2003).

<sup>146</sup> See, e.g., *WIPO Re:Search*, WORLD INTELLECTUAL PROP. ORG., <http://www.wipo.int/research/en/> (last visited Dec. 22, 2016). WIPO Re:Search was established in 2011 by WIPO in collaboration with BIO Ventures for Global Health and with the active participation of leading pharmaceutical companies and other private and public sector research organizations.

<sup>147</sup> Anatole Krattiger, *Promoting Access to Medical Innovation*, WIPO MAG., Oct. 2013, at 5, 7.

<sup>148</sup> *WIPO Re:Search*, *supra* note 146; see *Neglected Tropical Diseases*, WORLD HEALTH ORG., [http://www.who.int/neglected\\_diseases/diseases/en/](http://www.who.int/neglected_diseases/diseases/en/) (last visited Dec. 22, 2016).

<sup>149</sup> See *WIPO Re:Search*, *supra* note 146 (WIPO Re:Search stimulates more research and development for new and better treatment options for those suffering from these conditions, mainly, as mentioned, in developing countries).

<sup>150</sup> *Id.* According to WIPO, NTDs, "malaria and tuberculosis affect more than one billion people across the globe. Although recent years have seen the arrival of

The open-access policy exemplifies several distributive justice principles. First, it provides royalty-free licenses for research, development, and manufacture anywhere in the world. Second, it makes products available royalty-free to the least developed countries. Third, it considers, in good faith, access for all developing countries, taking into account the economic development of the countries and the need to facilitate access to disadvantaged populations.<sup>151</sup>

Several critical benefits of the distributive justice international method as applied to intellectual property products are highlighted by this new approach. According to WIPO, the policy of open access and common knowledge catalyzes the research and development of medical products for NTDs through innovative research partnerships and knowledge sharing. This approach increases the probability, and efficiency, of success and diminishes the high costs that have prevented investments in accessible pharmaceuticals. The targeted result is international distributive justice oriented: WIPO “offers its members access to an extensive range of knowledge assets, compounds, technology, and expertise provided by other private and public sector members. This saves scientists valuable resources and time.”<sup>152</sup>

The goal of this project, explicitly declared by WIPO, is to “benefit patients in the [l]east [d]eveloped [c]ountries . . . by creating an open innovation platform through which public and private sector entities can share” information as well as intellectual property.<sup>153</sup> I claim that international organizations such as WIPO have the potential to use international intellectual property tools beyond national interests and help achieve better distribution of goods, information, rights, and power, beyond borders and governments to developing countries (with poor economies and markets). In other words, international organizations can bring a different meaning to laws to better promote distributive justice.

The example of WIPO Re:Search further promotes distributive justice in favor of developing countries in several venues. First, it improves access to medicines, especially for developing countries, to the benefit of the poor and the needy. Second, it enhances access to knowledge and

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new R&D models and extra resources, there remains a pressing need to bridge research gaps and bring together knowledge, skills and infrastructure from the private, non-profit, and academic sectors.” WORLD INTEL. PROP. ORG. RE:SEARCH, SHARING INNOVATION IN THE FIGHT AGAINST NEGLECTED TROPICAL DISEASES (Aug. 2014), [http://www.wipo.int/export/sites/www/research/docs/flyer\\_wiporesearch\\_2014.pdf](http://www.wipo.int/export/sites/www/research/docs/flyer_wiporesearch_2014.pdf).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* The consortium of WIPO Re:Search was established as a collaboration between WIPO and BIO Ventures for Global Health and includes participating institutions from different sectors. The consortium is a voluntary endeavor open to private and public entities. *Id.*

<sup>153</sup> WORLD INTEL. PROP. ORG. RE:SEARCH, GUIDING PRINCIPLES (June 8, 2011), [http://www.wipo.int/export/sites/www/research/docs/guiding\\_principles.pdf](http://www.wipo.int/export/sites/www/research/docs/guiding_principles.pdf).

technology for developing countries. Third, it encourages developed countries to share knowledge and technology with developing countries. According to WIPO, 105 countries have agreed to the model, and leading pharmaceutical firms, such as Novartis, as well as leading universities, have joined the project.<sup>154</sup>

The phenomenon of giving intellectual property laws a new and different meaning by adopting the distributive justice approach, resulting in providing access to medicines, stands in contrast to the traditional point of view in which intellectual property is solely controlled by the owner. It is further illustrated by a few more examples.

As reported in the *Journal of Laboratory Physicians*, “[h]epatitis B infection is one of the major public health problems globally and is the tenth leading cause of death. Worldwide, more than two billion of the population show evidence of past or recent HBV infection and more than 350 million are chronic carriers of this infection.”<sup>155</sup> India, located in an intermediate HBV endemic zone with 50 million cases, is the second largest global pool of chronic HBV infections.<sup>156</sup>

The prices of HBV vaccines, produced mainly by the primary pharmaceutical firms in this market (Merck and Glaxo-Smith-Klein), were relatively high. These firms were mostly interested in marketing to the developed countries where they had registered patents.<sup>157</sup> After the Global Fund for Children’s Vaccine was established with seed funding from the Bill and Melinda Gates Foundation, and later by a Korean entity, by licensing another vaccine developed by Rhein Biotech and using different distribution methods in developing countries, where permitted, prices were reduced dramatically—to less than a dollar per dose.<sup>158</sup>

Another example, this time of a hepatitis C vaccine being distributed differently to developed and developing countries, was recently published.<sup>159</sup> Gilead Sciences allowed generic manufacture of its expensive

<sup>154</sup> See *Collaboration Agreements*, WORLD INTEL. PROP. ORG., [http://www.wipo.int/export/sites/www/research/docs/collaboration\\_agreements.pdf](http://www.wipo.int/export/sites/www/research/docs/collaboration_agreements.pdf) (last updated Nov. 21, 2016).

<sup>155</sup> Varsha Singha et al., *Hepatitis B in Health Care Workers: Indian Scenario*, 1 J. LAB. PHYSICIANS 41, 41 (2009).

<sup>156</sup> Sibnarayan Datta, *An Overview of Molecular Epidemiology of Hepatitis B Virus (HBV) in India*, 5 VIROLOGY J. 156 (2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2640379/>; Swati Gupta et al., *Role of Horizontal Transmission in Hepatitis B Virus Spread Among Household Contacts in North India*, 51 INTERVIROLOGY 7, 13 (2008).

<sup>157</sup> Richard T. Mahoney, *DNA Hepatitis B Vaccine: International Vaccine Institute, Korea (Case Study 9)*, in INTELLECTUAL PROPERTY MANAGEMENT IN HEALTH AND AGRICULTURAL INNOVATION: A HANDBOOK OF BEST PRACTICES CS 17 (Anatole Krattiger et al. eds., 2014).

<sup>158</sup> *Id.*

<sup>159</sup> See *Zydus Cadila Bags License for Hepatitis C Drug*, BUS. STANDARD ONLINE (Sept. 15, 2014), [http://www.business-standard.com/article/companies/zydus-granted-license-to-produce-generic-hepatitis-c-drug-114091500834\\_1.html](http://www.business-standard.com/article/companies/zydus-granted-license-to-produce-generic-hepatitis-c-drug-114091500834_1.html) (“There

vaccines (sofobuvir and ledipasvir, used for treatment of chronic hepatitis C) for distribution in 91 developing countries.<sup>160</sup>

Similarly, Golden Rice is considered a major source of food for billions of people in developing countries. Its development demonstrates once again a distributive justice approach. The rice, grown fortified with Vitamins A and D, prevents loss of eyesight due to these common vitamin deficiencies, especially among children and pregnant women.<sup>161</sup> Thus, much good can be achieved by the licensing of this fortified rice in developing countries.<sup>162</sup>

In all of these cases, innovative intellectual property products and new methods of distribution of these products in developing countries was accomplished without infringement of patents in developed countries through the use of patent law exceptions and innovative application of existing patent laws. This, then, is another avenue for incorporating distributive justice principles into intellectual property laws by way of international tools. I further conclude that according a special free license for humanitarian goals is a desirable and necessary interpretation of both new and existing patent laws.<sup>163</sup>

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are nearly 10 million patients suffering from hepatitis C in India. The problem is further compounded by the fact that patients remain undiagnosed” until the later stages of the disease “and can ill afford the treatment.”).

<sup>160</sup> Press Release, Gilead Sciences, Inc., *Gilead Announces Generic Licensing Agreements to Increase Access to Hepatitis C Treatments in Developing Countries* (Sept. 15, 2014), <http://www.gilead.com/news/press-releases/2014/9/gilead-announces-generic-licensing-agreements-to-increase-access-to-hepatitis-c-treatments-in-developing-countries>.

<sup>161</sup> Anatole Krattiger, *Golden Rice: A Product-Development Partnership in Agricultural Biotechnology and Humanitarian Licensing (Case Study 3)*, in *INTELLECTUAL PROPERTY MANAGEMENT IN HEALTH AND AGRICULTURAL INNOVATION: A HANDBOOK OF BEST PRACTICES*, *supra* note 157, at CS 11.

<sup>162</sup> *Id.*

<sup>163</sup> See TRIPS, *supra* note 83, art. 31 (“Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected: (a) authorization of such use shall be considered on its individual merits; (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly; (c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or



## VII. SUMMARY AND CONCLUSIONS

This Article has reviewed the fundamental concepts of distributive justice as a philosophy that underlies and justifies protection for intellectual property by employing an equality approach. This is in contrast to the more predominant schools of thought with respect to intellectual property justifications: the Lockean approach, protecting the fruits of labor,<sup>164</sup> and the school of thought prevailing in the United States, the law and economics approach.<sup>165</sup> In this Article we adopted Rawls's theory of

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administrative process to be anti-competitive; (d) such use shall be non-exclusive; (e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use; (f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use; (g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances; (h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization; (i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member; (j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member; (k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur; (l) where such use is authorized to permit the exploitation of a patent ('the second patent') which cannot be exploited without infringing another patent ('the first patent'), the following additional conditions shall apply: (i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent; (ii) the owner of the first patent shall be entitled to a cross-license on reasonable terms to use the invention claimed in the second patent; and (iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent." For additional perspectives on TRIPS, see Donald Harris, *TRIPS After Fifteen Years: Success or Failure, as Measured by Compulsory Licensing*, 18 J. INTELL. PROP. L. 367, 386 (2011); Jessica J. Fayerman, *The Spirit of TRIPS and the Importation of Medicines Made Under Compulsory License After the August 2003 TRIPS Council Agreement*, 25 Nw. J. INT'L L. & BUS. 257, 258 (2004); Sara Germano, *Compulsory Licensing of Pharmaceuticals in Southeast Asia: Paving the Way for Greater Use of the TRIPS Flexibility in Low-and Middle-Income Countries*, 76 UMKC L. REV. 273, 294 (2007); Divya Murthy, *The Future of Compulsory Licensing: Deciphering the Doha Declaration on the TRIPS Agreement and Public Health*, 17 AM. U. INT'L L. REV. 1299, 1307-08 (2001).

<sup>164</sup> Sterk, *supra* note 27, at 1234-39.

<sup>165</sup> Richard M. Hare, *Justice and Equality, in JUSTICE AND ECONOMIC DISTRIBUTION* 116 (John Arthur & William H. Shaw eds., 1978); see Elizabeth

justice as the basic concept of distributive justice. Clearly the discussion of social justice is related to the concept of equality. The right to equality is one of the most valuable human rights.<sup>166</sup>

Is distributive justice meant to serve the interests of the poor exclusively or to benefit society as a whole?<sup>2</sup> I argue that an equal distribution does not focus solely on assistance to the needy, but, rather, on equal distribution among all levels of society. The need for such an approach has strengthened lately, in light of the growing socioeconomic gaps among countries and within countries experiencing increasingly stratified levels of society.<sup>167</sup>

**Nationally speaking, the United States suffers an extreme inequality in the allocation of goods.<sup>168</sup> Twenty *individuals* in the United States hold among themselves more capital than half of the *entire population* of the United States.<sup>169</sup> The products of economic growth are divided unequally, resting disproportionately with the elite upper class; the wealth of the “top 400” has seen its share of the nation’s total wealth increase from 1% to 3% over the last 30 years.<sup>170</sup> Meanwhile, the rest of the population’s share of the nation’s overall wealth has decreased dramatically, with the bottom 90% of the population owning only 23% of the pie.<sup>171</sup> Thus, the magnitude of inequality of ownership over resources increases progressively.**

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Hoffman & Matthew L. Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J.L. & ECON. 73, 91–95 (1982) (an empirical study focused on and tested the three approaches, showing that subjects preferred to adopt equal distribution and Lockean rules, avoiding utilitarian rules).

<sup>166</sup> See, e.g., U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); Title VII of the Equal Rights Act of 1964, 42 U.S.C. § 2000e (2012); see also *United States v. Windsor*, 133 S. Ct. 2676, 2692–93 (2013); *Gratz v. Bollinger*, 539 U.S. 244, 260, 270 (2003); *Johnson v. Transp. Agency*, 480 U.S. 616, 640–41 (1987); *Brown v. Bd. of Educ.*, 347 U.S. 483, 488, 493 (1954); European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 22.

<sup>167</sup> See UNITED NATIONS DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2013: RISE OF THE SOUTH: HUMAN PROGRESS IN A DIVERSE WORLD (2013), [http://hdr.undp.org/sites/default/files/reports/14/hdr2013\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/14/hdr2013_en_complete.pdf); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453 (2010).

<sup>168</sup> Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519 (2016).

<sup>169</sup> CHUCK COLLINS & JOSH HOXIE, INST. FOR POLICY STUDIES, BILLIONAIRE BONANZA: THE FORBES 400 AND THE REST OF US 3 (2015).

<sup>170</sup> Saez & Zucman, *supra* note 168, at 523–24.

<sup>171</sup> *Id.*

Resources are inarguably valuable, but distributive justice does not target essential material needs exclusively; it considers access to knowledge and cultural needs to be important as well. Agreeing with this perspective, Professor Andrei Marmor states that distribution principles strive for real equality rather than ensuring minimal subsistence.<sup>172</sup> Professor Marmor adopts Ronald Dworkin's "envy test": in his opinion, a distribution is insufficient if afterwards one individual envies the other.

Based on the discussion above, I claim that, for many reasons, intellectual property laws can serve as an efficient tool for achieving distributive justice, at least in the realm of intellectual property. Even though intellectual property laws were created in accordance with distributive justice principles, the utilitarian economic justifications adopted by policy makers recast intellectual property laws, preferring utilitarian economic aspects to others and becoming the dominant school of thought in contemporary intellectual property theory.<sup>173</sup> I argue that limiting one's understanding of intellectual property to the influence of the law and economics theory influences the outcomes. Scholars "who justify increasing corporate power and broadening protection in the allocation of intellectual property . . . rights usually anchor their conclusions in law and economics." The predominance of the utilitarian calculus likewise influences the scope and content of today's intellectual property laws.<sup>174</sup> But there is another way—a way that promotes the fundamental values of justice and equality that ostensibly underlie the very basis of the founding of the United States of America, and thus a way that certainly deserves serious consideration in shaping the nation's intellectual property policy toward more egalitarian results.

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<sup>172</sup> See Andrei Marmor, *The Intrinsic Value of Economic Equality*, in *RIGHTS, CULTURE, AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ* 128 (Lukas H. Meyer et al. eds., 2003).

<sup>173</sup> Menell, *supra* note 11, at 129–30 (explaining the dominance of the law and economics approach in understanding intellectual property laws in the United States).

<sup>174</sup> Yanisky-Ravid, *supra* note 75, at 148, 176–84 (I argue that employed inventors play an important role in promoting innovation and therefore changing the current policy, which favors firms in allocating intellectual property rights and benefits, would improve productivity within workplaces. "The allocation of rights in inventions and works developed by employees may actually give the employer a windfall when weighed against what is necessary to achieve optimal production."); see POSNER, *supra* note 26, at 37–45, 44 ("[T]he economic benefits of investing in intellectual property are not exhausted in the initial creation."); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 1–5 (2004). ("[T]he measure of social welfare" as well as morality and fairness "will usually not accord importance" to the economic analysis of "the distribution of utilities" and intellectual property.); Robert P. Merges, *The Law and Economics of Employee Inventions*, 13 *HARV. L.J. & TECH.* 1, 2 (1999) ("defend[ing] prevailing default rules, as well as the strong presumption that employee invention contracts should be enforced").