

**OWNERSHIP CAUSES SOCIAL INEQUALITY. TO  
REDUCE SOCIAL INEQUALITY, REDUCE OR DIFFUSE  
OWNERSHIP**

**AN ANALYSIS WITH PARTICULAR APPLICATION TO THE COPYRIGHT  
SYSTEM**

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## **TO MY PARENTS**

*Ave atque vale*

I thank my supervisors Professor Brian Fitzgerald and Dr John Gilchrist for the effort they made on my behalf and their excellent counsel.

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## **ABSTRACT**

Humans contest for control or ownership. Contest is to a considerable extent inescapable because conceptually a large part of most grammars involve possession and appropriation. Language creates antithesis ('mine, yours') that results in conflict. The result of conflict is possession and dispossession, which results in ownership, which is expressed in property and property systems. This dissertation focuses on the exclusionary effect of property systems. Property confers the power to exclude and the aggregate of legal exclusions, which constitutes a property system, objectively or instrumentally creates social exclusion and thus social inequality. Income and property tax facilitate redistribution, reducing social inequality. Another mode of reducing/diffusing the exclusionary effect of ownership is to enlarge the public domain, which I define as a commonwealth of non-control and non-ownership.

## **KEY WORDS**

Author, authors, constitution, constitutional, contest, control, copyright, copyright industries, crown, dispossession, distribution, equality, exclusion, exclusionary rights, exclusive rights, feudal, feudalism, freehold, grammar, hierarchy, income, income concentration, income distribution, inclusion, inequality, language, leasehold, legislation, owner, ownership, paratrophic, poorer countries, possession, possessive grammar, poverty, property, proprietary rights, public domain, regulation, rent, richer countries, rights, rights of inclusion, social exclusion, social inequality, source of authority, sovereignty, title, treaties, unitive rights, wealth distribution, wealth concentration.

## DICTIONARY OF ACRONYMS IN DISSERTATION

<b>ACC</b>	Australian Copyright Council
<b>APRA</b>	Australasian Performing Right Association
<b>ASCAP</b>	American Society of Composers Authors and Publishers
<b>BIRPI</b>	Bureaux Internationaux Reunis pour la Protection de la Propriete Intellectuelle (United Bureaus for Protection of Intellectual Property)
<b>CBS</b>	Columbia Broadcasting System (now CBS Corporation)
<b>CONTU</b>	Commission on New Technological Uses of Copyrighted Works
<b>EMI</b>	Electrical and Musical Industries (now EMI)
<b>LDC</b>	Least (or Less) Developed Country
<b>NAA</b>	National Archives of Australia
<b>NAB</b>	National Association of Broadcasters
<b>NBC</b>	National Broadcasting Corporation
<b>IFPI</b>	International Federation of the Phonographic Industry
<b>IPA</b>	International Publishers Association
<b>PPL</b>	Phonographic Performance Limited
<b>PRS</b>	Performing Right Society
<b>Rome Convention</b>	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations).
<b>TRIPS</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights
<b>UCC</b>	Universal Copyright Convention
<b>UN</b>	United Nations
<b>UNDP</b>	United Nations Development Programme
<b>UNESCO</b>	United Nations Educational Scientific and Cultural Organization
<b>UNDHR</b>	Universal Declaration of Human Rights
<b>USTR</b>	United States Trade Representative
<b>WIPO</b>	World Intellectual Property Organization
<b>WIPO Internet Treaties</b>	WIPO Copyright Treaty 1996 WIPO Performances and Phonograms Treaties
<b>WTO</b>	World Trade Organization

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# INTRODUCTION

## **PURPOSE**

To explain in summary the thesis that humans contest for sovereignty, a contest that is political in character. Exclusion is moderated by the effect of unitive rights, derived from the principle of equality. The instrumental effect of proprietary rights is exclusionary.

## **INTRODUCTION HEADINGS**

### **Part 1 – Thesis and dissertation**

*Demonstrating the thesis*

*Allocation of rights*

*Rights and ownership*

*Rights of inclusions and exclusion*

*The idea of property*

*Contest for sovereignty and possessive grammar*

### **Part 2 – Method**

*Method and chapters*

## Part 1 – Thesis and dissertation

### *Demonstrating the thesis*

1. My thesis is 'Ownership causes social inequality. To reduce social inequality, reduce or diffuse ownership.'

### **Property, exclusion and the public domain**

This dissertation focuses on the exclusionary effect of property systems. Property confers the power to exclude and the aggregate of legal exclusions, which constitutes a property system,<sup>1</sup> objectively or instrumentally creates social exclusion and thus social inequality. Income and property tax facilitate redistribution, reducing social inequality.<sup>2</sup> Another mode of reducing/diffusing the exclusionary effect of ownership is to enlarge the public domain, the domain of non-control and non-ownership.<sup>3</sup>

2. The purpose of the dissertation is to evaluate the social phenomena of ownership and inequality, explain their interrelationship, and more briefly assess ways of reducing inequality. The thesis is principally demonstrated by analysis of the evolution of a system governing production and distribution of a personal property, the copyright system. If the first part of the thesis is demonstrated, the second follows, as discussed in chapter 8. The dissertation is concerned principally with justification, and secondly with briefer treatment of ways to effect inequality reduction.

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<sup>1</sup> Introduction, chapters 1-2.

<sup>2</sup> Chapter 4 Part 1.

<sup>3</sup> Chapter 8.

3. One socio-legal factor, in particular, presses against social exclusion: the principle of human equality upheld by law, as discussed in chapter 1 ('The Unitive Rights'). The unitive rights controvert - insofar as they are upheld or enforced - the process of social exclusion. They also encourage growth of the public domain, which, whether in its actual or notional manifestation, is governed or controlled only to the extent necessary to secure and preserve the domain.<sup>4</sup> The domain is created by principles of equality and inclusion, and characterised by absence of control, ownership and exclusion.<sup>5</sup> Pressing against the public domain is the private domain, created by proprietary rights that exclude.<sup>6</sup>

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<sup>4</sup> Although some intellectual property lawyers might disagree, the term 'public domain' is not a determined category. The concept of the public domain appears to be exclusively identified with a notional public domain defined by reference to rules pertaining to copyright subsistence. In this dissertation, I deploy the term public domain to mean that which is co-mutual and unboundaried, a domain, or commonwealth, of non-ownership, non-control and non-exclusion. By private domain, I mean that which is created by proprietary rules, and which excludes. No person, or field of endeavour, such as law, can claim definitively to define what is the 'public' or 'private' domain, but the meaning conventionally ascribed by intellectual property lawyers to the 'public domain' is relevant at least to proposals that I make in chapter 8. The public domain, as I define it, is not confined by whatever copyright law, or interpretation thereof, permits the public to use or enjoy. However, the legal conception of the public domain is helpful in proposing rules for populating and protecting at least part of a public domain. My conception of the public domain is perhaps more abstract than that postulated by copyright lawyers, who wish to establish workable rules to facilitate greater public accessibility.

<sup>5</sup> The absence of control, ownership and exclusion (other than to the extent necessary to permit the domain's existence) is fundamental to my concept of a public domain. If the public domain is said to be governed by the rules of copyright law, the magnitude of the domain is determined in contradistinction to what copyright law claims as the owner's entitlement. Thus, to some, the domain might be narrowly defined as works in which copyright no longer subsists; to others it might be a permissionless domain, in which copyright works might be made accessible by, eg, creative commons licences. A number of academics, especially in the United States and United Kingdom, have proposed ways of characterising and defining the public domain. A leading writer on the domain is the Australian scholar, Professor Graham Greenleaf, who has synthesised and added to discourse on the subject. Among numerous papers, see (with Catherine Bond) "'Public Rights" in Copyright: What Makes up Australia's Public Domain' *Australian Intellectual Property Journal* (2013) 23 AIPJ 111-138). My proposal for encouragement of an expanding public domain is influenced by Professor Greenleaf's advocacy, over a number of years, of a domain that, like the Magic Pudding of Australian fiction, is endlessly replenishing (see, 'The Public Domain' B Fitzgerald B Atkinson (eds) *Copyright Freedom* Sydney University Press 2011 pp 180-186).

<sup>6</sup> Chapter 2. Just as in academic literature the public domain is mostly defined by elucidation of what is copyright and what is not (or what is exempt from copyright prohibition), so the private domain is sometimes notionally depicted as copyright enclosure of what is common. What is common is usually identified as 'the commons' a concept that evokes the physical commons of medieval England, a domain progressively shrunk by post-medieval acts of enclosure. The history of physical enclosure is seen as precursor, warning participants in a notional cultural commons of copyright's continuing enclosure of that commons. See James Boyle 'The Second Enclosure Movement and the Construction of the Public Domain' 66 *Law and Contemporary Problems* 3-74 Winter-Spring 2003 pp 33-74.



4. Two points about the structure of the dissertation should be stressed. The first is that chapter 3 ('Grammatical Category of Possession and Innate Tendency to Contest for Possession') and chapter 4 ('The Problem of Distribution'), do not focus, like other chapters, on rights and proprietary systems. The purpose of chapter 3 is to substantiate the premise that humans contest, or struggle, for sovereignty. The chapter reveals the key role of possessive grammar in creating linguistic antithesis, a consequence of which is conflict. It also shows that the category of possessive grammar has supplied the concepts and vocabulary of property law. Chapter 4 discusses how ownership is exteriorised as 'wealth' or 'capital', the distribution of which is recorded in domestic and international statistics that are said to define 'social inequality'. Findings on the relative effect on societies of disposition of proprietary rights can be correlated to data on social inequality.<sup>7</sup>
  
5. The second point is that the dissertation is demonstrated primarily by evidence supplied in the final chapters, chapter 5 ('The Copyright System – the Process of Proprietary Exclusion in Action'), chapter 6 ('The Rentier Copyright System') and chapter 7 ('The Paratrophic Copyright System'). Taken together, chapters 5-7 provide an account of the evolution of a property system – the copyright system – and show how the political process that created that system also allocated proprietary rights for the benefit of industries, while substantially excluding the public from access and use benefits. These chapters on the copyright system demonstrate the thesis that political contest, resulting in constitutional (and political) settlement, allocates proprietary

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<sup>7</sup> A number of algorithms are used to assign values to distribution of resources in a population. The most commonly used is the Gini coefficient. Organisations such as UNDP, the World Bank and IMF calculate income distributions in different countries assigning Gini scores on a 0-0.1 scale. Wealth distribution is more difficult to ascertain because of imperfect data but a major study under UN auspices has compiled worldwide wealth distribution statistics. Chapter 4 discusses world distributions in detail.

rights. The disposition of rights concentrates advantage in the hands of some, and excludes others from benefit, creating social inequality.<sup>8</sup>

6. Analysis involves determining origins, history and consequence, which could be viewed as an illimitable task, and one outside the usual scope of legal inquiry.<sup>9</sup> Legal research and exposition is usually ratiocinative, factual and concerned with exegesis of the norms identified or created by the formulary process of a legal system. Legal knowledge is axiomatic and concerned with exterior, not interior, reality.<sup>10</sup> Some of the chapters of this dissertation, ie, those on measurement of inequality, human contest, linguistics, grammar, and even authority, though critical to explanation of how ownership relations arise, and to that extent, could be considered outside the thetic perimeter of legal scholarship.<sup>11</sup>
7. On the other hand, most material in the dissertation supports conclusions the practical implications of which are distinctively legal (and, therefore, political).<sup>12</sup> My

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<sup>8</sup> A key purpose of the copyright chapters (and in part, chapter 2, which discusses historical allocation of proprietary rights in Athens, Rome and Latin America) is to demonstrate how a property system, connected to constitutional, political settlements, functions *instrumentally* to cause social exclusion and inequality.

<sup>9</sup> Without need to refer to various other schools of legal thought, a claim most appositely supported by the observation of Oliver Wendell Holmes Jr, a leader of the school of legal realism: 'The life of the law has not been logic; it has been experience.' (*The Common Law* Little Brown & Co 1881 at 5).

<sup>10</sup> Holmes (*id*) supplies partial support for the proposition: 'The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics ... We must alternately consult history and existing theories of legislation.' The necessary relationship between legal scholarship and some adherence to the positivist premise that inquiry into law must acknowledge the didactic value of primary legal material (such as legislation), probably persuades many legal writers to avoid much inquiry into sources of knowledge that are not positively legal. Conventionally, a topic such as possessive grammar, which occupies a chapter in the dissertation, might be considered outside the scope of legal inquiry.

<sup>11</sup> Positivists like John Austin (d 1859), HLA Hart (d 1992) and Hans Kelsen (d 1973), non-positivists like John Rawls (d 2002), who advocated law's instrumental role as arbiter of fairness, and rights-oriented theorists like Ronald Dworkin (d 2013) analysed the content of rules and laws, and their function. They did not usually step away from legal sources of knowledge, such as the genetic, behavioural and social research which informs dissertation.

<sup>12</sup> Significant legal debate concerns whether laws are invested with objects designed to secure benefit or advantage to some and not others, or can be said to be the product of neutral process. Does the validity of

primary conclusion is that property systems, which are constitutional and political instruments, distribute - as determined by constitutional and political settlements – social benefit and disadvantage. Distribution benefits some and excludes others. A property system by including and excluding creates social inequality. *Instrumentally*, a property system distributes ownership, which is a synonym for sovereignty or control.<sup>13</sup>

### *Allocation of rights*

8. In so doing, a property system also includes - to the extent that it distributes benefits of ownership. However, because proprietary rights are exclusive, the existence of a property system necessarily portends exclusion.<sup>14</sup> The process of social inclusion and exclusion may seem subjective in the sense that constitutions and laws, which determine property systems, are made subjectively, and choice and aptitude, as well as circumstance, influence whether, and to what extent, people enjoy the benefits of ownership. The exclusionary process, however, is objective. A property system

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law-making and laws depend on connection with moral consensus (eg, that murder is wrong)? I make the assumption that legal neutrality, if it occurs at all, occurs rarely, and most law-making cannot escape investiture by one or more interests. Thus legal results are usually political results.

<sup>13</sup> Although the concept of proprietary rights allocation is familiar in economics literature, and Karl Marx asserted that the governing class in any historical period governs by control of the means of production (a term indicating monopoly exercise of proprietary rights), I am not aware of any other writer who has so powerfully identified the instrumental role of property systems in causing exclusion and inequality. Rights allocation and Marx's theory are discussed in the dissertation. A number of writers other than Marx have written about the exclusionary effect of property systems, including, notably, Pierre Bourdieu (d 2002) a sociologist who coined the term 'symbolic violence', which referred to a process of social contest resulting in dissolution, creation and maintenance of social hierarchies. Society was constructed by self-interested actors seeking and protecting positions of social dominance.

<sup>14</sup> The process, as will be explained, can be called objective or instrumental. However, Ronald Dworkin's description of legal rights as 'trumps' is explanatory. Dworkin's theory of rights-as-trumps could be argued to be a theory of the paramount value ascribed by legal systems to private interest (even, it could be inferred, if the private interest is the sovereign in a totalitarian society). In western legal systems, enforceable private rights, typically proprietary, 'trump' public considerations (or perhaps more accurately, considerations of majority benefit): 'rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.' (Ronald Dworkin *Taking Rights Seriously* Gerald Duckworth & Co 1977 at 153). Thus exercising exclusive rights is exclusionary.

allocates as if a machine. This figurative machine is designed by humans, and they are influenced by predilection, prejudice, affiliation, greed, malice, and occasionally goodwill, to determine social outcomes, some of which are unforeseeable or unforeseen.<sup>15</sup>

9. The process can be called one of rights allocation, although the word 'allocation' does not suggest the vital contests for domination and control that terminate in the establishment of sovereignties.<sup>16</sup> To the extent that rights, as formally categorised by lawyers, are enforceable, or defined in a legal instrument or treaty, I am concerned in this study with the nature of rights and their allocation. Enactment of rights is necessary for allocation to occur.<sup>17</sup>
  
10. Many lawyers and social theorists are preoccupied by inquiry into rights,<sup>18</sup> presumably because rights are sovereign permissions that bestow power to do or prevent, and thus, when exercised, configure society. I do not inquire into rights' doctrines. It could

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<sup>15</sup> A point made whimsically by Reginald Bonney, counsel for the associated record companies (chiefly the EMI group) at the Australian Royal Commission on Performing Rights (1932-33). On the question of a record performing right, the commissioner, Sir William Owen, contended that the right to prevent unauthorised recordings protected record companies from economic injury. Bonney asked the commissioner how record companies benefitted from a right of prohibition if they could not profit from a public performance right. Owen replied, 'Because it is a wicked use of pirated article. The man has robbed you of an article which you made at great expense.' Bonney said, 'Such legislation against wickedness in general is very rare. I submit they had in mind the protection of a right which is hurt by what is being done.' (*National Archives of Australia*, transcripts of proceedings of Owen Royal Commission A467 SF1/85).

<sup>16</sup> Sir Paul Vinogradoff (d 1925, professor of history at Moscow University, émigré and then professor of jurisprudence at Oxford University) said of the process of legal change: 'History teaches clearly in this case that we have to deal in social life with a conflict of principles, each of which is necessary to human development, but neither of which is entitled to claim absolute superiority over the other. The principle of liberty carried to the extreme produces anarchy; even so State power, suppressing all individual freedom, produces a condition of things, the outcome of which may be emigration, separation, and revolution. ... a compromise has to be effected and the juridical problem consists in settling how far the line of compromise has to be drawn to the Right or to the Left.' ('The Foundations of a Theory of Rights' *Virginia Law Register* 10(8) December 1924 549-562 at 559).

<sup>17</sup> This is not a study of rights. However, enunciation and enforcement of legal rights is necessary to effect the distribution of social benefit that creates social inequality, the cause and amelioration of which is the subject of the thesis.

<sup>18</sup> Discussed chapter 1.

be argued that a definition of rights ought to comprehend unenforceable, and unwritten, norms or conventions,<sup>19</sup> or that rights, to be meaningful, must be categorised.<sup>20</sup> Doctrinal propositions, however, are immaterial to the present discussion of rights.<sup>21</sup> The more important question is to clarify what is meant by a 'right'.

11. The idea of a right is usually understood to comprehend entitlement, usually enforceable.<sup>22</sup> The nature of entitlement varies,<sup>23</sup> but the rights-holder is usually

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<sup>19</sup> See, for example, Ellen Messer 'Pluralist Approaches to Human Rights' *Journal of Anthropological Research* 53 1997 293-317, which discusses, among other things, arguments over the universality of the United Nations' Declaration on Human Rights. Controversy relates in part to the apparent indeterminacy of rights such as a right to self-determination (UHR) and the UN Convention on Genocide's 'right to existence'. (Esp 297-99 and 303).

<sup>20</sup> A view probably most accepted by lawyers, and associated with the school of legal positivism (eg, HLA Hart *The Concept of Law* 2<sup>nd</sup> ed Clarendon Press 1994).

<sup>21</sup> A categorical discussion might begin with philosophy of rights and analyse the growth of positive rights, enumerating a non-exhaustive list of categories: natural rights, innate rights, inherent rights, moral and subjective rights. See: Paul Marshall 'Two Types of Rights' *Canadian Journal of Political Science* 25(4) December 1992 661-76 at 665. To the list might be added economic rights and usually uncontroversial derivative rights, eg, the right to drive, which might be said to derive directly from conferral of a licence to drive, and indirectly through grant of right by the Commonwealth through Commonwealth and state instruments.

<sup>22</sup> See, for instance, HJ McCloskey's definition of rights in 'Rights' *The Philosophical Quarterly* 15(59) April 1965 115-127 at 116: 'I am legally entitled under our legal system to do whatever is not forbidden by the law. Thus I have a legal right to grow roses in my garden. This legal right is not simply a claim I can make under the law that others not interfere with me when selecting plants for my garden. It is essentially an entitlement to act as I please. It may give rise to derivative entitlements, and claims on others and the state.' McCloskey does not seem to allow for the possibility of sovereign interdiction, meaning that outside the law, putative rights are claims, including the claim to a right to grow roses, if for some reason local government forbids planting of roses. His argument, however, shows the amplitude of rights in a common or civil law system. Probably the entirety of statutory law describes or concerns rights, and common law clarifies or elaborates those rights. Cf Isaiah Berlin 'Two Concepts of Liberty' (1958) (32pp) in *Four Essays on Liberty* Oxford University Press 1969. He distinguished between positive rights of self-determination and negative rights guaranteeing freedom from coercion. The first right may invade the second, and accommodation is necessary. Moral evaluation is primary: '... life and thought are determined by fundamental moral categories and concepts ...'. (At 31).

<sup>23</sup> Thus categories of rights. The positivist argument that rights cannot be dignified with a higher status than enforceable subject matter contrasts with the tradition of characterising rights as expressions of moral decision. If rights are enacted for the purpose of utility, categories are more likely to be confined. Otherwise, the range of rights, pertaining to moral and material considerations connected with humanness and selfhood, grows. Differences between those concerned with moral right can, however, be considerable. Thomas Hobbes (*Leviathan* Part II 1651) and Jean-Jacques Rousseau (*The Social Contract or Principles of Political Right* 1762) each suggested a legal disposition of rights arrived at by supposed agreement of a notional social contract. John Locke, by contrast, while agreeing the existence of a state of nature, did not consider that the extremity of that state compelled a bargain with a sovereign. The state of nature is subordinate to, or

empowered by law (or custom or normative instrument) to do, or forbid the doing of, something.<sup>24</sup> Evidently, rights may give effect to a wide range of principles concerning, among other things, morality, custom, economic activity, health, and welfare.

### *Rights and ownership*

12. I discuss two types of rights that are opposites. The first class consists of rights of *inclusion* and the second, rights of *exclusion*, which are property or proprietary rights. To justify a division that excludes other species of rights and dispenses with further discussion of the meaning of rights I need to show how dyadic grouping of types of rights assists in the task of explaining how *ownership* results in social inequality.
13. The first necessity is to explain that ‘ownership’ is an indeterminate lexical category because the noun does not refer to a thing. It describes a state or condition that derives from a subject’s control of an object. People exercise control in ways definite and indefinite. A relationship determined by A’s control of B, however defined, can be described forensically, legally, poetically, notionally (‘Germany owned Brazil in the semi-final’). I have used the word ‘ownership’ in my thesis title *because* of its indeterminacy: it describes, in a way that a word such as ‘property’ – which has a

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governed by, natural law, and humans must create society in harmony with the principles of natural law. See *Two Treatises of Government* 1689 Bk 2 chapter 2.

<sup>24</sup> McCloskey *supra* at 117: ‘... we find here too that a right is an entitlement. It may be an entitlement to do, to demand, to enjoy, to be, to have done for us. Rights may be rights to act, to exist, to enjoy, to demand. We speak of rights as being *possessed, exercised, and enjoyed* ... [b]ut since a right may exist and be possessed in the absence of the relevant power or capacity, rights are distinct from powers. I possess the rights to life, liberty and happiness; my possession to of these rights means that I am entitled to live, to act freely without assistance, and be unimpeded in my search for happiness.’

meaning determined by law – does not, the *experience* and *state*, as well as the fact or reality, of control.<sup>25</sup>

14. My thesis declares that ownership causes inequality and reduction or diffusion of ownership reduces inequality. By this I mean that the assertion of control, one or more over another or more, removes parity from relationships, and creates social antithesis between superior and inferior, commander and commanded. Social life is impossible without acceptance of authority and obligation, but control relationships, implicit in the fact of ownership, have exclusionary consequences.<sup>26</sup>
  
15. More specifically, the term ‘ownership’ denotes, though not invariably, property relations, and more specifically still, the subject-object relationship of owner and ownership object. The exclusionary consequences of allocating to owners proprietary rights that allow them to forbid behaviour (chiefly trespass) and parlay for advantage (chiefly by contracting for payment of rent or royalties), are unmistakable. Surveys of income and wealth distribution convey the process of proprietary exclusion in a particular way. For example, if 5% of a population owns 80% of a country’s wealth, ipso facto, 95% of the population is excluded from ownership of 80% of wealth, and divides ownership of the residual 20%.
  
16. Expressed simply, ownership excludes because property rights are exclusive. Property rights, directly or indirectly, confer control. A’s control over B (exerted by reason of

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<sup>25</sup> Chapters 5-7, concerned with the copyright system discuss allocation of copyrights and neighbouring rights in practice. Chapter 3 discusses treatment of possession in language and how the law relies on possessive grammar concepts to explain the law of property. The idea of ownership signifying control relationships is discussed in chapter 3 and also in chapters 1-2.

<sup>26</sup> These points of course are explored in the dissertation and are probably best stated without elaboration in this introduction. The matter of the instrumental effect of a property system in effecting exclusions is particularly discussed in the discussion of the growth of the copyright system at chapters 5-7.

A's status as owner, or identification, as owner or non-owner, with owner C or owner E), is a consequence of exclusionary power. Ownership causes social inequality because the owner by exclusion arrogates control and benefit, which means that A (and C and E and G and so on) accrete benefit, while B, D, F etc are denied access to, or a share of, the benefit.<sup>27</sup> The act of exclusion is not necessarily a conscious one. Exclusion is effected instrumentally by operation of a property system.

### *Rights of inclusion and exclusion*

17. Putting to one side utility rights, such as the right to drive a motor car (an illustration of positivist doctrine, since its existence is dependent on state fiat), it seems obvious that society is particularly shaped and determined by rights of personhood, or selfhood, because they respond to Jacques Derrida's central question of philosophy, 'who'.<sup>28</sup> These rights are distinguished by their immanence or non-immanence. Immanent rights of person or self are rights inhering in every person because that person is human and expresses in personhood irreducible human dignity.<sup>29</sup>

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<sup>27</sup> To illustrate the point, consider hypothetical aspirants to house ownership in a well-appointed suburb, Happyville. They purchase houses. The entrants find, as they expected, that Happyville is populated by people not unlike themselves. They live lives of pleasant suburban quietude. Many kilometres away, indigenous people live lives divorced from quietude in a suburb called Noisyville. They own no houses and live in rental units available because of government subsidy. By mysterious process, which cannot be attributed to the operation of a law, or council regulation, or agreement of residents, or location, the fact of ownership - not the agency of owners - creates, uncontrived and unaided, its own welcome exclusion: it excludes anyone who might disturb the peace of Happyville. No resident of Noisyville is likely to set foot on the footpaths or verges of Happyville. The exclusionary power of ownership, which separates person and person, group and group, class and class, separates the provident householders of Happyville from the unmonied lessees of Noisyville. Exclusionary process ensures, for the benefit of Happyville's householders, that no resident of Noisyville will appear in Happyville and upset its residents' tranquillity.

<sup>28</sup> Jacques Derrida and Maurizio Ferraris *A Taste for the Secret* Wiley 2001 cf Gerald L Bruns 'Derrida's Cat (Who Am I?)' *Research in Phenomenology* 38 (2008) 404–423.

<sup>29</sup> This account of rights is simplified because exhaustive statement of rights' typology diverts inquiry from a principal concern of this dissertation, which is the *nature and effect* of property rights. The theoretical literature on right is extensive. Some important modern texts exploring categories and teleology of rights are: Joel Feinberg 'The Nature and Value of Rights' *Journal of Value Inquiry* 4 1970 243–257; John Rawls *A Theory of Justice* Harvard 1971; Joseph Raz *Practical Reason and Norms* Hutchinson 1975; Ronald Dworkin *Taking Rights*



18. Non-immanent rights are rights external to personhood, conferred by a sovereign, transferable, voidable, yet also connected to human dignity, since they create property, a grant of right explained originally by the Latin word *proprius*, ‘one’s own’, or that which becomes part of a person.<sup>30</sup> The idea of human equality, which is the animating norm of western jurisprudence, is also the source of immanent rights: every individual is equally entitled to rights of personhood, such as liberty, freedom from persecution, etc. Immanent rights are rights of inclusion.
19. Acceptance of a principle of equality means acceptance of shared humanity and entitlement.<sup>31</sup> Equality means acknowledgement of the principle of fairness. Only by distortion can principles of equality and fairness, enjoined in legal rights, be deployed to encourage social exclusion and inequality.
20. The same is not true of proprietary rights, made effective by exclusion. The essence of a property right, whether pertaining to abstract or concrete subject matter, lies in its prohibition of trespass. That which is owned is private (from medieval Latin *privatus* belonging to one individual; also *privare* to deprive, bereave). The owner is entitled to enjoy the thing owned without disturbance. Prevention of trespass protects the

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*Seriously* Harvard 1977, and ‘Rights as Trumps’ in Jeremy Waldron (ed) *Theories of Rights* Oxford 1984; Annabel Brett *Liberty, Right, and Nature* Cambridge University Press 1997; Michael Otsuka *Libertarianism Without Inequality* Oxford University Press 2003; Leif Wenar ‘Legal Rights and Epistemic Rights’ *Analysis* 63 (2003) 142–46 and ‘The Nature of Rights’ 33 *Philosophy and Public Affairs* 3 (2005) 223–53.

<sup>30</sup> A distinctively moral concept, philosophically related to the French idea of *droit moral*, and unlike John Locke’s pragmatic principle (*Two Treatises of Government* Cambridge 1689/1988) that admixture of labour and material creates property in its product.

<sup>31</sup> See the argument of Julius Stone, that equality and justice are distinct objects. He criticised ‘the “presumption of equality”, which is the presumption that equality is justice.’ As he noted, ‘[t]his idea, with diverse shadings, has been widely and persistently offered by a wide and distinguished philosophers’ consensus.’ According to Stone, ‘This concern for justice has been a search for principles, guidelines or criteria for human conduct in society and has had particular regard for the allocation of scarce resources and personal attributes and the sharing of social burdens.’ Justice determines rights, not rights justice. (‘Justice in the Slough of Equality’ 29 *Hastings Law Journal* (1977-78) 995-1024 at 995).

owner's privacy, and thus enjoyment. If property is to be private, it must be closed to the public.

21. The second half of the dissertation demonstrates how allocation of rights of exclusion – property rights – which is the consequence of political contest, creates gross distributive inequalities.

*The idea of property*

22. A thesis that connects distribution to disposition of property rights is likely to attract the enmity of one group in particular, the school of private property. In my discussion of property - and specifically, the instrumental functioning of a property system to distribute and exclude – the meta-ethical value of either property rights or property systems is irrelevant. Similarly, axiological inquiry into the purpose and value of proprietary rights is, so far as this inquiry is concerned, unnecessary. As I hope the dissertation shows, property rights express how humans apprehend reality and determine social relations according to that apprehension. To recognise this fact is to avoid dogmatic analysis and focus solely on instrumental effect.
23. Those inclined to view property rights as the indefectible means of perfecting human social life will object that the effect of rights is always socially palliative, since their absolute character:
  - ✓ protects the individual from oppression, thus upholding personal liberty

- ✓ enables the individual to engage in exchange for profit, thus procuring survival and prosperity
- ✓ prevents exhaustion of common resources, since property supplies incentive to engage in productive economic activity that causes increase
- ✓ permits governance that upholds personal liberty, which allows to the individual freedom of decision and action.

24. The libertarian economist Walter Block summarised the opinion that property rights must function to create social benefit in an epigram that has become a motto of sorts for advocates of libertarian theory: 'If it moves, you should privatise it; and if it doesn't move, you should privatise it. Since everything either moves or doesn't move, we should privatise everything.'<sup>32</sup> This statement can be contrasted, in sentiment and conclusion from that of Friedrich von Hayek (d 1992), who wrote that:

*The system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not. It is only because the control of the means of production is divided among many people acting independently that nobody has complete power over us, that we as individuals can decide what to do with ourselves. If all the means of production were vested in a single hand, whether it be nominally that of*

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<sup>32</sup> <http://412libertarian.com/>.

*'society', as a whole or that of a dictator, whoever exercises this control has complete power over us.*<sup>33</sup>

25. In this instance, Hayek recognises the distributive power of a property system. What he, in common with Ludwig von Mises (d 1973), and some of their contemporary adherents (including Walter Block) fail to discern is that the social benefit conferred by a right of exclusion (privacy, security, fungibility, transferability, utility) does not preclude the owner from excluding the trespasser. Such exclusionary power may be characterised as a bulwark of individual liberty but if the owner possesses means of sustenance unavailable to the trespasser, the trespasser may starve.
26. The power to forbid trespass admits that A possesses what B does not and may deny B the benefit of co-possession, which, in principle, allows 10% of a population to own, hypothetically, 80%, 90% or even 99% of available property. Gross distribution inequality is only possible if society upholds the principle that property is justified by its existence, which is no more than intellectual quietism, permitting avoidance of moral inquiry into the effect of proprietary rights. This dissertation argues that a property system instrumentally protects historical constitutional and political settlements that if unanalysed, will continue indefinitely to direct distribution of social benefit in favour of some and not others.
27. Von Mises, Hayek, Friedman etc are quietists, collaborating with a political settlement that ensures, by instrumental operation of the property system, concentration of advantage. I argue the opposite of Block. To privatise is to exclude, probably forever.

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<sup>33</sup>Friedrich Hayek *The Road to Serfdom* University of Chicago Press 1944 103–4.

I argue also that the term 'private property' is pleonastic: property is private. What is possessed, even if by more than one person, is possessed personally not corporately. That which is purportedly publicly owned is held in trust. What might be called public possession supplies one alternative to the effects of private exclusion. So far as distribution of benefit is concerned, the law is as productively engaged, for public welfare, in making that which is governable public rather than private.

*Contest for sovereignty and possessive grammar*

28. The dissertation proposes that social inequality *begins* with human contest. Humans contest for sovereignty, and the outcome of contest is sovereignty of one or more over another or more, which means in practice consent to enforcement of the rules, permissions and conventions that allow a sovereign to exercise control. Sovereign control is reinforced by a property system, which is the product of constitutional and political settlement. Instrumentally, the property system distributes benefit, and effects social exclusion, which results in social inequality.<sup>34</sup>
29. As to contest, the proposition that humans contest for control seems self-evidently true. The whole of recorded or anthropologically deduced history attests to human contest. However, no research demonstrates conclusively that innate disposition causes human contest.<sup>35</sup> Contest for sovereignty can be compared to class struggle, the instigator according to Karl Marx of social change and ultimately, capitalism's

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<sup>34</sup> Chapters 1-2 and 5-7.

<sup>35</sup> Putative proof of innate tendency to contest for sovereignty comes from three sources: biological and anthropological research, and research into evolutionary robotics (discussed in chapter 3.2). Social and psychological theories, chiefly those of Marx, Durkheim, Weber, Freud, Jung, Sartre, Lacan and Derrida suggest that human conflict is distinctively a product either of social process or psychological derangement (also discussed in chapter 3.2).

overthrow. However, the concept of class struggle is suppositional, supposing, among other things, class identification, and the co-operative purpose of the oppressed.<sup>36</sup>

30. A theory of sovereign contest, on the other hand, is demonstrable. While evidence for innate tendency to competition is weak, humans universally deploy possessive grammars, which argues innate drive to *possess*. Possessive grammar expresses possessive mental organisation, which derives from mental appropriation of environment: that is to say that humans conceptually comprehend their physical surroundings by notionally appropriating the objects in them.<sup>37</sup>
31. Possessive grammar states appropriating intention, wish and action: he is *my* pony, that house is *ours*, she *wants* that land, and so on. So long as humans mentally appropriate the physical world in which they exist, and in language *appropriate* people, things, territory, possessive grammar will inspire conflict. A grammar may be relatively denuded of possessive claim but a grammar that substantially abstains from use of possessive pronouns and adjectives is unusual. It indicates non-proprietary social relations, which no developed society is willing to contemplate.<sup>38</sup>
32. No urban society would adopt a linguistic convention that debarred reference to a person's ownership of a thing. To illustrate, no language of urban peoples requires a speaker to refer to a personal possession as group property. No rule of grammar requires that I forsake reference to *my* car and speak instead of *our* car. Your cat is

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<sup>36</sup> Karl Marx and Friedrich Engels, *The Communist Manifesto* published 1848; *Das Kapital* vol 1 published by Marx in 1867, vols 2 and 3 by Engels in 1885 and 1894.

<sup>37</sup> Discussed chapter 3, part 1, especially Noam Chomsky's theory of innate grammar.

<sup>38</sup> Discussed chapter 3, part 1.

*yours*, not *ours*. Inevitably, some possessive claims must cause competition: ‘that will be *our* land’ cf ‘*no*, that is going to be *my* land’.<sup>39</sup>

33. Unless people cease to assimilate reality by means other than mental appropriation, and accordingly to make linguistic appropriations, and thus possessive claims, they must from time to time enter the battleground of possession. Usually occasion for contest does not arise. Usually people do not contest a statement like, ‘that’s my box of smarties’. Conversely, the statement, ‘A’s girlfriend wants to be B’s girlfriend’ portends conflict.<sup>40</sup>
34. On a larger, historical, scale, conflict concerns want, desire, and wish for possession. The outcome of contest is that someone, or some group, wins – for a period. Sovereign contest ends in sovereignty, although contest, in some form or other, is usually ceaseless. On the larger scale, contest is political, though its effects are also social. By the process of contest, property systems, distributing control and benefit, emerge. Conceptually, the law understands possession and exclusion in the same way as possessive grammar because the latter supplies the law’s lexicon and mode of understanding what the law calls property.<sup>41</sup>
35. Custody/ownership/sovereignty/control/dominion/occupation/title/proprietorship are synonyms that express the grammatical reality of possession. Humans, as their grammars show, make sense of their world by mental appropriation. Physical appropriation follows. Acts of appropriation, accompanied by a grammar of

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Chapter 3 part 1.

appropriation, are antecedents to contests for sovereignty and creation of property systems.<sup>42</sup>

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<sup>42</sup> *Id.*



## Part 2 Method and premises of argument

### *Method and chapters*

36. My method is to validate the thesis that ‘ownership causes social inequality’ by explaining in successive chapters underlying premises or propositions that are discussed below. In the penultimate chapter, I discuss policies that, by reducing or diffusing, ownership, are likely to reduce social inequality. To demonstrate that ‘ownership causes social inequality’, I will elaborate subordinate premises described below.
37. The questions to which the thesis immediately gives rise are fourfold:
- ✓ What is ownership?
  - ✓ What is social inequality?
  - ✓ Why does ownership cause social inequality?
  - ✓ Is ownership reducible?
38. Answering these questions involves enunciation, and justification, as necessary, of the following underlying premises:
- A. Ownership is a subjective state of perceived possessory right (‘that’s mine’) and/or an objective state of actual possessory right, or legal title (‘the certificate of title says that A is proprietor of the house’). Irrespective of whether ownership is understood as a subjective or objective state, or both, the state always denotes putative or

actual *control*. Thus the first underlying premise of the thesis is that innate desire for control causes humans to seek ownership, which manifests in the subjective declarative state ('he belongs to me') or the objective state that refers to legal title ('that's his house').

- B. The second premise of the thesis follows from the first. If innately, humans seek to exert control, over people or things, they must compete for control. Thus the second underlying premise is that humans contest for control or *sovereignty* over other humans and nature.
- C. Contest for sovereignty results in sovereignty. Someone becomes sovereign. How is sovereignty expressed? Sovereignty or control – ownership – is a declarative state ('this is my country') or a legal fact. The law calls that which is possessed or owned, property. The third underlying premise is that the subject matter of ownership is *property* (which is governed by the rules that constitute a property system).
- D. Property rights, and a property system, are not endogenous phenomena: they are products of the contest for sovereignty. That contest is a political and constitutional struggle. This struggle allocates proprietary rights, and determines social benefit and exclusion. The fourth underlying premise is that the disposition of proprietary rights within a property system is political and constitutional.
- E. The fifth premise is that political struggle that allocates proprietary rights is also a constitutional struggle over the source of authority for law and governance.

- F. Property, as legal category, and property system, as sociological category, each manifest the same chief characteristic: they exclude. All property rights, including a derivative right or estate, such as leasehold, are *exclusive* and thus exclusionary. Independently of each owner's intention, the exercise of proprietary rights effects, in total, objectively or instrumentally, a total exclusion, which results in social inequality. The sixth underlying premise is that a property system instrumentally excludes, and this exclusion results in social inequality.
- G. Unless rights' allocation is delimited by considerations of equality and fairness, a property system becomes paratrophic, ie, the system is designed to enable the successful rent seeker to collect rent; a paratrophic system – such as the copyright system, or property systems in certain other countries, or the feudal system - creates a right of remuneration (exceeding a right to bargain), and permits the proprietary rights-holder to license and compel payment for activities that do not subtract from the economic welfare of the rights-holder. The seventh premise is that unless principles of equality and fairness govern distributive arrangements, a property system is paratrophic. The concept of a paratrophic system is discussed further in Chapter 7 (The Paratrophic Copyright System). For present purposes it can be noted that by paratrophic is meant a control system that vests power to exercise proprietary rights to extract from licensees or renters payment for use or occupation of property without imposing an obligation to provide benefit in return.
- H. Social inequality is defined by the United Nations and other statistical compilers as unequal distribution of resources within a jurisdiction, which is amenable, in theory, to equalisation. The UN and other entities compile statistics on income and wealth

distribution. The eighth underlying premise: social inequality is conventionally defined as unequal distribution of income and wealth in a jurisdiction.

- I. Political and constitutional struggle effects more than allocation of proprietary rights. Struggle resulted, in some jurisdictions, in acceptance of the principle of human equality, which is the source of inclusionary, unitive, rights – human rights - that recognise human dignity. Social acceptance of the principle of equality, and certain allied human rights, reduces the exclusionary effect of proprietary rights. Ninth premise: application of the principle of equality, expressed in *inclusionary* rights, reduces the exclusionary effect of proprietary rights.
  
- J. Many governments reduce the scope and effect of ownership concentration by income redistribution and property taxes. Proprietary rights create the private domain. Inclusionary rights support the public domain, a domain of non-control and non-exclusion. Public and private domains may encroach on each other, although near-unbroken historical precedent is for private to encroach on public.<sup>43</sup> A feasible way to reduce socially harmful effects of ownership or privatisation is to increase the public domain. Tenth premise: reduction of ownership occurs in two ways, by:
  - a) change in societal values, from values that uphold dominance, appropriation and exclusivity, to values of inclusiveness, non-appropriation and mutuality.
  - b) delimitation of proprietary rights by:

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<sup>43</sup> Collectivism as practised in the 20<sup>th</sup> century cannot be called a political manifestation of the public domain. The public domain as I have defined it is not political and exists if conditions of non-ownership exist. Collectivist regimes controlled all domains however named. Control other than control necessary to protect the domain has no part in the public domain.

- i. voluntary de-privatisation
- ii. government circumspection in awarding proprietary rights
- iii. expansion of the public domain.

40. The purpose of each chapter in the dissertation, and how it relates to the premises described above, is summarised below.

**Chapter 1 Unitive rights**

To explain a process of historical development that led to espousal of human rights and the unitive rights derived from the principle of equality. (Refer premise G).

**Chapter 2 Proprietary rights**

To explain the social effect of exercise of exclusionary rights. Proprietary rights function instrumentally to distribute social benefit and disadvantage, and are defined and allocated by constitutional and political process. (Refer premises C, D, E).

**Chapter 3 Human possessive tendency and innateness**

The grammar of possession, creating linguistic antithesis, suggests that humans must inevitably contend for control; objectified, the struggle for social control is a political struggle that results in creation of exclusionary property systems. Other evidence of human tendency to contest for control is more hypothetical but explanatory data is adducible from:

biological/anthropological research; evolutionary robotics; social/psychological theory. (premises A and B).

#### **Chapter 4 Income and wealth distribution**

Data on worldwide income and wealth distribution illustrates how more equal income distribution is associated with wealthier and more democratic countries, whereas wealth is highly concentrated in all countries: in three of the world's richest countries (Denmark, Switzerland, United States), wealth is more concentrated than in any other country except Zimbabwe. Relatively low distributive inequality, which pertained from 1950-1980 in a number of rich countries, including the US, is an historical anomaly. The historical trend towards extreme wealth concentration indicates that historically coteries controlled (and continue to control) political power and wealth. (premise F).

#### **Chapter 5 Copyright system and proprietary exclusion**

Describes how a proprietary system – the copyright system – came into existence. Explains the contest for rights resulting in a continuing process of rights allocation and the emergence of a global copyright system regulated for the principal benefit of industries; rights allocation creates economic exclusion, which has social consequences. (C and D).

#### **Chapter 6 The rentier copyright system**

Outlines the characteristics of the copyright system, its evolution and the effect of treaty, politics, policy, legislation, and courts on the growth of a

rentier system directed to income transfer benefitting economic coteries, not the public. (D and E)

### **Chapter 7      The paratrophic copyright system**

The history of the creation of the paratrophic copyright system, an international system of royalty collection instituted for the benefit of coteries not the public. Discusses exclusionary effect of paratrophic arrangements and central role of politics and political in proprietary exclusion. (D and E).

### **Chapter 8      Reducing Social Inequality: Some Reform Proposals**

Income and wealth taxes press against social inequality by funding social spending and also, in theory, reducing the scale of ownership and consumption. Discusses ways to enlarge the public domain, broadly conceived, by voluntary property redistribution and surrender of property, and especially surrender of IPR before expiry of term (I and J).

### **Chapter 9      Summing up the argument**

Distills the parts and purpose of the dissertation, enumerate key findings and propose ways to effect reduction or diffusion of ownership.

## CHAPTER ONE

### THE UNITIVE RIGHTS

#### **PURPOSE**

To explain concepts of equality and inequality, and the elaboration of rights derived from the principle of equality – the inclusive or unitive rights – resulting in the doctrine of human rights.

#### **CHAPTER ONE HEADINGS**

##### **Part 1 – Rights of inclusion and exclusion**

*Rights*

##### **Part 2 – History of unitive rights**

*Christianity*

*The idea of solidarity*

*Spiritual equality*

*Reinterpreting natural law*

*Diffusion of political power*

*Emancipation*

*Anti-capitalism*

*Racial equality*

*United Nations*

*Universal declaration of human rights*

*International law and development*



## Part 1 Rights of inclusion and exclusion

### *Rights*

1. Rights determine society.<sup>1</sup> They express the law. Laws state duty and entitlement. Rights are properly understood as legal entitlements to do something or forbid something.<sup>2</sup> Rights exist in any society.<sup>3</sup> They are, in the western tradition, identified and categorised by philosophical exegesis, and formally recognised at law. Outside that tradition, rights can be characterised as powers to act, or permit or prohibit actions, which may be as commonly ratified by custom as formal instrument. Non-literate tribal societies, while unlikely to prescribe rights as profusely as the laws and conventions of literate societies, are, like those societies, governed by permissions and interdictions.<sup>4</sup>
  
2. Supporting the thesis that ownership causes inequality necessarily involves discussion of rights. The law, stochastically expressing societal volition, defines and allocates

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<sup>1</sup> This claim is logical and empirical: society, from Latin *societas*, meaning association or alliance, coheres if associates or allies obey commonly binding rules, and no evidence exists, so far as I am aware, of any association of people that does not prescribe enforceable rules of association known as laws, which in turn describe rights.

<sup>2</sup> Theories of rights vary considerably, presumably because they concern human social action. Theories are concerned philosophically with the moral and material dimensions of *licitness*, and pragmatically, with categorising rights by *content*. Theories of legal rights, in the English-speaking tradition, are more particularly concerned with the second activity (classification), as indicated in the 20<sup>th</sup> century by Hohfeld's theory of the opposite/analogous structure of rights, and Hart's discussion of rules. The question which divides most theorists is whether, as proposed by *will* theorists, a right confers legal choice, which is exercised to determine an outcome, or, as asserted by *interest* or *benefit* theory, the law intends a right to benefit the right-holder by imposing duty on another person. See Wesley Hohfeld 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' 23 *Yale Law Journal* 16 1913; Walter Wheeler Cook 'Hohfeld's Contribution to the Science of Law' 28 *Yale Law Journal* 721 1918; HLA Hart *The Concept of Law* Oxford University Press 1961, and *Essays on Bentham: Studies in Jurisprudence and Political Theory* Oxford (Clarendon) 1982. I wish to discuss the *inclusive* and *exclusionary* effect of two types of rights: rights concerned with the nature of the person (which begin with the right of equality), and rights allocating to a person the power to exclude others, ie, proprietary rights.

<sup>3</sup> Normatively if not formally proclaimed.

<sup>4</sup> For an unusual treatment of this topic, see the study by Walter Weyrauch and Maureen Bell of the *Vlax Roma*, the largest Roma society in the United States, reported in 'Autonomous Lawmaking: The Case of the "Gypsies"' 103 *Yale Law Journal* (1993) 323-399. Roma society is part-literate.

rights that inform us, instrumentally, objectively, or definitively, what the law and thus society declares the meaning of ownership.<sup>5</sup> Rights may be said to exist ontologically - independently of what laws say - but their social effectiveness usually depends on legal enforceability.<sup>6</sup>

3. The existence of enforceable rights is not the solitary indicator of social concern for justice: the beatitude, 'blessed are they that hunger and thirst after justice',<sup>7</sup> uttered to an audience oppressed by foreign occupation, and imposition of foreign law, shows that justice is a human moral object irrespective of what law declares. On the other hand, systematic analysis of how social exclusion and inequality occur is unfeasible unless formal categories of rights, in particular the category of proprietary rights, are understood, and their deployment analysed. Social deprivation occurs in societies that keenly uphold human and inclusive rights. The utility of rights theoretically available to a person socially excluded may be inconsequential, or the possibility of their benefitting from useful economic rights, especially proprietary rights, limited.<sup>8</sup> Whether directly, or indirectly, rights, particularly proprietary rights, are implicated in social inclusion or exclusion.<sup>9</sup>

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<sup>5</sup> This proposition is implicitly acknowledged in most literature examining the relationship between law and society, most famously by Max Weber in *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* translated in part by AM Henderson and Talcott Parsons in 1947 as *The Theory of Social and Economic Organization* (Free Press); complete translation by Guenther Roth and Claus Wittich as *Economy and Society* University of California Press 1978.

<sup>6</sup> Herbert (HLA) Hart, enunciating the will theory of rights (1982 *supra* at 185).

<sup>7</sup> John 12:8; Matthew 26:11; Mark 14:17.

<sup>8</sup> See for example, Amartya Sen's elaboration of 'entitlements' and 'capability' theory (*Resources, Values and Development* Oxford University Press 1984), which in part stresses the systemic exclusionary effect in poorer countries of the absence or unenforceability of useful rights (compared to rights favouring hegemony asserting property prerogatives).

<sup>9</sup> D Parthasarathy has outlined how in India, rural poverty among tribal and nomadic groups observing customary law is compounded by misuse of bargaining power by government-commercial consortia to appropriate or privatise supposedly vacant land. Multinational companies, collaborating with governments obeying the prescripts of the international intellectual property legal regime, utilise bio-patent rights to

4. Rights are multifarious but two categories are relevant to this dissertation: rights of inclusion and exclusion. These rights can be referred to broadly as human rights and property rights, the one set derived from a principle of human equality<sup>10</sup> and the other from a premise that rights holder possesses something against all the world.<sup>11</sup> As noted, inclusive or unitive rights contribute to formation of a public domain and proprietary rights create the exclusionary private domain. These domains bifurcate, usually as proprietary exclusions multiply.
5. Separately, many rights could be categorised as everyday utility rights that are activated by contract. If I catch a bus to a restaurant, then eat and pay for a meal at that restaurant, I enter into contracts with the bus driver's employer and the proprietor of the restaurant. These contracts confer rights of utility (although these rights of utility could be characterised as mere **licences**): that is, rights (or licences) to occupy a seat on the bus and a table at the restaurant. Rights of utility may thus often be interchangeably definable as licences. A licence to drive a motor vehicle is a species of contract, revocable on breach of prescribed terms.<sup>12</sup>

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impose agri-production and plant-species extraction regimes deleterious to the rural poor. One effect may be literal marginalisation. See, 'Law, Property Rights, and Social Exclusion: A Capabilities and Entitlements Approach to Legal Pluralism' in Rajendra Pradhan (ed) *Proceedings of the XIII International Congress of the Commission on Folk Law and Legal Pluralism* 7-10 April 2002 Chiang Mai Thailand 2003 Vol 1 295-322.

<sup>10</sup> The principle of equality, which is a foundation stone of the formal category of human rights, is central to the argument in this chapter about rights of inclusion, or unitive rights. The United Nations' *Universal Declaration of Human Rights*, and *International Covenant on Civil and Political Rights*, constitute a statement of what I call inclusionary rights, or rights of personhood. The UDHR begins by recognising, 'the inherent dignity and of the equal and inalienable rights of all members of the human family'. The UDHR is a statement about human dignity. It is not concerned with the content of rights asserted, which are diverse. They include (Article 12) a person's right to legal protection against, 'arbitrary interference with his privacy, family, home or correspondence ... [and] attacks upon his honour and reputation', and (Article 17) the right 'to own property' (Article 17 adds the declaration that no person 'shall be arbitrarily deprived of his property'.)

<sup>11</sup> These claims are discussed in this chapter.

<sup>12</sup> This concept of contractual rights is not derived from the *contractualism* of Thomas Scanlon (*What We Owe Each Other* Harvard University Press 1998), which is concerned with the duties that people owe each other, nor social contract theory, which elaborates rights from a concept of social contract (eg, James Rachels *The Elements of Moral Philosophy* McGraw-Hill 1986/2014 8<sup>th</sup> edition).

6. I distinguish between these utility rights, and *ontological* rights, expressing primary social beliefs about human value, aspiration and reward. Ontological rights are the rights of equality, which can also be called unitive rights - since they are said to be common to every human - and rights of exclusion, which are proprietary rights. These rights, including property rights, are formally designated human rights.<sup>13</sup> It is these two categories that are critical to explaining my thesis that ownership excludes.
  
7. Rights proposed and acknowledged, by custom or in law, are defined and allocated after political struggle, which is also a constitutional struggle, to determine the constitutive values or principles of a society. That struggle may take centuries, but its outcome is definitive: allocation of rights, whether defined formally or otherwise, effects distribution of political power, and creates classes of entitled and disempowered, and a continuing process of social inclusion or alienation.<sup>14</sup>
  
8. The intellectual tradition and social thought that enunciated, and upholds, human rights, continue to controvert the praxis of exclusion, appropriation and disadvantaging that maintains social inequality in all countries. Rights of equality and reciprocity, recognising the irreducible value of human life, and indeed the intrinsic

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<sup>13</sup> United Nations' *Universal Declaration of Human Rights* (adopted 10 December 1948). Also United Nations' *Covenant on Civil and Political Rights* (adopted 16 December 1966).

<sup>14</sup> Numerous writers attest to contest as the source of rights, including, perhaps most famously, Thomas Hobbes in *Leviathan* 1651. In *Civilisation and its Discontents* (1930) Chrysoma e-books (2005), Sigmund Freud devoted considerable attention to the origin and purpose of law, suggesting that law protects humanity against itself. He wrote of humans (at 24): 'their neighbour is to them not only a possible helper or sexual object, but also a temptation to them to gratify their aggressiveness on him, to exploit his capacity for work without recompense, to use him sexually without his consent, to seize his possessions, to humiliate him, to cause him pain, to torture and to kill him.' Jean-Jacques Rousseau, by contrast, discovered the beginning of regulated society in settlement, possession and production: 'Such was, or may well have been, the origin of society and law, which bound new fetters on the poor, and gave new powers to the rich; which irretrievably destroyed natural liberty, eternally fixed the law of property and inequality, converted clever usurpation into unalterable right, and, for the advantage of a few ambitious individuals, subjected all mankind to perpetual labour, slavery and wretchedness.' (*Discourse on the Origins and Foundation of Inequality among Men* Second Part 1754).

value of sentience, help to meliorate social oppression in many countries and exercise powerful suasion over government policy and social thinking in those countries.<sup>15</sup>

9. The principle of equality, if acknowledged and accepted, powerfully undermines social hierarchy, and liberates people from types of social, economic and political abuse.<sup>16</sup> But formal equality, meaning enactment of laws requiring equal treatment in society and before the law, is an inadequate device to undo social oppression caused by accession and deployment of proprietary rights. This is because exclusionary rights pre-empt sharing and mutualism.<sup>17</sup>
10. Distribution data testifies to this fact. In richer countries, which usually espouse in law and policy axioms of equality,<sup>18</sup> distribution of personal income is usually relatively unconcentrated, because government redistributes a large portion of higher incomes by taxation. By contrast, personal net assets are highly concentrated, because proprietary rights impede redistribution.<sup>19</sup>
11. Rights of inclusion, identical rights deemed intrinsic to, and shared by, every person, function to achieve public objects, including parity in social relations. Proprietary rights, however, function to achieve private as well as public objects. Most

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<sup>15</sup> See final paragraph UDHR preamble: *Now, therefore the general assembly proclaims this universal declaration of human rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.*

<sup>16</sup> Cf Freud *supra* at 25: 'Anyone who has been through the misery of poverty in his youth, and has endured the indifference and arrogance of those who have possessions, should be exempt from the suspicion that he has no understanding of or goodwill towards the endeavours made to fight the economic inequality of men and all that it leads to. To be sure, if an attempt is made to base this fight upon an abstract demand for equality for all in the name of justice, is a very obvious objection to be made, namely, that nature began the injustice by the highly unequal way in which she endows individuals physically and mentally, for which there is no help.'

<sup>17</sup> Exclusionary rights are implicated in social exclusion, but their exclusionary character is also judged socially useful to the extent that the benefits of privacy, production and commerce are considered socially useful.

<sup>18</sup> Discussed chapter 3, part 1.

<sup>19</sup> Discussed chapter 3, part 2.

importantly, they mark a personal domain. Within that domain, the proprietor or owner is sovereign, exempt - unless political necessity compels government to introduce wealth taxes such as inheritance tax - from exercise of government's power to redistribute.<sup>20</sup>

12. The domestic (or commercial) sovereignty of ownership does not yield, except in exceptional circumstances, to political sovereignty. Wealth concentration, and the inequality that it portends, is an apparently unchanging social reality.<sup>21</sup> This chapter analyses the origins of rights of inclusion and exclusion, and their ameliorative or exclusionary potential. Although the primary purpose of discussion is to elucidate the instrumental role of proprietary rights in effecting social exclusion, exposition of the intellectual history leading to legal recognition of human rights is also important, since the existence of inclusionary rights is a bulwark against social exclusion.
  
13. The distinction between inclusionary and exclusionary rights is more than abstract. Both types of right contribute to or create public and private domains. If these domains were distinct and abstract, discussion of categories of rights intrinsic to them would be necessary and informative. However, they are neither distinct nor solely abstract. The private domain refers to that which is private and that which is private is created by proprietary rights, which, though themselves intangible are tangible in effect.<sup>22</sup> The public domain is protected and made possible by inclusionary rights, and

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<sup>20</sup> As declared by John Locke *Second Treatise of Government* 1689 chapter V property paragraph 27: 'For this *Labour* being the unquestionable Property of the Labourer, no man but he can have a right to what that is once joynted to, at least where there is enough, and as good left in common for others.'

<sup>21</sup> Discussed chapter 4 Parts 1 and 2.

<sup>22</sup> The foundation essay in United States' law on privacy is that of Samuel Warren and Louis Brandeis 'The Right to Privacy' 4 *Harvard Law Review* 193 15 December 1890 pp 193-220. Warren and Brandeis (a later Supreme Court justice) in fustian language asserted a right of privacy to protect against unauthorised publication of photographs and 'gossip'. The cause of their indignation appeared to be press publication of material that an

is itself partly tangible (a public park is part of the public domain) and also powerfully intangible.

14. John Ball, a leader of the Peasants' Revolt of 1381, asserted in that year, to protestors gathered at Blackheath, the equality of people. Acceptance of the principle of equality, which implies equal entitlement to things public, is necessary if a public domain is to be created. Ball said, 'When Adam delved and Eve span, Who was then the gentleman? From the beginning all men by nature were created alike, and our bondage or servitude came in by the unjust oppression of naughty men ... ye may (if ye will) cast off the yoke of bondage, and recover liberty.'
15. It might be said that inclusionary and exclusionary rights may conflict with each other.<sup>23</sup> A more accurate statement is that the private domain encroaches inevitably on the public because what is private must be created, either by subdivision of something private, or alienation of what is public. Thus protecting against the exclusionary effect of proprietary growth must partly involve upholding the public domain, and encouraging its growth.<sup>24</sup>

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individual might consider unseemly. In their discussion, a privacy right is considered akin to, but distinguished from, a proprietary right such as copyright. Their final sentence asks, 'Shall the courts ... open wide the back door to idle or prurient curiosity?' (at 220).

<sup>23</sup> Since the publication of 'The Right to Privacy' (*id*) academic or juridical discussion of conflict between public and private domains seems focused on clarifying the scope of a privacy tort, with the result that public or state are viewed as potential intruders on the private domain. See, for example, Konrad Lachmayer and Normann Witzleb 'The Challenge to Privacy from Ever Increasing State Surveillance: A Comparative Perspective' 37 *University of New South Wales Law Journal* 748 2014. See, eg, *United States v Kincade* (2004) 379 F3d 813 9th Circuit in which a federal appeals court affirmed that the state could, without violating the 4<sup>th</sup> amendment prohibition of unreasonable search and seizure, require a prisoner to undergo a DNA test as a condition of parole. Cases before courts view the privacy right as personal and susceptible to infringement by state or person. Thus, insofar as antithesis between private and public domains is essayed – and noting that the state and individuals are not identifiable as part of the public domain – writers and courts focus on privacy infringement, not infringement of whatever rights that could be assignable to the public domain. More abstractly, in the absence of legal definition of the public domain, what could be characterised as intrusion into, or appropriation from, the public domain is ignored.

<sup>24</sup> See Conclusion and proposals therein.





## Part 2      History of unitive rights

### *Christianity*

16. In antiquity, philosophers and political leaders were not much concerned about ideas of equality and inequality.<sup>25</sup> The pervasiveness in ancient societies of inequality, and the absence of fairness, perhaps explains why philosophers paid most attention to ethics and metaphysics, the principles of which can usually be debated without disturbing soldiers or politicians.<sup>26</sup> Well-connected individuals, or aristocratic factions, controlled politics, and, for the most part, calculation of private advantage overruled consideration of public welfare. A prudent thinker confined intellectual speculation to private life.<sup>27</sup>
17. Social thought thus tended to affirm seemingly fixed social relations. Chinese social thought, over millennia, upheld principles of hierarchy and obedience.<sup>28</sup> Plato

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<sup>25</sup> Forms of representative government in the ancient world, most notably the graded plebiscite democracy of Athens, which accorded votes to property-holding citizens, and the earlier Roman Republic, developed to protect the interests of those who could contest power, excluding consideration of the needs or welfare of those who could not (non-citizens, slaves, the poor, and, in a formal sense, women, who were deprived of civic power).

<sup>26</sup> Chinese ethical coda and Greek and Roman philosophy emphasised the necessity of practising private virtue and performing public duty divorced from the mores of surrounding society. Those who participated in public life, even if separated from the formal process, often paid for their opinions with their lives. Three notable examples are Socrates (suicide 399 BC), Cicero (murdered 43 BC) and Seneca (suicide 65 AD).

<sup>27</sup> Even in the classical period of Athens, politicians threatened the lives of philosophers, including Socrates, Plato and Aristotle. The later Roman Republic descended into social wars that tore the constitutional arrangement apart and ended in dictatorship. By the beginning of the 1<sup>st</sup> century BC, few politicians dared to speak openly about politics. As the century progressed, those who did so usually died violently, notably Cicero, murdered at the insistence of Mark Anthony. The atmosphere of violence and threat inescapable in the Greek and Roman worlds, discouraged generous sentiment, care for others, and advocacy for social improvement.

<sup>28</sup> Two social philosophers exercised particular influence on Chinese politics, Confucius (d 478 BC) and Han Fei (d 233). Application of their theories encouraged social quietism. The *Legalism* of Han Fei led to enforcement of punitive legal rules designed to secure obedience to authority. Confucianism encouraged cultivation of private virtue and, in practice, reinforced obedience to a postulated virtuous authority of emperor, government and family.

advocated aristocratic government<sup>29</sup> and Aristotle justified slavery.<sup>30</sup> Slavery remained an unchanging feature of social life in the ancient world, common in China and India, pervasive in the civilised countries of the Mediterranean, north Africa and the middle east, and in most countries that could not be called civilised.<sup>31</sup> Division between governing and servile classes, solidified by custom, precluded speculation about universal equality. Burdened by near incessant warfare, internecine and external, no society displayed the moral vitality necessary to imagine a politics of parity.<sup>32</sup>

18. Acceptance of the idea that as humans we owe to each other equal respect by reason of common humanity is identifiable with spread of Christianity across the Roman Empire in the centuries following the death of Christ (c 14 AD). Before Christ, social thinkers expressed a humanist conception of mankind,<sup>33</sup> which asserted the

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<sup>29</sup> Or rule by the wise, a small minority of the population. Plato compared this ideal form of government, in increasing order of degeneracy, to: government by lovers of honour (timocracy – for which the city of Sparta is a model); government by oligarchy; democracy (the Athenian plebiscite democracy of citizens); and tyranny. (*Republic*, Penguin 1974 pp 298-320).

<sup>30</sup> Aristotle *Politics* Book 1 Pts 5, 12, 13 and Book 3 Pt 6.

<sup>31</sup> Measured by the period between its first obvious appearance in China and Egypt (c 1650 and 1550 BC) and the collapse of the western Roman Empire (traditional end date 476 AD), the practice of slavery in the civilisations of the ancient world continued for well over 2000 years.

<sup>32</sup> While precise commonalities between the social systems of complex ancient civic societies are usually difficult to identify, and the category 'ancient' (here used to describe at least the period 1000 BC- 100 AD) is broad, two characteristics are observable in these societies. The first is that each practised government by aristocracy, the existence of which depends upon a servile population. Aristocratic government collaborates with rule by an emperor or a king. Most importantly, it rejects the principle of equality, hence its substantive indifference to the social condition of most members of society, its support of slavery, and its conscienceless appropriation of public wealth and other benefits. The second noticeable characteristic is that each society, generally speaking, assigned a *stationary* role to members of the servile population, ie, birth fixed a person's social station, although a person, such as a freed Roman slave, might gain wealth, and thus gain in status.

<sup>33</sup> The classical period of Chinese philosophy (the *Hundred Schools of Thought* 6<sup>th</sup>-3<sup>rd</sup> centuries BC) taught a conception of humanity based on authority and virtue (Confucius) and nature (Laozi). Individuals governed their destinies by practising virtue. They observed principles concerning *dao* (the way), *de* (virtue), *ren* (humanity or love), *yi* (righteousness), *tian* (heaven) and *yingyang* (the opposites of calm and vigour). Chinese thought does not assert the innate value of each person. A person practised virtue because of the intrinsic value of virtue, which enabled a person to live a life worthy of approbation. The classical Greek and Hellenistic philosophers, and the Graeco-Roman schools of Epicureanism and Stoicism encouraged acceptance and self-knowledge, and they too stressed virtue as a necessary external accomplishment that enabled a person to lead a good life.

uniqueness and intrinsic value of human creative potential, declared human moral faculties unique and valuable, and identified human capacity for cooperative moral action. But none adopted a view of human relationship that could be traced, without qualification, to the assumption that as moral creatures humans are equal, one neither greater nor less than the other.<sup>34</sup>

19. Toleration of Christianity (311 AD) and its acceptance as the official religion of the Roman Empire (380)<sup>35</sup> did not alter modes of imperial governance. Administrative reforms of the emperors Diocletian (d 311) and Constantine (d 337) increased social inequality, probably hastening the western empire's collapse in the following century.<sup>36</sup> Imperial government became more obviously autocratic.<sup>37</sup> Slavery remained a bulwark of social and economic life.
20. Acceptance of the new religion did, however, change official attitudes to centuries-old practices now judged morally repugnant. Constantine abolished crucifixion in 337. Imperial edict abolished gladiatorial shows in 404.<sup>38</sup> Roman jurists absorbed from church teaching a new idea of human identity, one that inspired laws which limited

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<sup>34</sup> 'A new commandment I give you, That you love one another as I have loved you ...' (John 13:30).

<sup>35</sup> An imperial edict of toleration ended persecution of Christians in 311, and the imperial Edict of Milan confirmed Christian freedom of worship and restored confiscated Church property in 313. The imperial Edict of Thessalonika in 380 commanded the nations of the empire to follow the 'religion of Peter' and authorised followers of the law to call themselves 'Catholic Christians'.

<sup>36</sup> Diocletian divided the empire into western and eastern halves, and created the system of dual emperors. Constantine established Constantinople as the capital of the eastern empire, and consolidated a shift in power to the east. As power concentrated in Constantinople, and the upkeep of armies on the western frontiers drained local treasuries, signs of impoverishment, alienation and civic decay appeared in western prefectures and dioceses. More than previously, great wealth and great poverty co-existed. See Chester Starr *Civilization and the Caesars: The Intellectual Revolution in the Roman Empire* WW Norton & Co 1965.

<sup>37</sup> Diocletian recognised the hitherto unacknowledged autocratic role of the emperor, inaugurating what is known as the *Dominate*.

<sup>38</sup> An imperial edict abolished contests in 325. In the Roman Colosseum spectacles apparently continued for at least 20 years after abolition. Abolition of the no less abominable *ventiones*, public spectacles that placed condemned individuals in arenas with starved wild animals, or introduced hunters into rings to hunt animals may have continued to occur until about 525. ([http://penelope.uchicago.edu/~grout/encyclopaedia\\_romana/gladiators/gladiators.html](http://penelope.uchicago.edu/~grout/encyclopaedia_romana/gladiators/gladiators.html)).

the formerly absolute powers of fathers over children, conferred property rights on women, forbade maltreatment of slaves, and, in commercial law, extended the scope of principles of good faith and obligation.<sup>39</sup>

*The idea of solidarity*

21. From the time of the early church, theologians and expositors wrote apologetics, confessions and histories to explain matters of faith, morals and practice. Most religious writers known today published works in the three centuries following the imperial edict of toleration in 311.<sup>40</sup> These included the four great Greek religious teachers, St Athanasius (d 373), St John Chrysostom (d 407), St Basil the Great (d 379) and St Gregory of Nazianzus (d 390), and the great Latin saints, Ambrose (d 397), Jerome (d 420), Augustine (d 430) and Gregory (d 604).<sup>41</sup>
  
22. Asserting a soteriology derived from belief in Christ's incarnation,<sup>42</sup> the redemptive necessity of love, and the principle of imitating the Saviour's example, the Fathers taught that accumulation exceeding sufficiency is evil,<sup>43</sup> wealth endangers salvation,<sup>44</sup>

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<sup>39</sup> These and many other innovations were codified in *Codex Theodosianus* (438) and *Codex Justinianus* (534). The latter makes explicit the link between religious and juridical philosophy, beginning: *We desire that all peoples subject to Our benign Empire shall live under the same religion that the Divine Peter, the Apostle, gave to the Romans ... We order all those who follow this law to assume the name of Catholic Christians, and considering others as demented and insane, We order that they shall bear the infamy of heresy ...* (book 1, title 1, paragraph 1).

<sup>40</sup> The term 'Father of the Church' refers to individuals, usually saints, recognised by the Catholic and Orthodox Churches as great teachers of doctrine and faith. The Catholic Church also recognises some theologians a smaller group of Church 'Doctors'.

<sup>41</sup> The 'Greek' Fathers wrote in Greek and usually lived in the eastern empire. 'Latin' Fathers wrote in Latin and lived in the western empire.

<sup>42</sup> God becoming man in the person of Jesus Christ.

<sup>43</sup> 'What you have more than enough of is needed by the poor.' (St Augustine d 430 sermon 39:6). 'You with a second coat in your closet, it does not belong to you. You have stolen it from the poor man who is shivering in the cold.' (St Basil the Great St. Basil's Homily on the saying of the Gospel According to Luke, *I will pull down my barns and build bigger ones*, and on greed), §7 (PG 31, 276B – 277A).

<sup>44</sup> 'For all wealth is derived from wickedness, and unless one man has lost, another cannot find.' (St Jerome d 420 *Letters* 120.1. 'None of these things is good, not luxury, not wealth ... They often indeed cause our

God loves especially the poor and downtrodden,<sup>45</sup> and sharing is the essence of *agape*, that is, love that expresses the character of divine love.<sup>46</sup> For the first time in history, literature available to most literate identifies all people, without exception, and regardless of status, as numinous creatures, each person equally precious to a God of love.<sup>47</sup>

23. For pagan society that for centuries embraced an opposite idea of humanity, expressed most grotesquely in arena spectacles and crucifixion,<sup>48</sup> such an idea could only be anathema or liberating. Although Christianity's concrete influence on civil society in late antiquity is debated, its transcendental effect on moral sentiment is unmistakable. The Fathers translated the Beatitudes into a syllabus of virtue, and warned against accumulation.<sup>49</sup>
24. The idea of selfless affiliation, expressed in proto-religious synonyms like *communion*, *solidarity and sodality*, influenced the ascetic communities, or monasteries, which first

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destruction, when we use them improperly.' (St John Chrysostom *supra* 136-137). St James 5: 1-6: 'Now you rich, weep and howl for the miseries that are coming ... Your gold and silver ... will eat your flesh like fire ...'.

<sup>45</sup> '[God is] the despiser of the rich and defender of the poor.' (Tertullian d 225 *Against Marcionem* 4.35 PL 2.392-93).

<sup>46</sup> 'Give what you can; God asks for nothing above your powers.' (St Gregory of Nyassa d 395 *Love of the Poor* Peter Phan (ed) *Message of the Fathers of the Church* 1984 Michael Glazier).

<sup>47</sup> 'I do not despise anyone; even if he is only one, he is a human being, the living creature for which God cares. Even if he is a slave, I may not despise him; I am not interested in his class, but his virtue; not his condition of master or slave, but his soul.' (St John Chrysostom *supra* 99-100).

<sup>48</sup> 'I turned in to the games one mid-day hoping for a little wit and humour there. I was bitterly disappointed. It was really mere butchery. The morning's show was merciful compared to it. Then men were thrown to lions and to bears: but at midday to the audience. There was no escape for them. The slayer was kept fighting until he could be slain. "Kill him! flog him! burn him alive" was the cry: "Why is he such a coward? Why won't he rush on the steel? Why does he fall so meekly? Why won't he die willingly?" Unhappy that I am, how have I deserved that I must look on such a scene as this?' Lucius Annaeus Seneca (suicide 65 AD), *Moral Epistles (VII)* (from William Stearns Davis (ed) *Readings in Ancient History* Allyn and Bacon, 1912-13 Vol II).

<sup>49</sup> The Beatitudes (Matthew 5:3-12): 'Blessed are ... the poor in spirit ... the meek ... those who hunger and thirst for justice ... the merciful ... [etc]'. Cf Luke 6: 24-26: 'Woe to you rich, for you have your consolation. Woe to you that are filled, for you shall hunger. Woe to you that laugh, for you shall mourn and weep. Woe to you when men bless you for so did their fathers the false prophets.'

appeared in Egypt in the 3rd century, and spread westward in succeeding centuries.<sup>50</sup>

These communities lived apart from the world of money and ownership attacked by great patristic writers such as Basil, Chrysostom, Jerome and Augustine.

### *Spiritual equality*

25. From the 11<sup>th</sup> century, jurists systematising ecumenical, ecclesiastical and papal decrees created the canon law of western Europe. After rediscovery, in the later part of the 11<sup>th</sup> century, of Justinian's *Corpus Iuris Civilis*,<sup>51</sup> jurists also wrote commentaries, or 'glosses', on the *Digest* and *Code*, thus receiving Roman law into western Europe,<sup>52</sup> and creating the beginnings of secular civil law.<sup>53</sup> After the 11<sup>th</sup> century, the ultimate source of authority is spiritual, not temporal, and that authority is concerned with salvation. Medieval law could not countenance, in principle, that the soul of peasant mattered less than that of a king. If, before God, all humans were equal, then on earth, law must adopt principles of parity. From the 11<sup>th</sup> century, jurists began to import into law rules of fairness based on the idea of equality.<sup>54</sup>

### *Reinterpreting natural law*

26. The theology of St Thomas Aquinas (d 1274), author of the great exposition of moral theology, *Summa Theologica* (1265-74), is not usually identified as progenitor of

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<sup>50</sup> The word 'monastery' comes from the Greek root 'mono' meaning single, alone, one. In early Christian times, hermits retreated to the desert, partly to escape persecution. St Anthony of Egypt (d 356) probably established the first community of hermits in the 3<sup>rd</sup> century and St Benedict of Nursia (d 543) established in the Catholic Church the model of monastic living, creating the 'Rule of St Benedict'.

<sup>51</sup> Consisting of the *Institutes*, *Digest* and *Code* of the Roman/Byzantine emperor Justinian (d 565), which, as a whole document seems to have been unavailable to lawmakers in western Europe for at least 300 years, until rediscovery of a library copy in northern Italy in about 1070.

<sup>52</sup> A process culminating in the definitive *Glossa Ordinaria* of Accursius (d 1263).

<sup>53</sup> In England, development of common law forestalled formal reception of Roman law, although practitioners and theorists remained open to, and applied, civil law concepts, some of which informed the law of equity.

<sup>54</sup> As elaborated much later, rules of fairness became integral to development in England of the law of equity.

societies characterised by movement of capital and labour, enforceable proprietary rights, and permissive secular political systems. Their origins are conventionally said to lie in political acceptance of the principle of individual human equality asserted by the Reformation and Enlightenment, and the revolutions of the United States and France.

27. Aquinas could not have foreseen that his teaching on proprietary rights would, in some measure, clear the path to society governed by capital. His theology of ownership prefaced a novel attitude to property that allowed medievals to look with more friendly eyes on commercial behaviour not easily reconciled with the centuries-old teachings of the Fathers. Aquinas supplied an authoritative didactic voice that departed from the patristic tendency to regard ownership, possessive and absolute, as anathema to natural law.<sup>55</sup>
28. The Fathers considered that natural law rejected property as alien to nature – though they allowed that its existence is inevitable, and therefore that intention rather than possession, determines whether a particular instance of ownership is sinful – and Aquinas agreed with this proposition.<sup>56</sup> Natural law, according to Aquinas, does not comprehend private property. However, he said, natural law does not *forbid* property.

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<sup>55</sup> 'But as soon as soon as someone tries to appropriate a thing to himself by making it his private property, strife begins; it is as if nature itself were aroused over the fact that, despite God's efforts to keep us together in peace and harmony by all possible means, we are intent on being torn asunder in our attempts to acquire private property and private possessions. Yes, nature is aroused by the very mentioning of the metallic words "mine and thine". From that moment the battle was joined and all vileness began. But wherever this "mine and thine" is unknown, there exists no struggle or strife. From all this should follow the community of possessions is a more appropriate form of life than private property. And this community of all possessions is also more according to nature.' (Chrysostom *Twelfth Homily on the First Epistle to Timothy* c 386-398).

<sup>56</sup> Anton Hermarn Chroust and Robert J Affeldt 'The Problem of Private Property According to St Thomas Aquinas' *Marquette Law Review* Vol 34 Winter 1950-51 No 3.

29. Aquinas declared that property is the consequence of original sin. Humans create property because they are imperfect creatures, with imperfect understanding of the divine order, which does not admit possession or exclusion. But they do so by applying their God-given faculty of reason to the surrounding world, as they should. Human law, the *ius gentium* justifies property, while *lex naturalis*, the natural law, justifies absolutely the *community of property*, that is, the society of sharing prescribed by the Fathers (in contradistinction to the worldly community of ownership).<sup>57</sup>
30. Aquinas thus *justified* property, whereas the patristic teachers considered private possession, in principle, a signifier of moral failure.<sup>58</sup> Aquinas, like the Fathers, insisted that owners are obliged to obey the natural law. Unlike them, he characterised property as ‘super-added’ to natural law. He thus created a theory of property that would be interpreted to admit departure from the Christian ethic of solidarity.<sup>59</sup>
31. Aquinas represents an intellectual bridge to coming eras, affirming the legitimacy of private property, albeit conditionally, and departing, by degree, not in principle, from a tradition of spiritual censure of economic activities directed towards accumulation and exchange.<sup>60</sup> Since property confers on the owner a right to exclude, in principle

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<sup>57</sup> *Id.*

<sup>58</sup> ‘The possession of all things in common is ascribed to the natural law; not in the sense that the natural law dictates that all things should be possessed in common, and that nothing should be possessed as one’s own; but in the sense that no division of property is made by the natural law. This division arose from human agreement which belongs to the positive law .... Hence the ownership of possessions is not contrary to the natural law, but a super-addition thereto devised by human reason.’ (St Thomas Aquinas *Summa Theologica* 2.2 quaest art 2 ad 1).

<sup>59</sup> The idea of ‘solidarity’ is central to patristic commentary: by loving and each serving each other, people unite with the divine nature.

<sup>60</sup> ‘... St Thomas for all times made the Church the final arbiter in all matters concerning the problem of private property and private possessions. ... [his stated position] furnishes the most excellent argument not only



the existence of property undermines the patristic ideal of solidarity. Aquinas's endorsement of proprietary rights is thus an important theoretical beginning in the political movement towards endorsement of rights of ownership and property. Marked social inequality emerged as an inevitable effect of creating economies reliant on allocation and enforcement of proprietary rights.

*'All men are born equal'*

32. Paolo Carozza has pointed out the influence, in Spanish-speaking countries, of the 16<sup>th</sup> century commentaries of the Dominican priest Bartolomé de las Casas, 'Defender of the Indians', who asserted, against often murderous opponents, church doctrine affirming the spiritual equality of all people.<sup>61</sup> The Spanish crown affirmed that equality in the *New Laws of the Indies for the Good Treatment and Preservation of the Indians* (1542).<sup>62</sup> For Carozza, de las Casas's public defence of universal spiritual equality, which insists on equal treatment, and equal justice, while doctrinally uncontroversial, is the first public declaration of human rights.
33. Conventional narrative on rights' development, however, usually focuses on the effect of three events, the Renaissance (c late 13<sup>th</sup>-16<sup>th</sup> centuries), Reformation (c 16<sup>th</sup>-17<sup>th</sup> centuries) and Enlightenment (c 17<sup>th</sup>-18<sup>th</sup> centuries), social phenomena that asserted in principle the primacy of individual human decision in matters of faith, morals or social action. By identifying the power of personal agency to effect personal or

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against all immoral excesses of a capitalistic system in that it reminds us of the original communion of all possessions, but also against all forms of materialistic communism by pointing out that the institution of private property rests upon the sanctity of human agreement – the *ius gentium* – and is the product of that intelligent human conduct which is akin to acting in conformity with the natural law.' (Chroust and Affeldt *supra*).

<sup>61</sup> 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights' *Human Rights Quarterly* 25 (2003) 281–313.

<sup>62</sup> Various restated in the *Laws of the Indies*, most definitively in 1680.

collective improvement, these movements, though philosophically disparate,<sup>63</sup> presaged creation of new political systems.

34. Arguments for political freedom, diverse, complex, rent and shaped the politics of Europe, and later North America, between the 16<sup>th</sup>-18<sup>th</sup> centuries (and world politics in succeeding centuries).<sup>64</sup> From contention, strife and war emerged principles of toleration, representation and freedom from oppression. These principles were elaborated from the premise, which remains the premise of the modern idea of equality, that personhood, by itself, confers on each person certain identical rights, which must every just polity must recognise.<sup>65</sup>
35. Philosophers and propagandists of liberty, including Thomas Hobbes (d 1679), John Locke (d 1704), Montesquieu (d 1755),<sup>66</sup> Voltaire (d 1778),<sup>67</sup> Jean-Jacques Rousseau (d 1778), Denis Diderot (d 1784) and Immanuel Kant (d 1804) advanced ideas about human freedom. People must be left free, according to the principle of liberty, to

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<sup>63</sup> Individual autonomy characterises each of these three movements. The intellectual origins of Reformation are to some degree traceable to the German Renaissance (c 15<sup>th</sup> century), which interpreted, again by degree, the humanism of the Italian Renaissance. Similarly, it could reasonably be argued that the Enlightenment could not have taken place had the Reformation not occurred (a representative presentation of this argument is given by Bertrand Russell *A History of Western Philosophy* Allen & Unwin 1946). Differences are important: Italian humanism rejected intellectual restriction but embraced natural law and the transcendental and sublime aspects of art and literature. The Reformation, following Martin Luther's formula of 'faith alone' and 'by scripture alone', opposed religious authority and an allied culture that profusely explored sacred and human themes. The Enlightenment divorced itself from revelation and belief, substituting reason as the epistemological agent of understanding and progress.

<sup>64</sup> In Europe, religious protest transformed into a political cause, co-opted by princes and electors to achieve secession, gain territory, or procure temporal advantages. Lutheran and Calvinist programs formed a backdrop to both internecine state conflicts and those involving multiple states. The Treaty of Westphalia in 1648 ended a century of religious war.

<sup>65</sup> In short, the philosophy of liberty, which is a syllabus of writings and documents, especially those of the 17<sup>th</sup>-18<sup>th</sup> centuries, most publicly expressed in the declarations of independence promulgated during the revolutions of the United States and France (1776 and 1793). The philosophy of liberty locates sovereignty in the collective of people ruled by law, each person possessing the same sovereign right to elect rulers. Government legitimacy depends on public consent.

<sup>66</sup> Charles-Louis de Secondat, Baron de La Brède et Montesquieu.

<sup>67</sup> François-Marie Arouet.

think and do as they please.<sup>68</sup> The idea of liberty is a political idea, albeit one pressed in the service of faction,<sup>69</sup> and the English Parliament promulgated the first national statement of political liberty in 1689, passing the Bill of Rights.<sup>70</sup>

36. Practical admirers of various Enlightenment philosophers, most notably the authors and inheritors of the American and French revolutions (beginning 1775 and 1789) debated what limits to place on liberty, and the type of political system that might guarantee its continued existence.<sup>71</sup> From their deliberations emerged a political principle of equality, and a political conception of inequality, usually secular, though not always.<sup>72</sup> The United States *Declaration of Independence* (1776) declared that, ‘... all men are created equal ... endowed by their Creator with certain inalienable rights ...’. The French Revolutionary *Declaration of the Rights of Man and the Citizen* (1793) stated that ‘Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.’

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<sup>68</sup> Or as John Locke explained (*Two Treatises of Government*, 1689) a person’s rights to life, property and individual liberty is inviolate by reason of natural law, and natural rights are not to be abrogated by coercion. A government must protect these rights, and is legitimate to the extent that it does so; its continuation must be by popular consent.

<sup>69</sup> The English faction was the Whigs the political grouping of landed and commercial magnates who organised the accession of William of Orange in 1688, and, benefitting from royal favour, dominated British politics for a large part of the 18<sup>th</sup> century.

<sup>70</sup> The Bill transferred from crown to parliament asserted or residual political power of the monarch, although the crown remained the source of state power. Some propose the Magna Carta (1215) as a much earlier statement of rights – albeit one agreed between nobility and king primarily for the benefit of the nobility – that protected free men from summary arraignment, imprisonment, denial of legal rights, confiscation of property, proscription or banishment. Nor would the crown deny or delay its subjects access to justice untainted by corruption. See Article (39) which states that, ‘No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.’ Also Article (40) which states that, ‘To no one will we sell, to no one deny or delay right or justice.’

<sup>71</sup> For an account of how leading Enlightenment figures differed in interpreting ideas of universal liberty, and equality without distinction, see Siep Stuurman ‘Global Equality and Inequality in Enlightenment Thought’ *Reeks Burgerhartlezigen Werkgroep 18e Eeuw nummer 3* Burgerhart Lecture 2010.

<sup>72</sup> One of the most famous contemporary advocates of universal equality, Guillaume Raynal (‘Abbé Raynal’ d 1796) in the bestselling *L’Histoire philosophique et politique des établissements et du commerce des Européens dans les deux Indes* (‘Philosophical and Political History of European Possessions and Trade in the Two Indies’ 1770) affirmed that all men are, without qualification, equal ‘in the eyes of the Supreme Being.’

37. Both statements of rights are fundamentally political in content, not moral. They are asserted, not justified teleologically. The presumption that equality is necessary for human welfare - evident in the language of the two declarations – was, so far as the defenders of liberty were concerned, true *a priori*. They justified the contents of the declarations by reference to natural law. But those contents expressed the spirit and intent of a political movement proposing to implement a political program.
38. Humans are *created* or *born* equal, and, according to the French declaration of rights, equality is guaranteed by rights, presumably as articulated from time to time in public documents: ‘The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.’ The *inalienable* rights specified in the US declaration of independence include ‘life, liberty and the pursuit of happiness.’ These documents thus created a model for a description of political equality.

### *19<sup>th</sup> century*

39. In the urbanised world of the 19<sup>th</sup> century, poverty and want, and employers’ contempt for the revolutionary promises of the previous century, ensured that discussion of rights could no longer be abstract. A landscape punctuated by dark satanic mills<sup>73</sup> concentrated thought on a question unasked in preindustrial days of social rootedness and rural quietism: if all are equal, why are some very rich, and many very poor?

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<sup>73</sup> From William Blake’s poem *And did those feet in ancient time* (1808), containing the lines, ‘And was Jerusalem builded here/Among these dark satanic mills?’

40. If the satanic mills helped to produce unceasing riches that built the extraordinary monuments of capitalism,<sup>74</sup> why must the poor live and die in unsanitary slums, mostly of disease and overwork, sometimes of cold and starvation? Discussion of rights became an argument about capitalism. Most prominently, Karl Marx warned against capitalists endorsing a message of rights to present the appearance of amity: he wrote that the *Declaration of Rights of Man and the Citizen* is a testament of bourgeois egotism, encouraging self-regard and unconcern for others.<sup>75</sup> Equality proposed by the controllers of capital is a fraud, intended to procure popular consent to a program suited to the needs of the capitalist class.<sup>76</sup>
41. Protest came also from adherents to the theory of anarchism. Broadly, anarchism, a term possibly coined by Pierre-Joseph Proudhon (d 1865) and author of the famous aphorism that property 'is theft', declares human goodness. The best way for humans to live, and the way they will choose to live if freed from institutional oppression, is voluntarily, that is, by freely choosing cooperation, which is the opposite of the modes of state or other institutional coercion. Anarchists varied in theory and behaviour but they advocated a social theory that was the antithesis of that articulated by liberal thinkers and shared little ground with Marxist or communist theories. An important later anarchist Peter Kropotkin (d 1921) rejected the idea of competition as the agent of social development and emphasised the necessity for social progress of mutuality,

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<sup>74</sup> 'The bourgeoisie has ... accomplished wonders far surpassing Egyptian pyramids, Roman aqueducts, and Gothic cathedrals; it has conducted expeditions that put in the shade all former exoduses of nations and crusades.' Karl Marx *Communist Manifesto* (1848) Part 1 Bourgeois and Proletarians.

<sup>75</sup> Karl Marx 'On the Jewish Question' (1844) in *Karl Marx: Early Writings* Penguin 1977 at 230.

<sup>76</sup> Karl Marx (*Capital Vols 1-3*, 1867, 1885, 1894) did not supply a philosophical justification for equality. Rather, he presented equality as a necessary consequence of the scientifically observable operation of social laws. Class antagonism must lead, according to Marx, to a final conflict of two classes, capitalist and proletarian, and the ultimate result of the victory of proletarians would be radical equality. Equality was thus ordained by history.

glimpsing in indigenous societies an example of how humans can live cooperatively together.<sup>77</sup>

42. The controllers of capital paid little attention, but their response came, indirectly. In the later 19<sup>th</sup> century, parliamentary politics responded slowly to the logic of equality, gradually enlarging the franchise, and turning attention to social amelioration, which included legislation to protect labour,<sup>78</sup> and efforts to provide for universal primary school education.<sup>79</sup> Intellectually, capitalist society responded ingeniously to the communists and socialists who criticised yawning social inequality: it succoured a new class of affirmative materialists, economists.<sup>80</sup> They reduced reality to a model that avoided consideration of exploitation and inequality, and justified proprietary rights as necessary *a priori*.
43. They also created a theory of social behaviour that came to be called ‘neo-classical economics’,<sup>81</sup> and posited the determinative social role of rational economic actors.<sup>82</sup>

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<sup>77</sup> Refer, eg, Ellie Clement and Charles Oppenheim ‘Anarchism, alternative publishers and copyright’ *Anarchist Studies* 2002 10 (1) 41-69.

<sup>78</sup> An early example in the United Kingdom is the first *Factory Act* (1833), which placed restrictions on child labour.

<sup>79</sup> Eg, the UK’s *Elementary Education Act* (1870), which provided for local boards to subsidise the schooling of poor children, ensuring that all children could receive public primary education.

<sup>80</sup> Led by the important Cambridge systematiser Alfred Marshall (d 1924), a pioneer of marginal theory, who felt that the object of economics ought to be human material improvement. His efforts, and the work of others resulted in the development of a discipline that by method, data, and mathematics, modelled and tried to explain the social world. His most famous work is *Principles of Economics* (1890).

<sup>81</sup> A partly behavioural theory of markets which posits that market actors act rationally to secure utility and maximise choice. It developed in the later 19<sup>th</sup> century from the classical theory said to originate from the work of Adam Smith. In evolved form it constitutes the mainstream of economics. Espousal, especially by Austrian and Chicago schools of the economic and social benefits of property rights is connected to the conventional treatment of property rights by the ‘school’ of neo-classical economics. However, the term ‘neo-classical’ refers usually to a mode of economic inquiry that models and measures economic activity and makes assumptions about motivation and the necessity for certain regulatory functions such as monetary policy. Thus, broadly, most economists, including John Maynard Keynes, are neo-classicists.

<sup>82</sup> Many economists acknowledge the criticism that the premise of consistent rational individual behaviour, meaning that humans consistently make choices to secure material welfare, unduly simplifies human motivation. However, the idea that people are self-interested and treating for material reward is regarded by most economists as self-evident. John Stuart Mill is considered to have originated the concept of the human agent parlaying for private reward in ‘On the Definition of Political Economy, and on the Method of

The neo-classicists assumed that a rational economic actor avoids making, or continuing to make, choices injurious to self. They went further: the object of rational actors is to become wealthy, and their collective success in achieving this object is measured in national growth statistics.<sup>83</sup> The neo-classical model assumes that rights, accumulation and growth are intrinsic to social welfare.

44. The posited rational actor is capital's defence against the claim that capitalism is not inherently distributive, and an assertion of its boundless potential for creating conditions of material well-being, and effective social action. If a system permits rational action, and people are rational actors, how could capitalism not harness productive energy for social good?
45. Conventional economic theory dispenses with complex rights discourse but assumes that, since its primary social object is to uncover the conditions that rationally (or sanely) liberate humans from choice restriction, rights consistent with achieving that goal must be endorsed.<sup>84</sup> It follows that neo-classicism has been instrumental in elevating the status of proprietary rights as guarantors of individual freedom, and the security and integrity of commercial transactions.<sup>85</sup>

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Investigation Proper to It' *London and Westminster Review* October 1836. He wrote that political economy judged a human 'solely as a being who desires to possess wealth, and who is capable of judging the comparative efficacy of means for obtaining that end.'

<sup>83</sup> National growth is measured as gross national income or gross domestic product, which calculate national income by different income criteria. The author of the more commonly-cited measure, that of GDP, is the economist Simon Kuznets, who in the 1930s pioneered compilation of statistics to determine national economic output and income.

<sup>84</sup> See, eg, Gary Becker *The Economic Approach to Human Behavior* University of Chicago Press 1976.

<sup>85</sup> Discussed further in chapters 2 and 3, but chiefly because of the advocacy of the allied Austrian School economists, Friedrich Hayek, and Ludwig von Mises, and Chicago School proponents, including Milton Friedman.

46. Revolutions predicted by Marx and others did not occur in the 19<sup>th</sup> century.<sup>86</sup> But one great social revolution transpired and gradually transformed discourse on equality, slowly enlarging understanding of the meaning of equality. Abolition of slavery in the United States in 1865, in principle casting aside the idea of racial inferiority, hitherto a justification for slavery in both American continents, constituted a radical event in the development of a theory of equal rights. The United Kingdom abolished slavery in 1833, 32 years before abolition in the United States, and in 1808 abolished the slave trade in British possessions. Abolition of the slave trade meant that slaves could no longer lawfully be transported from West Africa to American markets.
47. As the history of the 20<sup>th</sup> century shows, the idea of racial merit as a principle of social action did not vanish in 1865.<sup>87</sup> Abolition did show that polities could embrace the idea of equal rights for all peoples, and that thetic public documents like the United States' *Declaration of Independence*, drafted by a slave owner, could inspire legislation to emancipate and make equal.<sup>88</sup>

### *Racial equality*

48. However the principle of equality is deduced, it implies the necessity of belief in human solidarity. For substantial parts of the 20<sup>th</sup> century some of the world's most powerful nations denied the possibility of universal solidarity. Racial theory, which in

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<sup>86</sup> Possibly because the impulse to revolution was latent in the proletariat and peasantry that middle class theorists predicted as the likely originators of revolution. Fyodor Dostoyevsky wrote in 1880 of the 'servile ecstasy' of a Russian *muzhak* or peasant on beholding his master (*The Brothers Karamazov* Penguin 2003 at 533).

<sup>87</sup> Many writers are guarded about enthusiasm for the effect of abolition, and legal equality, given 150 years of social inequality: see, eg, Evelyn Glenn Nakano *Race and Freedom: How Race and Gender Shaped American Citizenship and Gender* Harvard University Press 2002.

<sup>88</sup> Thomas Jefferson wrote and spoke against slavery until his death in 1826. At his death, he owned about 200 slaves, of whom he freed under his will only five. The remainder were sold.



Germany permeated the ideology of National Socialism, opposed human solidarity.<sup>89</sup>

Political preferment of white races in colonial possessions, or places of white settlement, suggested widespread belief in racial hierarchy.<sup>90</sup>

49. The second world war changed the perspective of governments in the victorious powers. Before the war's end, the main allied powers agreed to create an international organisation to secure peaceful international relations.<sup>91</sup> In the war's aftermath, horror at the Nazi program of racial extermination,<sup>92</sup> now revealed in full, inspired urgent consideration of how to make possible worldwide acceptance of a lasting conception of human unity. Soon, too, began the process of decolonisation, which involved repudiation by the colonial powers of policies of racial preferment.
50. Like their predecessors after the first world war, politicians hoped to create peace by establishing a community of nations.<sup>93</sup> Detailed planning for creation of the United Nations began in 1943, and its principles and structure were agreed by the major

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<sup>89</sup> See, eg, Paul Weindling *Health, Race and German Politics between National Unification and Nazism, 1870-1945* Cambridge University Press 1989.

<sup>90</sup> Colonial powers did not implement in their colonies policies of racial extermination and eugenics (Nazi Germany), racial exclusion (apartheid regime of South Africa post World War II), or racial segregation (former Confederate States post bellum). This is to say that countries of European settlement (the dominions South Africa, Canada and Australia) passed racially discriminatory laws, and other countries (eg Germany) passed laws entirely depriving some races of rights, whereas colonial powers practised policies of preferment, without usually passing laws concerning race. Racial preferment began with arrogation by whites of control of government, judiciary and economy and sometimes (especially by the British) implementation of policies favouring one race or another's predominant participation in a particular part of the economy. The official attitude to colonies, and their inhabitants, is to some extent expressed in Rudyard Kipling's poem *The White Man's Burden* (1899), which enjoins white races to rule, guide and assist 'new-caught sullen peoples'. Some critics, however, consider that the poem satirised arguments for empire.

<sup>91</sup> On 30 October 1943, the foreign ministers of the United States, United Kingdom and Soviet Union signed the *Joint Four-Nation Declaration* (Moscow Declaration). The document asserted the necessity to establish a 'general organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.'

<sup>92</sup> The Moscow Declaration 1943 contained a 'Statement on Atrocities' signed by Franklin D Roosevelt, Winston Churchill and Joseph Stalin, which referred to 'evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces ...'.

<sup>93</sup> The 1919 Paris Peace Conference authorised establishment of the League of Nations, the first international body created to encourage peace among nations. The League relied on moral suasion, majority resolutions and voluntary arbitration, to try to resolve international disputes.

powers in 1944.<sup>94</sup> Politicians accepted that nations, as well as people, are equal. They agreed also that to effectually influence behaviour, the principle of equality must be translated into legal rights, enforceable insofar as particular circumstances permitted, and complemented by enlightened policy.

### *United Nations*

51. In 1944, the Four Nations, described also as the 'United Nations',<sup>95</sup> established the framework for a United Nations notionally to consist of all the world's nations. This body came into existence in 1945, declaring a Charter, and organised to function as an international agent of human, social and economic development.<sup>96</sup>
52. The Charter assigned powers and responsibilities to the UN's 'principal organs', including the Economic and Social Council, asked to, 'make recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedoms for all.'<sup>97</sup> The council was to coordinate agencies with, '... international responsibilities ... in economic, social, cultural, educational, health and related fields

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<sup>94</sup> In August-October 1944, senior functionaries of the governments of the United States, United Kingdom, Soviet Union and China met at Dumbarton Oaks, Washington DC to discuss creation of an international body to maintain security, cooperation and peace. They issued a declaration (7 October 1944) which determined the name of the new organisation would be 'United Nations' and set out the new body's organisational structure, as well as its purposes and principles.

<sup>95</sup> The first official use of the term 'United Nations', coined by President Roosevelt to describe allied forces fighting against Tripartite Pact forces in World War II, occurred on 1 January 1942. The *Declaration of the United Nations*, published on that date, stated the commitment of 26 nations, led by the United States and United Kingdom, to waging total war against the Tripartite Pact forces until victory was achieved.

<sup>96</sup> On 26 June 1945, at the end of the United Nations Conference on International Organization, held in San Francisco, 50 nations signed the Charter of the United Nations. Following ratification of the Charter, the United Nations came into existence on 24 October 1945.

<sup>97</sup> Article 62.

...'.<sup>98</sup> After 1945, the council elaborated the UN's international poverty reduction and development programs.<sup>99</sup>

### *Universal declaration of human rights*

In 10 December, 1948, the General Assembly adopted the *Universal Declaration of Human Rights* (UDHR), which expressed in 30 articles rights to which all humans, by reason of native endowment, are entitled.<sup>100</sup>

53. The first sentence of the Preamble to the UDHR states that:

*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*<sup>101</sup>

Article 1 states that:

*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

The succeeding 29 Articles assert propositions intended, in the words of the preamble, to 'promote social progress and better standards of life in larger freedom.' The UDHR

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<sup>98</sup> *Id.*

<sup>99</sup> Today, development strategy is managed by the United Nations Development Group (est 1997). The economic and social committee co-directs the UN Development Group.

<sup>100</sup> Preliminary discussions led to formation of a *Commission of Human Rights*, chaired by Eleanor Roosevelt, which first met in 1947. Consisting of 18 members, the commission took agreed a final text of the UDHR in 1948. The commission also agreed two draft international covenants on *Civil and Political Rights* and *Economic Social and Cultural Rights*, both of which came into force in 1976.

<sup>101</sup> Cf the *Preamble to the United Nations Charter* (establishing the UN in 1945): 'We the peoples of the United Nations determined: to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom ...'

envisages a world exorcised of the familiar demons: hunger, want, avoidable sickness, ignorance, fear and oppression. It bound countries, for the first time in history, to make common cause to create equality within and between nations.<sup>102</sup>

*International law and development*

54. In 1948, the community of nations renounced, in principle, competition for territory and resources, theories of racial superiority, and the practice of racial preference. Some rich countries also acknowledged their obligation to materially assist poorer nations.<sup>103</sup> So began the era of development assistance.<sup>104</sup> The UN and its agencies oversaw assistance programs, involving transfer of capital, supplies and technical assistance, usually in return for trade preferment or other benefits.<sup>105</sup>
55. Acceptance in international treaty of the principle of universal human dignity, and consequently the equality of persons, is one of the great preternatural events in

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<sup>102</sup> Over time, the United Nations promulgated more than 20 treaties concerned with human rights, including the *Convention on the Elimination of All Forms of Racial Discrimination* (in force 1969), the *Convention on the Elimination of All Forms of Discrimination Against Women* (in force 1981), and the *Convention on the Rights of the Child* (in force 1990).

<sup>103</sup> The United Nations Monetary and Financial Conference held at New Hampshire in July 1944 settled rules to create an international monetary system (Bretton Woods Agreement, signed 22 July 1944). Delegates intended the new system to replace past protectionism and mercantilist practice with liberal trading practices and co-operative economic behaviour. The Bretton Woods Agreement created two international credit agencies, the International Monetary Fund (concerned with exchange rate stabilisation and establishing an effective international monetary credit system) and the International Bank for Reconstruction and Development. The function of the latter, soon renamed the World Bank, was to provide credit for postwar reconstruction. From the 1950s, its activities focused largely on less developed countries, and focused until the 1970s on infrastructure and related development loans.

<sup>104</sup> On 20 January 1949, President Harry S Truman stated in his inaugural address that the United States 'must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of undeveloped areas...' (*Department of State Bulletin* 30 January 1949 at 123). From 1950, the Technical Cooperation Administration administered the Point Four Program for technical assistance (referring to the fact that Truman's development initiative was the fourth foreign policy objective stated in his inauguration address). The TCA inaugurated the era of economic development aid to less developed countries. The TCA supplied assistance to improve agriculture and economic practices in countries which entered into bilateral agreements with the United States for the purpose of receiving assistance.

<sup>105</sup> See, eg, Erik Thorbecke, *The Evolution of the Development Doctrine 1950-2005* UNU-Wieder 2006 and United Nations Conference on Trade and Development Geneva 2006 *Economic Development in Africa, Doubling Aid: Making the 'Big Push' Work* UNCTAD/GDS/AFRICA/2006/1.

history. Agreement, after the second world war, of the UDHR, and effectuation of programs of reconstruction and international development constituted something like moral (and legal) apotheosis, giving effect to centuries of advocacy for human dignity. The UDHR, in large part, adopts the ideas of the many historical advocates of unitive rights. However, the hope of some of those advocates that enunciation of rights will cause humans to recognise their shared humaneness, and eschew war and conflict, is esoteric.<sup>106</sup>

56. As discussed in succeeding chapters, one chief reason why conflict and war are likely to continue to blight history is that human mentality and communication creates a possessive drive in social relations, one by-product of which is conflict, and another creation of property relations that simultaneously apportion and deny. That possessive drive appears to be innate<sup>107</sup> as well as social. But as well as seeking to possess and alienate, humans are also cooperative, inclined to sharing and willing to eschew control and exclusivity in favour of equality and inclusiveness. The more that social policy is directed towards encouraging inclusionary behaviour, which partly involves encouraging growth of a public domain liberated from control and ownership, the more productively that inclusionary and proprietary rights can be deployed co-extensively.

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<sup>106</sup> The United Nations 'was not created in order to bring us to heaven, but in order to save us from hell' - statement of Secretary General Dag Hammarskjöld's at the University of California Convocation on 13 May 1954 (Cordier and Foote (eds) 1972, *Public Papers of the Secretaries General of the United Nations* Vol. II at 301).

<sup>107</sup> See discussion chapter 3 Part 1.

## Summary

This chapter discussed the distinction between rights of inclusion, unitive rights, and rights of exclusion, proprietary rights, focusing on theories of human dignity and equality. The history of rights of inclusion culminates in the enunciation of human rights in the UDHR. Policy that encourages growth of the public domain permits constructive co-existence between two categories of rights that could be viewed as antithetical, inclusionary and exclusionary rights. The next chapter explains the history and formative role and function of proprietary rights, as well as their exclusionary effect.

## CHAPTER TWO

### PROPRIETARY RIGHTS

#### PURPOSE

Certain historical examples of political struggle and crisis crystallise the process of allocation of proprietary rights leading to social exclusion. The societies struggled for social consent, the necessary precursor to constitutional legitimacy. Occluded source of authority compromises constructive and peaceful social settlement, and enlarges scope for social exclusion. Historical discourse on property is political and ideological in character.

#### CHAPTER TWO HEADINGS

##### **Part 1 – Proprietary rights and exclusion – some historical examples**

*Property is distributive and exclusionary*

*Control and exclusion*

*Athens and Rome and social exclusion*

*The problem of constitutional settlements*

*Source of authority*

*Spanish empire*

##### **Part 2 – Property discourse**

*Social welfare*

*Property*

*Adam Smith*

*Natural law in favour of representative government*

*Natural law, liberalism and inequality*

## Part 1      Proprietary rights and exclusion – some historical examples

### *Property is distributive and exclusionary*

1. Property rights are distributive. They distribute the benefit of ownership, which is to say that they distribute control in a society. Control of what? Control of whatever may be appropriated. Appropriation is a political act, made possible by politics, and political (although by no means solely political) in its consequences.<sup>1</sup>
  
2. The whole of history is shaped (or in Marxian terms, determined) by struggle for control.<sup>2</sup> This fact is illustrated by the history of every society on earth. Society is impossible without appropriation, although the appropriations of nomads or semi-nomads are more attenuated than those of settled societies, and their societies usually are harmonising rather than appropriating.<sup>3</sup>
  
3. In the case of settled society, the problem of appropriation, allocation of control (which involves primal struggle for resources, and political struggle for command and preferment) is observable everywhere. The history of antiquity illustrates, in ways especially pertinent to the present, the control struggle, and the process of proprietary rights allocation. The social struggles of Athens and Rome signally influenced the later social struggles of some democratic countries, and the property systems adopted by those countries.

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<sup>1</sup> This account of rights is conventional. Schools agree that the act of appropriation or annexation precedes or accompanies the creation of property. They disagree variously on the necessity for, and scope, value and function of property rights.

<sup>2</sup> Karl Marx *Communist Manifesto* (1848) chapter 1: 'The history of all hitherto existing society is the history of class struggles.'

<sup>3</sup> No value judgment is intended: certain itinerant indigenous or tribal groups unable to depend for survival on fixed, predictable, production, conform to environment, rather than seeking to subdue it.



4. This dissertation is concerned with the instrumental role of property systems, and, in particular, the function of a property system, wherever it is found, as a control instrument. The particular characteristics of a particular property system are relevant to the discussion only to the extent that aspects of that system demonstrate the process of social exclusion (the copyright system is examined later in the dissertation to demonstrate that process).
  
5. A property system is, universally, a control system. Every control system manifests the same chief characteristics: a source of authority, which commands assent and obedience – in short, a sovereign that appropriates and allocates – an authorised method of appropriation, an authorised method for allocating the subject matter of appropriation, and grant of powers to what is called property (such as the power to exclude others from the property).<sup>4</sup> All settled societies acknowledge a sovereign authority that defines and allocates property. What is relevant to this dissertation is how control is objectified – by political process – in a property system that distributes political, social and economic benefit to some, and to varying degrees, excludes others from benefit. The fact that it concentrates little on the socially beneficial characteristics of property is not intended to imply by silence rejection of the various merits and benefits of exclusive rights.<sup>5</sup>

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<sup>4</sup> The idea of a determinative sovereign is much discussed by Plato, who proposed the ideal of a philosopher-king (*Republic* 380 BC). Aristotle discusses the legitimacy granted by *kurios*, the sovereign. For Aristotle, law is sovereign although sovereignty is constituted by nature, and the human agents who give effect to the natural law (*Politics* 350 BC). For the church fathers, God is sovereign. In the English-speaking world, Thomas Hobbes (d 1679), writing in a period when regicide provided a frightening example of dissolution of sovereignty, asserted the necessity for the sovereign, all powerful but responsible, to exercise power, and protect society against possibility of relapse to the state of nature (*Leviathan* 1651). Hobbes's sovereign absolutism is reflected in the English legal tradition, from William Blackstone (d 1780), in his *Commentaries on the Laws of England*, to the positivism of John Austin (d 1859) and beyond.

<sup>5</sup> Property permits economic exchange. It also allows seclusion, another word for which is privacy (from *privus* 'one's own', *privare* 'to separate, deprive', *privatus* 'apart, belonging to oneself'). 'Privacy' also has a separate

*Control and exclusion*

6. History shows that people and groups tend to assert rights that more usually exclude than include.<sup>6</sup> Exclusion concentrates power and inclusion diffuses power. Thus group A and B contest the power to exclude – that is, they seek the greater allocation of proprietary rights - even as, within group A, groups A<sub>1</sub> and A<sub>2</sub> contend, and within B, B<sub>1</sub> and B<sub>2</sub> struggle to exclude. Yet provided that all groups acknowledge corporate identity, a constitutional purpose, a reason to cohere, the whole constitutes society.
7. According to Marx, the story of humanity is one of class struggle, each stage terminated after subjugation of one class by another.<sup>7</sup> Though Marx's theory determined a particular end and resolution of corporate human struggle, history proceeds in its own way, revealing powerful human impulse to cooperation. To some extent, acceptance of unitive rights counteracts and overcomes control neurosis, and its corollary, social exclusion. The histories of Athens and Rome witness to the heroic efforts of individuals to create machinery of social fairness, but repeatedly in these histories, the inimical power of faction and class is successfully asserted to the detriment of society. In the politics of these powers, the overt instrument of power is force. But force is exerted to extend and protect that which is appropriated - property.

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or specific legal meaning in relation to the use and dissemination of information. As will be discussed in the next chapter, humans appear to manifest an innate wish to own things: analysis of possessive grammar indicates that humans mentally organise their environment by notional appropriation, and thus also seek to appropriate their environment materially.

<sup>6</sup> Freud *supra*: 'The existence of this tendency to aggression which we can detect in ourselves and rightly presume to be present in others is the factor that disturbs our relations with our neighbours and makes it necessary for culture to institute its high demands. Civilized society is perpetually menaced with disintegration through this primary hostility of men towards one another. Their interests in their common work would not hold them together; the passions of instinct are stronger than reasoned interests.'

<sup>7</sup> Karl Marx *Communist Manifesto* (1848).

*Athens and Rome and social exclusion*

The pattern of politics and social growth in Athens and Rome is, in important aspects, approximately similar. Both began as societies constituted by tribes and ruled by kings.<sup>8</sup> Deposition of kings and reformation of tribal structures resulted in aristocratic governance, and aristocrats dominated politics until dissolution of Athenian democracy and the Roman republic (and continued to dominate imperial politics thereafter).<sup>9</sup>

8. The political histories of democratic Athens and republican Rome are consumed by struggle of 'people' against aristocracy, the former insisting on equal rights of representation in politics and law, freedom from economic oppression and redistribution of the often vast agricultural properties of the wealthy, a substantial portion of which the rich acquired by politically-sanctioned appropriation of public lands. In these periods of political struggle, lasting about 350 years in the case of Athens, and over 500 years in the case of Rome, the 'people' and aristocracy reached two remarkable political accommodations.

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<sup>8</sup> The *Athenian Constitution* a work attributed to Aristotle but now thought to have been written by a contemporary or contemporaries, refers to Athens' 'ancient constitution' which, before the time of Draco (d c 600 BC) provided for the city's magistrates, king, polemarch and archon governing for life. By Draco's time, the council of the areopagus, both an advisory and ruling council had deprived kings of their powers, and vested the power of state in nine archons elected by the areopagus, thereby establishing oligarchy. Magistrates now governed for 10 years. Only nobles could serve as magistrates or enter the council. The population of Athens and Attic districts consisted of four tribes or *phylai*. In the same period, Rome was an Etruscan kingdom, later to become a republic. The Senate of 300 noblemen representing the three Roman tribes (Latins, Sabines, Etruscans) selected kings. The Senate (from *senex* or 'old man') acted as the king's advisory council.

<sup>9</sup> Respectively c322 BC ended by the Macedonian general Antipater after Alexander's death in 323 BC, and 27 BC, when Caesar Augustus established the *principate*, assuming in substance supreme imperial Roman power.

9. The first, in Athens, resulted in substantial male enfranchisement and consultative government (at different periods during the 5<sup>th</sup> century BC).<sup>10</sup> The second, in Rome, during the 4<sup>th</sup> century BC, produced a republic that, legally at least, established rough parity between the political powers of aristocrats and people.<sup>11</sup> Both systems of government were variously extolled by 18<sup>th</sup> century republicans of the United States and France, and in part adopted as prototypes by constitutional drafters of both these countries.
10. However, for all their politico-legal achievements, political disputants in Athens and Rome could not solve the problem of representation, which is also a social problem of inclusion and exclusion, and they could not solve the economic problem of distribution of social benefit. Although republican Rome achieved theoretical political

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<sup>10</sup> In 594 BC, the areopagus appointed the nobleman and poet Solon archon with supreme powers, charging him to resolve the Attic social crisis. The landed nobility, controlling credit, had reduced impoverished small farmers to the status of sharecroppers and pledge debtors, in danger of slavery if they defaulted. Consequent dispossession indicated peasant destitution or possible revolution. Solon cancelled debts and pledges, to the chagrin of the nobility, and refused to redistribute land, to the chagrin of the peasantry. He instituted a constitution, repealing the draconian laws, and providing for, in addition to the areopagus, an enlarged citizens' assembly (*ekklesia*) and a citizens' court (*heliaia*). The *ekklesia* could elect and censure representatives but the aristocracy continued to control government. Solon divided citizens into four property classes with different entitlements to office. The lowest class, of *thetes*, of labouring poor or indigent, could not vote, while only the foremost class of wealthy could be voted archons. A recent theory proposes that Solon was not enlightened reformer, as traditionally depicted, but crypto-tyrant imposing an aristocratic settlement: Kelcy Shannon Saggstetter 'Solon of Athens: The Man, the Myth, the Tyrant?' (2013) *Publicly Accessible Penn Dissertation Paper 923*.

<sup>11</sup> The founding of the kingdom of Rome is usually dated to the 8<sup>th</sup> century BC, towards the end of the European bronze age. Rome was patrician. Great patrician families dominated its three tribes and patricians controlled the city's governing institutions: assembly, senate (exclusively patrician) and kingship. In time, Rome's non-citizen immigrants, the plebeians, demanded political rights, and the patricians consented to their becoming citizens and participating in the assembly. King Servius Tullius (d 535 BC) reformed the tribes, creating four urban and 16 country tribes, membership of which depended on domicile not clan association. He also created a new assembly, the assembly-of-the-centuries, which gradually became a more important voting body than the original assembly. Lucius Tarquinius Superbus, the son-in-law of Servius, usurped and murdered him, winning the senate's equivocal support by alleging that Servius's policies favoured plebeians and poor. Tarquinius ruled as a tyrant and in 509 BC, the assembly voted to banish him. The assembly-of-the-centuries then created the offices of joint consuls to perform executive duties of the state, in consultation with the senate. Then began the continuing political struggle in republican Rome over allocation of powers and rights, a struggle that took place first between patrician and plebeians, and later, the propertied equestrian class (identifying with the Senate), and those less propertied, or more likely propertyless, referred to as 'the people'. Primary source: Titus Livius Patavani (*Livy* d 59 AD) *Ab Urbe Condita Libri* ('Books Since Foundation' or in English, *History of Rome*) using the Roman *anno urbis* dating system, ref books 1 and 2.

equality between senate and people,<sup>12</sup> the great aristocratic families, ruled politics by wealth, manipulation, prestige, convention and exploiting the weaknesses of the people's committees or councils.<sup>13</sup>

11. Since aristocrats in large part determined policy and laws, it follows that they rarely accommodated redistribution proposals, and they opposed with violence the four main attempts in Roman history to effect material alteration in property arrangements.<sup>14</sup> Since opponents of aristocratic power in Athens and Rome could neither usurp nor attenuate that vested power, democracy and republicanism proved ineffective to resolve social problems. Wealth concentrated, and exclusions multiplied. The greatest exclusion was that of people from ownership of property.<sup>15</sup>

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<sup>12</sup> The 12 Tables, published 450 BC, codified, and thus made transparent, Roman law, previously monopolised by the Senate. The Valerio-Horatian laws (448 BC) permitted legal appeal to the people, and created a plebeian assembly (later called the assembly of the tribes) with power to make laws binding all. The Canuleian law (445 BC) permitted intermarriage of plebeian and patrician. The Licinian laws (367 BC) provided that consuls must be elected and one must be plebeian. The offices of dictatorship, censorship and praetorship became open to plebeians in 356, 351 and 337 BC, ending the patricians' exclusive rights to public office. (Livy, *supra* books 3-7).

<sup>13</sup> Voting in committees or councils were counted per head, and representatives by eligible voters present. The Roman system did not permit absent voting for a representative. The system of voting resolutions and representatives was in practice, un-representative, since most eligible voters were not present to vote. The Senate was a relatively small legislative and policy forum of 300 senators, and far more able to agree policy and resolutions in the common interests of senators.

<sup>14</sup> The Senate's judicial condemnation resulted in the beheading for treason of the consul Spurius Cassius who proposed the first agrarian law to redistribute public land (486 BC). Decades later, a patrician, L Minucius Augurinus, accused the wealthy plebeian Spurius Maelius of treason after he bought a large wheat supply to provide food relief during famine, and shortly after, the Master of Horse, G Servilius Ahala, murdered Maelius (439 BC). Marcus Manlius Capitolinus, a patrician hero of the Gallic siege of Rome (c 390 BC), and consul in 392 BC, sold part of his estate to relieve plebeian debtors in threat of bondage. The Senate condemned him for seeking to make himself king, causing him to be hurled from the Tarpeian Rock in 384 BC. In 132 and 123 BC, the Gracchi brothers, Tiberius and Gaius, plebeian nobles and tribunes of the people sought, among other things, to revive the Licinian laws and effect redistribution of public land appropriated by aristocrats. Senate mobs murdered Tiberius and hunted Gaius to suicide. (Source: Livy *supra*).

<sup>15</sup> An exclusion of centuries, which caused social discord and ultimately resulted in a century of war between *optimates* and *populares* that led to the fall of the republic. Although social conflict beset Rome from the founding of the republic, the final struggle began when the Senate opposed the social reforms proposed by the Gracchi brothers. Tiberius Gracchus, elected tribune in 133 BC, sought to revive the 235-year-old Licinian law prohibiting ownership of more than 121 hectares of public land. He intended both to redistribute public land appropriated by large landowners, and obtain from sale monies funds for poor relief. The Assembly of Tribes approved his legislation in opposition to the Senate but the Senate declared illegal the Assembly's expulsion, at Tiberius's behest, of the tribune Marcus Octavius, an agent of the senate who undermined before the

12. Many poor rural landowners, throughout the periods described, could not afford to maintain their smallholdings, and were ejected by creditors, who were usually rich landholders consolidating adjacent smallholdings. Overshadowing this history of exclusion of citizens by citizens, is unshakeable refusal, by Athenian and Roman polities, to permit public office and voting rights, to other than propertied males.
13. For Rome especially, exclusionary policy proved socially disastrous. Slaves worked the estates of wealthy landholders, and since slaves were chattels and plentiful like chattels, they could be deployed anywhere their masters owned property. Rome's rural citizens could not find work, and as Rome conquered Italy, unemployment plagued the Italian provinces. Many of the landless poor migrated to Rome, joining landless plebeians in urban indigence, and subsistence on public corn supply.
14. Italians were neither citizens nor slaves but they could not find work as rich Romans gobbled up the countryside and compelled servile labour to make their estates productive. Thus political failure engendered social failure.<sup>16</sup> In both Athens and

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assembly Tiberius's reform program. Senators declared Tiberius guilty of the ancient offence of seeking to make himself a king, and a gang of senators and their accomplices murdered him, and 300 of his followers, near the Forum (133 BC). His younger brother Gaius, tribune in 123 and 122 BC, proposed, among other things, public provision of corn, continuation of his brother's agrarian reform program, and enfranchisement of Italians, the last policy opposed by Gaius's poor supporters who resented extension of citizenship. The Senate would not countenance revival of land reform, and the prospect of Gaius and his collaborators systematically reducing the economic and political power of large landholders. The Senate opposed Gaius's legislation, and empowered the consul Lucius Opimius to declare Gaius an enemy of state, which he promptly did. Opimius led his supporters against Gaius and Marcus Fulvius Flaccus, a former consul, and tribune and colleague of Gaius. The mob killed Flaccus and 3000 of Gaius's followers. On the day of Flaccus's murder, Gaius committed suicide (121 BC). Thereafter, the reform program of the Gracchi disintegrated, and the optimates asserted political supremacy, prior to outbreak of civil war in 88 BC. Primary source: Plutarch (d 120 AD) *Makers of Rome* Penguin 2004; tran from Plutarch's *Parallel Lives*.

<sup>16</sup> By the late republic, the slave population of Roman Italy, mostly concentrated in urban areas may have totalled between 15% and 25% of the total population (Walter Scheidel 'The Roman Slave Supply' *Princeton/Stanford Working Papers in Classics* May 2007). If the higher estimate is adopted, it is obvious to surmise that if a quarter of the working population is servile (a reasonable guess since probably far more of the

Rome aristocracy and plutocracy, the one usually, though not always, connoting the other, helped to ensure the failure of democracy and republicanism.<sup>17</sup>

15. Attica became a province of Rome and then Byzantium.<sup>18</sup> Republican Rome became imperial Rome, and when eventually, in the 5<sup>th</sup> century, the western empire lapsed into political nullity, the ancient Roman estates, worked by slaves obedient to an absolute ruler, suggested a pattern of control and production later adopted by the lords of feudalism.

*The problem of constitutional settlement*

16. The failure of democracy and republicanism in antiquity is complex in cause, and the foregoing account necessarily simplifies aspects of that failure. For present purposes, the key point is to illustrate the instrumental role of proprietary rights in producing exclusion and inequality. Aristocracy fatally dominated democratic and republican government, and its object was its own continuance as supreme arbiter of politics and society. While social supremacy has many parts, wealth is integral to its nurturance, and only by control of wealth, which, all the more in the ancient period, subsisted

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slave population would be of working age), that population excludes a large proportion of free individuals from participating in a relatively static economy. Rome's population swelled with landless poor, many dispossessed as well as excluded from work, and supplied with subsidised corn (one consequence of the reforms of Gaius Gracchi). They became the unfortunate fodder of the culture of 'bread and circuses'. Bread and circuses, a symptom of the malaise of social division, pacified the poor and symbolised culmination of Rome's centuries-long descent into social destruction.

<sup>17</sup> The history of the supremacy of the aristocratic senate is accompanied by a concomitant development of a secondary class comprised of wealthy plebeians, often commercial magnates. This equestrian order, which emerged about a century after the republic's foundation, became a group distinct from plebeians or commoners. The equites were so called because they had the financial means to equip themselves as army cavalry. They could not claim patrician lineage, and they could enter the senate only by holding public office, but, by and large, not always, equestrians and senators united politically.

<sup>18</sup> A Roman, later Byzantine, province from 146 BC until incorporated in the Ottoman empire in 1458.

mostly in possession and cultivation of land, could aristocracy insist on social pre-eminence.<sup>19</sup>

17. The doomed struggles of Athenians and Romans against aristocratic power show that unless the opposed sides in social struggle can find a constitutional means to escape class or factional identification, and embrace principles of mutuality or reciprocity – creating common ground, identified by a constitution, or an idea of common good – they must struggle against one another without resolution.<sup>20</sup>
18. Constitutions need not be written, although an unwritten compact is more open to subversion, since what is ethereal cannot contradict rival propagandists who try to pre-empt one another by asserting society's values and principles. Constitutions are whatever is agreed by members of a society, implicitly or otherwise, to constitute the principles that govern, or constitute, that society.
19. It is striking that possibly the most successful of all constitutions, that of the United States, read together with the *Declaration of Independence* (1776), declares the unity

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<sup>19</sup> The necessity for wealth is epitomised by the rise of the first triumvirate the alliance of Julius Caesar, Marcus Crassus and Gnaeus Pompeius (60-53 BC). Each of senatorial family, Caesar a patrician, and Crassus and Pompey equestrians, they manipulated Roman politics, and usurped the senate, to receive the gubernatorial gifts of the provinces of Gaul and Illyrium (Caesar), Hispania (Pompey) and Syria (Crassus). Crassus was the richest man in Roman history and Pompey wealthy from his conquests. Both were former consuls. Crassus subsidised Caesar's campaigns for political office, including for high priest (63 BC) and consul 59 BC. Thereafter, Caesar enriched himself from plunder from the conquest of Gaul. Between them the trio helped to precipitate civil war, but intriguing for political control depended on money, and to usurp the state required a vast amount of money. Crassus, having bought himself a province, died in an ambush in the deserts of Parthia, trying to prove himself, aged 62, a conqueror. After his death, the mortal character of the Caesar-Pompey rivalry became obvious. Source: Plutarch Lives *supra*.

<sup>20</sup> This is not a statement of the modern theory of constitutionalism, derived from the thought of Locke and the American founders, which proposes that enlightened government depends on self-limitation, presumably imposed constitutionally. It is constitutionalist to the extent that it affirms that the solution to political conflict can only be (short of one side achieving supremacy by presumably violent means) a constitutional one, that is, by agreed expression of common values and purpose that is persuasive to all.



and equality of humans, implicitly rejecting social exclusion. The Constitution's preamble states:

*We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity ...*<sup>21</sup>

The Declaration of Independence states:

*We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are Life, Liberty, and the pursuit of Happiness; that, to secure these rights, governments are instituted among Men, deriving their just powers from the consent of the governed ...*<sup>22</sup>

20. Greeks and Romans tried to draft constitutions, and made important statements of law that could be interpreted as constitutional, but they could not reject caste-identification and nor could they accept human equality.<sup>23</sup> They could neither adopt principles of inclusion nor eschew principles of exclusion. While they could fight and conquer as nations, they could not live together peaceably as nations. Although

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<sup>21</sup> 17 September 1787.

<sup>22</sup> 4 July 1776, second paragraph.

<sup>23</sup> The Athenian areopagus and Roman senate tried respectively, in their pre-Solon, and early republican years, to monopolise justice by avoiding publication of laws, and thus preventing public knowledge of the laws. Solon ended this practice in Athens by publicly displaying his laws, as did the senate, agreeing, under pressure, to publication in 450 BC of the *12 Tables* drafted by the *decemviri*. A systematic codification of Roman law did not appear until the emperor Justinian's *Corpus Iuris Civilis* 529-534. Neither state produced a discrete constitution declaring unitive social principles.

marvels of civic achievement, their societies were odious for preference accorded caste, sex and rank, the practice of slavery, and of cruelty to people and animals.

21. The aristocrats of the senate murdered those who sought redistribution or poor relief. The Senate procured, on grounds of treason, the beheading of Cassius (486 BC), the stabbing death of Meilius (439 BC), the hurling of Manlius to his death (384 BC), and the lynching of the Gracchi (133 and 121 BC).<sup>24</sup> To its end, Rome upheld the eminence of the Senate. Roman society never enunciated a principle of universal human equality, and centuries of treating as chattels, reinforced acceptance of social hierarchy.

*Source of authority*

22. Political inequality makes certain social exclusion and inequality. The extent to which a society can constitutionally agree equitable political and social arrangements appears to predict its future social health. As the Athenian and Roman examples, among many others, show, consensus about political and social arrangements is stymied at the outset of political struggle by failure to agree a source of authority.<sup>25</sup>

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<sup>24</sup> Livy *supra*.

<sup>25</sup> A proposed source of authority is nugatory unless authentically yielded to, licensed, or sanctioned by the collective (though disaggregated) process of affirmation that is likely to be expressed in multifarious ways but if brought to issue reveals unflagging consensus. The patriotism of the Athenians and Romans, which recognised affiliation to place and forms of society, encouraged men to enlist for war in times of danger, and usually to respect law and maintain social peace. But neither society could find or express common sympathy because for grossly unequal economic and social relations to continue to pertain over centuries, the dominant aristocrats could not feasibly care much for the degraded condition of the propertyless, while the mass of the poor and politically impotent could only see enmity and presumption in the attitude of the rich. In these circumstances, no authentic source of authority is discernible.

23. Who is the source of the power to allocate rights? By seeming happenstance,<sup>26</sup> the usurping Norman crown inhere, and continues to inhere, in the minds of the English population as indubitable and unshakeable source of right and authority in that country, and the populations of its affiliates in the United Kingdom, and those of many of its former possessions, including Australia. The United States' polity, uniquely in the history of the world prior to promulgation of its constitution, conjured from the American people an enduring source of authority.<sup>27</sup>
24. Legitimacy comes from unanimity and perception of right. If the crown constitutes itself justly, or the American people constitute themselves justly, which means by accepting the right of equality and derivative rights, and creating institutions to succour rights, and enforce fairness, they also constitute societies concerned about fairness and justice. But if a source of authority is not agreed, or is disputed, or rejected, society falls into conflict, desuetude or anomie.<sup>28</sup>
25. Property systems are the creation of a constitutional settlement or social compact, which supplies a source of authority, more or less imperfect, for political action.<sup>29</sup> The stronger the assent to a constitutional source of authority, the greater the stability of

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<sup>26</sup> I have not read an historical or legal account that satisfactorily explains why in England, conquest, dispossession and brutality did not turn the Saxon population against the Norman overlords. While native population may have bitterly resented the invaders, in England, unlike other places, the invader crown came to be seen (over two or more centuries) as protector of the people against their feudal (and Norman/French) overlords.

<sup>27</sup> It is also unclear why the identification of 'we the people' as source of authority has **endured as a statement** of sovereign right. Perhaps because the formulation exactly expressed a true and near-universal belief that in turn expresses the heart's willingness to affirm solidarity and human affiliation.

<sup>28</sup> On anomie see Émile Durkheim *Division of Labour in Society* 1893(trans George Simpson) The Free Press 1949 at 338, discussed chapter 3, part 2.

<sup>29</sup> Karl Marx wrote in the *Communist Manifesto* (1848) Ch 2: 'The selfish misconception that induces you to transform into eternal laws of nature and of reason, the social forms springing from your present mode of production and form of property – historical relations that rise and disappear in the progress of production – this misconception you share with every ruling class that has preceded you. What you see clearly in the case of ancient property, what you admit in the case of feudal property, you are of course forbidden to admit in the case of your own bourgeois form of property.'

political and social arrangements (although popular assent does not mean that the authority assented to is good authority).<sup>30</sup> If consensus is missing, political flux and social derangement are likely to pertain.<sup>31</sup>

26. If people cannot agree who should make laws, and why laws should be accepted, or what confers political, legislative, and judicial legitimacy, social breakdown has begun. Some countries, most obviously the United States, have, by embracing a principle of equality, and elaborating unitive rights, apparently escaped the vice of political oppression. A unitive and morally suasive constitution, like that of the United States, engenders social welfare and stability. Even such a constitution, however, is not proof against distributive usurpation by faction – in the United States, the so-called 1% - intent on securing disproportionate control of resource and property allocation.<sup>32</sup>
27. In the absence of unitive purpose and values, societies usually cannot agree the primary question – what is the source of right and lawfulness? Failure to reach social unanimity on the answer to this question is socially crippling, resulting in the politics

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<sup>30</sup> In this chapter, the idea of consent comprehends more than conscious adherence to the social compact that may be designated in a constitution. It refers also to unconscious acceptance manifested in action, such as the continuing allegiance of English subjects to the feudal crown. The opposite of unconscious acceptance is the anomie caused by alienation from social compact, caused by unconscious self-distancing from usurping constitutional authority. An example of such alienation is that of indigenous peoples from intrusion of two supervening sources of constitutional authority, the Spanish crown in South America, and the British in Canada and Australia.

<sup>31</sup> The concept of social change, as objective or non-objective process, is debated and interpreted by various contemporary schools: sociocultural evolution, sociobiology, neoevolutionism, evolutionary anthropology, and cultural neuroscience. Postmodernism argues that objective inferences about social development must be considered conditional: the proper subject of study is the person making the inference, as well as the conditions in which a person makes inferences.

<sup>32</sup> As discussed in chapter 4, the reconstruction of European economies funded after 1945 by United States loans also effected social reconstruction, distributing the benefits of capital investment (in industry and building most noticeably) and social spending (in health and welfare) relatively evenly through the economy. Thus income and wealth distribution statistics for certain European countries and the United States during the period 1950-1980 reveal far lower income and wealth concentration than before the 2<sup>nd</sup> world war or after 1980.

of faction, appropriation and exclusion. Example of this failure, historical and current, abound.

### *Spanish empire*

28. Spanish settlement in the Americas and Philippines from Columbus's founding of Hispaniola (1492) was plagued by the problems of absence of consent and unitive purpose that destroyed the Roman republic.<sup>33</sup> In theory, the Spanish crown supplied a source of distributive authority. Since the pattern of distribution emerged from a history of the dispossession and exclusion of millions of indigenous peoples, establishment of local aristocracies, political entitlement determined by defined caste, and social relations shaped by caste preferment, it is unsurprising that the inhabitants of Spanish possessions, and successor countries, failed to manifest corporate unity or avow shared purpose.<sup>34</sup>
29. The corporate unity of the Spanish possessions, and the nations they became, continues to be undermined – as does that of some originally British possessions like Australia – by the absence of consent of populations dispossessed, and successor populations, to dispossession. If dispossession is extinguishment, the protest of the

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<sup>33</sup> For an overview, see JH Elliott *Imperial Spain 1469-1716* St Martin's Press 1964.

<sup>34</sup> Elliott *id* provides perhaps the authoritative general account of the early history of the Spanish Americas. Hugh Thomas (*World Without End: the Global Empire of Philip II* Penguin 2014 3 volumes) is possibly a more broad-ranging writer and equally influential as Elliot on Spanish history. A factor often overlooked but critical to understanding the social history of Latin America, and the pattern of exclusion, is that far from the caricature of English-speaking writers, the Spanish imperial authorities, and the Catholic Church, made concerted efforts to protect the indigenous or Indians of the Americas from the social exclusion, murders of convenience, and exploitation, that became their lot under local Spanish settlers, politicians, hidalgos and later caudillos. But Spain's own history of reconquering Spain from the Moors over nearly 800 years, the *reconquista*, deeply coloured the Spanish attitude to society, creating psychological attachment to the idea that Spanishness, and Spanish blood, must be preserved. The corollary of this attitude was broad acceptance of racially-based social division of society which reinforced the exclusion of the underprivileged, most particularly the Indians – despite official and church attempts to stress spiritual equality and secure laws of protection and their enforcement.

population extinguished may vanish even from memory. If a dispossessed indigenous population survives, the memory of dispossession haunts civic consciousness, reminding society of its consent to murder, chicanery and usurpation. The Spanish empire and the countries that emerged from it were thus socially reduced by knowledge of continuing dispossession and exclusion, and its moral consequences.<sup>35</sup>

30. The Spanish crown and church, far more than local governments, and the societies they governed, insisted on legal accountability, and asserted individual spiritual equality.<sup>36</sup> Spain, however, locating authority in the person of the monarch, failed to conceive the legal device necessary to create universal perception of licit authority, and command universal assent to an idea of common good: constitutional assertion of the principle of human equality, and laws to enforce that principle.<sup>37</sup>
31. The Spanish conquest of the 16<sup>th</sup> century presaged creation of caste society dominated by the great and lesser landholders of exclusively Spanish blood: the *peninsulares*, the Spanish-born, and the *creolos*, those born in the Spanish Americas of

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<sup>35</sup> See for instance David M Traboulay *Columbus and Las Casas: The Conquest and Christianization of America 1492-1566* University Press of America 1994.

<sup>36</sup> Most notably, after the Conquest, by promulgation of King Charles I's *New Laws of the Indies for the Good Treatment and Preservation of the Indians* (1642), inspired by the Dominican Bartolomé de las Casas, 'Protector of the Indians'. The reception accorded the New Laws, which provided for gradual abolition of the great estates, the *encomiendas* (on death of their owners) and forbade enslavement, illustrated the humanity of crown policy, relative to the inhumanity of settlor policy. It also showed that the crown could not easily enforce its authority in the Americas against the prolific populations of local recalcitrant. The new laws could not be enforced in the two great vice-royalties of New Spain (Mexico) and Peru. In Peru, the conquistador Gonzalo Pizarro, led rebellion against vice-regal authority centred on enforcement of the laws. He was executed in 1547. The New Laws were amended and formed part of the consolidated the *Laws of the Indies* published in 1681.

<sup>37</sup> See the discussion of Paolo Carozza ('From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights' *Human Rights Quarterly* 25 (2003) 281–313) on the Latin American contribution to the development of human rights doctrine. Carozza focuses on the writings of Bartolomé de las Casas, who wrote: *All the races of the world are men, and of all men and of each individual there is but one definition, and this is that they are rational. All have understanding and will and free choice, as all are made in the image and likeness of God . . . Thus the entire human race is one.* (Apologetic History, 3 *Obras Escogidas* 165–66, excerpted in George Sanderlin (ed) *Writings of Bartolomé de las Casas* New York 1971, 174–75.

pure-blood Spanish parents. The *mestizos*, of mixed Indian-Spanish blood ranked below, though above the indigenous, and later the *mulattos*, mixed blood descendants of African slaves.

32. The *casta* system appears to have evolved more by influence of social process than legal, and it facilitated transition to social arrangements that acknowledged the political supremacy of imperial Spain, while affording settlers and adventurers the many benefits of rank and privilege.<sup>38</sup> Those cast out by hierarchy, the Indians dispossessed by the conquest, made little protest. Designation of caste is a useful device for procuring eternal compliance of the governed, since by proposing that social possibility is determined by race, skin pigmentation, or other irreducible criterion, it demoralises those for whom conditions of social oppression, connected to race or other criterion, are declared inescapable.<sup>39</sup>

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<sup>38</sup> The great act of social alienation began after first Spanish settlement in Hispaniola after 1492. The crown granted rights of land alienation, which permitted creation of settler estates, the *encomiendas*. These dispossessed Indian populations, and resulted in compulsory and slave labour. After the conquest, the conquistadores and privileged settlers received enormous grants. The crown reluctantly endorsed, then tried to regulate, this new aristocracy of *encomiendas*. Given their assertiveness in all matters of policy, it seems unlikely that the settlers did not instigate the racial classification system, as well as the social hierarchies, of the Spanish Americas.

<sup>39</sup> Development of the *casta* system is connected to the *Reconquista*, the war conducted by the Iberian kingdoms, led ultimately by Castile, to eject the Moors from the peninsula which they invaded in 711, and finally departed in 1492. The *reconquista*, lasting nearly 800 years, and terminated in the year that Columbus discovered the Americas, left a lasting imprint on Spanish consciousness. By the 12<sup>th</sup> century, the word *España* (translated in English as Spain) had come to be recognised as the name given to the five united kingdoms fighting the reconquista. After 1492, the united peoples of the peninsula, who came to recognise themselves as inhabitants of Spain, the Spanish, conflated psychologically, religious and race identities. They viewed the Berber-Arabic Moors as more than usurpers and oppressors: they were also foreigners and Muslims, and, in this instance, foreign race and religion indicated anathema. By contrast, the reconquista Spanish considered Spanishness indistinguishable from Catholicism, and the centuries of struggle evidence of burning necessity to protect alike the blood and religion of Spain. The Spanish did not propound a race ideology but rather a doctrine of identity, which was also partly a doctrine of race affiliation. Baptism affiliated a person to a Spaniard but it did not make that person Spanish. A baptised person was spiritually equal to a Spaniard but still not a Spaniard, and to be a Spaniard, one must be of Spanish blood. Thus, fear of Spanish extinguishment, which inspired the *reconquista*, also partly fuelled in the Americas the social elaboration of blood distinctions that separated one racial mixture from another.

33. The wars of Latin American independence that followed Napoleon's deposition in 1808 of the Spanish king Ferdinand VII, and resulted in creation, by 1826, of independent republics in Spanish central and south America, enlarged the problem of authority and consent. These new republics drafted constitutions modelled on those of the United States and, to a lesser extent, revolutionary France, but constitutional documents did not invite popular assent or offer real prospects of a popular vote, protected from coercion. In short, the revolutionaries made revolution for themselves and their class.<sup>40</sup>
34. Nineteenth century republicanism effected one significant social change: the merger of the Spanish-blood castes into one, as the population of Spanish-born died out.<sup>41</sup> Domination of society by aristocracy, replicating Roman practice, continued, although, as in Roman history, members of the ambitious pressing class of less-propertied individuals, some of Spanish blood only, some mixed blood, even indigenous, could secure offices of power, sometimes supreme power.<sup>42</sup>

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<sup>40</sup> Simon Bolivar, one of the 'fathers' of the new Latin American republics, designated the 'Liberator', drafted Bolivia's first constitution, promulgated 1826. A drafting committee modelled its first draft on the United States constitution. Bolivar's constitution purported to establish a system seemingly modelled on British and Roman constitutional systems. Government consisted of the executive presidency, an advisory body of life-appointees, and a legislative body of senate and chamber of tribunes. The constitution, however, vested executive power in the president, setting a precedent for government in most Latin American republics for exercise by one person, a president or caudillo, of executive, and usually unanswerable power.

<sup>41</sup> Karl Marx argued that Simon Bolivar, and presumably most of his confederates, sought in the wars of independence against Spain, gain for themselves and their own criollo class. In an 1858 article, Marx is scathing about Bolivar, depicting him, as a coward, blackguard, opportunist and egotist, the beneficiary of favourable circumstances and the military excellence of others. Bolivar's design was to unite 'the whole of South America into one federative republic, with himself as its dictator.' See, 'Bolivar y Ponte' entry in *The New American Cyclopaedia* Vol. III 1858.

<sup>42</sup> Andres de Santa Cruz (d 1865) was a *mestizo*, his father a creolo and his mother a high-born indian, or *indio*, and president of Peru (1827) and Bolivia (1829-39); Ramon Castilla (d 1867) president of Peru (1844; 1845-51; 1855-62) was *mestizo*; Rafael Carrera (d 1865) president-for-life of Guatemala (first 1844-48 and then 1851-65) was a *mestizo*; Benito Juarez (d 1872), president of Mexico (1859-64 and 1867-72; president-in-exile 1864-67) was an *indio*; Porfirio Diaz (d 1915), president of Mexico (1876-80; 1884-1911), was a *mestizo*.



35. The important fact is that independence did not greatly alter the old distributive pattern, and consolidated the existing powers of aristocrats and would-be aristocrats. In the 19<sup>th</sup> century, land reform affected only church lands in Mexico. The pattern of ownership and consolidation did not significantly alter. The new constitutions, repetitively amended and replaced, became documents of justification, as contestants for supreme political power, often *caudillos*, men of violence exploiting the nugatoriness of declared authority, insisted on the constitutionality of actions intended to secure power.
36. Social exclusion, mirrored in the 16<sup>th</sup> century by establishment of huge estates awarded to the *conquistadores*, their successors and other adventurers and proto-aristocrats, the *encomiendas*, did not abate. As in Rome, the prerogatives of aristocratic rule did not accommodate the needs or wishes of those outside caste circles. Power and wealth accrued, as it had done for 400 years, to those who, by interconnection and patronage could effect their will.

## Part 2      Property Discourse

### *Society and social welfare*

37. All societies and their modes of organisation, governance and control begin somewhere at some time, although the emergence of definable society may occur over a period of decades, and maturation may occur over centuries. Since antiquity, moral philosophers have proposed theories about the origins, and desirable or ideal configurations, of society and government. Each of these figures shares with others characteristic attitudes to human value and the **rules** of social behaviour.
38. Thus, the idealism of Plato is a device also deployed by Saint Thomas More with some similar results.<sup>43</sup> The policy of governing in accordance with ideal principles is not supported by Cicero, and rejected by Niccolò Machiavelli, who oppugned obedience to principle, if principle prevented attainment of sovereign objects.
39. The tenor of thought of Thomas Hobbes, John Locke and some of the United States' constitutional framers, as well as that of Adam Smith, David Hume, Jeremy Bentham and John Stuart Mill, derives in no small way from John Calvin's theory of salvation, which could be interpreted to condone appropriation and profit-seeking.<sup>44</sup> Thomas Paine's radical approbation of the people as source of constitutional meaning, and simultaneous rejection of government as source of human suppression, condenses the

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<sup>43</sup> Plato *Republic* ; Sir Thomas More *Utopia* 1516.

<sup>44</sup> In *Institutes of the Christian Religion* (1536) Calvin provided a basis for two propositions that greatly influenced the political and social thought and praxis of northern European countries (and the United States). The first is that on earth, humans, ignorant of whether they are predestined for salvation or the opposite, must act as if destined for salvation. Calvinists espoused, as primary Christian duties, useful activity and demonstration of material productiveness. The second proposition is that humans owe total allegiance to God. Allegiance to humans is subordinate to allegiance to God, and must be justified by the merits of a putative human sovereign. The Calvinist-inspired attitude of 'levelling' is evident in 18<sup>th</sup> century political thinking, and earlier, for instance, in John Locke's idea of a social contract.

sentiments of the 18<sup>th</sup> century revolutionary movements and anticipates elements of libertarian thought.<sup>45</sup>

40. Like the Church Fathers, who objected to property's exclusionary character, Thomas More's Utopians also banished property from their society, to avoid the social trouble attending greed and accumulation.<sup>46</sup> Rousseau considered creation of property a cause of social evil: inequality he declared a consequence of the words 'This is mine'.<sup>47</sup> The idea that immanent process determines social development **informs** the social theory of Montesquieu, Karl Marx, Émile Durkheim and Max Weber.<sup>48</sup>

### *Property*

41. These philosophers differ most radically about a property system. Those most concerned with analysing the moral content of social relations, and encouraging social mutuality, regard the existence of a property system either as anathema, or necessary, and theoretically undesirable. Names in this category include Plato, the Fathers (such as Irenaeus, Basil, Ambrose and Augustine), St Thomas More, Rousseau

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<sup>45</sup> See esp *Rights of Man* 1791 (Cosimo 2008). Paine's disapproval of government in principle went far beyond ideas of contemporaries like Jefferson, and his idea of the heroic individual forging identity free from the encumbrances of collective restriction is similar to ideas pressed by 'freedom' advocates such as Hayek and Friedman.

<sup>46</sup> *Id.*

<sup>47</sup> Jean-Jacques Rousseau *A Discourse upon the Origin and the Foundation of the Inequality Among Mankind* Gutenberg 2004 at 19.

<sup>48</sup> Montesquieu considered that general cause directed history, not accident or a particular event (*Reflections on the Causes of the Greatness of the Romans and their Decline* 1734); Marx that history records repetitive class conflict resulting from the inevitable determination of one faction to dominate and exploit another for material gain (*Communist Manifesto* 1848); Durkheim too considered that 'individuals are much more a product of common life than they are determinants of it' (*Division of Labour in Society* 1893); Weber asserted that embrace of the 'Protestant ethic', and the belief that God favoured the industrious (and prosperous), presaged emergence, over centuries, of a new kind of social organisation (*The Protestant Ethic and the Spirit of Capitalism* 1905).

and Marx.<sup>49</sup> By contrast, philosophers proposing government systems that uphold individual freedom of choice, insist on the necessity of property systems.

42. Excepting Rousseau (who considered property an existent evil)<sup>50</sup> and Marx,<sup>51</sup> philosophers from Hobbes<sup>52</sup> onwards regarded property as a source of security and stability, a stimulus to useful industry, the means of accumulation, a prophylactic against idleness and indigence, and guarantor of personal safety and freedom.
43. By contrast, Rousseau, who shared some of the conclusions of the Fathers, though not their moral philosophy, declared: ‘ ... you are lost if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody.’<sup>53</sup> John Locke, on the other hand, accepted the inevitability of inequality, which must result, he said, from development of a money economy, which encourages vast accumulation and yawning differences in pecuniary holdings.<sup>54</sup>
44. The English jurist William Blackstone (d 1780), partly influenced by Locke, expresses a conventional view in English-speaking countries of property, recognising that fairness and justice may have nothing to do with the creation of property, nor its maintenance:

*And, as we before observed that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the substance of the earth itself;*

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<sup>49</sup> Discussed chapter 1.

<sup>50</sup> Jean-Jacques Rousseau *Discourse on Inequality* 1755.

<sup>51</sup> Generally, *supra*.

<sup>52</sup> Thomas Hobbes *Leviathan* 1651.

<sup>53</sup> *Id* at 19.

<sup>54</sup> John Locke *Second Treatise of Government* Awnsham and John Churchill 1689; *Some Considerations on the consequences of the Lowering of Interest and the Raising of the Value of Money* (Letter to Parliament) Awnsham and John Churchill 1691.

*which excludes everyone else but the owner from the use of it ... every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by anyone else.*<sup>55</sup>

*Adam Smith*

45. Adam Smith considered that accumulators or holders of wealth, motivated by a logic of appropriation, colluded with political authority to exclude others from the benefit of more equal distribution:<sup>56</sup>

*Wherever there is great property there is great inequality. For one very rich man there must be at least five hundred poor, and the affluence of the few supposes the indigence of the many.*<sup>57</sup>

Smith also wrote:

*Civil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all.*<sup>58</sup>

46. Smith's concern at oppression caused by concentration and misuse of proprietary rights is in principle not much different from patristic concern at the practical

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<sup>55</sup> *Commentaries on the Laws of England* Bk 2 Ch 1 (1765-69).

<sup>56</sup> Deborah Boucoyannis 'The Equalizing Hand: Why Adam Smith Thought the Market Should Produce Wealth Without Steep Inequality' *Perspectives on Politics* Vol 11 No 4 December 2013 esp 1061-63.

<sup>57</sup> Adam Smith *The Wealth of Nations: An Inquiry into the Nature and Causes of the Wealth of Nations* W Strahan and T Cadell 1776 Book V Ch I Pt II.

<sup>58</sup> *Id.*

consequences of human exclusion from the benefits of property concentrated in the hands of a few.<sup>59</sup>

*Natural law in favour of representative government*

47. Leaving aside Plato, who proposed a fantastical polity directed by renunciates, and Machiavelli, uninterested in social welfare, moral philosophers from More to Jefferson,<sup>60</sup> and after, agreed that if power is not to be abused, it must be distributed.<sup>61</sup> If the source of ideal government is sovereignty evenly distributed, ideal government must be effected by allocating an identical vote to each citizen.
48. In the United States, Thomas Paine identified the people *res publica* as the source of political virtue, and government as the source of vice.<sup>62</sup> He died reviled,<sup>63</sup> however, and many of the leading lights of the American revolutionary movement, from Franklin to Adams and Jefferson favoured imitation of Rome's early and supposedly virtuous republic which entrusted aristocrats to lead the state.<sup>64</sup>

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<sup>59</sup> Cf St Thomas Aquinas (d 1274): 'The possession of all things in common is ascribed to the natural law ... but in the sense that no division of property is made by the natural law. This division arose from human agreement which belongs to the positive law ...' (Summa Theologica 2.2 quaest art 2 and 1). Like Smith, the patristic writers, and later theologians like Aquinas, did not expect ideal government on earth. See, eg, St Augustine's *City of God* (426) which compares the city of god, ruled by love, and the earthly city, ruled by love of self. The first endures, the second ends in hatred.

<sup>60</sup> Eg, Thomas Jefferson, 'Where the principle of difference is as substantial and as strongly pronounced as between the republicans and the monocrats of our country, I hold it as honorable to take a firm and decided part and as immoral to pursue a middle line, as between the parties of honest men and rogues, into which every country is divided.' – letter to William Branch Giles, 1795. Monitcello.org research collection, ME 9:317.

<sup>61</sup> The proposition argued by Francis Fukuyama in 'The End of History?', *The National Interest*, Summer 1989 and *The End of History and the Last Man* Free Press 1992. Fukuyama argued that the evolution of political process ended in 'the final form of human government' (*National Interest* at 1), as adapted to human socio-political need as is possible, viz western liberal democracy.

<sup>62</sup> Especially Rights of Man *supra* and *Common Sense* 1776 (The Thomas Paine Reader Penguin 1987).

<sup>63</sup> In *The Age of Reason* published progressively in 1794, 1795 and 1807, Paine attacked biblical authority and conventional religion. He advocated deism. He attacked George Washington in a letter published 1796. Erstwhile political allies shunned him.

<sup>64</sup> The Founders were frequently classicists, and alluded often in writing to ancient politics. They referred to Greek and Roman institutional models though not invariably with enthusiasm. Jefferson especially disliked Roman corruption of representative government, and the pronounced character defects of even supposedly

49. From the time of Locke until Adam Smith, the secular moral philosophers justified their arguments by appeal to natural law. Natural law, religious or secular, is neither axiomatic nor inductive. It is a product of ratiocination. More, Locke, Montesquieu, Rousseau, Jefferson and others deduced principles of political equality, as the patristic tradition deduced principles of moral equality.

*Natural law, liberalism and inequality*

50. Those legislating at the modern world's political primordium, bathed in the light of Wordsworth's blissful dawn,<sup>65</sup> were preoccupied with rights, not the absence of rights, and equality, not inequality. Their common view that human rights, broadly construed, are necessary to procure human and social welfare, says little about inequality, except for one implied proposition. If the *philosophes* and their predecessors and successors are correct, only representative systems, distributing political power equitably, can hope to resolve, or reduce, the problem of inequality.

51. It may be that *Universal Declaration of Human Rights* created an unsurpassable political ontology. Yet all systems embracing unitive rights suffer, in common with other governance systems, a gross flaw: they have failed to solve the problem of social inequality. Societal capacity to attenuate the power of ownership owes nothing to formal adoption of democratic or republican forms. Equality is manifested in social

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virtuous Roman politicians like Cato (who, Jefferson found, exploited his estate workers) (see Karl Lehman *Thomas Jefferson: American Humanist* 1947 Macmillan Ch 7 'The Dark Side of Humanity'). However, John Milton's sentiment summed up the Founders' opinion: 'Did you not remember that the Romans had a most flourishing and glorious republic after the banishment of the kings?' (John Milton 'A Defence of the People of England' 1651 in Martin Dzelzainis (ed) *Milton Political Writings* Cambridge University Press 1991 at 155).

<sup>65</sup> William Wordsworth on the French Revolution, from Book 10 *The Prelude* (composed 1805): *Bliss was it in that dawn to be alive/But to be young was very heaven!*

belief, law and practice: it is not conjured by legal declaration in societies without social belief in the dignity of every person.

52. The patristic writers, and certain of the later moral philosophers such as More, Rousseau, and even Smith, said much about unfair distribution. They judged the matter in moral terms. Blameless wealth is rare: a society which extols riches approves greed, avarice and abuse of the defenceless. For Smith, humans, unregulated, inflict social harm, usually from cupidity:

*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.<sup>66</sup>*

### Summary

The dissertation proposes that the process of proprietary exclusion occurs instrumentally. A property system exists because humans contest for power or control, and accrete and distribute power by allocation of exclusive rights. This chapter summarised the distributive process in Athenian, and especially Roman and Latin American societies. The process is observable elsewhere, and in the copyright system (examined in chapters 5-7). The chapter also examined theories of property. The following chapter examines the source of the struggle that results in property systems. What causes human contest? Is it inevitable? Is the wish to appropriate and possess innate? Is the creation of property systems inevitable?

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<sup>66</sup> Smith *supra* Bk 1.



## CHAPTER THREE

### THE GRAMMATICAL CATEGORY OF POSSESSION AND

### INNATE HUMAN TENDENCY TO CONTEST FOR POSSESSION

#### PURPOSE

The category of grammatical possession supplies the concepts and language of the legal category of property. The structure of possessive grammar is the product of mental appropriation, and human mental appropriation leads to conflicting possessive claims. Possessive grammar creates linguistic antithesis which results in conflict between people. Other theories of innate cause of conflict are assessed.

#### Headings

##### **Part 1 Possessive grammar, property and exclusion**

*Assumptions about propensity or innateness*

*Possessive grammar, antithesis, conflict, exclusion*

*Chomsky and innate/universal grammar*

*Grammar and reality*

*Some considerations about grammatical structure and possession*

*The possessive case*

*Possessive pronouns and adjectives*

*Verbs of possession*

*Possession*

*Property and ownership*

*Exclusion*

*Inalienable, alienable possession*

*Conclusion*

##### **Part 2 - Evidence of drive to contest for control**

*Gene for aggression*

*The brain and aggression*

*Evolutionary robotics and the psychology of human violence*

*Anthropological explanations*

*Sociology of aggression*

*Subconscious source of aggression*

*Alienation, otherness and assertion of power*

## Part 1 Possessive grammar, property and exclusion

### *Assumptions about propensity or innateness*

1. The purpose of this dissertation is to demonstrate that ownership causes social inequality. The abstract noun, 'ownership', refers to a state: the subjective state of understanding that a thing is 'mine' or 'ours', or 'yours', and the objective state of knowledge that a thing 'belongs to' or 'is owned by' a person. Subjectively and objectively, ownership is a state of *control*.
2. The statement that ownership causes social inequality can be refined: the wish for control leads to appropriation, which creates property, and the exercise of control over property, which is exclusionary, causes social inequality. Control, and exclusion, the corollary of control, are agents of social inequality. Humans contest for sovereignty, and from political struggle emerges society, and the modes of social control, paramount of which is invariably a property system.
3. A property system takes and gives, and is so doing, excludes. How can we know these propositions to be true? The whole of recorded and anthropologically deduced history appears to testify to the reality that humans contest for control, and that war and human struggle create and shape societies. Yet a history of contest is not proof of innate human disposition to conflict, and more importantly, does not explain why humans create societies governed by property relations that are more or less exclusionary.
4. The purpose of this chapter is to try to answer two questions:

- ✓ what evidence demonstrates innate drive to assert or enforce control by exclusionary property arrangements?
- ✓ what evidence demonstrates human propensity, or innate drive, to exert and contest for control?

*Possessive grammar, antithesis, conflict, exclusion*

5. Possessive grammar, the structure of which is universal in language, and which expresses how humans perceive and mentally organise reality, furnishes the concepts utilised to define, informally or formally, what is known as property. Common and civil lawyers recognise that property is something formally alienated, and therefore definable, which creates a sovereignty ruled by a sovereign, the owner, who *possesses* exclusively that which is defined as property, a thing owned.
6. As will be seen, the legal category of property is conceptually dependent on the grammatical category of possession. Why identifying the link between the two categories is important is that analysis of the grammar of possession reveals a human mental process of appropriation, alienation and assimilation that is mirrored by the legal process of defining property. The material product of the mental process expressed by possessive grammar is definable subject matter known formally and informally as property.

*Chomsky and innate/universal grammar*

7. Noam Chomsky's (b 1928) theory of innate or universal grammar, positing that grammatical structure is universal,<sup>67</sup> supports the argument that possessive grammar is instrumental in linguistic choices that result in conflict, appropriation and creation of property. The possessive grammar deployed universally in communication creates linguistic antithesis, and can be seen as harbinger of conflict: if, for example, A declares that, 'that lamp is mine', and B replies, 'No, the lamp belongs to me', one must surrender a claim to avoid contest.
8. Consistent with the grammar of possession, after dispute is settled, the thing defined, a lamp, a *possession*, is *possessed* by A or B. The lamp, belongs to, is owned by, or is the property of either A or B. The consequence of A or B's possession is exclusion of the other. Our grammar expresses our desire for possession, creates antithesis and makes conflict inevitable.
9. In 1957, Chomsky published a book *Syntactic Structures*, a 'theory of linguistic structure', which introduced the idea that knowledge of grammar is a property of the human brain.<sup>68</sup> In the 1960s, Chomsky's theory of generative grammar, which posits that young children innately *know* how to construct meaningful sentences, initiated a so-called linguistics revolution.<sup>69</sup> Ideas of innateness or universality swept aside both

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<sup>67</sup> In the sense that language structure, or mental organisation, which is not consciously to humans, is identical, and therefore universal, not that grammars are identical.

<sup>68</sup> Mouton & Co 1957.

<sup>69</sup> Chomsky published extensively on generative theory in the 1950s and 1960s. See: 'Three models for the description of language' *IRE Transactions on Information Theory* 1956 (2) 113–124; 'On certain formal properties of grammars' *Information and Control* 1959 2(2) 137–167; *Current Issues in Linguistic Theory* Mouton 1964; *Aspects of the Theory of Syntax*, MIT 1965; *Cartesian Linguistics: A Chapter in the History of Rationalist Thought* Harper and Row 1966; *Language and Mind* Harcourt, Brace & World, 1968; *Topics in the Theory of Generative Grammar* Mouton 1972; *Studies on Semantics in Generative Grammar* Mouton, 1972.

behavioural linguistics, and the theory that language is understood by analysis of its structure.<sup>70</sup>

10. If Chomsky's theory of universal or innate grammar is accepted,<sup>71</sup> universality can be taken to imply that behaviour posited as innate, such as aggression, violence or competitiveness, is predicted, and possibly made inevitable, by types of grammatical structure. Grammar creates, in all languages, a formulary system for apprehending and communicating reality. One of the realities of human existence is conflict. Thus formulations of possessive grammar, counterpoising one proprietary claim against another, predict human conflict for control.
11. The possessive case permits syntactical constructions conducive to eliciting inimical emotions that lead to conflict. It enables a person to declare that something 'mine', and by so doing deprive another of use of the thing that is 'mine'. What is mine is not yours. More abstractly, a person might assert that, 'this country is ours' or 'that information belongs to me' or 'she's my wife and you can't talk to her.' A consequence of possession, and in particular, exclusive possession, is exclusion, and

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<sup>70</sup> Modern schools that diverge from Chomsky's theory of innate or universal grammar, or adopt premises different from the idea that human grammar is encoded in the brain, include those espousing cognitive linguistics and connectivist psycholinguistics. Cognitive and psycholinguists argue that language acquisition is the result of neural-environmental interaction, rather than innate linguistic knowledge/capacity responding to stimulus. . No other person in the field of linguistics has proposed so-called paradigm shifts as far-reaching as Chomsky, but such shifts remain hypothetical. Hypothesis invariably meets counter-hypothesis, because knowledge of brain function is inadequate to verify assertions about how the brain effects linguistic actions.

<sup>71</sup> Language acquisition, according to Chomsky, must be attributable to brain function: some undiscovered brain property must impart language knowledge. Children do not acquire language because of adult didactics: no adult tries to instruct a three year old child in formal grammar. The *brain* instructs, or rather, imparts language structure, causing the senses of infants and young children to respond to mental and sensory stimuli, which are apprehended structurally and linguistically. The cognitive process of learning about the environment external to the child, by assimilation of external stimuli, begins at birth (Eg, among many examples, Chomsky *Topics in the Theory of Generative Grammar* Mouton 1972).

therefore inequality. The possessive case gives humanity language to assert control over things and people, and the linguistic formulas to claim sovereignty.

*Grammar and reality*

12. As explained by Chomsky, grammar is an ontological device that enables humans to discover and express meaning consistent with reality. Grammars differ in type. Notably, the placement of subject, verb and object in sentences varies among languages.<sup>72</sup> Languages, however, share common categories of meaning (for example, subject, verb and object), which indicate common objective ways of making sense of self and the environment external to self.<sup>73</sup>
  
13. Language and reality are inseparable twins. Subject, object, noun, verb, adjective, tense, descriptors of material, temporal and relational reality, recur as mainstays of grammars because humans experience what is objective in an identical way (although *perception* or *interpretation* of reality is subjective). Person A (speaking one language) may attribute totemic meaning to a rock, while Person B (speaking another language) does not, yet both apprehend a rock, and each constructs similar sentences to describe the rock objectively (ie, as an object) and the person's relationship with the object (eg, 'I am standing a short distance from this rock and will shortly move close to it.').<sup>74</sup>

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<sup>72</sup> Languages are characterised by six types of placement in the subject verb object (SVO) category: SVO, SOV, VSO, VOS, VSV, OVS. Of these 'linguistic typologies', the most common are SVO (English is SVO) and SOV (Japanese is SOV).

<sup>73</sup> Cognitivists deny innateness, although not strictly its consequence, ie, universality. Others, like Geoffrey Sampson deny innateness ('Grammar without Grammaticality' *Corpus Linguistics and Linguistics Theory* vol 3 2007 pp 1-32 and 111-129).

<sup>74</sup> Cf the language philosophy of Ludwig Wittgenstein (d 1951), a figure influential in linguistics, although at a distant remove. According to Wittgenstein, we perceive and categorise phenomena; our categorisation supplies meaning; we deploy language as if playing a game, ie, we observe accessible rules that are not in our

*Some considerations about grammatical structure and possession*

14. What is grammatical structure, and why is it important to human assertion of control or sovereignty? All languages share common or universal features<sup>75</sup> which comprise the structure of a particular language, and permit explanation or teaching of that language to a neophyte. In the case of possessive grammar, examination of these structures shows how, linguistically, the concept of possession, which implies exclusion, also discourages mutualism. Possession cannot occur without appropriation, an act which may in turn involve dispossession, notional or actual. Since possessive statements imply or declare appropriation, they may be, depending on the nature of appropriation, political in content.
15. Grammar is a system that represents axiomatically human perception of reality, or *what is*. Grammar shows that the world perceived by humans is one of form, substance, agency and motion. Connection between agency, motion and phenomena is manifest in verb linking of subject and object categories. A (a category of one or more, person or thing, maybe abstract) *does* B (any action) *to* C (a category of one or more, person or thing, maybe abstract). The grammatical system of *inflection* - addition of a letter, or letters, to nouns, verbs and adjectives - also reveals how humans mentally organise their surrounding environment.

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consciousness as we play the game. Wittgenstein's main published work in his lifetime is *Tractatus Logico-Philosophicus* Kegan Paul, 1922, a work supplanted, in his view, by material in *Philosophical Investigations* (published posthumously in 1953 by Macmillan).

<sup>75</sup> The term universal grammar does not refer to universal characteristics of grammar. Universal grammar is a hypothesis about the existence of a human brain property that causes humans to acquire grammatical or meaningful speech. All humans (unless severely socially deprived or brain impaired) acquire language by operation of this brain property. Characteristics of grammar are the explanatory categories and lexical elements that allow for explanation of how a particular language works to convey meaning.

*The possessive case*

16. In this chapter, the term 'reality' (or *what is*) is used to equate to the concept of phenomena external to the person. References to reality are references to human *perception* of reality, not statements of *what is*. Languages testify to human perception of reality.
  
17. Analysis of the grammatical category of possession informs us that humans assert control, or seek to assert control, or aspire to assert control, over every particle of the universe, and every living creature on earth.<sup>76</sup> Though many humans would in principle abjure control over the universe, language denies everyone the perfection of total renunciation.
  
18. Not even the instrumental conception of selfhood professed by saints such as Francis of Assisi ('Lord make me an instrument of your peace ... ') liberates a person from the linguistic necessity of daily annexing lexical items to make sentences ('my heart bleeds'; 'she's my flesh and blood'; 'she is a friend of mine'; 'it's my country'; 'these old shoes are mine'). For every human, exercising control of some sort is an everyday

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<sup>76</sup> Approaches to grammatical analysis vary. However, all linguistic schools, despite fundamental differences over how humans acquire language, and thereafter communicate, acknowledge that a mental process, involving sensory input and output, governs individual deployment of language. No school, however, is able to show, let alone prove, contents of this mental process. Again, all linguists accept that the structure of grammar provides compelling clues about the mental process determining language. Thus, for example, the permutations in order of subject-verb-object indicate that every language mentally utilises concepts of actor-action-thing to represent meaningfully what people see: a world of sentience, matter and motion. The concept of control, embodied in grammar, can be said to be inferable from every aspect of daily life. It can be argued that grammatical possession reflects the way the human brain apprehends phenomena as subject matter requiring categorisation, the act of which makes categorised material available to mental 'control'.



necessity, as it was for St Francis, and even extramundane language may involve notional possession ('my soul is sorrowful, even unto death').<sup>77</sup>

19. The possessive case creates in everyone lexical necessity to assert control of some sort, which usually involves an act of appropriation. Grammar hypostasises the human account of reality, meaning that grammar is instrument, not author, of human mental arrangement. Innately or analytically, humans accorded themselves psychological centrality in a world of materiality, and assumed a right to appropriate, if feasible, whatever is or moves.

*Possessive pronouns and adjectives*

20. Implicit in the function of possessive pronouns and adjectives ('mine' 'yours' 'his' 'hers' 'its' 'theirs' 'ours' 'my' 'her' 'its' 'our' 'their') is a phenomenology of invariable human appropriation. The possessive pronouns and adjectives perform the linguistic task of appropriation. The statement, 'My cat is bigger than your cat', conceptually appropriates two cats, by defining objects of possession (cats) and declaring implicit and individual possession of each cat. Possession can be seen as something amounting to sovereignty or control over cats. Yet the notional allocation of sovereignties described in the sentence above, involving acts of appropriation and conferral, is carried out by two possessive adjectives, 'my' and 'yours'.<sup>78</sup>

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<sup>77</sup> In each of these examples, the mental act of possession is hidden but explicit in its advisement: *I* am controller, and mentally, for the purpose of the speech in question, *I* control my self/physical person, and any other syntactic item to which the different phases refer. Clearly, some underlying *concept* or mental factor, known to the brain of the speaker, but not consciously the speaker, is determining the mental act of possession or annexation to self.

<sup>78</sup> Concerning the validity of assuming concepts underlying grammar (of which a person deploying grammar is unaware) see, eg, David Crystal *How Language Works* Penguin 2008 on neurolinguistic processing esp 176-9.

21. Pervasive use in language of possessive pronouns and adjectives has produced in history an inescapable social tendency towards control and exclusion. The language correlates 'my mine ours' implicitly state logical propositions that betray human identification with power, that is, control over things and other people. The simple statement, 'he's my child', for instance, asserts the following logic: 'A is a child; I am his parent; a parent governs a child; a child submits to governance; I govern A and A submits to me; the adjective "my" means that I govern A and A submits to me.'
22. 'The girl is mine' similarly declares in the pronoun 'mine' a governance-subordination relationship: I have, notionally, verbally, and temporally, appropriated the girl's sovereignty and declared that I am sovereign over her (though not necessarily permanently). The statement, 'the fortress is ours' asserts in the pronoun a collective sovereignty (not necessarily permanent) over something material. It can be seen from these few examples that most people would probably find repugnant some assumptions of possessive language.
23. Few parents would admit that the ordinary statement, 'my child' could impute to them subjugation. Assumption of control is hidden, latent in the possessive construction, '*my child*'.<sup>79</sup> Possessive statements are pervasive in daily discourse, and made with little more than a modicum of conscious awareness. A parent talking of 'my child' is conscious of filial relationship, which implies reciprocal bonds of affection and duty, not control and submission.

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<sup>79</sup> On connotations of possessive constructions, see in Bernd Heine *Possession* Cambridge 1997.

24. The concept of 'my dog', a dog subject to my governance, could transmute into 'dog beside me', that is, a dog that as a companion to me. However, while the grammar of communitarian societies may to some extent abjure concepts of appropriation and possession, no culture or language foreswears possessive relations altogether. Human mental arrangement of sense data necessitates appropriation.<sup>80</sup>
25. Few people would discern oppression in the words 'my wife'. Grammatical concepts, however, are mental propositions, and if mental propositions are repeated, they create mentality, that is, beliefs shaping action. The *grammatical* belief underlying the statement, 'she's my wife' is not 'we are two people joined severally in matrimony' but 'I possess her [bodily person]' or 'I control her [bodily person]'.<sup>81</sup>

*Verbs of possession*

26. Two verbs, 'have' and 'belong' perform a coadjutant function ('my dog' cf 'I have a dog' cf 'that dog belongs to me') as well as expanding the range of descriptive possessive statements in a way that pronouns and adjectives cannot ('You may have that coat if you wish'; 'I do not belong here.'). These words came into English in about

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<sup>80</sup> As to the reality of a process of mental appropriation, see two studies on the nexus between brain processing and consciousness: 'Fingers Detect Typos even when Conscious Brain Doesn't' *Science* 29 October 2010 and 'Grammar Errors? The Brain Detects Them Even When You Are Unaware' *Journal of Neuroscience* 8 May 2013. Both observed the brain's capacity to autocorrect small errors in data that a person is relying on to perform tasks. Evidently, the processing brain is a discriminating and ideational one (if discriminating between correct and incorrect data is seen to involve comparison of images). See discussion of 'Idealisations' in *Chomskyan Linguistics and its Competitors* Equinox 2007 70-72 and Crystal *supra* on neurolinguistic programming.

<sup>81</sup> The argument extends Chomsky's *linguistic mentalism*, which referred to the mental character of innate or universal grammar. If grammar is innate it becomes, and remains, known to a person by mental process. The mental process is part of a person's native linguistic endowment, which embodies in grammar human mental ordering of external phenomena. It can be argued that that ordering is also conceptual in the way that computer code is conceptual and imparts to the processing machinery conceptual information.

the 15<sup>th</sup> century,<sup>82</sup> and the efflorescence in medieval English of words identifying kindred concepts supplied lexical items useful for legal exegesis about property and ownership.

27. In the late medieval period, as crown, parliament and judiciary struggled to replace feudal tenure with new types of proprietary control, the new lexicon, and related concepts proved useful in defining property as exclusive possession. Verbs, whether co-opted by jurisprudence, or reflecting lexical innovations that surmised proprietary acts, created, in legal and ordinary semantics, a new vocabulary, circular in meaning, of appropriation and control.<sup>83</sup>
28. Circularity of meaning is evident in pronouns and adjectives concerned with possession and also verbs. The Germanic-Old English roots of the verb 'to own' indicate that the act indicated by the verb is concerned with self and singularity. The self alone owns, singly and in entirety. What does the owner own? A *possession* or *belonging*. To whom does a thing belong? To its *owner*.
29. What does the owner *have*? A possession or belonging, tangible or abstract. Does the owner *possess* a belonging? Yes. Does the owner *belong* to a possession? No. Circularity of this sort betrays social effect on language. It is not unlikely that linguistic discourse, at least in English, adapted in recent centuries to social and economic changes.

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<sup>82</sup> See Collins English Dictionary 10<sup>th</sup> ed 2009. The word 'possession' derives from the Latin verb *possidere* 'occupy/inhabit/control/seize upon/sit on [strictly sittable]' and the word 'property' - via 13<sup>th</sup> century French and Middle English - from the Latin *proprietas* 'something personal' and *proprius* 'one's own' (Collins 10<sup>th</sup> ed).

<sup>83</sup> For differing accounts of the development of English land law, see AA Berle 'Property, Production and Revolution' (1965) 65 *Columbia Law Review* 1; A W B Simpson, *A History of the Land Law* OUP 1986.

*Possession*

30. The mentality of appropriation, and the extent to which grammar relies on concepts of appropriation or possession, is influenced by social mores and modes of societal behaviour. Most European languages are considerably influenced by the possessive conceptions of Latin grammar, summarised by the word 'dominium'. Languages that display a distinctively possessive grammar are more likely to create an appropriating mentality than those that do not.<sup>84</sup>
31. Conceptually, in English, 'she's my wife' proposes that 'I possess this woman'. However, what is *meant* by possession is influenced by societal beliefs. A man uttering in 1870 the words, 'She's my wife', presumably endorses a number of legal-social attitudes enjoining male governance of females. A person saying in 2014, 'She's my wife', adopts his predecessor's grammar, yet presumably embraces a less assertive attitude to his wife's person.
32. Underlying beliefs created by possessive grammar may be harbingers, in the everyday world, of conflict, appropriation and exclusion.<sup>85</sup> If a fundamental characteristic of possessive grammar is to accrete to person or group notional primacy, that primacy must assign, notionally, secondary status to people outside the category of possessor.

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<sup>84</sup> As discussed later in the chapter, the proposition is self-evidently true: nomadic or hunter-gatherer societies disavow the forms of explicit control conferred by the property systems of settled societies, agricultural and advanced.

<sup>85</sup> Shakespeare's plays abound in examples of conflict caused by possessive desire. The *Merchant of Venice* Act IV Scene I provides a famous example: *You will answer 'The slaves are ours:' so do I answer you: The pound of flesh, which I demand of him, Is dearly bought; 'tis mine and I will have it.*

33. Since the function of possessive grammar is to assign relational control to a person or entity, it follows that the mentality created by possessive grammar is inimical to ideas of sharing or mutuality. Most people would find absurd the suggestion that even emollient phrases of the sort, 'please pass me my drink' connote a subjugating mentality. They would say that to ask another person to pass your drink is to not to annex a drink, nor exclude that person. Yet without mental annexation, the subject matter of possession - in the example cited, a glass filled with liquid - is undefined, and linguistically meaningless.<sup>86</sup>
34. Once 'a drink' is categorised, thereby becoming linguistically meaningful, it is possessable. Its possessor is entitled to consume the drink, and deny any other person a share. The effect of exclusivity varies: in a desert refusal to share a drink has more consequence than in a place plentifully supplied with public taps, or beverages for sale. In desert or city, subconscious appropriating beliefs that manifest a societal ethos of domination and subjugation are concomitant to possessive construction. The grammar of 'my mine ours' causes bias towards possession and control.

*Property and ownership*

35. An ordinary dictionary definition of the word 'possession' specifies that the word describes 'the act of possessing or state of being possessed; anything that is owned or possessed; wealth or property; the state of being dominated or controlled; physical control or occupancy of land, property etc whether or not accompanied by ownership;

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<sup>86</sup> Annexation in this sense has the same meaning as the word is used in legal parlance to describe the delineation of specified subject matter for the purpose of declaring property. The explicit act of legal annexation (or alienation) is analogous to the putative mental act of delineating subject matter specified as 'drink'.

a territory subject to a foreign state or sovereign; *sport* control of a exercised by a player or team'.<sup>87</sup>

36. The noun 'possession' is said by dictionaries to derive from the Latin verb *possidere* 'to control or occupy', the past participle referring to the act or fact of possessing, or 'to seize upon'. The word is said to have come into English legal usage in the first half of 14th century, and thereafter common speech.<sup>88</sup> Its Latin provenance is much older: long before Justinian's codification in the 6<sup>th</sup> century, Roman lawyers used the verb and its various forms in property disputes.<sup>89</sup>
37. Etymologically, 'possidere' comes from *potis* ('able') + *sedeō* ('sit').<sup>90</sup> 'Able to sit' or 'sittable' are terms metaphorically apposite to the task of conveying what is meant by the word 'possession': feet planted, the possessor claims by the act of sitting or squatting, control or lordship over whatever is, by this act, declared possessed. Both dictionary definitions cited refer variously to ownership, wealth, property, control and occupancy.
38. With the exception of the word 'control', which has a broader though connected meaning, each of these words is, in its primary meaning, a synonym for the others. The reason why this is so is that the law of property has connaturalised concepts of

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<sup>87</sup> Collins English Dictionary 10<sup>th</sup> edition.

<sup>88</sup> *Id.*

<sup>89</sup> Max Radin 'Fundamental Concepts of Roman Law' 13 *California Law Review* 1925 207-28: 'Possidere was a common word in Latin and unqualified it frequently meant just what the lawyers wished it to mean only with the adjectives "natural" or "corporal" added to it. And again in ordinary usage, "possession" often suggested something precise and limited, the quasi-ownership of public lands leased out to certain persons on long leases.'

<sup>90</sup> See <http://en.wiktionary.org/wiki/possideo>; also *sedeo* in Charlton T Lewis and Charles Short, *A Latin Dictionary* Clarendon Press 1879.

possession, occupancy, property and ownership, and cognate ideas of domination, control and wealth.<sup>91</sup>

39. A question then arises as to whether the common and civil law created conceptual connectedness, or whether ideas of possession, control, domination, ownership and property were distinct lexical categories in a range of languages, mostly, though not exclusively, derived from Latin (ideas of possession must have existed in other languages pre-dating Latin). It appears likely that ideas of linguistic possession are of ancient provenance. Chomsky has hypothesised that the language faculty, supporting sophisticated grammar, emerged 100,000 years ago, when the species *homo sapien* appeared on earth, others at a much earlier date in primate development.<sup>92</sup>
40. The grammatical concept of possession, implying annexation and control, must have emerged antecedent to juridical exposition of ideas of ownership, control and possession. At any rate, the Roman law designation of possession as centrifugal to concepts of ownership and property, shows that from a relatively early date, written European discourse attributed specifically legal meaning to words with exclusionary implications.<sup>93</sup>

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<sup>91</sup> No legal work appears to have specifically traced etymology and repetition of words suggesting the same idea of possession or control. The law appears to have assimilated useful words to explain a concept of property. That concept evidently refers to that part of human relations and conduct described by words such as alienation, annexation, appropriation, domination, possession and control.

<sup>92</sup> In the plethora of literature about language origin, see, eg, James Hurford, Michael Studdert-Kennedy Chris Knight *Approaches to the Evolution of Language: Social and Cognitive Bases* CUP 1998; Philip Lieberman *Uniquely Human: The Evolution of Speech, Thought, and Selfless Behavior* Harvard University Press 1991; P Lieberman 'The evolution of human speech: Its anatomical and neural bases' *Current Anthropology* 48 (1)39–66 2007.

<sup>93</sup> Issued under the Emperor Justinian's direction, from AD 529-533, the *Corpus Juris Civilis*, consisting of the *Code, Novels, Institutes* and *Digest*, restated and expanded Roman law, establishing categories of real and incorporeal property.



41. The critical matter is exclusion. Separately and together, grammar and law asserted that to create order, humans must annex what is around them.<sup>94</sup> While mores about property vary, and itinerant groups are less likely than settled societies to insist on asseveration of control, property and title to property is impossible without annexation, that is, definition of what is owned.
42. Humans appear to be incapable, conceptually, of making sense of surrounding matter without defining that matter. The act of definition may also be called a figurative act of annexation, of asserting control. It may be explanatory ('that body of water cascading down a cliff is called a waterfall'). On the other hand, it may be exclusionary: 'That fence encloses my land, and you must stay outside the fence.'
43. Grammar, reflecting human mental organisation, and law, imitating or following that arrangement, externalise an instinct to control in common words: control is possession and possession is ownership and ownership is property and property is custody, and so on.<sup>95</sup> The control concept embodied in these words insists upon exclusion.
44. Grammar and law alike accord sovereignty, notional and actual, to the possessor, because perceptually and psychologically, humans do the same. Humans vary in what

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<sup>94</sup> Not only in the sense that all settled societies created systems of property involving alienation, and, usually, subordination (manifest in feudal organisation, the most common form of proprietorial arrangement in human history). Aggressive, outward-looking polities, like Rome's, sought to spread dominium, that is, to conquer, annex and turn into property other countries. The city states of Greece, and Rome, fell into tyranny because they could not solve the political problem of equitable property distribution that would resolve or lessen social tension.

<sup>95</sup> For an account of ratiocination (internal) distinguished from affect (external) - which helps to explain how possessive concepts (such as, define, alienate, hold) may be implicit in language structure, and influence behaviour – see Chomsky on internal and external languages, or I-Language and E-Language (*Knowledge of Language* Praeger 1986). See also Louise M Antony and Norbert Hornstein *Chomsky and His Critics* Blackwell 2003.

they alienate as property, and expressions of control are much more varied than that concerned with title to property. But wherever control is asserted, and in whatever form, it is likely to exclude someone or something.<sup>96</sup>

### *Exclusion*

45. The instinct for control and possession is prima facie socially harmful if not meliorated by inclusionary purpose. Sovereignties vest power, including power to exclude, and exclusion from social benefit is a principal cause of harm to people. As much as they can be said to contribute to the so-called virtuous cycle of production and exchange,<sup>97</sup> possessive grammar and property may also trap societies in anomie and social indifference.<sup>98</sup>
46. Possession, upheld by laws of property and precepts of ownership, is necessary for accumulation and specialisation, the rudiments of capitalist production. The ontology of possession does not easily allow that the possessive principle, whatever its merits, is conducive to distribution that is socially equitable. Rather, possession tends towards enabling concentration, which contributes to social inequality.<sup>99</sup>

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<sup>96</sup> For analytically diverging accounts of how the mind, or process of thought and ideation, affect behaviour see Gerry Altman *The Ascent of Babel: An Exploration of Language, Mind, and Understanding* Oxford University Press 1999 and Steven Pinker *How the Mind Works* Norton 1997.

<sup>97</sup> Prudent consumption demands investment of surplus income, creating the 'virtuous' cycle/circle of more income and more investment, which creates wealth. A concept attributed to the text of Adam Smith's *Wealth of Nations* (1776) although the phrase 'virtuous cycle/circle' does not appear in the book.

<sup>98</sup> An issue discussed in Benedict Atkinson 'Australian Copyright History' in Brian Fitzgerald and Benedict Atkinson (eds) *Copyright Future Copyright Freedom* Sydney University Press 2011. According to psychologist Julian Rotter's locus of control theory, if a person does not internalise a perception of autonomous self, that person externalises the locus of control, surrendering autonomy to others. It can be argued that the same externalisation process may affect societies and nations. The desire for control, as well as assertion of control, are sources of anxiety. It can scarcely be doubted that prosperous, regulated societies with settled property systems manifest control anxiety. Poorer, less regulated societies manifest extreme control anxiety.

<sup>99</sup> Discussed in chapter 4.

47. Possessive grammar affects linguistic behaviour, introducing antithesis to ordinary discourse (eg, 'mine' v 'yours' or 'what belongs to me cannot belong to you'). It illustrates also how possessiveness informs the human tendency to try to dominate. Deployment of possessive grammar is an inevitable precursor to creation of social inequality. If universal grammar can be taken to verify the universality of grammatical structures, possessive grammar, to the extent that it is integral to discourse, shapes, or perhaps activates, exclusionary social attitudes.
48. To argue otherwise is to deny that projection of antithesis must engender inimical attitudes, or that verbal assertion of exclusivity implies metaphorical exclusion, or that a consequence of metaphorical exclusion is material exclusion. Some disagree, suggesting that thoughts and derivative metaphors vanish, like Prospero's magic: ' ... into air, into thin air/And, like this insubstantial pageant faded/Leave not a rack behind ... '.<sup>100</sup> Yet the idea that structure of speech does not influence a speaker's intention could only be true if humans conceive and express volition uninfluenced by other mental or emotional events. Mental process responds ceaselessly to stimuli. Intention emerges malleable from a maelstrom of emotion and cognitive affect, and may be meditated for some time.
49. Possessive and exclusionary intention recurs in human speech, and the plays of Shakespeare. In *The Taming of the Shrew* (Act III Scene 2), Petruchio says:

*But for my bonny Kate, she must with me.*

*Nay, look not big, nor stamp, nor stare, nor fret;*

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<sup>100</sup> William Shakespeare *The Tempest* Act IV Scene 1.

*I will be master of what is mine own.*

*She is my goods, my chattels; she is my house,*

*My household stuff, my field, my barn,*

*My horse, my ox, my ass, my anything.*

*And here she stands, touch her whoever dare.*

*I'll bring mine action on the proudest he*

*That stops my way in Padua.*

*Inalienable, alienable possession*

50. Human perceptual organisation, expressed in grammatical structure, appears largely fixed. On the other hand, while humans appear unable mentally to categorise sense data without resort to the idea of possession, the extent to which languages declare possession or control varies linguistically. Academics have extensively studied different linguistic ways of expressing control, and the implications of variance, under the rubric of a schema of *alienable and inalienable possession*.
51. An item that, for grammatical purposes, is possessed inalienably is one that is inseparable from its possessor. An alienable possessive item is severable from its possessor. Body parts or relatives are inalienable from a person: Jane's father, or her hand, are inalienable possessive items. By contrast, she possesses her purse, and motor vehicle, alienably.
52. Another way of expressing the inalienable-alienable distinction is to say that if the relationship between possessor and possessee is unchangeable, or, alternatively, that if the possessed item is non-substitutable, possession is inalienable. Jane is fixed in

relationship to her father. Inescapably, he is her father, and she his daughter. No-one can substitute as Jane's natural father.

53. The boundaries of the categories of inalienable and alienable possession are considerably debated, and different languages distinguish in different ways between the two classes. The relevant observation to make is that a distinction between inalienable and alienable possession reveals different linguistic attitude to control relations the social implications of which are considerable:

- (Ewe language Kwa, Niger-Congo) *é- kpɔ ga*: 'He/she see money' (cf English 'he/she *has* money')
- (Fijian) *e sega tu vei au na ilavo*: 'not stand near me money' (cf English 'I don't *have* any money')
- (Modern Irish) *tá leabhar agam*: 'is book at me' (cf English 'I have a book')
- (Russian) *u menja kniga*: 'at me book' (cf English 'I have a book')
- (Kpelle, Mande Niger-Congo) *senkau yee- i*: 'money be my hand' (cf 'I have money')
- (Gisiga Chad) *du 'a vəd o*: 'millet at body-my' (cf 'I have millet')
- (Finnish) *Lisa-la on mies* 'Lisa man' or 'A husband is on Lisa' (cf 'Lisa has a husband').<sup>101</sup>

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<sup>101</sup> The examples are cited in Heine *Possession supra* at respectively, at pp 43, 51 (x3), 52 (x2), 206.

54. In each case of possessive marking, it can be seen that the speaker, unlike an English speaker, creates conceptual distance between self and with whatever or whomever the speaker declares a relationship, or declares to be in relationship. In Ewe, the speaker does not appropriate money to the nominated person. Instead, the person sees money.
55. Conceptually, that person's physical custody (and possession) of money is defined differently from the way custody/possession would be defined in English, which offers possessive verb, pronoun or adjective to impute title or ownership to the custodian of money. The *Kpelle* example declares possessive distance: conceptually, speaker and money are connected by immediate proximity only. The *Gisiga* speaker separates person and millet. The millet is neither annexed nor appropriated.
56. No language eschews possession, since human mentality is possessive. Even linguistic expression that avoids possessive statements, if analysed, reveals control assumptions. This proposition can be most easily tested by imagining a language that attenuates control in posited relationships. If we posit that in such a language, a woman married to man is designated 'special woman near him/me/you' (cf in English, 'my/his/your wife') a question arises. Why, in the imaginary language, are specialness and proximity signifiers of marriage? If the answer is that specialness and proximity imply exclusive, or at least close, relationship, it is obvious that the phrase 'special woman near him' must in everyday speech become absorbed into possessive usage. The 'special woman near me' must become a lexical equivalent of my/his/your wife, unless we accept the untenable proposition that a society exists in which the relation of wife and husband is unknown.

57. Maori, like other Polynesian languages, such as Rapanui and Tahitian, acknowledges possession, allocating possessory items to two different classes of possession, A and O. In the case of Maori language, academics have explained the linguistic treatment of possession by referring to conceptual polarities: dominant v subordinate; control v non-control; inheritance v active production; responsibility v dependence; alienability v inalienability.<sup>102</sup> The A O possession classes incorporate lexical items and do not affect the possessive pronoun structure of Maori, which is not dissimilar to English.
58. Thus Maori take possession of lexical items such as dogs, cats, or canoes. However, the Maori, like other traditional hunter-gatherer/nomadic peoples (progenitors of the plethora of Austronesian languages) imported into their language, over hundreds of years (millennia in the case of Australian languages), concepts about appropriation and control that created a concept of possession perhaps unrecognisable to language speakers from immovable societies concentrated on production and exchange.
59. In the case of the Maori (and, it is probably safe to say, most Austronesian societies that survived European contact):

*very usually rights in things are not held exclusively by individuals, as they tend to be in Western societies, but rather by specified groups, often based on kinship ... these rights are usually limited and conditional, and not absolute.*<sup>103</sup>

The Maori idea of control is expressed in the idea of *mana*, the Polynesian concept of spiritual rightness that confers power or authority. The Western idea of possession is

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<sup>102</sup> Valerio Fusi 'Action and Possession in Maori Language and Culture. A Whorfian Approach' *L'Homme* 94 April-June 1985 25 (2) 117-145 at 119.

<sup>103</sup> J Beattie, *Other Cultures* Routledge & Kegan Paul 1966 194-195.

one of dominium or domination, that stretches back to the Romans. Possession is achieved by an act or annexation that grants control. Legally, subject matter is alienated, and non-possessors alienated, or excluded, from possession. In Maori society, land may be annexed in war, yet possession – which is not the same as control - is determined by mana.

60. Although mana transmission need not be lineal, the *iwi*, or tribe, usually confers mana on the *hapu*, or clan, which confers mana on the *whanau*, or extended family group, and one of these groups may vest mana in the individual. In a territory of great mana, resting place of ancestors and warriors, possession is honorary and custodial, not absolute, governed by respect for mana. Thus:

*... in Maori land there was an individual right of occupation, but only communal rights to alienation ... the tribe ... as a natural matter of course, held that the land was vested in the chief to hold in trust for them ... [t]he whole forms an intricate system of rights and privileges, obedient to the supreme dictates of the tribal welfare ...*<sup>104</sup>

The Maori, cognisant of mana of place or things, did not share Western preoccupation with personal absolute control over place or people, nor despotic attitude to what is *mine* or *ours*. Maori grammar allows the statement, ‘That is my canoe’ but among Maori, canoes, in which might be vested significant warrior or ancestral mana, were items of common use. ‘My canoe’ is thus ‘a/the canoe that I use’. For the westerner,

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<sup>104</sup> R Firth *Economics of the New Zealand Maori* Government Printer Wellington 1959 at 375-6 and 382.



'my canoe' is an object that I govern entirely, retained for my sole use and no one else's, unless I give permission.

61. Like Pacific and Australian tribes and groups:

*the Maori 'has a genealogical idea of actual filiation linking him to the land on which he lives ... he knows that he is not the only one to live on it: various other creatures share its riches with him ... the land is haunted with forces infinitely more powerful than a single man, forces that may be controlled and made friendly only with a rigorous organization and ceremonial translation of each and every one of the movements of man in his ecosystem ... When the Maori refers to the land as 'his', he is not stating his control over it, but rather stressing its being part of it, his filiation to it.*<sup>105</sup>

Pacific and Austronesian languages do not avoid use of possessive structures, and indeed may contemplate types of possessive appropriation. They are likely to differ from most European languages, however, in their concepts of possession, which dilute the appropriating, domineering logic of languages that assert that, 'I want it' 'I must have it' 'it's mine and belongs to me' and 'I am owner and no one else shall have it.'

62. If the English speaker discoursing in the possessive case becomes notionally a conqueror, able to annex the world with the words, 'that's mine', or 'my child belongs to me', or, 'it's our land', the Pacific-Australian speaker moderates control volition by assigning mental and linguistic primacy to the affiliations of place, lineage and natural world. The statement, 'it's our land' could not mean that the land in question could be

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<sup>105</sup> Fusi *supra* at 138.

subject to absolute control or subdivided. The land is rather held conditionally and for a protective spiritual purpose. Should the custodians lose mana or equivalently-described spiritual standing, they might lose social status necessary to be entrusted with custody.

### *Conclusion*

63. This part focused on whether, and to what extent, language is implicated in the emergence and prosecution of aggression and violence, and insinuates a demand for sovereignty. So far as human tendency to contest for control is concerned, history and everyday life furnish ceaseless examples, ordinary and horrifying, of bottomless human malevolence. Unless an act's authors and witnesses keep silent, or the mental process preceding and accompanying action is non-linguistic, language is author, witness and exegete of human deeds. Language is causative. If people rely on language in nearly all aspects of their lives, the structure, assumptions and concepts of language actuate consciousness. Possessive grammar, affirming mental appropriation and possession as integral to human discourse, equally actuates consciousness.
64. The grammar of possession influences people consciously and unconsciously. The idea of control expressed in pronouns and adjectives, and the verb representations of possession (have and belong), distil in the linguistic patterns of every linguistically capable person a dialectic of appropriation (mine) and contest or antithesis (mine/yours). Human mental organisation governs language. People makes sense of surrounding phenomena by naming, categorising and mentally appropriating what

they see. Our method of perceptual organisation, expressed in language, must result in social dispute over control over, and access to, resources.

65. Dispute does not usually result in fair allocation of resources. Benefit is divided unequally. Unequal division *ipso facto* means inequality. Some, seemingly, *have* or *possess* most or everything, some little or nothing. Possessive grammar is author of a control mentality and insistence on control results in conflict, which results in sovereignties – control arrangements – a consequence of which is exclusion, which is the beginning of social inequality.

## Part 2 - Evidence of drive to contest for control

66. Putative proof of innate tendency to struggle for control comes from three sources: biological and anthropological research, and research into evolutionary robotics. Social and psychological theories, chiefly those of Karl Marx (d 1883), Emile Durkheim (d 1917), Max Weber (d 1920), Sigmund Freud (d 1939), Carl Jung (d 1961), Jean Paul Sartre (d 1980), Jacques Lacan (d 1981), Michel Foucault (d 1984) and Jacques Derrida (d 2004), suggest that human conflict is distinctively a product either of social process or psychological derangement.

### *Gene for aggression*

67. Researchers into the observed trait of human aggression have speculated that it emerged during the prehistory of human survival struggle, resulting from evolutionary adaptation to environment. Evolutionary scientists propose that aggressive behaviours secured survival.<sup>106</sup> Some genetic researchers have proposed relevant effect of a so-called 'warrior gene'.<sup>107</sup>
68. In 2009, a Brown University research team reported a controlled experiment which implicated the Monoamine oxidase A gene (MAOA) in aggressive behaviour.<sup>108</sup> The Brown article<sup>109</sup>

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<sup>106</sup> John Archer 'The Nature of Human Aggression' *International Journal of Law and Psychiatry* 32 2009 202-208; David M Buss Todd K Shackelford 'Human Aggression in Evolutionary Psychological Perspective' *Clinical Psychology Review* Vol 17 No 6 (1997) 605-19; Jeff Victoroff 'Contributions to the special issue: How the science of aggression fleshes out the evolutionary framework' *International Journal of Law and Psychiatry* 32 2009 198-201.

<sup>107</sup> Rose McDermott, Dustin Tingley, Jonathan Cowden, Giovanni Frazzetto, Dominic Johnson 'Monoamine oxidase A gene (MAOA) predicts behavioral aggression following provocation' *Proceedings of the National Academy of Sciences of the United States of America* Vol 106 No 7 February 17 2009 2118-2123.

<sup>108</sup> Rose McDermott, Dustin Tingley, Jonathan Cowden, Giovanni Frazzetto, Dominic Johnson 'Monoamine oxidase A gene (MAOA) predicts behavioral aggression following provocation' *Proceedings of the National Academy of Sciences of the United States of America* Vol 106 No 7 February 17 2009 2118-2123.

began by referring to MAOA as the ‘warrior gene’, because observational and survey-based studies linked the gene to aggression.<sup>110</sup> The experiment’s findings are indeterminate, illustrating the difficulty of reducing complex behaviour to the operation of genes. Personal affect may differ. A carrier of the so-called warrior gene may seem unaggressive and a ‘benign’ carrier may present as an angry and aggressive person. Genes affect behaviour in ways that behavioural studies inadequately explain.<sup>111</sup>

### *The brain and aggression*

69. The greater part of research into the biology of human aggression focuses on brain function. Neuroscientists recognise the effect of interaction between biology and environment in repeated violent behaviour.<sup>112</sup> Scientists use brain scanning machinery to observe brain patterns during cognitive and emotional processing,<sup>113</sup> brain structure, function, process or perfusion.<sup>114</sup> Studies using brain imaging have

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<sup>109</sup> Professor Rose McDermott, Professor of Political Science, Brown University, led the team that conducted the 2009 experiment. For this reason the team’s article reporting results is called the Brown article.

<sup>110</sup> O Cases, I Seif, J Grimsby, P Gaspar, K Chen, S Pournin, U Müller, M Aguet, C Babinet, JC Shih, (June 1995) ‘Aggressive behavior and altered amounts of brain serotonin and norepinephrine in mice lacking MAOA’. *Science* 268 (5218) 1763–6.

<sup>111</sup> Molecular genetics, which links genes to pathologies, is considerably more successful in identifying genetic cause and effect than behavioural genetics. Behaviour is multi-faceted and unlikely to be connected to a single gene.

<sup>112</sup> A Raine ‘Autonomic nervous system factors underlying disinhibited, antisocial and violent behaviour: Biosocial perspectives and treatment implications’ *Annals of the New York Academy of Science* (1996) 794 46-59; A Raine ‘Annotation: The role of prefrontal deficits, low autonomic arousal, and early health factors in the development of antisocial and aggressive behaviour in children’ *Journal of Child Psychology and Psychiatry* (2002) 43(4) 417-34.

<sup>113</sup> Usually using computer tomography (CT) and magnetic resonance imaging (MRI).

<sup>114</sup> Brain ‘structure’ (organic mass) volumes are measured by segmentation, manual outline, semi-automatic combination of manual and automatic segmentation and stereotactical cavalieri principal (PE Barta, L Dhingra, R Royall, E Schwartz ‘Improving stereological estimates for the volume of structures identified in three-dimensional arrays of spatial data’ *Journal of Neuroscience Methods* 75(2) 1997 111-18). Brain function is studied using techniques such as positron emission tomography (PET) scanning, single photon emission computed tomography (SPECT) or functional magnetic resonance imaging (fMRI).

found evidence connecting smaller brain tissue and reduced frontal lobe activity to anti-social and violent behaviour.<sup>115</sup>

70. A host of conflicting studies have failed to settle the question whether tissue reduction contributes to aggression and violence.<sup>116</sup> Others note that deviation in temporal lobes and limbic system increase aggression,<sup>117</sup> while one study observed different brain characteristics in ‘successful’ and ‘unsuccessful’ psychopaths.<sup>118</sup> Nothing in brain research predicts that humans *must* engage in aggression, violence or contest.<sup>119</sup> The neural process that precedes and accompanies aggression and violence is documented.

*Evolutionary robotics and the psychology of human violence*

71. Research in robotics has shown that by a process akin to natural selection, robots evolve various types of capability, including tendency to aggression or violence. Experiments are conducted by programming robots controls with simulated genomes - software code that instructs robots to perform simple functions. Researchers replicate, with slight variations, the code (or genome) of robots that perform functions

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<sup>115</sup> Eg H Anckarsater ‘Central nervous changes in social dysfunction: Autism, aggression and psychopathy’ *Brain Research Bulletin* 69(3) (2006) 259-65.

<sup>116</sup> See discussion in Wahlund and Kristiansson *supra* at 268.

<sup>117</sup> Eg, KA Kiehl ‘A cognitive neuroscience perspective on psychopathy: Evidence for paralimbic system dysfunction’ *Psychiatry Research* 142(2-3)(2006) 107-28.

<sup>118</sup> A Raine et al ‘Hippocampal structural asymmetry in unsuccessful psychopaths’ *Biological Psychiatry* 55(2) (2004) 185-91; Y Yang et al ‘Volume reduction in prefrontal grey matter in unsuccessful criminal psychopaths’ *Biological Psychiatry* 57(10) (2005) 1103-08. ‘Successful’ psychopaths were those who avoided criminal conviction. ‘Unsuccessful’ psychopaths were convicted. The prefrontal grey matter of the group of unsuccessful psychopaths was 22% smaller than that of the successful group.

<sup>119</sup> See A Siegel and J Victoroff ‘Understanding human aggression: New insights from neuroscience’ *Int J Law Psychiatry* 32(4) (2009) at 214. Humans experience aggression, rage etc physiologically, and learn to modulate physiological response. A person learns to recognise autonomic cues, such as emotions of fear or anger, by physiological response (eg, deeper breathing) and cognitive decision (eg, selecting moderating phrases, such as ‘stay calm’). The fact that humans cannot always regulate emotions of anger or rage does not mean that they cannot elect, usually, to moderate anger, and avoid aggression.

most successfully. Multiple iterations of this process (sometimes more than 1000) mimic the process of generational adaptation. Robot 'generations' improve in performance.<sup>120</sup>

72. In 2007, an experiment intended to document the evolution of robot communication systems showed that some robots evolved characteristics of aggression. Programmed to search for a simulacrum of food, robots usually behaved cooperatively but sometimes behaved anti-socially. Anti-social responses over generations could be seen as evolutionary adaptations arising from competition for resources.<sup>121</sup>
73. Other studies have investigated evolution and aggression but none have shown by simulation development of aggressive traits by process of evolution.<sup>122</sup> Robot evolution, resulting in emergence of traits of aggression or violence, provides evidence to suggest that humans also, over the span of human pre-historical development, may have come to behave aggressively or violently to secure survival or advantage.

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<sup>120</sup> Selection of the best performing 'genomes' involves culling those performing less optimally, a process that can be likened to natural selection. Software is utilised to code genomes and performance is usually measured and monitored by computer simulation. Physical robots with embodied code may be utilised early in the 'natural selection' process, but usually 'embodied evolution' occurs, if at all, after hundreds of computer simulations that result in a genome code embodied in a physical 'evolved' robot.

<sup>121</sup> See discussion of Floreano et al experiment, and violence as evolved behaviour, in Aaron T Goetz 'The Evolutionary Psychology of Violence' *Psicothema* Vol 22 no 1 2010 pp 15-21.

<sup>122</sup> As referred to in Goetz, *id*, see J Tooby and L Cosmides *The evolution of war and its cognitive foundations* Institute for evolutionary studies Technical Report 1988 pp 88-1; ML Lalumière, S Mishra, and GT Harris 'In cold blood: The evolution of psychopathy' in J Duntley & TK Shackelford (eds) *Evolutionary forensic psychology* Oxford University Press 2008 pp 176-197; PH Hawley 'Evolution and personality: A new look at Machiavellianism' in D Mroczek and T Little (eds) *Handbook of Personality Development* Lawrence Erlbaum 2006; A Walsh 'Evolutionary psychology and criminal behavior' in J Barkow (ed) *Missing the revolution: Darwinism for social scientists* Oxford University Press 2006 pp 225-268; S Kanazawa 'Theft' In J Duntley & TK Shackelford (eds) *Evolutionary forensic psychology* Oxford University Press 2008 pp 160-75; PH Hawley 'Prosocial and coercive configurations of resource control in early adolescence: A case for the well-adapted Machiavellian' *Merrill-Palmer Quarterly* 49 2008 279-309.

*Anthropological explanations*

74. Evidence for aggression as an evolutionary adaptation in humans comes also from anthropological studies of the behaviour of chimpanzees. Scientists have observed that about 10 species of mammals, and various insect species engage, *intra-species*, in coalitional killing. Such killing is extremely rare.<sup>123</sup> Study of polyadic killing by chimpanzees is considered important because of the genetic similarity of chimpanzees and humans. Alone among primates, these species plan and carry out group violence (although in the case of chimpanzees, very rarely).
75. One comparative theory proposes that group killing by the two species is evidence of male dominance drive.<sup>124</sup> Since appearance of homo sapiens about 100,000 years ago, the 'demonic male' has, in human societies, contested for supremacy, establishing power hierarchies.<sup>125</sup> Aggression and strength, allied to intelligence and cunning, are vital attributes in contests for resources.<sup>126</sup>
76. The concept of the 'demonic male', whether understood to express an archetype of human aggression, or a biological reality, recognises that organising for catastrophic violence is distinctively, though not exclusively, male behaviour.<sup>127</sup> If the demon figure, motif for extermination and dispossession, is reduced to its primate

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<sup>123</sup> Richard W Wrangham 'Evolution of Coalitionary Killing' *Yearbook of Physical Anthropology* 42 1999 1-30.

<sup>124</sup> Ruth Moore Professor of Biological Anthropology at Harvard University.

<sup>125</sup> Although females participate in violence. Researchers (1970s Tanzania and 2000s Uganda) observed instances of females chimpanzees killing and cannibalising the young offspring of other females: Jane Goodall *The Chimpanzees of Gombe: Patterns of Behaviour* Harvard University Press 1986; Simon Townsend, Katie Slocombe et al 'Female-led Infanticide in Wild Chimpanzees' *Current Biology* 15 May 2007.

<sup>126</sup> See Richard Wrangham and Dale Peterson *Demonic Males: Apes and the Origins of Human Violence* Houghton Mifflin 1996.

<sup>127</sup> Note, among other works, R Paul Shaw and Yuwa Wong *The Genetic Seeds of Warfare: Evolution Nationalism and Patriotism* Unwin Hyman 1989; J van der Dennen and V Falger (eds) *Evolutionary Perspectives on Competition, Cooperation, Violence and Warfare* Chapman and Hall 1990; J van der Dennen *The Origin of War: the Evolution of a Male-Coalitional Reproductive Strategy* Origin Press 1995.



characteristics, it becomes, anthropologically, a thinking biped that found organised violence a useful way of asserting dominance, and thus achieving access to (or control of) resources.

77. The most accepted explanation for premeditated killing by chimpanzees is Jane Goodall's<sup>128</sup> imbalance-of-power hypothesis.<sup>129</sup> If power disparity exists between two groups of rivalrous chimpanzees, the more powerful group may terminate competition by eliminating the weaker group, or at least its claim to territory. Intergroup animosity is not the result of animus caused by sexual rivalry or personality discord.<sup>130</sup> Enmity arises from fear at displacement, leading to loss of territory and resources, meaning control of food sources.<sup>131</sup> Usually the aggressor group ascertains the relative weakness of the group attacked, and attacks because cost of aggression is perceived to be low.<sup>132</sup>
78. Chimpanzees, unlike humans, appear to kill for one reason only: to protect or secure territory and resources. The term 'demonic male' caricatures the behaviour of male

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<sup>128</sup> For Jane Goodall see especially: *My Friends the Wild Chimpanzees* National Geographic 1967; *In the Shadow of Man* Houghton Mifflin 1971; *The Chimpanzees of Gombe: Patterns of Behaviour* Harvard University Press 1986; with A Bandora, E Bergmann, C Busse, H Matama, E Mpongo, A Pierce, D Riss, 'Intercommunity Interactions in the Chimpanzee Population of the Gombe National Park' in DA Hamburg and ER McCown (eds) *The Great Apes* Benjamin Cummings 1979 pp 13-54.

<sup>129</sup> *The Chimpanzees of Gombe: Patterns of Behaviour* 1986 *id.* Thesis developed by Richard Wrangham with Joseph Manson and Dale Peterson; Joseph Manson and Richard Wrangham 'Intergroup Aggression in Chimpanzees and Humans' *Current Anthropology* 1991 32: 369-90; Wrangham and Peterson *Demonic Males* (1996) *supra*; see also Wrangham 'Is Military Incompetence Adaptive' *Evolutionary Human Behaviour* 1999 20:3-17.

<sup>130</sup> Although males from the aggressor group benefit from adding to their group females of the weaker group. However, if lethal attacks occur, usually the males of the weaker group, and many of its females, are, over time, killed (Wrangham and Peterson 1999 *supra*).

<sup>131</sup> Wrangham (1999) *supra*.

<sup>132</sup> Females tending young may regard newcomer females with offspring as rivals for food sources. Townsend et al and Goodall (1986) *supra*.

chimpanzees,<sup>133</sup> but it also suggests correlation between some chimpanzee and human behaviours. Individual chimpanzees and humans choose dominance behaviour. If chimpanzees are hypothesised to have adapted to act violently to protect or gain territory, then a similar hypothesis may apply to humans. That is, competing for resources, seeking or defending territory, humans may also have evolved to become aggressive, violent and sanguinary.

### *Sociology of aggression*

79. Although not denying evolutionary origins of apparently innate tendencies to aggression or violence, other theories or accounts of human behaviour have explained these tendencies by reference to pervasive social and psychological influences. Karl Marx, Émile Durkheim, and Max Weber, whose analysis of social process became mainstays of sociology curricula, recognised conflict as part of a dialectic of social change.
80. They analysed social process with little consideration of the role of biology. Marx and Durkheim regarded humans as involuntary actors, their fates determined by the conflict of historical opposites. That conflict, according to Marx would eventually resolve in apotheosis, and disappearance of society as hitherto known. Individuals play the role ordained for them by historical antithesis between exploiting class and exploited class.<sup>134</sup>

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<sup>133</sup> Survey took place at sites located in Tanzania, Uganda, Guinea, Côte d'Ivoire and the Democratic Republic of Congo for periods between eight and 38 years. Surveyors recorded a possible absolute total of 20 recorded group killings at four out of eight sites, each a food-deprived site. This data does not suggest a 'demonic' behaviour pattern.

<sup>134</sup> Karl Marx and Friedrich Engels *The Communist Manifesto* (1848); Marx *Capital* 1-3 vol (1867, 1885, 1894).

81. Durkheim observed that ‘individuals are much more a product of common life than they are determinants of it’.<sup>135</sup> Unlike Marx and Weber, he thought that society emerged from human sodality, which resulted in creation of legal and social norms. The sodality of modern society could be called ‘organic’, in the sense that its norms came organically from flux, evaluation and choice, unlike the prescriptive or ‘mechanical’ norms of medieval society, or societies of obedience.<sup>136</sup>
82. According to Durkheim, modern society can develop organically to the extent that it is constituted by laws and principles that correspond to reality. If social norms cease to command universal acceptance, or impart meaning, *anomie* occurs. The social conditions created by anomie are conflictual and cause hostility and social breakdown.<sup>137</sup>
83. Influenced, like Marx, by German idealism, and in particular Kant’s assertion that reality is apprehended, not objectively known, Weber declared that that which is immanently known to a ‘collective consciousness’, determines social action.<sup>138</sup> He provided a famous example. According to Weber, the predestinarian teaching of John Calvin (d 1564) caused among his followers anxiety about salvation. They collectively adopted belief that fitness for salvation is demonstrated by industry and material production.<sup>139</sup>

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<sup>135</sup> Émile Durkheim *Division of Labor in Society* 1893 (trans George Simpson) The Free Press 1949 at 338.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See discussion in David L Westby *The Growth of Sociological Theory: Human Nature, Knowledge, and Social Change* Prentice Hall 1991 esp at 251.

<sup>139</sup> Max Weber *The Protestant Ethic and the Spirit of Capitalism* 1905 Allen & Unwin 1930 (trans Talcott Parsons).

84. Weber argued that characteristics of industrial society, secular in orientation, rationalist in organisation, and devoted to capital increase, are significantly traceable to the social effect of acceptance of Calvin's theory of salvation – not ineluctable laws of social change.<sup>140</sup> For Weber, industrial society, indifferent to the individual's welfare alienates its members. Conflict results from alienation.<sup>141</sup>
85. After Durkheim and Weber, who were most active in the first two decades of the 20<sup>th</sup> century, two great psychological thinkers, Sigmund Freud (d 1939) and Carl Jung (d 1961), offered insights into the origins of aggression and violence.

*Subconscious source of aggression*

86. Freud theorised that humans repress what is felt as intolerable to self or consciousness.<sup>142</sup> However, repression does not extinguish the subject matter of repression, nor does it immure that subject matter. On the contrary, repression induces conflict between a person's conscious and unconscious awareness. Repression is a psychic defence against perceived threat to self.<sup>143</sup> According to Freud, conflict and pathology are resolved by introducing repressed material into the consciousness, which makes possible for the material to be understood and accepted. The desired therapeutic result is relief of inner conflict, and cessation of self-condemnation.<sup>144</sup> To his followers, Freud's theory explained many behaviours, including aggression. If

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<sup>140</sup> *Id.*

<sup>141</sup> Max Weber *Economy and Society* 1922 (posth); publ University of California Press 1978 (Guenther Roth, Claus Wittich, trans and eds).

<sup>142</sup> See, for example, early works of Freud: *The Neuro-Psychoses of Defence* 1894; *Sexuality in the Aetiology of the Neuroses* 1898; *Three Essays on the Theory of Sexuality* (1905); *Repression* (1915).

<sup>143</sup> James Strachey and Anna Freud (eds) *The Standard Edition of the Complete Psychological Works by Sigmund Freud* (24 vols) Hogarth Press 1956-74.

<sup>144</sup> See esp *The Interpretation of Dreams* (1900); *Introduction to Psychoanalysis* (1917); *The Ego and the Id* (1923).

repression defends against feared self-extinction, a person could displace the feeling of fear by directing feelings of anger and resentment at others.

87. By contrast, Jung, described by Freud, prior the two men's estrangement in 1913, as his 'successor and crown prince',<sup>145</sup> argued that human action is directed by a collective unconscious consisting of archetypes, or symbols, or quintessences of universal experience, and also the physical world.<sup>146</sup> Jung said, 'If an archetype is not brought into reality consciously, there is no guarantee that it will be realised in its favourable form; on the contrary there is all the more danger of a destructive regression.'<sup>147</sup>
88. He considered Nazi Germany 'possessed' by something 'essentially archetypal',<sup>148</sup> and he identified the archetype as Wotan, chief Teutonic god. Legend depicts Wotan, in his rise to mastery of the gods, as peripatetic. In 1933, when the Nazis seized power, vast hordes of Germans tramped across the country searching for work. According to Jung's theory, this movement expressed archetypal restlessness, which reflects the movement of the ancient Germanic tribes.<sup>149</sup>
89. Jung argued that failure to bring archetypes to consciousness could be disastrous. Once exposed to the light of conscious examination whatever is malevolent in a person may be understood and integrated.<sup>150</sup> The Germans, Jung suggested, subconsciously remained attached to pagan gods despite their 10 centuries of

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<sup>145</sup> From a 1909 letter in William McGuire (ed) (trans Ralph Manheim and RFC Hull) *The Freud/Jung Letters: The Correspondence between Sigmund Freud and C. G. Jung* Princeton University Press 1974.

<sup>146</sup> Carl Jung *The Archetypes and the Collective Unconscious* (trans RFC Hull) Routledge & Kegan Paul 1959.

<sup>147</sup> Barbara Hannah *Jung His Life and Work* Capricorn Giant 1976 quoting Jung at 213

<sup>148</sup> *Id*

<sup>149</sup> *Id*.

<sup>150</sup> Carl Jung *Psychological Types* 1921 (in *Collected Works* Vol 6, Princeton 1971).

Christianity. Wotan, primordial God, struggled always to assert his old supremacy.<sup>151</sup>

The Nazis represented Wotan's successful re-emergence. Wotan is one-eyed, ruthless and cruel. The archetype, emerging thus, unconsciously summonsed from the depths, invested German consciousness with unyielding conviction, and indifference to others' concerns or suffering.<sup>152</sup>

90. Jung could thus (although he did not do so precisely) explain Nazism as manifestation of a daemon. A centuries old split in the psychology of a people made possible Nazi accession to power. If Jungian theory is applied to the phenomena of aggression and violence, it can be argued that everywhere group failure to accommodate conflict between consciousness and archetype may create violent reaction.

*Alienation, otherness and assertion of power*

91. By contrast, Jean-Paul Sartre (d 1980) attributed conflict to individual consciousness. Consciousness is subjective. Our subjectiveness separates or *alienates* us, one from the other. Since individual perception and experience are unique, we face a dilemma: how do we accommodate the existence of unique subjective consciousness that is not our own? How can we tolerate another person's uniqueness?
92. The answer is that we cannot. The gaze of the other person, the 'Other', informs us of the existence of self-consciousness distinct from our own. We consider that gaze an intolerable threat to our selfhood. We try to extinguish the Other's uniqueness, to merge, or assimilate, the Other's subjectivity. We cannot. The human condition is

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<sup>151</sup> Jung 'Wotan' *Schweizer Rundschau* March 1936; *The Role of the Unconscious* Collected Works *supra* Vol 10;

<sup>152</sup> *Id.*

one of alienation. One is always alienated from the Other.<sup>153</sup> Alienation undermines human relationships. It is the source of conflict, aggression, war.

93. The concept of the Other predated Sartre,<sup>154</sup> and remains influential in primarily French philosophy and social-thinking. In the 1950s and 1960s, psychoanalyst Jacques Lacan and philosopher Emmanuel Lévinas, contemporaries of Sartre, elaborated theories of the Other.<sup>155</sup> Sartre's lifelong companion, Simone de Beauvoir (d 1986) declared that humans invent the Other to control those with whom they do not share characteristics intrinsic to self-identification, such as gender or race. Men perceived women, or female gender, as the Other, and created social roles that subordinate women to men.<sup>156</sup>
94. Postmodernist philosophers, including Michel Foucault and Jacques Derrida, theorised that assertion of otherness is a device of negation or denial, used by those who exercise or assert power to enforce or create power.<sup>157</sup> Humans define otherness to coerce or constrain others. If otherness is anathematised, and its common characteristic is powerlessness, it becomes a condition of subordination.

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<sup>153</sup> Jean-Paul Sartre *Being and Nothingness* Gallimard 1943.

<sup>154</sup> Originating with Fichte and Hegel. See: Robert R Williams *Recognition: Fichte and Hegel on the Other* New York University Press 1992.

<sup>155</sup> Jacques Lacan *The Four Fundamental Concepts of Psycho-analysis* (1964) Hogarth Press 1977; Emmanuel Lévinas *Totality and Infinity: An Essay on Exteriority* 1961 (trans Alphonso Lingis) Duquesne University Press 1969.

<sup>156</sup> Simone de Beauvoir *The Ethics of Ambiguity* Citadel 1949; also, *The Second Sex* Gallimard 1949.

<sup>157</sup> Michel Foucault *The History of Sexuality* Vol 1 An Introduction 1976 (trans Robert Hurley) Vintage 1990; Jacques Derrida *Speech and Phenomena and Other Essays on Husserl's Theory of Signs* 1973 (trans David B Allison) Northwestern University Press 1989.

95. The cognitive scientist Steven Pinker has argued that<sup>158</sup> while humans manifest apparently innate tendencies to aggression and violence, they also show themselves disposed – innately – to cooperative and socially constructive behaviours.<sup>159</sup> Responding to enlightenment values and upholding human rights, they respond to their ‘better angels’, have retreated from violence ‘towards cooperation and altruism.’<sup>160</sup>

### SUMMARY

This chapter explained how the structure of possessive grammar, stemming from innate human appropriating mentality, creates linguistic antithesis, and, inevitably, conflict. Possessive grammar supplies the concepts and lexicon of the legal category of property. Human possessiveness makes conflict inescapable. The chapter also explained theories concerning human aggression. While human appropriating tendencies, and human aggression, can be meliorated, they will continue to contest for sovereignty. The next chapter examines worldwide statistics on income and wealth distribution and analyses human distributive behaviour. All countries are exclusionary and unequal but some countries are far more redistributive than others.

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<sup>158</sup> Douglas Fry and Patrik Söderberg *Science* 19 July 2013 presented findings contrary to the conventional thesis that pre-agricultural hunter gather societies illustrate human disposition to violence. Studying 148 documented violence among 21 contemporary groups of hunter gatherers, they found that acts of war caused a tiny minority of violent deaths. Intra-group violence involving family disputes, fights over women and revenge killing accounted for 85% of deaths. Human groups do not naturally war on each other. However evolutionary anthropologists, such as Wrangham *supra* and Jared Diamond (*Guns, Germs, and Steel: The Fates of Human Societies* WW Norton & Co 1997) argue that humanity has practised violence without cessation. Steven Pinker, in *The Better Angels of our Nature: Why Violence has Declined* Viking 2011, proposes that humans have, for cultural and economic reasons, become progressively less violent over the last millennium.

<sup>159</sup> Pinker *id.*

<sup>160</sup> Pinker, chapter 9.



## CHAPTER FOUR

### THE PROBLEM OF DISTRIBUTION

#### **PURPOSE**

To explain measurement of global income and wealth distribution, which shows that wealth is highly concentrated in all jurisdictions, and – by contrast with income distribution – most concentrated in some of the world’s wealthiest and most democratic countries . Concentration is exclusionary and unequal distribution indicates unequal allocation of proprietary rights, which is a consequence of political settlement. Data compiled by economist Thomas Piketty shows that reduction in inequality is both historically anomalous and a consequence of concerted, directed, government social spending. Owners tend towards capital conservation.

#### **CHAPTER 4 HEADINGS**

##### **Part 1 Wealth Distribution**

*Relevance of wealth distribution*

*Redistribution*

*Intractable pattern of wealth distribution*

*Effect of social inequality*

*Gini*

*Human development*

*Wealth exclusion is proprietary exclusion*

*Critical role of income redistribution in richer countries*

##### **Part 2 Capital and ownership**

*Return on capital > growth*

*Reconstruction and redistribution*

*Role of government*

## Part 1      Wealth Distribution

### *Relevance of wealth distribution*

1. This chapter is concerned with wealth distribution. Wealth is defined by statistical survey organisations as net assets in a jurisdiction.<sup>1</sup> Wealth distribution is relevant for two reasons. The first is that net assets are owned, and wealth, as defined and reported,<sup>2</sup> quantifies that which is the subject of ownership. If, as the thesis asserts, ownership causes social inequality, it follows that the exteriorised representation of ownership – wealth – is implicated in the creation of social inequality.
  
2. Wealth, although material (or, if not material, materially realisable),<sup>3</sup> itself exteriorises an abstract phenomenon, that of control, the state of sovereignty or supremacy.<sup>4</sup> Proprietary rights, which guard wealth, bestow, above all, a potent control weapon, the power to exclude. Proprietary rights derive from political settlement, which permits or disallows wealth. Because wealth exteriorises ownership, statistics on wealth distribution demonstrate the exclusionary effect of ownership.

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<sup>1</sup> Refer OECD *Framework for Statistics on the Distribution of Household Income, Consumption and Wealth* OECD 2013 at 123: 'For micro statistics on household wealth, confining the concept of wealth to assets and liabilities in a narrow economic sense – i.e. comprising those items that have an economic value and are subject to ownership rights – is the most useful and practical approach for most purposes ... The definition of wealth, or net worth, for micro statistics on household wealth is the value of all the assets owned by a household less the value of all its liabilities at a particular point in time .' The World Bank adopts a similar definition of wealth.

<sup>2</sup> Data on income and inequality is collected within jurisdiction by the collecting agencies of national governments (census and tax data) and available to international statistical bodies. Data is often out of date, and data sets are inconsistent: data for country x may be collected in 1998 and compiled 1999, while data for country y was collected 2008 and compiled 2009.

<sup>3</sup> A conventional example given of abstract and realisable property is a *chose in action*, the right to sue for a debt. A considerable part of the value of assets lies in the enforceable value of legal rights. The alienable value of material subject matter is distinct from the rights that pertain to the subject matter. In the case of a chose in action, the material subject matter is the chose, ie, the thing, meaning tangible benefit, that is realised if proceedings result in payment of a debt.

<sup>4</sup> Meanings of most words used to define 'ownership' and 'property', such as 'possession', 'title' and 'sovereignty', are usually synonyms or near-synonyms. Circular definition points to conceptual unity.

3. The second reason for analysing distribution statistics is that while the World Bank, International Monetary Fund (IMF), Organization for Economic Cooperation and Development (OECD), and Central Intelligence Agency (CIA),<sup>5</sup> focus analysis on worldwide income distribution, wealth inequality, more than income inequality, determines social inequality. In the large majority of countries, wealth concentration is considerably greater than income concentration.<sup>6</sup>
  
4. While, typically, richer countries distribute income more equally,<sup>7</sup> wealth distribution in all countries is more unequal than income distribution. Statisticians usually use the Gini coefficient to plot income or wealth distribution on a scale 0-1 (in this chapter, 0-100). A Gini score of 1 (or 100) signifies that one person in a country owns all assets in that country. According to one study, the worldwide wealth distribution range is approximately 60-80. The worldwide income range is 30-50 (although another studies yields a range of 54-84 and 24-62).<sup>8</sup>
  
5. The egregiousness of wealth concentration in all countries, and the disparity between income and wealth distribution patterns in those countries, is shown in the United

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<sup>5</sup> The CIA releases a world factbook compendium annually (published by the US Printing Office), and updates the online version weekly ([www.cia.gov/library/publications/the-world-factbook](http://www.cia.gov/library/publications/the-world-factbook)).

<sup>6</sup> In a handful of countries that are ranked least unequal for wealth concentration, the Gini coefficient for inequality is lower by about 0-5 centiles than the income Gini for a handful of most unequal countries. This result is yielded only by cross-comparison. Within countries, wealth concentration is invariably greater than income concentration.

<sup>7</sup> Some poorer countries are among the least unequal measured by income and income/consumption distribution. A number of wealthier countries are not placed in the highest, or even second highest, decile of countries ranked for least unequal distribution. These facts demonstrate only that: (i) even if a richer country lags in income redistribution, absolute national income is sufficient to ensure that tax receipts make possible social provision (ii) more equal income distribution in a poorer country may indicate a subsistence economy in which no individual or coterie has means to appropriate a significantly larger share of national income than others (or some countries may receive economic subsidy that once distributed reduces inequality).

<sup>8</sup> For wealth distribution See James Davies, Susanna Sandstrom, Anthony Shorrocks, Edward Wolff *The Level and Distribution of Global Household Wealth* National Bureau of Economic Research Working Paper 15508 2009. For income distribution see esp World Bank Development Research Group data. The lowest reported wealth coefficient for a country has been about 54 (Davies et al) cf lowest income coefficient of about 24 (World Bank et al).

Nations' University's definitive study (to-date) of worldwide wealth distribution, published 2006/2008.<sup>9</sup> Of the four countries in which wealth is most concentrated, three are rich countries. Zimbabwe, the world's second poorest country,<sup>10</sup> is the country in which wealth distribution is most unequal. Zimbabwe is ranked immediately below Denmark, Switzerland, and the United States, the second, third and fourth most unequal countries.<sup>11</sup>

6. A number of statistics, drawn from the UNU study, point to prolific global wealth inequalities (distributions dated at 2000). In the United States, the world's largest economy by GDP, the top 10% owns 70% of assets. In China, the third largest economy, 10% own 40% of wealth. One per cent of the world's population owns 40% of net global assets. The second percentile owns 51%, and 5% owns 71%. 10% of the world's population owns over 85% of assets (figure calculated using official exchange rates; it reduces to 71% if USD PPP is used).<sup>12</sup> 50% of the world's population owns less than 1% of total assets.<sup>13</sup>

### *Redistribution*

7. Rich countries redistribute income, significantly reducing the scale of poverty in those countries. Redistribution by taxation and social transfer occurs on an absolute scale

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<sup>9</sup> James Davies, Susanna Sandstrom, Anthony Shorrocks, Edward Wolff *World Distribution of Household Wealth* United Nations University-World Institute for Development Economics Research 2006/08. 1. Davies et al calculated average wealth level using household balance sheets (census or other survey data), and specific wealth survey data for 39 countries, which comprise over 60% of the world's population and 80% of world wealth. Regression analysis of 39 countries and imputation of region income class means allowed for global estimates of wealth holdings.

<sup>10</sup> Ranked by *Global Finance* magazine 10 January 2015 using International Monetary Fund data to calculate GDP (PPP) for 2009-13.

<sup>11</sup> Davies et al *supra*.

<sup>12</sup> Davies et al *supra*.

<sup>13</sup> Nearly all the world's wealthiest households are located in North America, Europe and Rich Asia Pacific (although the number of millionaires/billionaires in China and India has grown rapidly since 2000).

that poorer countries cannot match, and a proportionate scale that few could match.<sup>14</sup> Other than by property taxes, rich countries do not redistribute wealth (and nor, usually, do poor countries, although some may extra-legally confiscate assets for political reasons).<sup>15</sup> While wealth is highly concentrated in Denmark, Switzerland and the United States, social spending in these countries, mostly funded by taxation,<sup>16</sup> helps to maintain high standards of living and support ‘human development’(although Switzerland, compared to most other OECD countries, redistributes parsimoniously).<sup>17</sup>

8. Few dispute that income collected by taxation, once allocated to social spending programs (including health and education), contributes to improvement of living standards and furtherance of human development. The logic and benefit of income redistribution, and its meliorating effect on social inequality, is apparent both from economic data and everyday observation.<sup>18</sup>

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<sup>14</sup> In 2011, the mean Gini score for OECD countries for income inequality was 32 (cf 30 in 1995). Adjustment for taxes and transfers subtracts an average of between 15 and 20 points from the Gini scores of most wealthier countries. In 2011 (the most recent compilation date) Denmark’s score fell from 43 to 25 after adjustment which caused its actual poverty rate to register as 6% instead the 25% predicted prior to adjustment. By contrast, the United States Gini fell from 51 before adjustment for taxes and transfers to 39 after adjustment, while its actual poverty rate was 17% instead of 28% predicted before adjustment. See annual OECD *Income Distribution Database: Gini, poverty, income, Methods and Concepts* ([www.oecd.org/social/income-distribution-database.htm](http://www.oecd.org/social/income-distribution-database.htm)).

<sup>15</sup> Usually expropriation is of assets belonging to foreign entities: in Argentina in 2012, the *Justicialist* coalition government nationalised the Spanish energy firm Yacimientos Petrolíferos Fiscale, having renationalised Aerolíneas Argentinas in 2009; in 2007-10 Venezuela nationalised telecoms and electricity companies, the cement industry, and, among other companies, some steel, oil and rice companies; in 2006 Bolivia nationalised the country’s gas industry.

<sup>16</sup> The OECD reported that in 2011, Denmark’s Gini before taxes and transfers (T&T) was 41; after T&T it was 25; after T&T, the actual poverty rate was 6% cf 25% projected without T&T. In 2011, Switzerland’s Gini before taxes and transfers was 37 and 31 after adjustment; an actual poverty rate of 15% fell to projected 10%. The United States Ginis were 51 and 39 and actual/projected poverty rates 28 and 17. (OECD Income Distribution Database *supra*).

<sup>17</sup> The United Nations’ Development Program *Human Development Report 2014* (at 168) ranks Denmark, Switzerland and the United States 10<sup>th</sup>, 3<sup>rd</sup> and 5<sup>th</sup> for investment in human development cf Zimbabwe ranked 156. The primary indicia of human development are mortality and education retention rates. The rankings are adjusted for inequality.

<sup>18</sup> See OECD database *supra* for comparative information on OECD members.

9. Yet rich countries, which productively redistribute income, make little effort to redistribute wealth. Wealth is taxed in certain ways - capital gains tax is an example of wealth tax – and for policy reasons that are not concerned only with revenue collection. However, wealth, unlike income, is seemingly regarded as outside the purview of distributive policy. Why? Firstly, assets, even intangible ones, are usually not liquid like income. To realise assets, which involves transfer of proprietary rights, usually takes time. Secondly, an owner may psychologically apprehend assets or wealth – property - as part of selfhood.
10. The Latin root of the word ‘property’ is *proprius*, ‘one’s own’. A person may acknowledge the social value of taxing income while arguing passionately that something understood as property (eg, house, car, copyright) is possessed by *oneself*, personally and irreducibly. Above all, wealth or property confers power: the power to exclude. The property of ownership is created by the legal right to exclude others from possession or enjoyment of the thing owned. Few people part willingly with this power of exclusion.<sup>19</sup>
11. For these reasons, at least, governments do not attempt substantively to redistribute wealth, although redistribution, whatever its other effects, must result in less unequal distribution.<sup>20</sup> Any property tax is, in theory, redistributive, to the extent that each

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<sup>19</sup> Psychologists Joris Lammers and Adam Galinsky have co-authored a number of papers beginning 2008 (‘Looking through the eyes of the powerful’ *Journal of Experimental Psychology* 44 1229-38, with Sabine Otten). Their experiments show that attitudes of power and/or entitlement tend to induce feelings of invulnerability and moral impunity. While the experience of ownership, which is commonplace, does not obviously predict feelings of power, the psychological effect of knowing that an object or item ‘is mine’, and ‘not yours’, is potentially potent.

<sup>20</sup> Naren Prasad *Policies for redistribution: the use of taxes and social transfers* International Labour Organization (International Institute for Labour Studies) DP194/2008 (at 6-8). See also OECD ‘Income inequality and growth: The role of taxes and transfers’, *OECD Economics Department Policy Notes* No 9 January 2012.

impost, however nominally, subtracts from wealth, and reduces the compass of ownership. Governments and institutions tend towards designing social amelioration policies as extensions of fiscal policy. Social policy is most conveniently funded by appropriations from tax funds, and policymakers accordingly focus attention on the disposition of national income.<sup>21</sup> The fiscal benefit, apart from the theoretical social benefit, of extensive *asset* taxation, is mostly undiscussed.

12. Conventional justifications for wealth policy stasis - which include the assertion that unequal distribution is a consequence of allocative efficiency or a reflection of variable market reward – are of limited relevance.<sup>22</sup> The intractability of the historical pattern of wealth distribution signifies that its connection to a hypothetical process of allocative efficiency, which promises dispersion of benefit, not concentration, is remote.<sup>23</sup> This dissertation proposes that a country's constitutional-political settlement allocates property rights, and the continuing allocation, consistent with the principles of the constitutional-political settlement, determines whether a society is more or less exclusionary.<sup>24</sup> Since property rights exclude, allocation and exercise of

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<sup>21</sup> Prasad *supra* at 12: '... the share of [OECD members'] fiscal distribution through taxes decreased from 27 per cent in 1980s to 24 per cent in the late 1990s, while the contribution of transfers increased in the same proportion.' Social transfers are social welfare payments (eg, family and unemployment benefits) funded principally from tax appropriations but drawn from allocated funds.

<sup>22</sup> See Milton and Rose Friedman *Free to Choose: A Personal Statement* Harcourt 1980, asserting that the mostly unregulated market is the sum of human transactional choices, which results in optimal benefit to motivated individuals and society. See also Friedrich Hayek *The Constitution of Liberty* Routledge and Kegan Paul 1960. Cf Amartya Sen, who outlined a different version of market operation in 'Markets And Freedoms: Achievements And Limitations of the Market Mechanism In Promoting Individual Freedoms' *Oxford Economic Papers* 1993 45(4) 519-541. Sen criticised the tendency to view personal and market liberty as inevitable by-products of legal declaration of property rights.

<sup>23</sup> This proposition is to some extent foreshadowed by Sen *id* in his discussion of income inequality at 537: 'While the efficiency advantages of the market mechanism, given the standard assumptions, tend to translate, in some forms, into the field of freedoms (even in the space of freedoms not just that of commodities), the problems of inequality remain, and if anything tend to get magnified in the process of the translation.'

<sup>24</sup> See UNDP HDR 2014 *supra*, at 102-103: 'Cohesive societies tend do better than less cohesive societies in most aspects of human development ... How do societies redress deep divisions and historically rooted exclusions? By improving the availability of basic social services, strengthening employment policies and

proprietary rights result, instrumentally, in social exclusions and thus social inequality.<sup>25</sup>

*Intractable pattern of wealth distribution*

13. Allocation solidifies owners' political and social advantage over non-owners. The category of ownership, and the class of owners, are socially avowed, meaning that ownership is, seemingly universally, a socially approved object, apparently not subject to limitation.<sup>26</sup> This conjecture hardens into fact when the characteristics of political settlements are examined. Invariably, they distribute power or control, which is both enforceable by coercion, and enforced conventionally, by the expression of dominant social values.
  
14. The pattern of ownership externalises distribution of power, and property gives material form to power distribution.<sup>27</sup> If society apparently consists of owners and those who aspire to own, a population thus attached to – or, alternatively, unemancipated from – historical political settlement, what government or institution will try to undo history, even to achieve a small revision to distributive imbalance?
  
15. The difficulty of wealth redistribution is compounded by the dual nature of proprietary rights, which are simultaneously wealth's sentinels and its legal sureties. A

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extending social protection. Yet these broader universal policies may not target specific exclusions and horizontal inequality of marginalized groups ...'

<sup>25</sup> *Id.*: 'How do societies redress deep divisions and historically rooted exclusions?'

<sup>26</sup> 'For each new class which puts itself in the place of one ruling before it, is compelled, merely in order to carry through its aim, to represent its interest as the common interest of all the members of society, that is, expressed in ideal form: it has to give its ideas the form of universality, and represent them as the only rational, universally valid ones.' Karl Marx 'German Ideology' (1843) reproduced in Laura Desfor Edels and Scott Applerouth *Sociological Theory in the Classical Era: Text and Readings* Sage Publications 2010 at 40.

<sup>27</sup> Chapters 5-7 are intended to validate the principle that property allocation in a society is instrumental, the consequence of political struggle.



patent, for example, excludes competition and is also a transferable asset, the value of which may be the attributed market value of a derivative product. Political settlement created the legal regime of patents, political settlement supports its continuance, and political settlement makes improbable reduction in the scope of patent rights.

16. As it grows more complex, an expanding economy multiplies proprietary rights. According to conventional narrative, market process increases the number of rights-holders permitting as much distributive justice as economic logic allows.<sup>28</sup> Allocation of property rights depends on human agency, and consideration of wealth distribution statistics suggests that humans are not collectively inclined to share or distribute economic rights, or the benefits accruing to those rights.
17. A high quantum of national wealth does not cause wealth diffusion. The theory that the growth-wealth dichotomy effectively distributes wealth is contradicted by Tables 1-3, which show that some rich countries are less unequal in distribution of wealth than most other countries, and conversely, some rich countries distribute wealth more unequally. Theory is additionally contradicted when wealth inequality Gini scores are interrogated. Japan's score is 54 (Table 2), meaning that wealth is less concentrated in Japan than elsewhere. Yet a score of 54 indicates high wealth concentration/exclusion. The share of the largest population cohort(s), distributed as a mean, shrinks in proportion to increase in the mean share of the wealthiest cohort(s). A wealth Gini of 54 indicates considerable wealth exclusion. In other

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<sup>28</sup> For conventional narrative about optimal market function, see Friedman and Hayek *supra*.

countries, exclusion is much greater. The worldwide wealth distribution Gini is 89,<sup>29</sup> a statistic which testifies to extremity of global social inequality.

**TABLE 1 – WORLD’S 10 LEAST UNEQUAL COUNTRIES BY HDI RANKING, AND DISTRIBUTION OF: INCOME & CONSUMPTION; INCOME; WEALTH<sup>30</sup>**

	Human Development Index country ranking (adjusted for inequality) 2013 <sup>31</sup>  <i>Source: UNDP Human Development Report 2014</i>	Country (Least unequal by distribution of <u>income or consumption</u> ) <sup>32</sup>  <i>Source: World Bank 2014 World Development Indicators</i>	Country (Least unequal by distribution of <u>income</u> )  <i>Source: World Bank. Compilation year 2011</i>	Rank (Least unequal by distribution of <u>wealth</u> ) <sup>33</sup>  <i>Source: Davies, Sandstrom, Shorrocks, Wolff World Distribution of Household Wealth 2008 UNU-WIDER</i>
<b>1</b>	Norway	Slovenia	Denmark	Japan
<b>2</b>	Australia	Belarus Czech Republic Iceland Sweden	Japan	China
<b>3</b>	Switzerland	Norway Rumania Slovakia	Norway	Spain
<b>4</b>	Netherlands	Albania Hungary Netherlands	Sweden	South Korea

<sup>29</sup> Davies et al 2006/08 *supra*.

<sup>30</sup> Rankings are made by reference to historical, not current, household data, and different organisations utilise household data compiled in different years. Compiled information provides a snapshot that is approximate.

<sup>31</sup> Not intended as a standard-of-living index but measuring components of welfare. Rankings are before adjustment for inequality. For inequality-adjusted rankings, see Table 4.

<sup>32</sup> The World Bank (Development Research Group) weights income/consumption data sets towards consumption information, a better welfare indicator, since it discloses more fixed household expenditure patterns. Rankings reflect Gini calculation after taxes and transfers.

<sup>33</sup> 'Wealth' for purposes of measuring distributions is assets (subject matter with a realisable value owned by a household or householder) – liabilities = net household assets. Actual wealth inequalities may be significantly higher than reported since survey respondents notoriously understate assets.

5	United States	Armenia Austria Iraq	Czech Republic	Macau
6	Germany	Germany Moldova Niger	Slovakia	Ireland
7	New Zealand	Bangladesh France Japan	Ukraine	Yemen
8	Canada	Azerbaijan Belgium Kyrgyz Republic Lithuania Poland	Finland	Finland
9	Singapore	Australia Canada Croatia Ethiopia Sao Tome & Principe West Bank & Gaza	Belarus	Australia
10	Denmark	Algeria Greece Cote D'Ivoire Uzbekistan	Afghanistan	Czech Republic, Slovenia

### *Effect of social inequality*

18. Inequalities within and between nations are understood by policymakers to contribute to (and result from) social dysfunctions associated with misallocation, and misappropriation, of resources, institutional failure, corruption, economic stagnation or regression, reduction of living standards, poverty, environmental degradation, corruption, war, climate change, and a range of so-called negative externalities.<sup>34</sup>
19. While studies of social inequality primarily construe inequality as an indicator of development deficit,<sup>35</sup> social inequality is, in principle, as potentially injurious to social

<sup>34</sup> See *Inequality Matters: Report of the World Social Situation 2013* United Nations ST/ESA/345 2013 at 21: 'Various social groups ... suffer disproportionately from income poverty and inadequate access to quality services ...'.

<sup>35</sup> See the first *Human Development Report 1990* at 1: 'This Report is about people - and about how development enlarges their choices ...' (UNDP). The focus of the HDRs is on improving welfare or 'human development' standards in poorer countries.

welfare in richer countries as in poorer.<sup>36</sup> The identifying characteristic of inequality is exclusion. Unequal distribution of social benefit, and specifically, unequal distribution of property, is effected by allocation of exclusive rights.<sup>37</sup> Exclusive rights confer power to exclude others from sharing in the benefits of those rights.

20. Since inception, in the 1950s, of the United Nations' international social amelioration programs, a range of policy actors, the United Nations, World Bank, IMF and OECD, and other interested institutional, private or public entities, have investigated causes of international inequality.<sup>38</sup> Inequality statistics, once analysed, show significant correlation between distributive inequality and social deficit. Countries that are politically more free, that more uphold human and other legal rights, that are economically more developed, tend, according to statistical analysis, to be the least unequal (refer Tables 1 and 4).<sup>39</sup>
21. Statistics do not show that a nation judged least unequal according to certain measures (no single country is least unequal according to all measures of inequality) is not affected by problems connected with inequality.<sup>40</sup> Analysts agree that the

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<sup>36</sup> Article (Special Report) *The Economist* 13 October 2012 'The rich and the rest: American inequality is a tale of two countries': '... the stratification of American society is having profound consequences ... it is clear that there has been no improvement in mobility to compensate for widening inequality.'

<sup>37</sup> Rights to exclude may exist even though not formally asserted in an instrument.

<sup>38</sup> For a history of the activities of the UNDP (involving consideration of its merged antecedents, the *Expanded Programme of Technical Assistance* or EPTA, created 1949, and the *United Nations Special Fund* (1958), see Craig Murphy *The United Nations Development Program: A Better Way?* Cambridge University Press 2006. UNDP, IMF and World Bank are UN specialized agencies, intended to work cooperatively to resolve common problems, which relate to issues of development and equity.

<sup>39</sup> CIA, World Bank, OECD and United Nations' surveys reveal a correlation between plural politics, open societies, sophisticated economies and less pervasive inequality. This correlation is explored in Richard Wilkinson and Kate Pickett *The Spirit Level: Why More Equal Societies Almost Always Do Better* Allen Lane 2009. CIA data, which dates from 2008 (indicating superior currency), shows that most of the 20 least unequal nations listed by the CIA are economically advanced, and all are democratically governed.

<sup>40</sup> For example, considerable variation can be observed between income and wealth Ginis of Denmark (invariably top 5 for income equality, 97<sup>th</sup> – or second-most unequal - for wealth) and Sweden (top 5 for income equality and 77<sup>th</sup> for wealth).

adverse social consequences of inequality affect every nation, as well as the community of nations, but consensus is less marked when cause and countervailing action are discussed.<sup>41</sup>

22. Most reporting on inequality concerns income distribution (the World Bank, OECD, CIA and IMF are leaders in compilation of income distribution data, and the World Bank and OECD also report on income and consumption). The UNDP reports annually on worldwide human development, ranking countries by their Human Development Index score (Table 4). HDI inputs are statistics on mortality and academic completion rates, as well as Gross National Income at purchasing power parity per capita (USD/PPP).<sup>42</sup>

### *Gini*

23. Over time, economists and econometricians devised formulae to determine algorithms measuring inequality preponderance. These include the Gini coefficient, Hoover index, Thiel index, and Atkinson index, usually but not invariably applied to income distributions. In 1936, Edgar Malone Hoover Jr devised the Hoover index,<sup>43</sup> or so-called 'Robin Hood index', since it identifies the proportion of the upper half of the income group necessary for transfer to the lower half to create income parity.

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<sup>41</sup>Eg, E Schlicht 'A Neoclassical theory of wealth distribution' *Jahrbücher für Nationalökonomie und Statist* 189 (1975) 78-96k, O Galor and J Zeira 'Income Distribution and Macroeconomics' *Review of Economic Studies* 60(1), (1993) 35-52, Jeff Frieden, 'The Inequality Predicament' *United Nations Report on the World Social Situation* 2005.

<sup>42</sup>In addition to publishing HDI data, the UNDP compiles statistics on worldwide poverty. The *Multidimensional Poverty Index* (replacing the Human Poverty Index), is utilised to report deficits in education, health and living standards, and evaluate 'dimensions' of poverty. Poverty is defined as a 'multidimensional' state some of the dimensions of which are measured by indicia of human welfare: Sudhir Anand and Amartya Sen *Concepts of Human Development and Poverty: A Multidimensional Perspective* UNDP NY 1997. The problem of inequality is not, of itself, a problem of poverty.

<sup>43</sup> Edgar M Hoover Jr 'The Measurement of Industrial Localization' *Review of Economics and Statistics* 18 (1936) 162-171.

24. In 1967, Henri Theil proposed the Theil Index for measuring income inequality.<sup>44</sup> Theil called income distribution 'entropic', meaning that low inequality suggested breakdown in distributive dynamism (low entropy) while high inequality signalled dynamism (high entropy) and potentially misallocation. Shortly after Theil's index gained popularity, Anthony Barnes Atkinson suggested (1970) a related way of measuring inequality utilising a formula that could more acutely explain variation in income distribution.<sup>45</sup>
25. The Gini, named after the statistician Corrado Gini, who devised the measure in 1912,<sup>46</sup> is the most commonly used measure of income and wealth inequality. The Gini's formula tracks relative mean deviation between equal and variable income distribution between percentiles of a population. As noted, the Gini coefficient is a number, whole or decimal, on the scale 0-1 or 0-100. '0' indicates perfect equality (each population percentile receives a percentage of income equal to its percentage share of population). An index of '1' indicates total inequality, since a single population percentile receives 100% of income. Mathematically, the coefficient can be described as the derived mean of the difference between every possible pair of individuals, divided by the mean size  $\mu$ :<sup>47</sup>

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<sup>44</sup> Henri Theil *Economics and Information Theory* Rand McNally & Co 1967.

<sup>45</sup> Anthony Barnes Atkinson 'On the measurement of economic inequality' *Journal of Economic Theory* 2 (3) (1970) 244–263.

<sup>46</sup> Corrado Gini, 'Variabilita e Mutabilita', C Cuppini (1912) 156 pp book; also published in 1913 in *Journal of the Royal Statistical Society* Vol 76 No 3 (February, 1913).

<sup>47</sup> <http://mathworld.wolfram.com/GiniCoefficient.html>

26. The Gini is not always viewed with favour as a measurement of inequality, and some econometricians consider that other measures more precisely represent inequality. The Gini coefficient remains the default international measure of inequality utilised by key international organisations, the United Nations, World Bank, OECD and IMF to interrogate patterns of inequality.

### *Human development*

27. In 1990, the United Nations began compilation of inequality indicia to provide insight into the extent to which different countries are able to provide for the welfare of inhabitants, or facilitate 'human development'.<sup>48</sup> The United Nations' annual publication of a Human Development Index,<sup>49</sup> which measures income, standard of living, life expectancy and educational attainment,<sup>50</sup> is intended to supply a composite picture of human economic and social welfare in different countries. The HDI reveals more totally differences in human welfare than those shown by economic indicia of inequality such as compilations of income or consumption differences (refer Table 4 for Top 50 countries by HDI score).

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<sup>48</sup> See <http://hdr.undp.org/en/reports/global/hdr1990/>: 'The Human Development Report (HDR) was first launched in 1990 with the single goal of putting people back at the center of the development process in terms of economic debate, policy and advocacy ... going beyond income to assess the level of people's long-term well-being. Bringing about development of the people, by the people, and for the people, and emphasizing that the goals of development are choices and freedoms.'

<sup>49</sup> Adjusted, since 2010, for inequality. The inequality-adjusted HDI, or IHDI, weights the average value for each measure of human development (income, living standard, longevity and educational attainment) by application of the Atkinson welfare (inequality) coefficient.

<sup>50</sup> Income parameters are USD100 (PPP) and USD107,721 (PPP), estimated for period 1980-2011. Standard of living ('decent standard of living') is measured by GNI per capita (PPP\$) not GDP per capita. Life expectancy at birth is calculated using a minimum value of 20 years and maximum value of 83.4 years. Educational attainment is measured by mean of years of schooling for adults aged 25 years and expected years of schooling for children of school entering age. See <http://hdr.undp.org/en/statistics/hdi/>.

28. The Pakistani economist, Mahbub ul Haq, when special advisor to the UNDP (1989-95), diverged from six decades of policy-making focus on exclusive reporting of national income accounts,<sup>51</sup> and proposed that the UNDP publish reports on human wellbeing or 'development'. Other leading development economists, including Amartya Sen, collaborated with Haq to devise the HDI, to measure 'human development'.
29. The Human Development Report (HDR), published since 1990, ranks countries according to their success in providing optimal conditions - defined by indices measuring mortality and school retention rates, and income per capita - for human development. Since 2010, HDI scores are adjusted for inequality, with adjustment causing scores to drop an average of about 23%. Adjustment caused global HDI in 2011 to fall from 68 to 52.<sup>52</sup> While reports on income and wealth are concerned with distribution of national resources, the HDI provides added insight into access to (or provision of) important social services.
30. HDI data thus provides insight into the extent to which a country counteracts social inequality by equalising access to resources/services. The HDR ranks countries surveyed by category: the most highly ranked countries are said to facilitate, 'Very high human development'. Rankings rarely show much variance year-to-year. Norway and Australia consistently rank first and second on the inequality adjusted HDI scale, and

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<sup>51</sup> The economist Simon Kuznets as head of the National Bureau of Economic Research during the 1930s, and later in different government roles, contributed significantly for formally determining the standard method for compiling national accounts, the development of a formal measure for determining quantitatively annual national economic activity (Gross National Product, later superseded as a primary measure by Gross Domestic Product). His work focused on measurement of income, and the United Nations and its agencies, such as the World Bank, adopted income as a primary measure of economic wellbeing, and, implicitly, personal wellbeing. UI Haq reacted against this trend.

<sup>52</sup> See <http://hdr.undp.org/en/statistics/ihdi/>.



most countries ranked among the top-10 countries for human development remain in the top-10.<sup>53</sup> In 2013 (see Table 4), the top-10 countries were: Norway, Australia, Switzerland, Netherlands, United States, Germany, New Zealand, Canada, Singapore and Denmark.<sup>54</sup> Of these countries, the only new entrant from the previous year's list was Singapore, which exchanged places with Ireland.<sup>55</sup>

31. Four Asian countries other than Singapore are ranked in the top-30 (Hong Kong, South Korea, Japan and Brunei Darussalam). All other countries ranked in the 11-30 group are European. Forty-nine countries are placed in the highest human development category ('Very high human development'). No African country is placed and only three from South/Central America and Caribbean (Chile, ranked 41<sup>st</sup>, Cuba 44<sup>th</sup> and Argentina 49<sup>th</sup>).
32. HDRs published 1990-2014 show correspondence between high HDI score and high GDP (PPP) per capita score, and little change in the composition of countries placed in in the 'Very High Human Development' category.<sup>56</sup> This observation confirms, from the perspective of country comparison, an observable characteristic of wealth concentration, which will be discussed in this chapter. Once wealth is accumulated, the perceived value of proprietary rights that govern wealth encourages owners to concentrate rather than distribute assets.

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<sup>53</sup> See UNDP ([www.undp.org](http://www.undp.org)) HDRs 2010-14.

<sup>54</sup> UNDP HDR 2014.

<sup>55</sup> *Id.* Singapore's rank increased between 2013 and 2014 by three places. Ireland fell three places.

<sup>56</sup> Excluding Japan, Korea and Hong Kong, highest ranked HDI countries divide roughly equally between Anglophone and Scandi-Germanic (including Netherlands) clusters. The Scandi-Germanic cluster countries (together with Japan), report income Gini's –in the range 25-34, and Anglophone countries (including Hong Kong) a range of 33-43 (including Hong Kong). A combined range of 25-43 suggests significant (and varying) income redistribution in all listed countries, which in turn predicts other indicators of societal welfare (and wellbeing) reported by these countries.

*Wealth exclusion is proprietary exclusion*

33. The UNU wealth distribution report by Davies et al,<sup>57</sup> adjusting for purchasing power parity,<sup>58</sup> confirms, above all, extraordinary concentration of wealth in all countries. The global wealth Gini before inequality adjustment<sup>59</sup> is estimated at 89, meaning that in a representative population of 10 people, one person would possess wealth of value USD 1000 and the other 9 people would each possess wealth of USD 1.<sup>60</sup>
34. The mean Gini for worldwide income also reveals extraordinary allocation to the top decile of income earners (and components within the decile). If the world income Gini is taken as 70, the distributive consequence is that the top percentile of income earners receive 13% of total income, the top 8% receives 50%, and the bottom 50% receives 7%.<sup>61</sup> Table 2 shows income and wealth distribution for the 15 countries that distribute most equally, or more accurately, the least unequally. Distribution patterns show that invariably wealthy countries distribute more equally because up to one third of available national income is redistributed to fund social programs. Wealth distribution patterns are not strongly correlated to country wealth (ie, richer countries tend to high degrees of wealth concentration and all countries concentrate to a high

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<sup>57</sup> *Supra*.

<sup>58</sup> PPP conversion usually increases the national and international wealth mean (the estimate in Davies et al 2008, id, is increase of per capita international wealth from \$34K to \$43.5K, lowering the international Gini from 89 to 80. Although World Bank and other studies of global income or consumption distribution usually adjust national per capita income figures to create price and purchasing parity with the USD, Davies et al preferred conversion at official exchange rates. Official exchange rates reveal more precisely than do PPP price indices the relative purchasing power of different countries. The wealth tend to expend and invest at world prices not domestic.

<sup>59</sup> Before allowing for deduction of property-related taxes and transfers, which has some effect on the pattern of wealth distribution, though considerably less than the effect on income concentration of income redistribution.

<sup>60</sup> Davies et al 2006 *supra* at 26.

<sup>61</sup> Branko Milosevic (formerly the World Bank's chief economist investigating distributive inequality): Global income inequality: the past two centuries and implications for the 21<sup>st</sup> century Autumn 2011 <http://www.ub.edu/histeco/pdf/milanovic.pdf>.

degree). Data sets are usually more than 10 years old – the ranking of China, among other countries, is likely to have altered significantly.

**TABLE 2 - WORLD INCOME AND WEALTH DISTRIBUTION (LEAST UNEQUAL - TOP 15)**

R A N K	Country  (Least unequal by distribution of <u>income</u> )	Gini	Year	Rank (Least unequal by distribution of <u>wealth</u> )	GDP/capita  (USD at official exchange rates)	Gini
	Source: World Bank 2011			Source: 2008 UNU-WIDER		
1	Denmark	24.7	1997	Japan	37547	54
2	Japan	24.9	1993	China	891	55
3	Sweden	25	2000	Spain	14048	57
4	Czech Republic Norway	25.8	1996, 2000	South Korea	9671	58
5	Slovakia	26	2009	Macau	14172	58
6	Ukraine	26.4	2009	Ireland	25135	58
7	Finland	26.9	2000	Italy	1864	61

8	Belarus	27.2	2008	Yemen	487	61
9	Afghanistan, Serbia	27.8	2008, 2009	Finland	23419	61
10	Bulgaria	28.2	2007	Australia	20338	62
11	Germany	28.3	2000	Czech Republic, Slovenia	4942, 9130	63
12	Kazakhstan	29	2009	Norway	36021	63
13	Austria	29.2	2000	Belarus	1017	63
14	Montenegro, Romania	30	2008, 2009	Slovakia	3569	63
15	Egypt, Luxembourg, Tajikistan	30.8	2008, 2000, 2009	Albania	1099	64

**TABLE 3 - WORLD INCOME AND WEALTH DISTRIBUTION (MOST UNEQUAL)**

<b>R A N K</b>	<b>Country (Least unequal by distribution of <u>income</u>)</b>	<b>Gini</b>	<b>Survey Year</b>	<b>Rank (Least unequal by distribution of <u>wealth</u>)</b>	<b>GDP/capita</b>	<b>Gini</b>
	<i>Source: World Bank. Compilation year 2011</i>			<i>Source: Davies, Sandstrom, Shorrocks, Wolff World Distribution of Household Wealth 2008 UNU-WIDER</i>		
95	Papua New Guinea	50.9	1996	Brazil, Gabon	3512, 4008	78
96	Swaziland	51.5	2010	US	35619	80

97	Panama	51.9	2010	Switzerland	33407	80
98	Chile	52.1	2009	Denmark	30505	80
99	Paraguay	52.4	2010	Zimbabwe	556	84
100	Lesotho	52.5	2003			
101	Suriname	52.9	1999			
102	Belize	53.1	1999			
103	Zambia	54.6	2006			
104	Colombia, Guatemala	55.9	2010, 2006			
105	Bolivia, Central African Republic	56.3	2008, 2008			
106	Honduras	57	2009			
107	Angola	58.6	1995			
108	Haiti	59.2	2001			
109	Botswana	61	1994			
110	South Africa	63.1	2009			
111	Namibia	63.9	2004			

## TABLE 4 HUMAN DEVELOPMENT INDEX 2013 – VERY HIGH HUMAN DEVELOPMENT

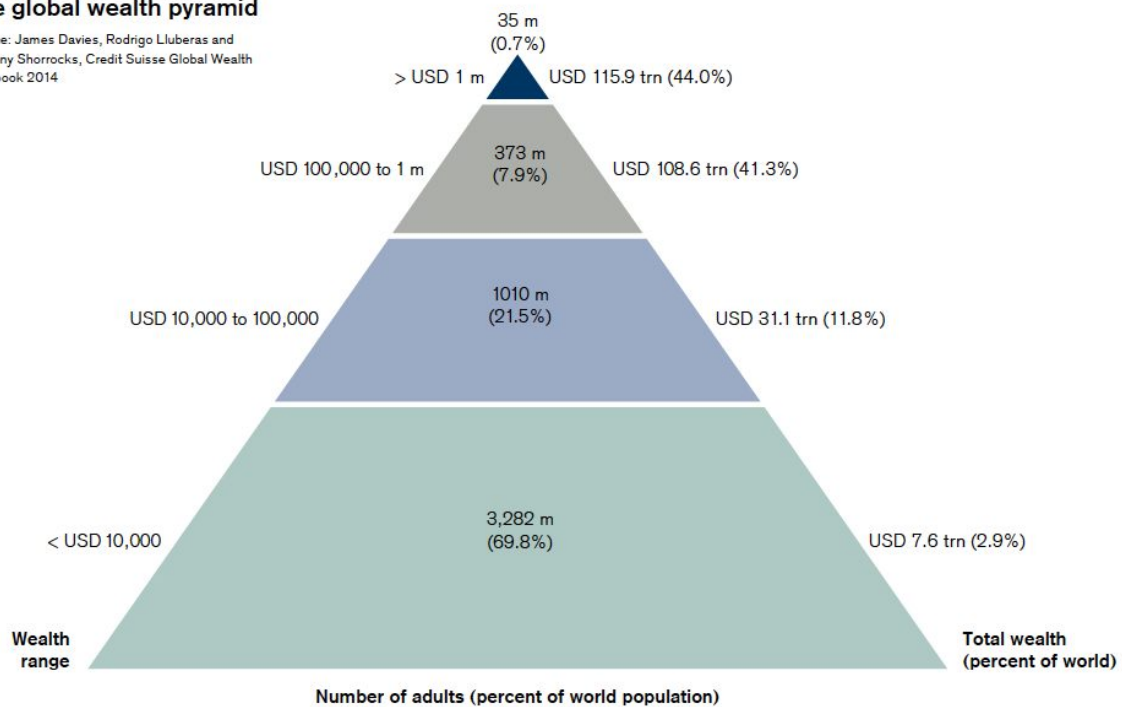
Brackets show ranking change from previous year. Numbers outside brackets = HDI value. Lowest HDI value = Niger = 337

(ranked 187). Statistics by UNDP.

1. Norway (0) 944	15. South Korea (+1) 891	31. Qatar (0) 851
2. Australia (0) 933	17. Japan (-1) 890	32. Czech Republic (0) 845
3. Switzerland (0) 917	18. Liechtenstein (-2) 889	33. Estonia (0) 840
4. Netherlands (0) 915	19. Israel (0) 888	34. Saudi Arabia (0) 836
5. United States (0) 914	20. France (0) 884	35. Lithuania -1 834
6. Germany (0) 911	21. Austria (0) 881	36. Poland -2 834
7. New Zealand (0) 910	21. Belgium (0) 881	37. Andorra 0 830
8. Canada (0) 902	21. Luxembourg (0) 881	37. Slovakia (+1) 830
9. Singapore (+3) 901	24. Finland (0) 879	39. Malta (0) 829
10. Denmark (-) 900	25. Slovenia (0) 874	40. UAE (0) 827
11. Ireland (-3) 899	26. Italy (0) 872	41. Chile (+1) 822
12. Sweden (-1) 898	27. Spain (0) 869	41. Portugal (0) 822
13. Iceland (0) 895	28. Czech Republic (0) 861	43. Hungary (0) 818
14. United Kingdom(0) 892	29. Greece (0) 853	44. Bahrain (0) 815
15. Hong Kong (0) 891	30. Brunei (0) 852	44. Cuba (0) 815
		46. Kuwait (-2) 814
		47. Croatia (0) 812
		48. Latvia (0) 810
		49. Argentina (0) 808

**FIGURE 1 – WORLD POPULATION SHARE OF WEALTH****The global wealth pyramid**

Source: James Davies, Rodrigo Lluberá and Anthony Shorrocks, Credit Suisse Global Wealth Databook 2014



Source: Credit Suisse Global Wealth Databook 2014 (for 2013).

35. At the same time, some countries are far more unequal in wealth distribution than others (see Table 3). Global inequality is linked to national inequality, and national inequality is simultaneously an intra-national and local phenomenon. Wealth is owned and ownership is made possible by proprietary rights. The thousands or millions of owners in a country, exercising exclusive rights, collectively exclude others from their proprietary domains. Exclusion occurs objectively but it not usually a conscious object of the excluder. The effect is, however, real. Figure 1 shows global population shares of wealth. Figure 1 shows that the uppermost 20% of population in all listed countries owns between 60-99% of net assets.<sup>62</sup>

<sup>62</sup> See also World Distribution of Household Wealth 2012 [www.oecd.org/site/worldforumindia/Davies.pdf](http://www.oecd.org/site/worldforumindia/Davies.pdf) which presents the same data. Cf also graphs 'Wealth share of top decile and top percentile by region, 2000–

36. Allowing for the socially beneficial effects of national income redistribution, high per capita wealth neither precludes wealth concentration nor insulates against its exclusionary effects. In Denmark, the world's least unequal country by income distribution (Gini 24 after taxes and transfers, see Table 2)<sup>63</sup> and a wealthy country,<sup>64</sup> the upper 20% of the population owns 99% of assets.<sup>65</sup> Denmark's wealth Gini is 80 (Table 3).<sup>66</sup>
37. Contrasting rankings suggest that if in a jurisdiction per capita income is high (Denmark ranks 19<sup>th</sup> highest in the world), and income redistribution is high – meaning a high degree of social provision and a low poverty rate – the exclusionary consequences of extreme wealthy inequality are meliorated (compare Tables 2 and 4). If national income falls, and/or redistributive policy is annulled, the exclusionary effect of wealth inequality becomes a social imperative.

*Critical role of income redistribution in richer countries*

38. Wealthy countries invariably rank highest in the top 1-49 cohort (very high human development) in the UNDP's annual HDI rankings (Table 4). Wealth concentration in those countries is high to very high, and it might be expected that they would manifest

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2014' and 'Trends in the wealth share of the top decile by country, 2000–2014' in Credit Suisse *Research Global Wealth Report 2014* at 32-33.

<sup>63</sup> The mean income of Denmark's top decile income group exceeds that of the lowest decile by a ratio of 8.1 cf top to the top-bottom quintile ratio of 4.3, rates which suggest relatively low – but by no means exceptionally low – income inequality. (Data from UNDP HDRs 2011 and 2007).

<sup>64</sup> Denmark's 2013 per capita income was USD PPP 44,445, 19<sup>th</sup> highest in the world. (World Bank World Development Indicators database GDP per capita PPP (current international \$) for 2011-13 – [www.data.worldbank.org/indicator](http://www.data.worldbank.org/indicator)).

<sup>65</sup> Davies et al *supra*.

<sup>66</sup> The top 20% own 61% of assets, meaning that a much larger share of total wealth is available to the remaining 39% of the population. Australia's wealth Gini is 62 placing it 10<sup>th</sup> on the ladder of least unequal countries.



symptoms of social breakdown similar to those observable in some poorer countries. The world wealth Gini is 89 (80 at PPP), a coefficient that translates as a near flat Lorenz curve, which predicts social misery (see wealthy country rankings and scores Tables 1 and 2).

39. Yet the rich countries in which wealth inequality is extreme (around a Gini of 80), including Denmark, Switzerland and the United States are ranked highly for human development. Even after adjustment for inequality, Denmark, Switzerland and the United States rank by HDI score, in the top 10 of countries surveyed (Table 4).
40. The reason for this apparently incongruous result is plain. If sufficient national income is available to countries to effect socially ameliorating redistribution and government gives relative priority to social welfare, and acts to redistribute income, what the UNDP calls 'human development' results. Income generated and redistribution of income collected are keys to social amelioration, although they have little effect on patterns of wealth inequality (see Table 2 for low Ginis reflecting redistribution of Table 4, greater global income share accruing to wealthier countries).
41. Rich countries possess the means to substantially mitigate the retrograde effects of highly concentrated wealth holdings, and distribute, or facilitate distribution of, social benefit. The gap in different national capacities to facilitate human development is vast. Of the countries ranked by the United Nations in four categories of human development<sup>67</sup> – low, medium, high and very high - the lowest ranked (187) is the Democratic Republic of the Congo, the citizens of which earn annual income of

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<sup>67</sup> UNDP *Human Development Report* 2014.

USD/PPP 740.<sup>68</sup> While citizens of the wealthiest per capita country, Luxembourg, earn PPP 89,012 per annum, Luxembourg is not ranked first for human development. It places 25<sup>th</sup> on the HDI scale, a ranking which places it in the 'very high' category of human development (Table 4).

42. Richer countries placing in the 'very high' category of human development generally distribute income more equally. Countries located in this category record, as a group, the lowest income Ginis (Table 1). None, however, reports a wealth Gini lower than 54 (Japan), a statistic pointing to what could be described as severe misdistribution of resources in all countries, including those classified as manifesting very high human development.
43. Disparity between mean income and wealth Ginis is therefore unsurprising, since income redistribution is both practicable and, to a large extent, politically sanctioned, while asset redistribution is neither practicable (if redistribution involves annual appropriation) nor sanctioned by the public. If government did not deduct income tax, mean income Ginis would likely be much closer to counterpart wealth Ginis. Income distribution before taxes and transfers highly unequal in most countries,<sup>69</sup> suggesting a tendency in resource distribution to inequality. Distributive equity appears to depend on political action to compel more equal distribution.
44. Comparison of statistics on wealth and income inequality, national wealth, and countries' HDI scores, indicates a relationship between extreme wealth concentration and degrees of economic, political and social dysfunction. For many countries, such as

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<sup>68</sup> World Bank updated 2015.

<sup>69</sup> Though the pre-tax distribution trends remains less unequal for income than that for wealth distribution.

those declared by UNDP to manifest 'low human development' the nexus appears inescapable. In short, extreme wealth concentration, and national poverty, or relative paucity of national income, imprisons countries in dysfunction (Figure 1 shows extreme inequality in world distribution of wealth, which correlates to extreme inequality in income distribution).

45. On the other hand, national wealth tends to disguise the effects of underlying inequality. National income quantum tends to correlate to national wealth quantum, and, if a country is both wealthy and generates high national income, it is likely to be said to exhibit a 'very high' level of human development. Social dysfunction is also evident in, among other things, problems of integration, poverty that is part-meliorated by redistribution, and unequal access to resources (demonstrated acutely by educational outcomes that correlate to familial geographic and income profiles). So long as wealth or property concentration – the pattern of ownership – excludes a majority from the social benefits conferred by wealth, the problem of social inequality remains.

## Part 2      Capital and ownership

### *Return on capital > growth*

46. A number of economists have examined the causes of social inequality, not from the perspective of nature of ownership, or allocation of proprietary rights, but instead the relationship between growth rates and return on capital. Some have focused primarily on identifying inequality trends from government statistics.<sup>70</sup>
47. A recent work by French economist Thomas Piketty<sup>71</sup> suggests that historical patterns of capital accumulation and economic growth predict a continuing pattern of high wealth inequality unless government taxes wealth to reduce concentration. Piketty compared the wealth/income ratio, ie, rate of return on capital to rate of economic growth for the last 200 years, although data only becomes reliable from the early 20<sup>th</sup> century, when richer nations began taxing personal income.<sup>72</sup>
48. His findings contradict conventional policy narrative that economic growth, by increasing national income, causes government to distribute income to reduce social inequality.<sup>73</sup> The premise that more national income allows more social spending

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<sup>70</sup> Eg, Anthony Atkinson, Professor of Economics, Oxford University, Emmanuel Saez, Professor of Economics, University of California, Thomas Piketty, Professor Paris School of Economics, Dr Antoine Bozio Director of the Institut des politiques publiques, Dr Lawrence Mishel, President Economic Policy Institute, Paul Krugman Professor of Economic and International Affairs Princeton University, Joseph Stiglitz Professor of Economics Columbia University, Branko Milanovic visiting Presidential Professor City University of New York Graduate Center, Gabriel Zucman Assistant Professor of Economics London School of Economics.

<sup>71</sup> Capital in the 21<sup>st</sup> Century Harvard University Press 2014. The work analyses several years of personal and collaborative research data on inequality, publicly available at <http://piketty.pse.ens.fr/en/capital21c2> and [http://www.quandl.com/PIKETTY?keyword=\\*&page=1](http://www.quandl.com/PIKETTY?keyword=*&page=1).

<sup>72</sup> Piketty's data on inequality extends as far back as records allow (in some instances 2000 years). Among others, Branko Milanovic, supra, have analysed medieval income records (Milanovic looked at tax records for some Paris districts) to make localised and qualified assessments of income inequality.

<sup>73</sup> In 1955, the economist and Nobel prize winner Simon Kuznets (d 1985) proposed that income inequality rose then fell in an inverted U shape as a country's economic development progressed ('Economic Growth and Income Inequality' *American Economic Review* 65). Explanations for the Kuznets curve effect vary – many

seems axiomatic. Increased revenue permits government to reduce inequality by social spending, and, in theory, public or private expenditure of income increases employment, productivity and innovation, consequentially increasing social welfare. Piketty, however, identified a recurrent feature in the pattern of income allocation that stymies realisation of inequality reduction programs.

49. Capital, which can be defined as the wealth or net assets of a country, historically appropriates a share of national income exceeding the rate of income growth.<sup>74</sup> Piketty's formula is  $r > g$  ( $r$  is the rate of return to capital and  $g$  is the growth rate).<sup>75</sup> He projects that historical trend, which resumed in the early 1970s, after a 25-30 year 'Golden Age' of economic growth and more equal distribution of benefit, will continue into the future (Figure 3). A rate of return on capital that exceeds the rate of annual growth creates the anomie described by Émile Durkheim,<sup>76</sup> a condition - anti-social in character - of indifference to possible interior urgings in favour of benevolence, obligation, or social concern.
50. Preoccupied by increase, owners avoid risk or creativity, and instead focus on extracting returns from assets. The sub-percentile of the most wealthy maintain or increase an extraordinary share of national income, by degree concentrating wealth

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economists assume that capital accumulation and technological advance increase national income, leading to wage and salary increases that reduces the difference between lowest and highest incomes. The concept of growth as a panacea for inequality has been widely accepted since 1955 but a number of economists have expressed scepticism about evidence for growth reducing the Gini income coefficient. Piketty's work suggests that the pattern of capital accumulation militates against the effect postulated by Kuznets.

<sup>74</sup> The average return on capital is about 5%. According to Piketty supra, in richer countries an aggregate of 5-6 years national income is required to equal the value of capital stock (at 50). In 1700, the ratio was 7:1. In the 1940s, the ratio fell to 2.5:1 (see Piketty, chapters 3 and 4 with accompanying charts).

<sup>75</sup> See <http://www.economist.com/blogs/economist-explains/2014/05/economist-explains?page=1&spc=scode&spv=xm&ah=9d7f7ab945510a56fa6d37c30b6f1709#sthash.yc51Flsl.dpuf>.

<sup>76</sup> *Suicide : a study in sociology* (1897) The Free Press 1951.

already concentrated far beyond ordinary reckoning (Figures 3 and 5).<sup>77</sup> Growth is impaired by investment dysfunction, and deficient growth rates result in income shortfalls that undermine government social distribution programs. Social inequality is not ameliorated. More colloquially, the rich become richer. Those possessing capital may increase wealth, and those without capital remain poor.

### *Reconstruction and redistribution*

51. Historical trend is contradicted by the period 1914-1980, and especially 1945-1980. After 1914, two world wars destroyed private capital holdings, and the Great Depression, while less directly destructive to private wealth, undermined capacity for capital formation. By 1945, the wealth of European nations apparently lay in ruins, and so too the fortunes of many of the great families that for 200 years and more dominated European economic and political affairs (Figure 3).<sup>78</sup> This great destruction led to economic equalisation unprecedented in European history. Economists and policymakers mistakenly drew the conclusion that an anomalous 35 year period of so-called economic 'convergence' (1945-80), resulting in wealth and income distribution more equal than at any other time in modern history, represented a permanent equalising tendency created by capitalism.<sup>79</sup>

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<sup>77</sup> The world's richest 85 people own assets valued at \$1.68 trillion, equal to the total estimated wealth of 3.5 billion people, the poorest 50% of the world's population; the wealthiest 1% of the world's population (wealth \$61tr) own assets valued at 65 times the value of assets owned by the poorest 50%. (178 Oxfam Briefing Paper 'Working For the Few: Political Capture and Economic Inequality' 20 January 2014).

<sup>78</sup> The wealth of the richest 10% of the population of the richest countries in Europe fell by about 50% in the period 1914-1945. (See data in Piketty at 261).

<sup>79</sup> In 1900, the richest decile of capital owners in the wealthiest European countries owned 90% of wealth. 90% of populations owned 10% of wealth, and most people owned nothing. By 1945, the top decile had lost about half of its wealth. By 2010, the 90% cohort owned, in Europe, about 33% of wealth, and in the United States, about 25% of wealth. (Piketty at 261). Although not as extreme as a century before, extreme wealth concentration had returned to Europe and even greater concentration could be observed in the United States.

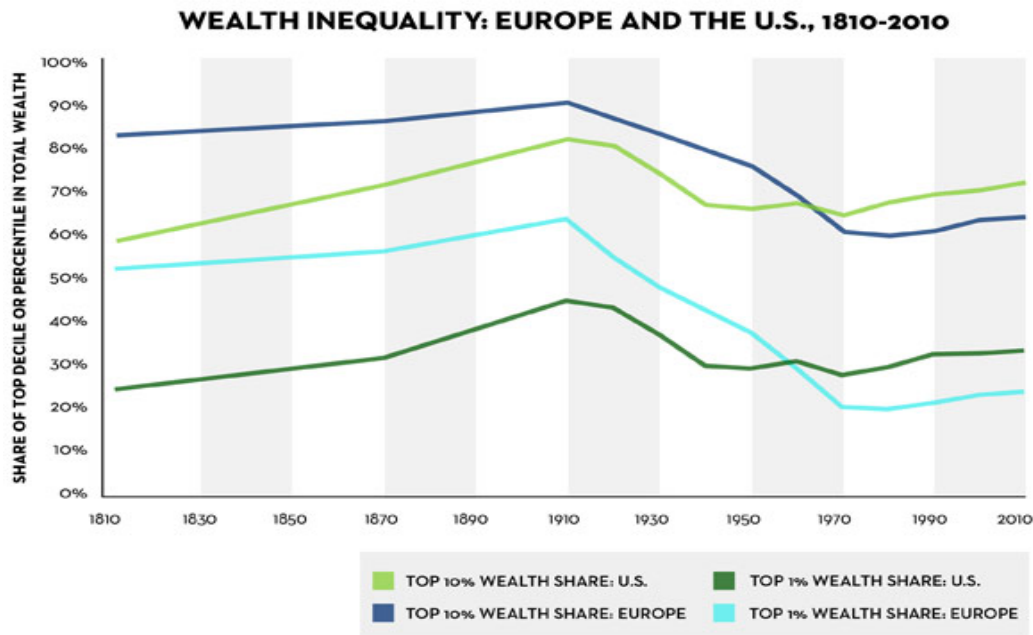
52. Curative growth, however, is not the norm. Piketty's taxation and other statistics reveal that capital returns, as a rule, outstrip the growth rate: as capital increases its share of national income, the benefits of ownership invite consolidation, not productive investment (Figure 3).<sup>80</sup> Capital return is the dividend of ownership and the owners of capital obey the logic of predictable return, eschewing uncertain investment (most capital investment is in real property, stocks and bonds).<sup>81</sup> As a result, owners extract rents, dividends and royalties. The greater returns in an economy are usually derived from activities that generate revenue from capital holdings that return income to owners.
53. Figure 2 compares European and United States wealth inequality over two hundred years, revealing that national income and wealth shares of the top 1% and 10% of income recipients in both continents rise for a century until 1910 then fall until 1970 (Europe) and 1940 (United States). In Europe, the decline, especially for the top 1% is precipitate, while the falls in the United States are much less steep. Once recovery begins, it continues more or less steadily upward. Piketty argues that in the absence of government intervention (similar to that seen after the second world war) the historical pattern of concentration will continue, enabling the highest wealth cohorts to appropriate a progressively increasing share of national income.

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<sup>80</sup> Piketty at 233: in the rich countries the value of total annual rents from realty is about 50% of the value of total wealth (of which rental property is one part); cf cheque and savings accounts, the total value of which is about 5% of total wealth.

<sup>81</sup> *Id* at 119-20.

FIGURE 2<sup>82</sup> WEALTH INEQUALITY EUROPE v US



54. Bias against diversification and innovation means that owners choose not to invest to increase or diversify output, a choice which entrenches barriers to entry, constrains economic expansion, and depresses employment. Growth becomes consistently sub-optimal and capital returns continue to induce investors to engage in rentier activity.<sup>83</sup> The wealthy receive continuing and increasing income, inordinately larger in proportion than the share claimed by the general population. Inequality becomes entrenched.<sup>84</sup>

<sup>82</sup> Figures are from the New Yorker ('Piketty's Inequality Story in Six Charts' 26 March 2014). The graphics are visually improved reproductions of Piketty's charts.

<sup>83</sup> In 1970, at the end of the period during which growth rate outstripped capital return rate, the labour-capital percentage share of national income in the wealthiest countries was between 85/15 and 75-25. By 2010, labour's share had dropped and capital's risen. The new ratios are: 75/25 and 65/35. (Piketty chapter 6 Figure 4). Some opponents of Piketty would argue that capital's rising share of income is a benign development reflecting more saving and thus increased output (www.livemint.com a livemint-Wall Street Journal publication 5 May 2014).

<sup>84</sup> Piketty (at 244) points out that in the United States, the top decile of owners receive 50% of capital income, while the lower half of the owner cohort receives close to zero income. The top decile of wage and salary earners receive about 35% of income and the lower half 25%.



55. The cause of the anomalous 1945-70 Golden Age of growth, according to Piketty, is two-fold. First, the period 1914-45, which begins with one destructive war, followed by revolution, political instability, economic boom, worldwide depression, and then a second world war, prepared the way for unprecedented reform of international credit, monetary, and trade policies.<sup>85</sup> Second, the creation, after 1945, of international political and financial institutions controlling international credit (thus capital movement), facilitating investment and domestic spending - for instance, on welfare services and public works - stimulated employment and investment.<sup>86</sup>
56. Gigantic reconstruction loans from the United States, prohibition of currency speculation, and low interest rates to stimulate demand, created stable monetary conditions. The United States, United Kingdom and others instituted high income taxation, compelling those with means to contribute significantly to offsetting reconstruction costs. These measures stimulated spending and investment, expanding economies and resulting in mushrooming trade.<sup>87</sup>
57. War stimulated research spending, and new products found growing consumer markets. War, and unique, connected events of profound economic and social import, upended the old system of capital and created a new agglomeration of institutions, actors, markets and productive capabilities.<sup>88</sup> In this new era, fuelled by government spending, growth rates uniquely exceeded capital returns – for the first and possibly only time. The interregnum of inequality reduction was short, as Figure 3 shows.

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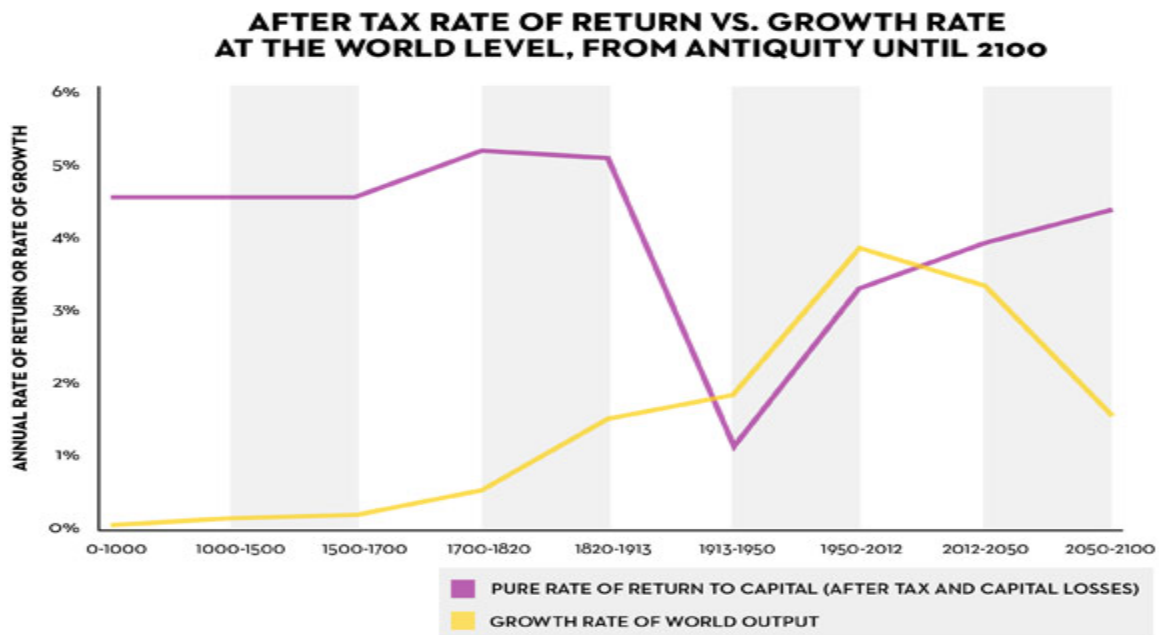
<sup>85</sup> Reform inaugurated by the 1944 Bretton Woods Agreement, which created the World Bank and IMF.

<sup>86</sup> The intellectual author of the Bretton Woods settlement, and the policy of flooding - or re-floating - Europe's economies with credit (intended to stimulate latent demand) is John Maynard Keynes (d 1946).

<sup>87</sup> Piketty *supra*.

<sup>88</sup> *Id.*

**FIGURE 3 – RETURN v GROWTH, HISTORICAL**



### *Role of government*

58. The period 1945-80 is erroneously identified (in Piketty's view) as a quarter-century in which endogenous growth led, in western countries, to rising living standards and the most equal income distribution in modern history.<sup>89</sup> Piketty and others attribute the source of growth to exogenous factors, chiefly government social spending, as well as monetary policy. If the usual investment policy of owners creates an economic succubus, and not a stimulant, only prodigious energy released by externalities (such as reconstruction spending) overthrows systemic entropy.

<sup>89</sup> Examples of those who would disagree with Piketty about government spending, and discern in processes of growth higher than capital return the positive effect of government largely absenting itself from market intervention, or transparently justifying intervention, are the supply side economists of the Austrian and Chicago schools. Examples of individuals identified with the latter school, influential in late 20<sup>th</sup> century economic policy, include Ronald Coase ('The Problem of Social Cost' *Journal of Law and Economics* 3 (1) 1960) and Milton Friedman (*A Program for Monetary Stability* Fordham University Press 1960; *Capitalism and Freedom* University of Chicago Press 1962).

59. Government is especially capable of reversing the torpid effect of rent-seeking capital accumulation.<sup>90</sup> However, government must have will, and it must have income. The apparatus of state social spending in richer countries after the second world war – resulting, for example, in creation of the national health system in the United Kingdom – pressed against private accumulation, and spread income in a ways almost unimaginable to contemporary policymakers.
60. The contemporary tendency is to argue that reduction of private accumulation by taxation or other forms of income diversion is hostile to initiative and inimical to incentive.<sup>91</sup> As Piketty's work shows, government underspending in part results from political acceptance of the ideology that efficient public spending is confined to curing market failure (or spending on public goods).<sup>92</sup> According to ideology, increasing income transfer from capital owners retards growth. This proposition is unverified. By contrast, OECD poverty statistics show that in countries ranked highest by HDI score for human development, income redistribution reduces the poverty rate by approximately 10%-20%.<sup>93</sup>

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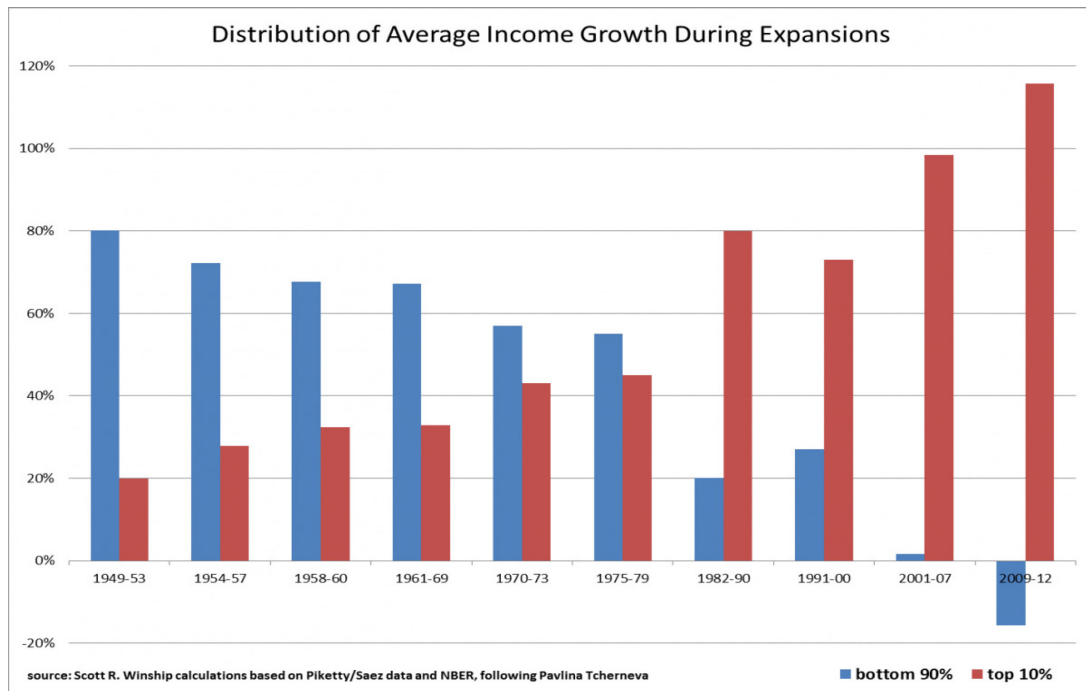
<sup>90</sup> Piketty (b 1971), who is identified politically as a conventional European social democrat, follows in the steps of John Maynard Keynes. Keynes's conception of government spending to remove demand entropy is largely rejected by supply-side economists. Their academic ascendancy is lessening but their policy influence is little reduced.

<sup>91</sup> A chief advocate of the theory of lowering taxes to stimulate enterprise and growth is Arthur Laffer (eg 'Monetary Policy and the Balance of Payments' *Journal of Money, Credit, and Banking* Part I 4 (1) 1972; with Victor Canto and Douglas Joines *Foundations of Supply-Side Economics – Theory and Evidence* Academic Press 1982). Laffer's influence on fiscal policies of President Ronald Reagan presaged advocacy by many economists of low taxes.

<sup>92</sup> Milton Friedman (focusing on macroeconomics) and George Stigler (focusing on government regulation) were leading advocates of the view, representative of the Chicago School, that government is justified in spending solely on provision of necessary goods or services that will not be efficiently produced/supplied by market actors, eg, defence services, anti-pollution measures, maintenance of public parks. For a summary of their views, see, Daniel Yergin and Joseph Stanislaw *Commanding Heights* Free Press 1998 at 145-149.

<sup>93</sup> OECD Income Distribution Database: *Gini, poverty, income, Methods and Concepts* ([www.oecd.org/social/income-distribution-database.htm](http://www.oecd.org/social/income-distribution-database.htm)).

61. How are Piketty's findings relevant to the thesis that ownership causes inequality by reason of its exclusive character? Piketty shows that that capitalism does not autogenously tend towards correction of unequal distribution. In the absence of extraordinary, and probably unforeseeable, externalities and/or government intervention, the pattern of capital accumulation is anti-distributive, meaning that wealth is concentrated and national income insufficient to effect redistribution (Figure 4).
  
62. Piketty's findings support the thesis that control arrangements - political and property systems - concentrate control/ownership, precluding diffuse distribution. Ownership is concentrated because the native tendency of owners is to retain and increase control by consolidation and agglomeration. As can be seen from Figure 4, (compiled by Pavlina Tcherneva from Piketty's data), after the post-war Golden Age of growth, a concatenation of principally political and economic events resulted in economic policies that reversed three decades of distribution favouring the bottom-90% of the population of income earners/recipients. The income growth rate of the bottom 90% in richer countries exceeded that of the top 10% for three decades from 1950 until 1980. The income growth rate of the top 10% of recipients enormously outstripped that of the bottom 90% and (with the exception of the 1990s) in a progressively increasing trajectory. Since 2010, the growth rate of the bottom 90% has been negative while the rate of growth for the top 10% has increased by nearly 120%.

**FIGURE 4 – DISTRIBUTION OF MEAN INCOME GROWTH**

63. Piketty's concern is to collect and interpret statistics concerning the historical disposition of a quantitative abstraction called 'capital' or 'wealth', and its relationship to another quantitative abstraction, national income. He concentrates more on the historical pattern of accumulation, the distributive consequence of that pattern, and ways to respond to adverse distributive effects. Piketty does not explore deeply why concentration is historically normal, or how the pattern of concentration leads to inequality.

64. This dissertation is concerned with the twin questions of why and how. 'Capital' is commonly understood to refer to that to which market value is attributed. Quantifying capital, by reference to monetary value, reveals nothing about the proprietary rights that make capital holdings possible, and in part constitute capital's value.

65. The answer to 'why' and 'how' lies in why and how proprietary rights are created, dispensed and exercised. The answer to those questions emerges from examining the establishment of control arrangements (or more usually, response to existing control arrangements). Control arrangements are constituted by interlinked political and property systems which confer, as if by unitary process, preferment, prerogatives and privileges. Political and property systems ratify control by exclusion.

## **SUMMARY**

This chapter examined the worldwide distribution of income and wealth, and historical behavioural patterns that show that income and wealth concentration – accompanied by social exclusion and inequality – is normal in human society, including in countries that most redistribute income. The causes of concentration do not appear limited to human mentality or social attitudes to wealth. Allocation of proprietary rights, which enable rights-holders to exclude others from access to wealth or its benefits, blocks prospects of redistribution, since exercise of proprietary rights likely to be exclusionary. The following chapters examine the origins, growth and exclusionary effects of the copyright system.

## CHAPTER FIVE

# THE COPYRIGHT SYSTEM – THE PROCESS OF PROPRIETARY EXCLUSION IN ACTION

### PURPOSE

To describe how the process by which rights allocation creates social exclusion. The chapter explains how a proprietary system – the copyright system – came into existence, its extraordinary growth in the 20<sup>th</sup> century after promulgation of the Berne Convention, the harmonised allocation of proprietary rights principally by the agency of the Berne Union and the exclusionary effect of allocation.

### HEADINGS

#### Part 1 Introduction

Summary

Model

Phases of growth

#### Part 2 Phases

Phases 1-4.

#### Part 3 Exclusion

Exclusionary character of copyright system

Excluding effects

Economic success a marker of exclusion

## Part 1 Introduction

### *Summary*

1. Chapter 3 explained that human mentality is appropriating. Possessive grammar is the formulary linguistic instrument of mental appropriation. Possessive speech declares claim and counterclaim, creating antithesis in human discourse. Linguistic antithesis is progenitor of conflict. Humans express in language a mentality that takes possession of, asserts control over, annexes, external phenomena. Inevitably, people will contest or compete for the same appropriation objects. In so doing, they try to exclude each other from control over the subject matter of contest.<sup>1</sup>
2. Contest for sovereignty results in sovereignty for someone or some group.<sup>2</sup> Sovereigns secure sovereignty by instituting, or adopting, control arrangements. In every society, the principal control arrangement, itself progenitor of subsidiary and accessory arrangements, is a system of property, which distributes control and benefit through society, reinforces the political system, and externalises the society's constitutional compact or constituting beliefs.
3. Property systems may in theory permit anyone to own, but they are always exclusionary.<sup>3</sup> Exclusion is the corollary of possession: for one person to own, another must be excluded. Exclusion is precursor and guarantor of property, and proprietary

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<sup>1</sup> 'The history of all hitherto existing society is the history of class struggles ... Hitherto, every form of society has been based ... on the antagonism of oppressing and oppressed classes.' Karl Marx *Communist Manifesto* 1848 Ch 1. .For effect of possessive grammar on human action see Chapter 3.

<sup>2</sup> Social dominance theory explains social hierarchy as the consequence of desire to establish hegemony. Social hierarchies engender self-sustaining myths: multiculturalism, pluralism, meritocracy are myths, or partial myths of liberal democratic society; one culture/race/religion/purpose is a myth of totalitarian society. See, Jim Sidanius and Felicia Pratto *Social Dominance: An Intergroup Theory of Social Hierarchy and Oppression* Cambridge University Press 1999.

<sup>3</sup> If owner or tenant is to occupy or possess property consistent with norms of privacy and self-government, the right of exclusion must be cognate to the right of possession.



rights are the source of control over, and access to, resources. Exercise of the power of exclusion determines the nature of society. Society is more or less exclusionary according to the liberality with which proprietary rights are distributed among members of society.<sup>4</sup>

4. Distribution involves social and political choices, as well as economic. For instance, societies that repeal slavery or segregation laws procure legal emancipation but not automatically elimination of social, economic and political oppression. Social change may involve fiat, but volition also is necessary. A property system is a mirror reflecting social, economic and political choices, and exteriorises the 'who-whom' of appropriation and social control.
  
5. Social inequality is a consequence of social exclusion, which is a consequence of distribution of ownership, which is a consequence of politics, which is the product and continuing expression of contest for sovereignty, and the constitutional settlement that creates and informs political settlement. This chapter explains the causative process that results in birth of a property system, its growth, and consequential emergence of social exclusion and inequality.<sup>5</sup> It demonstrates, by examination of the copyright system, the exclusionary effect of proprietary rights allocation, and emergence of social inequality.
  
6. The model that is deducible from analysis of the copyright system is applicable to any property system. Property systems are the creation of a constitutional settlement or

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<sup>4</sup> A fact reflected in income and wealth distribution statistics, and findings of the Human Development Index and Social Progress Index, and other welfare indexes.

<sup>5</sup> On teleology of ownership see Plato 'States Ideal and Real: Community of Property' *The Laws* Bk 5 s 9 trans Trevor Saunders Penguin 2004 161-68; Aristotle 'The Ownership of Property' *The Politics* Bks II and V rev trans Trevor Saunders Penguin 1992 112-32.

social compact, which crowns contest for sovereignty, and supplies the source of authority for political action by the sovereign. Political action is directed towards securing sovereignty, and requires institution of control arrangements, chief of which is a property system that distributes control, or, expressed differently, allocates power.<sup>6</sup>

7. Whether political sovereignty is secure or insecure, however, depends not on control arrangements, but whether those subject to sovereignty consent to constitutional settlement, and resultant source of authority (such as the crown, or, in the case of the copyright system, the Berne Convention).<sup>7</sup> The stronger and more informed the assent, the more likely that sovereignty created endures. The process of political action is fluid, and may involve continued negotiation of society's constitutional settlement and constitutive principles. Thus a social compact is not final. It may be negotiated for as long as a society endures. Social compact does not cause sovereign contest to cease. Contest is ceaseless.<sup>8</sup>

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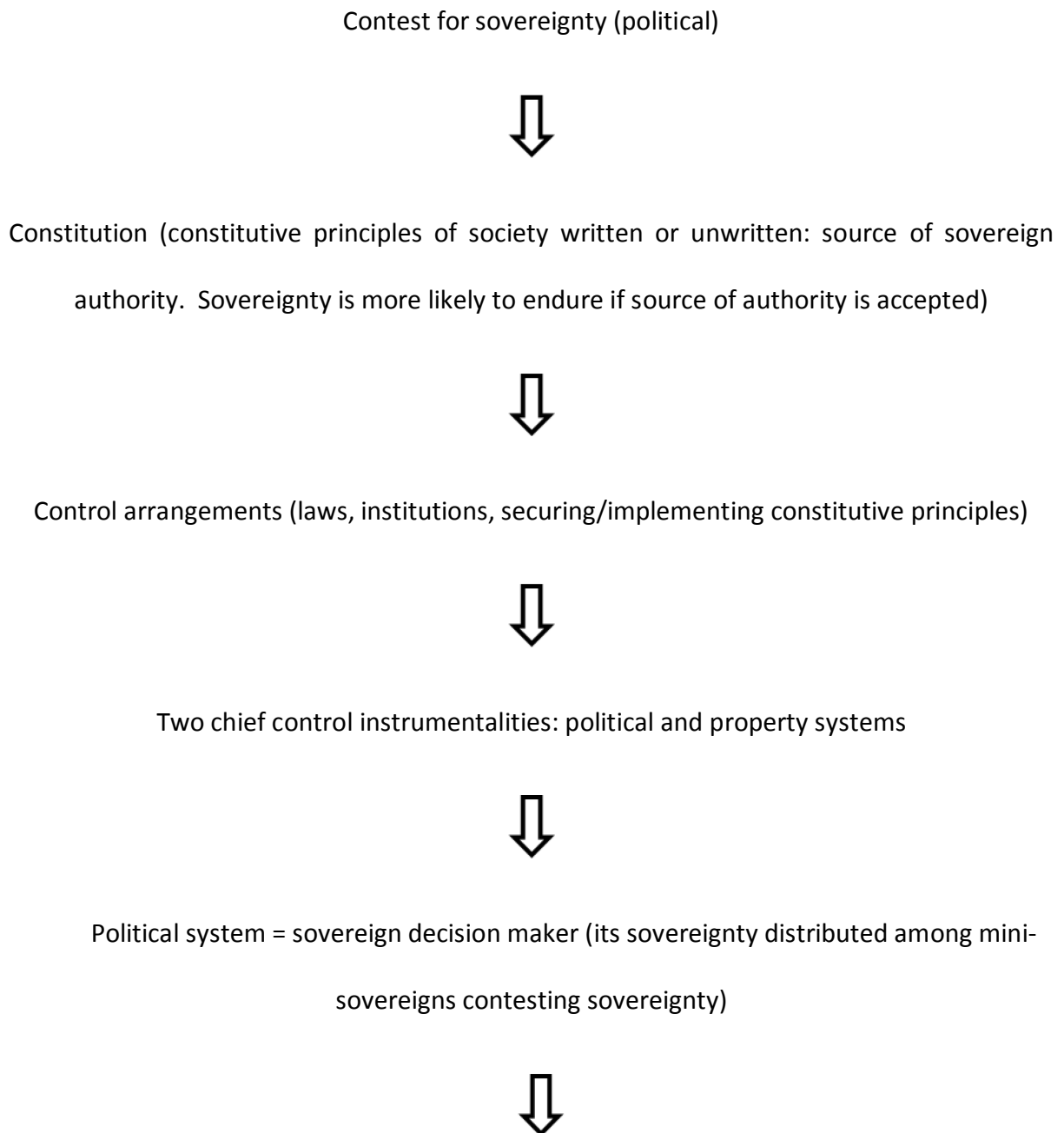
<sup>6</sup> As expressed by Marx in the *Communist Manifesto* (1848) Ch 2: 'The selfish misconception that induces you to transform into eternal laws of nature and of reason, the social forms springing from your present mode of production and form of property – historical relations that rise and disappear in the progress of production – this misconception you share with every ruling class that has preceded you. What you see clearly in the case of ancient property, what you admit in the case of feudal property, you are of course forbidden to admit in the case of your own bourgeois form of property.'

<sup>7</sup> The outstanding examples of constitutional declaration attributing state legitimacy to popular will are found in the preambles of the United States' *Declaration of Independence* (1776) and *Constitution* (1789). The first referred to *consent of the governed*: 'That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government ...'. The second states: 'We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.'

<sup>8</sup> The concept of social change, as objective or non-objective process, is debated and interpreted by various contemporary schools: sociocultural evolution, sociobiology, neoevolutionism, evolutionary anthropology, cultural neuroscience and postmodernism.

*Model*

8. The model is represented in the process diagram below. Although the arrow diagram arranges events logically in sequence, the development process involves continuous interaction of the events described.

**FIGURE 5 MODEL OF PROPRIETARY EXCLUSION**

Property system = distributes sovereignty/power/control among mini sovereigns (may be moderated by extent of allocation of inclusionary rights)



Exclusionary effect of property system reflecting the sovereign's disposition of rights and exercise of exclusionary rights



Social exclusion/social inequality

### *Phases of growth*

9. The growth of a property system regulating intangible subject matter, and allocating exclusive rights over the use and disposition of that subject matter – in short, the growth of the copyright system – occurred, in parts of Europe and North America, over a period of about 600 years, from the 15<sup>th</sup> century until the 21<sup>st</sup> century.<sup>9</sup>
10. Countries outside Europe, in particular China and India, regulated print, usually for the purpose of control of information supply,<sup>10</sup> but the principles of statutory copyright, recognised today across the world, are the outcome of centuries of political

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<sup>9</sup> The foundation texts of copyright historiography are probably Benjamin Kaplan *An Unhurried View of Copyright* Columbia University Press 1967 128 pp and Lyman Ray Patterson *Copyright in Historical Perspective* Vanderbilt University Press 1968 264pp. Neither deals with the history of information regulation prior to the emergence of English printers competing for political privileges from the 15<sup>th</sup> century.

<sup>10</sup> Woodblock printing for textiles came into use in China from about 220. Ceramic movable type came into use during the 11<sup>th</sup> century (Song Dynasty). Publishing flourished in China into the 19<sup>th</sup> century but imperial government did not tolerate politically dissentient literature. Works published were devotional, technical, poetic and fictive. See C Holcombe 'The Bonds of Empire: Liberty in Early Medieval China' *The Historian* 54(4) 1992 609-26.; WP Alford *To Steal A Book is an Elegant Offence: Intellectual Property Law in Chinese Civilization* Stanford University Press 1995. The Mughals introduced the European printing press to India and informally controlled literary output by patronage. See JP Losty and M Roy *Mughal India: Art, Culture and Empire* British Library Publishing Division 2012.

disputation in some European countries, and concepts and cultural precepts enunciated especially by legislators of the United Kingdom, United States and France.<sup>11</sup>

11. Invariably, regulatory developments originated from political contest. Contest occurred in four phases:

- ✓ Phase 1 – after invention of movable type printing press, governments license printing to control religious, political and other dissent (1450-1695)
- ✓ Phase 2 – statutory copyright assists publishers to consolidate control over supply of books (1710-1886)
- ✓ Phase 3 - publishing, recording, broadcast and software industries secure regulated control over supply/dissemination of copyright material, and industries establish an international system for payment of public performance and copying and communication fees (1909-1996)
- ✓ Phase 4 - digital communication creates contest between industries/intermediaries and consumers/users over information supply/access (2000- ).

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<sup>11</sup> Benedict Atkinson and Brian Fitzgerald *A Short History of Copyright: The Genie of Information* Springer 2014 esp chapters 2-4.

## Part 2 Phases

### *Phase 1*

12. Phase 1 begins in 1450, the date of Johannes Gutenberg's first printing of a bible using his movable-type printing press. The multiplication of printing presses across Europe after 1450 resulted, in succeeding decades, in dissemination of heterodox ideas about Christianity, and new secular ideas about human nature and purpose. Within 100 years of Gutenberg's first printing of his bible, religious and political warfare erupted in Europe and continued periodically for over another century.<sup>12</sup>
  
13. The printing press continued to spread dissentient religio-political opinion throughout Europe, and later, in North American, arguments for political emancipation.<sup>13</sup> The invention of printing elsewhere did not have so radical an effect. The Chinese printing industry accepted censorship and political restraint, although its output, over centuries, was large and diverse. In Mughal India, printers produced texts of edification.<sup>14</sup>

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<sup>12</sup> Luther's reformist theology influenced outbreak of the Peasant War of 1524-25, a German peasant revolt against the exactions of the Holy Roman Emperor. Thereafter insurrectionist princes and kings embracing reformist theology fought wars both of offence and independence against Catholic powers (Spain, the Holy Roman Empire and France). Ultimately, considerations of power politics subordinated those concerned with religious difference. The Thirty Years War (1618-48) involved principally Lutheran Sweden and France in opposition to the Holy Roman Empire. It ended, in the Treaty of Westphalia (1648), in ratification of a Protestant-Catholic territorial settlement, independence of Holland and the German states (Protestant and Catholic), the political predominance of France, and the weakening of Spanish and Hapsburg dominance.

<sup>13</sup> On more specifically religious dissent see Louise Holborn, 'Printing and the Growth of the Protestant Movement in Germany from 1517 to 1524' *Church History* 11(2) 1942 123-137; Richard Crofts 'Printing, Reform and Catholic Reformation in Germany 1521-1545' *Sixteenth Century Journal* 16(3) 1985 369-381.

<sup>14</sup> On China, see Holcombe 'The Bonds of Empire' *supra* and Alford *To Steal A Book is an Elegant Offence supra*.

14. In Europe, the breakdown of feudalism, undone first by renaissance assertion of the autarchic self,<sup>15</sup> then the black death's terrifying extinguishment of one third of Europe's population, and lastly - and most importantly - invention of the printing press, instrument of subversion, produced conditions which caused governments to license printing of works (and, in effect, censor works).<sup>16</sup>
15. Printed books and pamphlets could spread unorthodox opinion to an audience of tens of thousands, and, over time, millions. Governments reacted to the explosion of novel, and often dissident, opinion, by licensing printing, which meant that one or more printer received official imprimatur to print all literature, or authorise select printers to print select material. Attempted censorship could not, however, pre-empt the political whirlwind unleashed in 1517 by Martin Luther's nailing of his 95 theses to the door of All Saints' Church at Wittenberg.<sup>17</sup> As noted, Luther's act was the precursor to about 130 years of episodic religious warfare in Europe.<sup>18</sup>
16. The English Parliament abolished licensing, viewed especially by puritans and non-conformists as an instrument of crown tyranny, in 1695.<sup>19</sup> In other parts of Europe, licensing continued into the 19<sup>th</sup> century. As late as 1878, the great French social

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<sup>15</sup> For treatment of the emergence of autonomous self-concept from the perspective of art history, see Kenneth Clark *Civilisation* BBC/John Murray 1972 chapters 3-5.

<sup>16</sup> See Benedict Atkinson and Brian Fitzgerald, *Copyright Law* Vol1 Ashgate 2011 introduction.

<sup>17</sup> *95 Theses on the Power and Efficacy of Indulgences*; also *Disputation of Martin Luther on the Power and Efficacy of Indulgences*. Luther objected to the sale in Wittenberg of indulgences to remit sins. Luther stated that indulgences cannot be proxies for forgiveness of sins since God alone pardons.

<sup>18</sup> A political as well as religious quarrel. The Protestant principle that God's desired relationship with the individual believer is, or potentially may be, subverted by intermediation of religious authority, provided a powerful secular pretext for princes to overthrow imperial authority, and informed later arguments against political coercion.

<sup>19</sup> Parliament introduced the *Act for Preventing the frequent Abuses in Printing Seditious, Treasonable and Unlicensed Books and Pamphlets; and for the Regulating of Printing and Printing Presses* in 1662, two years after Charles II's Restoration. John Milton objected to censorship in 1644 in *The Aereopagitica* presenting an argument that could be said to be representative of puritan thought. However, his tract responded to the legislation of the puritan parliament in the year following outbreak of the civil war: viz, the 1643 order which vested in parliament the censorship powers previously exercised by the Star Chamber abolished in 1641.

novelist Victor Hugo,<sup>20</sup> addressing the International Literary Congress in Paris, said of books and other literature:

*This hallowed property is daily violated by tyrannical governments, which seize control of publication, hoping thereby to control the author.’ He said of literary France in the 17<sup>th</sup> century: ‘... in the so-called Great Century, the ways kings behaved, these fathers of the nation and fathers of the arts and letters, led to these two grim facts: people going hungry and Corneille going shoeless.’<sup>21</sup>*

## *Phase 2*

17. The Peace of Westphalia in 1648 substantively ended the religious wars, inaugurated by Luther’s dissent at Wittenberg in 1517. After this date, licensing continued to be a symbol of censorship.<sup>22</sup> The political struggle against state coercion launched the second phase of regulatory contest, one characterised by enactment of copyright statutes in the United Kingdom, United States and France. The first copyright statute is the *Statute of Anne*, passed in the United Kingdom in 1710. Although a response to the agitations of publishers, the Statute of Anne favoured authors. It also declared

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<sup>20</sup> 1802-85. Author of, among others, *The Hunchback of Notre Dame* and *Les Misérables*. Co-founder (1837) of the French Society of Authors and ALAI (1878) (*Association Littéraire et Artistique Internationale*).

<sup>21</sup> Victor Hugo address to the International Literary Congress Paris 17 June 1878 in Benedict Atkinson and Brian Fitzgerald (eds) *Copyright Law Vol II selected readings*, Ashgate 2011 29-33 at 31.

<sup>22</sup> ‘Dispersing seditious books is near akin to raising tumults; they are as like as brother and sister: raising tumults is more masculine; printing and dispersing books is the feminine part of every rebellion.’ Sergeant Morton at the trial of Thomas Brewster, 1664 (*A Compleat Collection of State Tryals* London 1719). Brewster was tried for publishing a ‘seditious libel’ against the king. John Milton *Areopagitica* (1644) wrote, ‘So much the more whenas debtors and delinquents may walk abroad without a keeper, but unoffensive books must not stir forth without a visible jailor in their title.’



knowledge dissemination the object of copyright regulation: the preamble called the statute 'An Act for the Encouragement of Learning'.<sup>23</sup>

18. The twin statutory purposes of copyright laws in this period, which extends from about 1710 until the early 20<sup>th</sup> century, were knowledge dissemination and protection of authors.<sup>24</sup> Authors struggled against publishers until the 20<sup>th</sup> century. Statute, though, could not alter the reality that publishers controlled the production and distribution of books. Their superior bargaining power enabled them to compel authors to assign copyright.
19. Unless authors benefitted from patronage, or could rely on reputation, only commercial success, causing publishers to compete for their services, might bestow on them greater bargaining power.<sup>25</sup> In the struggle between publishers and authors, publishers replaced government as the archetype of oppressive authority,<sup>26</sup> although

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<sup>23</sup> The title calls the statute, *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Times therein mentioned*. The Act recognised an author's right to control the copying of books and 'writings' for an initial period of 14 years, renewable for a second term of identical length.

<sup>24</sup> The first sentence of the United States federal copyright statute passed in 1790, declared the statute (cf the Statute of Anne): *An Act for the encouragement of learning, by securing the copies of maps, Charts, And books, to the authors and proprietors of such copies, during the times therein mentioned*. Courts in the United Kingdom and United States discussed the purpose of statutory copyright law, as it related to scope, for nearly 200 years after the Statute of Anne. See, eg, Lord Chancellor Hardwicke's judgment in *Gyles v Wilcox* 1740 2 Atkyn's Reports 142, in which he rejected the argument that copyright is an absolute monopoly. Cf the opinion Sir William Page Wood in *Tinsley v. Lacy* (1863), 1 H and M 747 at 754 who said: '... it is difficult to acquiesce in the reason sometimes given that the compiler of an abridgment is a benefactor to mankind by assisting in the diffusion of knowledge.'

<sup>25</sup> Augustine Birrell, Chief Secretary for Ireland in the Liberal Government, and author of *Seven Lectures on the Law and History of Copyright in Books*, Cassell and Company Ltd 1899, told the Commons on 7 April 1911 that John Milton's literary success late in life apparently benefitted his publisher more than him. Seven years before his death, Milton licensed publication of *Paradise Lost* for a £5 advance. He received £5 for the first print run of 1500 copies, the same for a second run of 1500 copies, and another £5 for a third impression. He died in 1674, and his widow parted with all her rights in Milton's works for £8.

<sup>26</sup> Writers' criticism of publishers might be explicit. Often writers criticised in passing, as if publishers' oppression were taken for granted. See, eg, Croker's edition on Boswell's *Life of Dr Johnson* in the Edinburgh Review 1831 at 26. Johnson, 'had long been tried by the bitterest calamities, by the want of meat, of fire, and of clothes, by the importunity of creditors, by the insolence of booksellers ...' Thomas Babington Macaulay, in his speech to the Commons on the *Copyright Bill 1841* (*Hansard* 29 January 1841), referred to Thomas Noon Telford's earlier reference to the evil of a bookseller holding copyright to *Paradise Lost*, while Milton's grand-

government, depending on jurisdiction, could still censor or otherwise proscribe writers.<sup>27</sup> Though in the United Kingdom and United States, copyright statutes vested proprietary rights in authors, they continued to depend on publishers to reach a market.

20. To secure publishing contracts, authors usually assigned copyright in their works to their publishers. Publishers became reviled as exploiters,<sup>28</sup> and though legislators continued in principle to support authors' rights – and the Assembly in France passed a law in 1793, recognising the moral right of authors, or *droit d'auteur*<sup>29</sup> – increasingly governments became sympathetic to publishers' arguments that their investment made the book trade possible. In 1842, the United Kingdom passed a copyright act that ensured that British publishers could control the distribution of books throughout the British Empire.<sup>30</sup>
21. However authors continued to protest against publishers' exploitation of their superior bargaining power,<sup>31</sup> and in the second half of the 19<sup>th</sup> century, when the

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daughter suffered poverty. Macaulay said that while copyright in the hands of a bookseller deprived Milton's grand-daughter of that benefit, it equally denied the public cheap editions. 'The reader is pillaged, but the writer's family is not enriched. Society is taxed doubly.' Macaulay did not support copyright of long duration whether in the hands of a publisher or author's descendant.

<sup>27</sup> See Victor Hugo quotation at paragraph 16.

<sup>28</sup> Reputedly, Dr Samuel Johnson, adapting a phrase from the Crucifixion, wrote: 'Now there was a *publisher* and his name was Barabbas.' (Repeated in a speech by Australian Senator Anthony St Ledger on the Australian Copyright Bill, 23 October 1912 *Hansard* 4516). John Drummond Robertson, manager of the Gramophone Company Ltd, pointed out, during debate over provision for a compulsory recording licence in the 1911 UK Copyright Act, the mercenary role of music publishers in securing and enforcing copyright without regard for authors' interests. In a letter to *The Times* dated 1 May 1911, he said of the proposed compulsory recording fee for each recording (shortly enacted as 5% of record retail price): 'The cry of the "poor composer" is ... "so much nonsense." The composer has in almost every case parted with all his rights to the publisher ... and the effect is that the enormous tax to be levied on the public will pass as unearned increment into the pockets of the musical publishers – who have not paid a penny for it.'

<sup>29</sup> *Décret de la Convention Nationale du dix-neuf juillet 1793*.

<sup>30</sup> (5 & 6 Vict. c. 45). Section XVII granted the proprietor control over the import into any British dominion of works published in the United Kingdom 'or reprinted elsewhere'.

<sup>31</sup> Robert Burns wrote *In To Robert Graham of Fintry Esq* (1791), 'To thy poor, fenceless, naked child - the Bard! ... Vampyre booksellers drain him to the heart, And scorpion critics cureless venom dart.'

public came to perceive as heroic figures the great social writers of Britain, France, and Russia, an authors' rights movement gradually won political favour for international legal recognition of authorial copyright. Hugo's speech in 1878 to the International Literary Congress crystallised sentiments of the international Congress of Authors and Artists, which first met in 1858, in Brussels.<sup>32</sup>

22. Nearly 30 years after the Brussels collaboration, the Paris congress established the International Literary Association, which expanded to include artists (becoming the *Association Littéraire et Artistique Internationale* or ALAI) and adopted five resolutions thereafter promoted by ALAI.<sup>33</sup> In 1882, ALAI (Hugo was honorary president) called for a meeting to establish a union to protect literary property. National delegates met in Berne in 1883 and drafted a 10 article treaty. In 1884, the Swiss government invited diplomatic representatives of other governments (11 came) to negotiate a longer treaty, signed in 1886, the Berne Convention.<sup>34</sup>
23. In his speech to the Paris literary congress of 1878, Victor Hugo asserted the public interest in dissemination of works. He also suggested grant of limited publishing monopolies.<sup>35</sup> As will be discussed, the Berne Convention embraced a more dogmatic conception of authors' rights. Most significantly, however, the Berne settlement was constitutional, or constitutive, in the sense that it created an authoritative legal source for growth of an international copyright system.

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<sup>32</sup> Peter Burger 'The Berne Convention: its History and Key Role in the Future' 3 *JL & Tech* 1988 1-69.

<sup>33</sup> National treatment of copyright; absence of formalities; recognition of property in author's right; recognition that author's right is perpetual; request to French Government to call for international convention to agree international copyright regulation.

<sup>34</sup> Burger *supra*.

<sup>35</sup> Hugo in Atkinson and Fitzgerald *supra* at 31: 'Let us insist on literary property while at the same time fostering the public domain.'

24. The Convention appeared conclusively to resolve the contest between publishers and authors in favour of authors. However, the Convention, although it established the norm that continues to govern international copyright law, viz the primacy of authors' rights, did not alter the disposition of economic power between publishers and authors. It could not. In the next two or more decades, various jurisdictions passed legislation implementing Berne Convention norms that required copyright laws to confer on authors copyright in works for a minimum posthumous term of 50 years. Enjoining internationally a right of authorisation could only benefit publishers, as assignees of rights.<sup>36</sup>
25. The Berne Convention is an enduring constitution, elaborated over time, and connaturalised with neighbouring rights.<sup>37</sup> Throughout the history of development of the copyright system, which could be said to have reached an apotheosis in the current global regime for acceptance and enforcement of super-extensive rights, industries acknowledged the convention as the source of law and legitimacy.
26. The convention is the foundation document of a copyright magisterium, which declares, among other things, the principle that copyright law stimulates creative output.<sup>38</sup> From the outset, however, the convention could not cure the exigency that

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<sup>36</sup> The power of publishers could be seen in parliamentary debates. John Murray, head of the eponymous publishing house, commenting on the bill for a new Copyright Act, said in a letter to *The Times* published 7 July 1911: '[t]he Government admitted at the start that if the publishers opposed their Bill, they could not hope to pass it.'

<sup>37</sup> The Rome Convention of 1961 (*International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*) recognised in international law neighbouring rights, which are authorisation rights bestowed on performers, broadcasters and producers of sound recordings. The genesis of the Rome Convention is traceable to resolutions of the 1928 and 1948 Berne Convention revision conferences.

<sup>38</sup> Copyright proponents weave a tangled web to justify in principle the Berne Convention and the extended laws of copyright. Today, policymakers usually rely on incentive theory to justify copyrights. Incentive theory posits, without drawing definite conclusions about the appropriate duration of copyright, that legal monopoly is necessary to protect authors from free-riding. Granted that protection, and thus some surety of economic return (if commercially successful), copyright holders will continue production. Without the incentive

had stimulated enthusiasm for authors' rights: if authors wished to find markets they must rely on publishers, and publishers usually insisted on assignment of rights.<sup>39</sup>

### *Phase 3*

27. Authorial assignment of copyrights to publishers satisfied the publishers' wishes. On the cusp of the 20<sup>th</sup> century, as a new technology for playing music, the phonograph (or gramophone) became immensely popular in Europe and the United States, music publishers, although they did not know it, would soon join battle with the music industry, a battle that they would lose.
28. Thus early in the life of the Berne Convention, conflict over its requirements, caused, for the first but not the last time, conflict between industries. This first conflict also signalled the emergence of a new politics of copyright. Publishers (in this instance, music publishers) found themselves at a political disadvantage.
29. Reviled by authors for three centuries as commercial oppressors, and, in their earlier incarnation, as agents of government censorship,<sup>40</sup> they attracted the moral disfavour

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conferred by legal rights, they will not. Legislative debates, at least until the modern era, beginning 1980, did not refer to incentive as a reason for awarding protection copyright protection. See survey of legislative and surrounding debate until 1968 in Benedict Atkinson LLM-by-research thesis *Narrative, counter-narrative and the challenge of the historical record* USyd 2002.

<sup>39</sup> Illustrated by a two-week controversy in the pages of *The Times* November-December 1912 over the indigence of the widow and children of the composer Samuel Coleridge-Taylor, composer of *Hiawatha*, after his death in August 1912. The chairman of the Society of Authors, Samuel Squire Sprigge, and the composer, Sir Charles Stanford, pointed out that Coleridge-Taylor's publisher Novello & Co exploited superior bargaining power to effectively compel assignment of copyright. They argued that publishers usually deprived composers of copyright. 20 months earlier, a correspondent to *The Times*, Clement Shorter (letter 7 April 2011) suggested a limitation on publishers' copyright which may have inspired enactment of the 25 year rule in the 1911 Copyright Act. The 25 year rule prohibited authorial assignment of copyright to any person for a period exceeding 25 years after the author's death. If in the 25 year period the publisher assignee failed to republish the copyright work, compulsory licensing took effect. A compulsory licence in any case pertained on elapse of the 25 year period following the author's death. The 1956 Copyright Act abolished the 25 year rule. Publishers expressed more hostility to the obligation to deposit books with libraries than provision in the legislation for a 25 year, although the enactment clearly responded to concern about publisher exploitation of authors.

of some parliamentarians but endorsement for their effectual role in ensuring a continuing supply of literature and musical works.<sup>41</sup> Now they provoked the indignation of an industry that manufactured enormously popular products (phonograph and records), was immensely wealthy, and favoured by politicians who insisted on the national benefit of investment in production of useful things.<sup>42</sup>

30. The music publishing industry fought this battle ostensibly as proxy for authors – the composers of musical works – although the industry, not authors, chiefly benefitted from rights that it purported to defend on authors' behalf. The Berne Convention asserted the principle that the benefit of copyright could be extended to one category of beneficiary only – authors.
31. Assertion of this kind did not bother musical publishers. They procured assignments of copyright from artists, lyricists, composers, and dramatists, for whom publishers were indispensable if they, the authors, were to have a market. The publishers did not fear authors, but they feared the phonographic industry, the members of which, such as the mighty Gramophone Company Ltd, the Columbia Gramophone Co Ltd, and

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<sup>40</sup> Among English-speaking authors, the most commonly cited instance of printers/booksellers collaborating with government censors is that of the Stationers' Company. The Stationers' guild merging 14th and 15<sup>th</sup> century brotherhoods of manuscript makers and writers of text, established itself in the City of London by the beginning of the 16<sup>th</sup> century. By assiduous political manoeuvring, the Guild received the royal charter in 1557, entitling it to control, in collaboration with government, the supply of books – meaning that it acted as proxy censor, and granted its members exclusive printing rights. The Guild continued to perform this dual role, excepting a period of interruption during the Civil War and its aftermath, until 1695, when licensing of books ceased.

<sup>41</sup> Shown by the composition of the 1909 Gorrell Committee (*Law of Copyright Committee* chaired by Lord Gorrell) commissioned to determine whether and on what terms the United Kingdom should implement the Berne Convention and 1908 Berlin revision Act. The Committee consisted of eight members, including the music publisher William Boosey, and the literary publisher Frederick Macmillan.

<sup>42</sup> A hint of coming enactment of a compulsory licence for music recordings, which the Gorell Committee did not recommend (but was provided for in the 1911 Copyright Act) can be found in the Committee's report. The phonographic industry companies 'have developed their businesses under the impression that they were within their rights in using the works of authors without making any compensation whatever to those authors, and that those rights would not be interfered with by legislation.' (*Report of the Law of Copyright Committee 1909 Cd 4976*).

Parlophone Records Ltd, recorded musical works without permission, and grew rich selling gramophones and records.

32. The gramophone giants presented an intractable problem that not even the claims of the Berne Convention, reinforced by a steadily increasing number of diplomatic accessions, could resolve. From 1886, as will be discussed, the Berne Convention set out a program of authors' rights, which enjoined signatory countries to vest in authors the right to authorise acts relating to original artistic, dramatic, literary and musical works. The Convention thus, as it were, claimed for authors, an international copyright domain.
33. If the practice of nearly 300 years continued to pertain, the Convention would have proved a marvellous boon to publishers exercising copyrights assigned to them by needy authors. However, in the early 20<sup>th</sup> century, the recording industry undermined the market for sheet music, inviting the public to abandon domestic piano recital and instead delight in a cornucopia of recorded music and songs, expertly performed.
34. By the time that the United Kingdom implemented the Berne Convention in legislation in 1911,<sup>43</sup> music publishers had for more than a decade complained furiously at the phonographic industry's unauthorised copying – by sound recording - of performances of musical works. Until 1911, their complaints won little sympathy from judges, and politicians also enamoured of recorded music.
35. For its part, the recording industry – chiefly represented in the United States and United Kingdom by the Gramophone Co Ltd and the Columbia Gramophone Co Ltd – feared that once legislation empowered copyright holders to authorise recording of

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<sup>43</sup> Geo 6 5(1911) c 46.

musical works, a combine of publishers would exercise exert a stranglehold over supply. Oppressive exercise of monopoly rights could cripple phonographic companies. Having grown rich in fewer than 20 years they faced a future determined by the economic preferences of the predicted publisher cartel.<sup>44</sup>

36. As it happened, legislators declined to give publishers an opportunity to realise the recording industry's fears. On both sides of the Atlantic they enacted compulsory licences (1909 and 1911)<sup>45</sup> which provided that if the copyright owner authorised recording of a musical work by one company, any other company could, by giving notice, record the work. To compensate for rights derogation, an unauthorised licensee must pay royalties fixed as a percentage of the retail sale price of each record. The 1911 UK Copyright Act set the royalty rate at 5% per record.<sup>46</sup>
37. Introduction of compulsory licensing attested to the value of lobbying by Gramophone and Columbia companies, which, in the United States, began as early as 1906, at joint House-Senate committee hearings on a copyright bill.<sup>47</sup> In Europe, lobbying began at the Berne Union's<sup>48</sup> 1908 Berlin revision conference, and the Union agreed to permit members to limit, in legislation, the right to authorise sound recording, in short to permit compulsory licensing. The lobbyists repeated a persuasive message, imitated

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<sup>44</sup> Probably the most able expositor of the record industry's concerns, John Drummond Robertson, the manager of the Gramophone Co Ltd, made persuasive public arguments about the social and economic value of his industry that are discussed in Chapter 6.

<sup>45</sup> See the US *Copyright Act 1909* (35 Stat 1075 section 1(e)), and the United Kingdom *Copyright Act 1911* section 19(2).

<sup>46</sup> *Id.*

<sup>47</sup> Jessica Litman chapter 3 'Copyright and Compromise' *Digital Copyright* Prometheus Books 2006 at 283.

<sup>48</sup> The Berne Union, the collective of nations signatory to the convention, established in 1893 in Berne a secretariat to administer the convention, calling it the *Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle* (United International for the Protection of Intellectual Property) or BIRPI. Under a 1967 convention signed at the Union's Stockholm conference to revise the Berne Convention, BIRPI became the World Intellectual Property Organization in 1970. WIPO's headquarters are at Geneva. In 1974, BIRPI became a specialized agency of the United Nations in 1974. All members of the UN are entitled to join WIPO.



later by radio, television and software industries, that industry investment deserves legislative protection.<sup>49</sup> They also emphasised the social value of selling records.<sup>50</sup>

38. In the 20<sup>th</sup> century also, industries sometimes fought each other, as well as putative representatives of authors' rights - principally copyright collecting societies acting as agents for publishers - over public performance and copying fees.<sup>51</sup> The outcome of these commercial struggles suggested that, despite the efforts of authors' rights advocates, copyright law's instrumental function was not to assure reward for authors, or increase of their bargaining power. Instead, because of the actions of industries, the confluence of law and politics resulted in a paratrophic copyright system, that is, one that demanded automatic remuneration for exercise of rights, or use of copyright material.<sup>52</sup>
39. Louis Sterling, the managing director of EMI,<sup>53</sup> expressed the paratrophic principle in 1933, in the words, '... are we getting paid for that?'<sup>54</sup> The 'that' to which he referred was radio broadcasting of music recorded by EMI. His inquiry to his legal officers galvanised EMI to pursue High Court action that ended in Justice Maugham

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<sup>49</sup> John Drummond Robertson manager of the Gramophone Company pointed out to the 1909 Gorrell Committee *supra* at 226 that: '... we adduce only that, during the last year, we, ourselves, paid no less than 150,000*l.*, in wages and salaries, and that the tangible assets of our company, as shown in its last Report, amounted to 757,000*l.*'

<sup>50</sup> The Columbia Gramophone Company, in evidence to the Gorrell Committee said: 'During the present generation there has sprung up an industry in instruments that mechanically reproduce music, so vast and far-reaching that in every civilised country on the globe talking machines and piano players are influencing the lives and temper of the masses of the people, bringing into the homes of the rich and the poor, but especially to the humbler classes of the community, the elevating and educational advantages of the purest and most beneficent of the arts.' Gorrell Report *supra* at 220.

<sup>51</sup> Atkinson and Fitzgerald *Short History of Copyright* *supra* chapter 8.

<sup>52</sup> *Id.* Paratrophic means to parasitically gain nourishment from living organic matter. A synonym is 'suctorial'.

<sup>53</sup> Formed in 1931 by the merger of the Gramophone Co Ltd and Columbia Gramophone Co Ltd.

<sup>54</sup> See *A Short History of IFPI* (<http://www.ifpi.org/downloads/ifpi-a-short-history-november-2013.pdf>). This monograph published by the International Federation of the Phonographic Industry quoted Sterling as follows: 'I put the radio on this morning. I heard them playing one of our records. I want to know something: are we getting paid for that?' The recording industry founded IFPI in Rome in 1933 to lobby for enactment of the record performing right.

recognising in *Gramophone Co Ltd v Stephen Cawardine & Co*,<sup>55</sup> a record performing right. The question, ‘are we getting paid for that?’ expresses the sentiment of all industries importuning for legislation to enable them to compel payment-for-use.<sup>56</sup>

40. Assisted by favourable legal judgments, especially in the United States,<sup>57</sup> industries, over time, re-interpreted the copyright holder’s power of prohibition as a right to remuneration, a right principally demanded for, and exercised by, industries. Although courts did not explicitly identify a right to remuneration, they typically treated infringements as economic torts, to be compensated economically. In so doing, they assisted industries to win political support for the paratrophic premise that a right to extract rent is appurtenant to the larger proprietary power to forbid or exclude.<sup>58</sup> Empowered to demand fees-for-use, the industries primarily fought each other, and, over decades, established a private international taxation system.<sup>59</sup>
41. Today, broadcasters (and venues permitting public performance of copyright material) contract to pay publishers, film producers, the music industry and incorporated sports and other associations, for the public performance of music, film, sound recordings,

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<sup>55</sup> [1934] Ch 450.

<sup>56</sup> As discussed in the next chapter, Sterling’s sentiments were echoed, and elaborated, by counsel for the associated manufacturers (in substance the Australian subsidiaries of EMI) at the Royal Commission on Performing Rights in 1933. Since EMI in England (through the Gramophone Co Ltd) was preparing for the *Cawardine* test case, the uniformity of reasoning is predictable. Reginald Bonney, for the associated manufacturers, told the commission that, ‘The person who uses that record in public for his own profit, who could not otherwise obtain that profit should pay for it; does not justice require that those who have provided him with those means should be provided to pay for it?’ (NAA A467 SF1/85).

<sup>57</sup> See in particular *Herbert v Shanley & Co* (1917) 242 US 591, discussed later in the chapter.

<sup>58</sup> *Id.*

<sup>59</sup> Primarily, in the English-speaking world, in the radio wars of the 1930s, which confirmed the effective right of music publishers (the legal right vested in whomever was the copyright holder, usually a publisher) to collect fees for public performance of music. After *Cawardine* the UK recording industry immediately established (1934) Phonographic Performance Ltd, or PPL, to collect record performing right fees. The United States did not recognise a record performing right but the 1956 and 1968 Copyright Acts of the United Kingdom and Australia did. The radio wars are discussed later in the chapter.

and sports fixtures. In theory, fees are claimable for communication of the same copyright subject matter.<sup>60</sup>

42. Publishers' collecting societies levy copying taxes on governments, schools, universities, other educational institutions, and libraries. Photocopying and digital copying and communication attract per page or equivalent impost rates.<sup>61</sup> The number of automatic remuneration arrangements increased dramatically after 1961, and signature of the International Convention for the *Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (Rome Convention).
43. As industries in the 20<sup>th</sup> century configured a copyright system that conformed to their wishes, that system's constitution, the Berne Convention, continued to grow in length at scope, modified at revision conferences, Rome (1928), Brussels (1948), Stockholm (1968) and Paris (1971). These conferences were dedicated to consideration of authors' rights but industries' concerns intruded.
44. Broadcasters and record companies, seeing the economic benefits obtained by publishers exercising assigned copyrights, coveted analogous proprietary rights. The Berne Union, for an uncomplicated reason, had no power to confer such rights:<sup>62</sup> a

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<sup>60</sup> In the United States, six compulsory licences govern commercial use of copyright material: licence for production and distribution of records of musical works and their digital audio transmission; digital performance right for records for some operators of non-interactive digital transmission services; licence for ephemeral recordings used to facilitate digital transmissions; licence for secondary transmissions by cable television; licence for use of certain copyright works by non-commercial broadcasters; licence for satellite re-transmissions to public for private viewing. In the English-speaking world, the state, following the arbitration model first proposed by the Australian Royal Commission on Performing Rights (1932-33), interposes between parties disputing licensing terms to determine a bargain. In most countries, tribunals composed of one or more judges, and usually one or more non-judicial officer, determine equitable remuneration and related matters.

<sup>61</sup> For a detailed treatments of international collective rights administration, which underlies most of the royalties system, see Phillip Louis Landolt (ed) *Collective Management of Copyright & Related Rights* Kluwer 2006 and Daniel Gervais (ed) *Collective Management of Copyright and Related Rights* Wolters & Kluwer 2010 2<sup>nd</sup> ed.

<sup>62</sup> The argument made in the first decade of the 20<sup>th</sup> century by phonographic companies and repeated by representatives of the recording and other industries for the remainder of the century.

copyright protects original works and works are original because they are created by an author. The makers of recordings and broadcasts do not create original works.<sup>63</sup>

45. Union members knew that, under pressure from lobbyists, the 1908 Berlin revision conference amended the convention to afford to the gramophone and film industries legal power to prohibit unauthorised duplication of their product.<sup>64</sup> In 1934 came an equally significant event. In the English High Court case *Cawardine*, Justice Maugham, with barely a nod towards authors' rights principles, inferred from statute the existence of record copyright.<sup>65</sup>
46. Perhaps in response to pressure,<sup>66</sup> or from principle, some continental jurisdictions proposed the concept of 'related' rights to resolve the problem that copyright, cannot protect performances or fixations of works, since they are, *ipso facto*, unoriginal. Related rights, as conceived, vested rights analogous to those of copyright in persons who perform works in public and persons or entities which fixate works.

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<sup>63</sup> Although at common law the threshold for originality is lower than civil law, which disallows the possibility of manufacture as original production. In English law, sound recordings and broadcasts are argued – by some at least – to be original. See Jill McKeough and Andrew Stewart *Intellectual Property in Australia* LexisNexis Butterworths 2004 2<sup>nd</sup> ed para 6.13.

<sup>64</sup> Respectively Articles 13 para 2 and 14 paras 3 and 4 of *Berlin Convention* of 13 November 1908. Article 13 permitted legislatures to apply limitations and conditions to the musical copyright holder's mechanical rights. The British Copyright Act 1911 section 19(1) tortuously delineated copyright in a sound recording by treating records 'as if such contrivances were musical works', and declaring the owner of the plate from which a record (mechanical contrivance) was made to be the author of the quasi-musical work – the record.

<sup>65</sup> *Supra* [1934] 1 Ch 450. For an insider's account of the *Cawardine* case, see 'An interview with Professor Adrian Sterling' in *A Short History of IFPI supra*. Professor Sterling (not a relation to Louis Sterling), a former IFPI Deputy Director General, who worked for the EMI lawyer who persuaded EMI's counsel to argue the test case, explains IFPI's strategy to secure international recognition of the record performing right, and its role in lobbying for recognition of the record performing right during negotiation of the Rome Convention. In 1934, one year after IFPI's founding, the record industry founded Phonographic Performance Limited to collect equitable remuneration for the public performance of records.

<sup>66</sup> Neighbouring rights are, theoretically, derivatives of, and secondary to, authors' rights. Their rationale is utilitarian. Most people recognise a moral argument for authors' rights. The industries claimed that since their investment made possible commercial production of copyright works, investment must be rewarded by grant of proprietary rights in so-called fixations of works, and the modes of distributing such fixations, such as broadcasts

47. At the Rome revision conference in 1928, delegates resolved that members should consider measures to protect performers, referring to the rights of performers as 'neighbouring rights'. Then, 20 years later, the Brussels Conference resolved that members should consider how best to protect performing artists, recordings and broadcasts.<sup>67</sup> After 1947, UNESCO (parent of the Universal Copyright Convention 1953), jointly with the Berne Union<sup>68</sup> (and to a smaller extent the International Labour Organization) spent over a decade determining the provisions of an agreement that in 1961 would become the Rome Convention (*International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*).<sup>69</sup>
48. The Rome conference that agreed the eponymous convention met for three weeks, spending most time debating the draft convention's article 12, which recognised the record performing right. Broadcaster representatives fiercely opposed article 12 because they feared it would release floodgates of demand for equitable remuneration. They were outvoted, and article 12 stayed.<sup>70</sup> In effect, the Rome Convention created the legal basis for recording and broadcasting industries to control production and distribution of 'fixations' of copyright works, sound recordings, video, broadcasts, and, later, communications.

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<sup>67</sup> See *Documents de la conférence réunie à Bruxelles du 5 au 26 juin 1948* (1951) resolutions VI-VIII at 428. Also, Peter Jaszi 'Garland of Reflections on Three International Copyright Topics' 8 *Cardozo Arts & Entertainment Law Journal* 47 1989.

<sup>68</sup> The Union is the collective of signatories to the Convention. Its secretariat, active from 1893 until 1967, when WIPO took administrative responsibility for the Convention and Union, was the *Bureaux Internationaux Reunis pour la Protection de la Propriete Intellectuelle* (BIRPI).

<sup>69</sup> *'Neighboring Rights' Guide to the Rome Convention and Phonograms Convention* WIPO 1981.

<sup>70</sup> A Short History of IFPI *supra*.

49. The convention provided for signatory countries to provide 'minimum rights' for performers that 'include the possibility of preventing' unauthorised fixation, reproduction, broadcast and communication of public performances.<sup>71</sup> Producers of phonograms were to enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.<sup>72</sup>
50. Broadcasting organisations were to enjoy the right to authorize or prohibit rebroadcasting of their broadcast, fixation of their broadcasts, and communication to the public of television broadcasts if communication is to a venue charging entry fees to watch the broadcast. Broadcasters could authorize or prohibit rebroadcasting of unauthorized fixations, and fixations which, though claimed to be made under convention article 15, were made for purposes 'different from' those referred to in Article 15.<sup>73</sup>
51. Three decades after agreement of the Rome Convention, United States trade diplomats, powerfully influenced by US copyright industries, played a leading part in establishment of the World Trade Organization (1994). The WTO supplies an adjudicative forum for resolution of trade disputes over non-enforcement of legal standards prescribed by the Trade Related Aspects of Intellectual Property Rights (TRIPS), and WIPO's 1996 treaties, the copyright and performances and phonograms agreements.<sup>74</sup>

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<sup>71</sup> Article 7(1).

<sup>72</sup> Article 10.

<sup>73</sup> Article 13. Article 15 purposes relate to private use, making excerpts for reporting current affairs, ephemeral fixation, and use solely for teaching and scientific research.

<sup>74</sup> For different perspectives on the politics and establishment of the WTO, and the interrelated functions of WIPO and TRIPS see John Braithwaite and Peter Drahos: *Global Business Regulation* Cambridge University

52. The WTO and WIPO demonstrate the political power of the United States in matters concerned with international copyright policy, regulation and distribution. Neither body is necessarily dominated by the US, but both have done the work of creating and overseeing a machinery of worldwide copyright governance that favours, and responds to, United States trade interest.<sup>75</sup> Although the Berne Convention remains the constitution and fountainhead of copyright law, the Berne century, preoccupied with authors' rights, is long past, replaced by a new period in which the law is a commercial instrument governing the trade practices of industries according to rules they designed.<sup>76</sup>
53. The economic (and social) power of the US industries caused the government of the United States to create, under the auspices of WTO and WIPO, a world safe for copyright.<sup>77</sup> By dint of lobbying, and by the agency of the US government, principally the office of United States Trade Representative, an industry coalition procured establishment of an international system harmonising laws to secure effectuation of fees-for-use payment schemes, rights enforcement programs, and programs to

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Press 2000 and *Information Feudalism: Who Owns the Knowledge Economy* Earthscan 2002. Also, Daniel Gervais *The TRIPS Agreement: Drafting History and Analysis* 4<sup>th</sup> ed Sweet and Maxwell 2012.

<sup>75</sup> Aside from the pioneering work of Braithwaite and Drahos, *id*, the literature on the politics of the establishment of the WTO, negotiation of the TRIPS agreement, and further negotiation of the 1996 WIPO treaties, is scant. Journal articles examine aspects of the three agreements and the origins and machinery of the WTO, but few analyse in total the relationship between the WTO's establishment and operation, as well as the purpose of the TRIPS and WIPO agreements, and further development of the copyright system. See, eg, Laurence R Helfer 'Regime shifting in the International Copyright System' *Perspectives on Politics* Vol 7 No 1 March 2009 39-44.

<sup>76</sup> Braithwaite and Drahos *supra*.

<sup>77</sup> On 2 April, 1917, President Woodrow Wilson asked a joint session of Congress to authorise a war declaration against Germany. In his speech, he said that the world 'must be made safe for democracy.' The tenor of US government discourse about infringement or non-enforcement of copyrights in other jurisdictions also implies a righteous imperative to secure for US companies, as if as a public good, foreign markets functioning to the design of US copyright industries.

protect against piracy.<sup>78</sup> Notoriously, and probably effectively, the USTR maintained (and maintains) a Special 301 Watchlist that ranks jurisdictions for compliance with US-determined standards of copyright law enforcement. The USTR threatens sanctions against declared egregious non-compliers.

#### *Phase 4*

54. In the 20<sup>th</sup> century, industries persuaded governments to grant them neighbouring rights,<sup>79</sup> thereby strengthening their control over the copyright system, which notionally functioned to uphold the interests of authors of works. The invention and cultural effect of gramophones, music recordings, and radio and television broadcasting, emancipated and transformed societies. As supplicants for rights, the industries that became the copyright industries skilfully harnessed winds of change to secure economic benefit for themselves.<sup>80</sup>

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<sup>78</sup> From the early 1980s, the US Trade Representative's Office listened with friendly ears to importuning from patents and copyright industries. Pfizer's CEO chaired the government's Advisory Committee on Trade Negotiations, and IBM's chairman sat on the board. Lobbying of the USTR became more intense after 1984, when the industries formed the International Intellectual Property Alliance. Thereafter, the USTR began to campaign for international harmonisation of copyright standards and acceptance of enforcement protocols. Together, the ACTN and IIPA and others lobbied the USTR, which, at the suggestion of the Washington lawyer Jacques Gorlin, instructed trade negotiators to tie negotiations about the General Agreement on Tariffs and Trade (which ended in creation of the WTO) to agreement of protocols about intellectual property rights. See Braithwaite and Drahos *supra*.

<sup>79</sup> The Rome Convention formalised recognition of neighbouring rights in 1961.

<sup>80</sup> As discussed later in the chapter, industries responded to the Berne Union's progressive assertion of authors' rights by seeking, and obtaining, legal qualification of those rights. Beginning with the phonographic industry securing in legislation provision for compulsory licensing of musical recordings, a success followed by arbitrary restriction on the freedom of music copyright holders to demand from radio stations maximal prices for playing music, which preceded the Union's acceptance of a convention on neighbouring rights, the history of copyright international lawmaking in the 20<sup>th</sup> century is one of continuing usurpation by industries seeking protection and preferment.



55. In 1976, Congress passed a new United States Copyright Act.<sup>81</sup> In 1980, legislative amendment, added to the Act's definitions section the definition of a 'computer program' and amended section 117 which vests in the owner of a computer program the right to control copying or adaptation of a computer program.<sup>82</sup>
56. The amendments did not explicitly state a nexus between a computer program and literary work, which, if original, attracts copyright protection. Drafters presumably intended a reader to infer that the definition of computer program comprehends literary works,<sup>83</sup> and court decision affirmed that inference.<sup>84</sup>
57. As amended, the Act states that a computer program is a 'set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result.'<sup>85</sup> 'Literary works' are 'works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.'

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<sup>81</sup> 17 USC 101-810.

<sup>82</sup> Pub L 96-517, 94 Stat. 3015, 3028 (*Computer Software Copyright Act 1980*) amending section 101, adding section 117.

<sup>83</sup> Although Congress made clear its intention, in a 1976 house report, that it intended a computer program to be treated as a literary work under the 1976 Act, stated: '... computer programs [should be protected by copyright] ... to the extent that they incorporate authorship in the programmer's expression of original ideas ..'. (26 HREP No 1476, 94<sup>th</sup> Congress, 2d session 54. The National Commission on New Technological Uses of Copyrighted Works (CONTU) appointed by Congress 1974 affirmed this statement in its 1978 Final Report: 'computer programs, to the extent that they embody an author's original creation, are proper subject matter of copyright.'

<sup>84</sup> The first significant case on the application of the 1980 amendments came in *Apple Computer Inc v Franklin Computer Corp* 714 F2d 1240 (3<sup>rd</sup> Circuit 1983). On appeal, the third circuit found that Franklin's copying of Apple's operating system infringed copyright. As defined under section 101, 'computer program', which consists of 'statements or instructions' is a literary work, and an original literary work is protected whether it is human-readable or machine-readable. In copying the object code supplying instructions to the operating system, Franklin infringed copyright.

<sup>85</sup> 17 USC §101.

58. Thus, statements or instructions which cause a machine to perform functions, are, because the definition of 'literary program' is encompassing, definable as original literary works attracting copyright protection. A computer program is a literary work because it is expressed in 'words, numbers, or other verbal or numerical symbols or indicia'.<sup>86</sup>
59. More precisely, a computer program is expressed in machine language, not natural language. The legal innovation involved in recognising computer programs as literary works goes beyond finding concordance between the description of language described in the definition of 'computer program' and the definition of 'literary work'. Rather, it lies in acceptance of the proposition that a literary work may be expressed in languages other than natural languages. That proposition departs from the suppositions of legislators who, before the invention of machine language, gave thought to the meaning of 'literary work'.<sup>87</sup>
60. That computer code - which issues instructions to procure a machine operation in a computer - should be deemed a literary work, is not obvious if a literary work is regarded as a collocation of 'verbal or numerical symbols or indicia' that is understood by human readers.
61. On the other hand, by calling a computer program a literary work, legislators solved a political problem: how to confer proprietary protection on the software industry,

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<sup>86</sup> See *Apple Computer Inc supra*.

<sup>87</sup> This is not a point that appears to have been discussed in the relevant literature but it follows that before invention of machine language the legislators who implemented the directives of the Berne Convention, or who, in the case of US legislators, followed a parallel process of reasoning, could only have understood the category of literary works to comprehend expressive formulations that are understandable, or apprehended, by humans looking at/reading the formulations.

which claimed, with importuning urgency, that its investment deserved protection.<sup>88</sup>

The legislators offered an ingenious rationale for creating software copyright: a program corresponds to a literary work because it consists of symbolic instructions that, when executed, convey meaning that is understood (albeit by a machine).<sup>89</sup>

62. The legislators' willingness to attenuate the ordinary meaning of 'literary work' in order to accommodate the wishes of actors in a new industry indicated the extent to which the concerns of industries governed regulatory policymaking. Now, more than ever, politicians organised the copyright system in accordance with precepts and prescripts offered by powerful economic actors, not the disaggregated group of 'authors' in whose interests the authors' rights movement mobilised a century before.<sup>90</sup>

63. Significantly also, although government identified the software industry with the bloc of existing so-called 'copyright industries,' of publishers, record companies and

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<sup>88</sup> Public debate over granting software proprietary rights intensified in the United States from the early 1970s. To try to determine policy on the subject, Congress in 1974, during preparation of legislation that became the 1976 Copyright Act, established CONTU to, among other things, make recommendations about 'the use of copyrighted works of authorship ... in conjunction with automatic systems capable of storing, processing, retrieving, and transferring information.' (Pub L No 93-573 88 Stat 1873 (1974)). CONTU consulted for four years and reported on 31 July 1978 (*Final Report of the National Commission on New Technological Uses of Copyrighted Works* (Library of Congress 1979)). The commission made three findings suggesting the success of the nascent software industry's arguments for proprietary protection: (1) to encourage production and dissemination of software (computer programs) Congress should provide some form of legal protection of computer programs (at report 11 fn 12); (2) protection other copyright protection are ineffective or impose too high a cost on society (report at 16-23); (3) copyright provides sufficient protection without unduly limiting public access to the computer program (report at 12).

<sup>89</sup> See, eg, description of legislative and judicial process surrounding delineation in legislation of the nexus between a computer program and literary work in Lisa Green 'Copyright Protection and Computer Programs: Identifying Creative Expression in a Computer Program's Nonliteral Elements' 3 *Fordham Intellectual Property, Media and Entertainment Law Journal* 1 (1992) Article 9 89.

<sup>90</sup> See, eg, J Clark Kelso and Alexandra Rebay 'Problems of Interpretation under the 1980 Computer Amendment' 23 *Santa Clara Law Review* 4 1001 (1983) at 1006-07 for summary of CONTU's economic analysis of necessity for legislation to introduce copyright in computer programs. Note also that computer programs are protected for a period of life plus 70 years, a period which far exceeds the economic life of any program and encourages so-called 'infringement trolling', ie, mercenary legal action for technical rather substantive infringement. In the United States, patent protection has been granted to software, increasing the weight of user restriction.

broadcasters, the imputed expressive nature of computer programs identified the creators of software as ‘authors’ and deserving beneficiaries of authors’ rights. Software copyright was not treated as a secondary copyright, or, more accurately a ‘neighbouring’ right that cannot in principle be called a copyright.<sup>91</sup>

64. Software is protected as an authorial product or work. By contrast sound or film recordings, or broadcasts, or book editions are ‘fixations’ of non-expressive subject-matter. More importantly, the creation of software copyright symbolised a further conquest by industries of the notional terrain of authors’ rights.<sup>92</sup>
65. The 1980 amendments anticipated the growth, fuelled by vesting of proprietary rights, of the United States commercial software industry centred in Silicon Valley. Without rights, Microsoft could not have established a near-monopoly in the supply of its operating system, a development which conspicuously influenced the uptake of personal computers. Nor would maximal profit optimisation, enabled by rights and their enforcement, have determined growth in digital storage and communication technology, or the characteristics of the digital economy.

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<sup>91</sup> According to one study, the United States software industry, ‘simply exploded in the late 1970s’ growing, between 1976 and 1982 at an annual rate of 43%. In the same period, the computer industry accounted for 70% of growth in high tech manufacturing and 45% of technology jobs growth. (Manuel Castells and Peter Hall *Technopoles of the World: the making of 21<sup>st</sup> Century Industrial Complexes* Routledge 1994 at 31).

<sup>92</sup> One measure of the relative economic returns generated by authors’ rights and neighbouring rights (although both types of rights are usually exercised jointly to obtain return) is the statistics published by industries. For instance, the International Intellectual Property Alliance in its 2013 report on *Copyright Industries in the US Economy*, stated that annual output in the reporting year constituted nearly 6.5% of national output, or more than \$1 trillion. The IIPA report does not record total annual income of individual non-corporate copyright holders so the relative returns accruing to corporations and private copyright holders cannot be ascertained from that source. It is significant, that collecting societies, particularly the authors’ rights societies, have for nearly a century refused to disclose in other than a general way, details of distributions to members. That reticence suggests prima facie that the largest beneficiaries of distributions are corporations, not artists.

66. The legislative specification of compulsory licences during the first two decades of the 20<sup>th</sup> century, and thereafter the institution of systems for the payment of fees for public performance of copyright material, the making of recordings, and the copying and communication of works, as well as legislative award of proprietary rights in recordings and broadcasts, strengthened relevant industries economically and politically. The 1980 award of software copyright empowered the software industry to assert proprietary rights for profit, and display, like the other copyright industries, dual characteristics, on the one hand productive, on the other anti-social.<sup>93</sup>
67. The emergence of the internet in the mid-1990s, and its remarkable growth thereafter, increased the power and influence of Silicon Valley, while causing alarm to the recording and cinematographic industries, which discovered that digital data compression technology makes possible theoretically limitless unauthorised copying of unencrypted digital copyright material.
68. The copyright industries had come almost entirely to supplant authors as the favoured objects of government copyright policy – they plainly contributed more to the size of the national economy - and they could be satisfied that regulatory arrangements provided sureties for continued profit-making. But they decided that they could not rejoice. They felt certain that digital technology, and the internet, promised to subvert legislative advantages.
69. The software, or digital communications, industry had little to fear from piracy but publishing, recording and even broadcasting industries, which extracted profit from

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<sup>93</sup> The recording industry obviously demonstrates this assertion. An extraordinary contributor to musical culture and by the 21<sup>st</sup> century, ferocious antagonist of peer-to-peer file sharers.

distribution of copyright material were, and remain, fearful that unauthorised copying and communication, and the competition of the internet's hundreds of millions of independent voices, might fatally undermine lawful dissemination of their product, and thus profits.<sup>94</sup>

70. The fourth phase of copyright regulatory development involved seeming advance and consolidation of a schema of law and practice arrived at over a century, one in which industries reached private and public commercial accommodations that ensure that copyright law worked maximally for their benefit. In that process, the original objects of the law, authors, seemed to have receded as favoured beneficiaries of government policy. This seeming zenith of industry regulatory favour proved misleading. Although the copyright industries, protected by proprietary rights, continue to flourish economically, they can no longer assume the primacy of their voices in policy debate.
71. A new policy object has emerged, the 'copyright user', or 'digital consumer'. The aggregate of users is the public engaged in digital communication across the internet and by other means. The term 'user' is more accurate than 'consumer' since many members of the public create as well as communicate digital works. The preferences and habits of this public of users now variously consumes the output of copyright industries, and contests the legal and other prerogatives once asserted by industries

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<sup>94</sup> Industries allege that copyright infringement threatens their economic viability, although others (pointing to publication in industry annual reports of significant profits) assert that online infringement does not substantially divert demand from markets. Industry (and government) intent is indicated by signature of the Anti-Counterfeiting Trade Agreement by 32 states (2011-12). ACTA is not in force (six ratifications are required and only Japan has ratified) but, if it comes into force, and is widely implemented, it could potentially facilitate creation of a global IP rights enforcement regime that is not limited to suppression of the trade in counterfeit goods.

without opposition. Politicians must now take account of a new hybrid interest group, that of the authorial information consumer-user.<sup>95</sup>

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<sup>95</sup> While illegal downloading suggests apparent public rejection of copyright prohibitions, probably the strongest force causing governments to consult an indeterminate public interest is the demand of access corporations, most prominently Google, for dissemination freedom. The idea of limitless information supply, made possible by digital communication, removes the proprietary rationale for information restriction, which is that supply is exhausted unless copyright law regulates output. See Atkinson and Fitzgerald *A Short History supra*, chapter 13.

### Part 3 Exclusion

#### *Exclusionary character of copyright system*

1. A category of law is systemic in any network of commercial relationships that relies for its functioning and continuance on that law and its enforcement. In this way, copyright law is systemic in the modern global economy of entertainment, broadcasting and digital communication.<sup>96</sup> The law is inseparable from the copyright system, and both, to a considerable extent, are products of political decision, usually influenced by one or other economic actor seeking legal sureties condoning or forbidding commercial practices (or prohibiting presumptively harmful non-commercial activity such as unauthorised downloading for private purposes).<sup>97</sup>
  
2. When consumers could, and did, copy and communicate copyright material heedless of copyright controls, the industries turned on them.<sup>98</sup> The exclusions that industries

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<sup>96</sup> A number of economists, in different eras, expressed concern that regulators identified with the objectives of the regulated. See, eg, Arnold Plant 'The Economic Aspects of Copyright in Books' (1934) *Economica* 1 167-95 (expressing the view that regulation is socially inefficient), and, more influentially, James Buchanan and Gordon Tullock *The Calculus of Consent* University of Michigan Press 1962. Buchanan and Tullock pioneered public choice theory, which proposes that private actors, seeking private advantage, are likely, if the process of rights allocation is not subject to rigorous public examination, to secure allocation harmful to the public. The Nobel memorial prizewinners Ronald Coase and Kenneth Arrow, in a span of 25 years from 1937 to 1962, also outlined concerns about the proximity of regulator, regulation and regulated. Coase considered that proprietary rights may be used to restrict competition, although rights are necessary to permit productive economic activity ('The Nature of the Firm' 4 *Economica* 16 Nov 1937 386-405; *British Broadcasting: A Study in Monopoly* Longmans 1950; 'The Problem of Social Cost' 1960 3 *Journal of Law and Economics* 1-44). Arrow concluded that while award of rights is intended, in theory, to create and maintain productive incentive, it may also supply rights-holders with the means to exercise and abuse monopoly powers. ('Economic Welfare and the Allocation of Resources for Invention' (1962) in National Bureau of Economic Research (ed) *The Rate and Direction of Inventive Activity* Princeton University Press).

<sup>97</sup> Public choice theory predicts that government, unscrutinised, will collaborate with private actors for mutual benefit (in the case of government, that benefit may be expectation of political support).

<sup>98</sup> In particular, electronic file-sharing, enabled by digital copying and communication services available on the internet, permitted users to bypass the requirement to purchase a record, and instead download digital copies of recordings of musical works. File-sharing resulted in significant diminution in the revenues of record labels. Beginning with legal action against Napster in 2000-01 (*A&M Records Inc v Napster Inc* 239 F3d 1004 9<sup>th</sup> Circuit), and proceeding to Grokster in 2005 (*MGM Studios Inc v Grokster Ltd* 545 US 913), then Limewire in 2010 (*Arista Records LLC v LimeWire LLC* 2010 WL1914816), the US music industry tried, unavailingly to stymie the growth of P2P file-sharing.



had long relied on to harvest super-profits now became perceptible to the public. These exclusions arose because of the proprietary character of the copyright system. The copyright system shares primary characteristics with a land property system but the two are not identical.

3. The copyright system excludes differently from a land title system.<sup>99</sup> Viewed as a property system – that is, a political control system distributing sovereignties, or allocating power - the copyright system can be seen to perform the same instrumental role as any system of land title. It confers exclusive rights on a person, the titleholder. Its character and existence is indivisible from the law that upholds it. That law derives from a constitutional settlement, written or unwritten, which determines its purpose. That constitution is also the source of authority for the grant of title (as the crown, and original consensus about the role of the crown, is the source of authority for freehold).
4. Differences are observable, however, in the type of exclusion occasioned by the grant and exercise of copyrights and the grant of land rights. The political history of contest for land sovereignty is characterised by dispossession, clearance, appropriation and enclosure, violent acts that distort societies for generations and centuries.<sup>100</sup> In the case of the copyright system, violence and its consequences are absent from the

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<sup>99</sup> A key difference between systems is duration of title, which significantly alters, or potentially does so, the economics of titleholding under intellectual and real property systems. As John Drummond Robertson, manager of the Gramophone Company Ltd - the forerunner of EMI - observed in 1911, during public debate over the United Kingdom copyright bill, copyright confers: 'a leasehold with a limited term of years, during which the author would be free from molestation and would enjoy statutory protection against trespassers on his domain, but with reversion to the public at the end of his lease.' (Letter to *The Times* 9 May 1911).

<sup>100</sup> Historical examples of land dispossession, usually, though not invariably for private gain, are innumerable. However, one type of historical dispossession, that by enclosure of common land, or 'the commons', in England and Scotland, is often cited by participants in debate over the scope of copyright, as a phenomenon of catastrophic exclusion, which invites comparison with the exclusionary growth of the copyright system. See James Boyle's essay on enclosure of the so-called intellectual commons: 'The Second Enclosure Movement and the Construction of the Public Domain' 66 *Law and Contemporary Problems* 3-74 Winter-Spring 2003 pp 33-74.

history of sovereign contest that begins with a formative constitutional event, signature of the Berne Convention in 1886.

5. The copyright system, in principle dedicated to upholding authors' rights, evolved, and functions to protect, the production and distribution arrangements of industries. Supposedly protections such as the posthumous term and distribution rules, like parallel importation restrictions, are necessary to delimit piracy, and sustain incentive to produce, thereby optimising dissemination. The protections offered by copyright law place owners in a quasi-monopolist position, albeit that they usually compete in markets populated by other quasi-monopolists (such as movie studios, record labels and producers of software-embedded products).<sup>101</sup>
6. The copyright monopoly is not a monopoly over supply of all product but rather specific copyright product. This specific monopoly, however, permits activity that is likely to exclude from markets some prospective consumers or users. A chief practice is that of price discrimination, attended by restrictions on supply and distribution (such as geo-blocking), and premium pricing. Price discrimination, import restrictions, rules upholding non-exhaustion of rights, and premium (or monopoly) pricing, exclude some consumers in richer countries, and more consumers in poorer countries.
7. Copyright exclusion is not procured in blood, nor instituted by race or religious hatred, or intention to enslave, exploit or subordinate, or insistence on caste supremacy. The

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<sup>101</sup> Economists tend to give qualified assent to copyright regulatory arrangements for this reason, and on the basis, suggested by Ronald Coase (*supra* re broadcasting), that proprietary rights help solve market failure problems. Against this proposition, Robert Hurt and Robert Schuchman stated that copyright literature has not provided empirical evidence to persuasively demonstrate that proprietary rights work efficiently to stimulate production in the field of copyright ('The Economic Rationale for Copyright' 56 *American Economic Review* 1966 421-132 - edited and completed by Robert Schuchman owing to the death of Robert Hurt).

quotidian exclusions of copyright manifest in consumption deficit, or perhaps consumer satisfaction deficit, one cure for which – probably politically unfeasible – could be repeal of intellectual policy exemptions in competition law, and substantive reform of copyright law (including, for example, gargantuan reduction of the copyright term).

8. The question arises, to what extent do copyright exclusions cause social harm and how does harm translate into inequality? It could be argued that price discrimination creates a deficit in consumer welfare, rather than social welfare, if social welfare is defined to pertain to health and self-maintenance. Particularly in richer countries, differential pricing and pricing far exceeding marginal cost might be argued to constrict only discretionary spending on copyright products. According to this argument, price may delay, but does not deter, consumption.

*Excluding effects*

9. Assuming the validity of this proposition, the question of exclusion remains. The case of the market for academic books in the United States, which is estimated to generate sales of over \$7 billion annually, is instructive.<sup>102</sup> The price of new college textbooks in the United States rose by 82% for the period 2002-12 compared with growth in consumer prices for the same period of 28%.<sup>103</sup> Expenditure on books in the same period did not match the increase in the price of textbooks, indicating that, for economic reasons, students abstained from buying books. Average expenditure on

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<sup>102</sup> US Census Bureau census data for 2007 ([www.census.gov](http://www.census.gov)) stated that US market size for textbooks is \$7.06 billion (quoted [www.marketsize.com](http://www.marketsize.com)).

<sup>103</sup> Government Accountability Office Report to Congressional Committees June 2013 *College Textbooks: Students have Greater Access to Textbook Information* at 6.

books changed little in 10 years: expenditure was positively proximate to \$600 in 2002 and negatively proximate to \$600 in 2012.<sup>104</sup>

10. In the year 2001, students bought an average of seven new textbooks and six used textbooks. In 2013, they bought an average of nearly three new textbooks and five used, rented an average of slightly less than two, and procured an average of one textbook from another source.<sup>105</sup> According to a 2005 study, the average first year college student would have to spend over one month in full time employment to pay for books.<sup>106</sup> If 2005 data on labour hours necessary to accumulate income to purchase books can be said to be apply approximately to subsequent years to date, it could be asserted that financing purchase of books consistently causes most US students hardship, though not insuperable difficulty.
11. In theory, a capacitated student who paid other necessary disbursements could find the time and employment to raise funds to purchase a year's supply of academic books. In practice, many students of limited means might experience considerable difficulty in doing so. To varying degrees, the cost of textbooks excludes students

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<sup>104</sup> Student Monitor (Credit: Quoctrung Bui/NPR) quoted planetmoney 9 October 2014: *How college students battled textbook publishers to a draw in 3 graphs* ([www.npr.org](http://www.npr.org)).

<sup>105</sup> *Id.*

<sup>106</sup> Heather Boushey 'The Debt Burden of New College Graduates' *Center for Economic and Policy Research*, September 2005 (at [http://www.cepr.net/publications/student\\_debt\\_2005\\_09.pdf](http://www.cepr.net/publications/student_debt_2005_09.pdf)) outlined the equivalent labour cost of paying for textbooks. According to the US Government Accountability Office, which publishes the annual average student expenditure on textbooks, in 2004, the average first year college student spent \$898 on academic books (GAO Report to Congressional Committees June 2013 GAO-13-368 College Textbooks at 6). To raise an amount equivalent to the cost of books, a student without other means would have needed to expend 170 hours labour in a minimum-wage job, a total equivalent to over one month of full-time employment.

from complete access to information necessary to effectively master course material.<sup>107</sup>

12. Academic books, in the United States and other English-speaking countries, may be inflated from marginal cost by a factor between 10 and 20.<sup>108</sup> Some, perhaps many, students are unable to purchase textbooks required for the study of courses in which they are enrolled. The price of academic books in the United States rose by 812% between 1978 and 2012 compared to an increase in the Consumer Price Index of 250% during the same period.<sup>109</sup>
13. In poorer countries, the problem of access to educational, or theoretical, information is more acute. In these countries, price mark-up, or encryption of electronic academic material, may altogether deprive students, and others, from securing access to information. Academic publishers, exponents of 'online enclosure',<sup>110</sup> collect research articles in a 'walled garden'.<sup>111</sup> Price constrains access, which may be further

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<sup>107</sup> According to a joint publication of the Public Interest Research Group Fund and the Student PIRGS *Fixing the Broken Textbook Market: How Students Respond to High Textbook Costs and Demand Alternatives* (27 January 2014), 65% of students surveyed had chosen not to buy a college textbook because it was too expensive, while 94% reported that they feared they would suffer academically because of this choice (at 11).

<sup>108</sup> Philip Soos 'Required reading: Here's why textbooks are so expensive' *The Conversation* 6 February 2013. Data on price inflation is unverified.

<sup>109</sup> Mark Perry 'The college textbook bubble and how the "open educational resources" movement is going up against the textbook cartel' *American Enterprise Institute* public policy blog 24 December 2012. Perry prepared a chart comparing inflation in prices of academic books, medical services and new home prices against the CPI. Inflation in books prices outstripped that in the prices of the other items (the cost of medical services, the item next most inflated in price increased by 575%). Perry relied on data from the Bureau of Labor Statistics and Census Bureau.

<sup>110</sup> Gavin Yarney MD 'Excluding the Poor from Accessing Biomedical Literature: A Rights Violation that Impedes Global Health' *Health and Human Rights* Vol 10 No 1 (2008) 21-42 (publisher The President and Fellows of Harvard College on behalf of the Harvard School of Public Health/Francois-Xavier Bagnoud Center for Health).

<sup>111</sup> Nancy Kranich 'Countering Enclosure: Reclaiming the Knowledge Commons' in Charlotte Hess and Elinor Ostrom (eds) *Understanding Knowledge as a Commons* MIT Press 2007.

constrained by limitations on copying and communication (and translation). Library budgets frequently preclude purchase of medical and scientific research journals.<sup>112</sup>

14. Prior to maturation of an online publishing market, more than 50% of higher education and research institutions in least-developed-countries did not subscribe to hard-copy international journals.<sup>113</sup> The consequence of price exclusion is material:

*Worldwide, only a small fraction of researchers, clinicians, health and science policymakers, teachers, patients and the broader public can afford to pay access tolls on biomedical research articles.’<sup>114</sup>*

The consequence may be death of some people afflicted with treatable disease and illness. A former executive director of UNICEF stated that prior dissemination of medical and scientific knowledge, including copyright material in journals, could have reduced, perhaps by two thirds, preventable deaths in LDCs.<sup>115</sup>

15. Quantifying effects of price discrimination and supply restriction of copyright product, even in jurisdictions like that of the United States, is difficult. Research, or more accurately, data collection, is focused on industry output and the effect on output of

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<sup>112</sup> This is the case even though, increasingly, especially in fields such as law, publishers offer subscriptions to electronic journals, a practice that does not appear to result in lower subscription fees.

<sup>113</sup> B Aronson ‘Improving Online Access to Medical Information for Low-income Countries’ *New England Journal of Medicine* 350 2004 at 966-68.

<sup>114</sup> Yamey *supra* at 23.

<sup>115</sup> *Id* at 24, quoting James Grant, former executive director of UNICEF speaking of deaths in the late 1980s in LDCs: ‘[o]f the approximately 50 million people who were dying each year in the late 1980s, fully two thirds could have been saved by the application of that knowledge.’ Yamey refers to the case of James Tumwine, professor of paediatrics at Makerere University, Kampala Uganda. Asked by the World Health Organization to investigate an outbreak of seizures among children in southern Sudan called ‘nodding disease’ he tried to research the disease online by reading articles – but could not pay the cost of access to relevant articles. (Reference to Yamey ‘Africa’s Visionary Editor’ *British Medical Journal* 327 2003 at 832). Yamey cites also the case of a physician in southern Africa, and his colleagues, who, relying on article abstracts altered a perinatal HIV prevention program. The revised program proved less effective. Access to the article would have revealed that the study results were based on short term follow-up, a small sample, and incomplete data unlikely to be relevant to southern Africa (at 21).

consumer behaviour. Unsurprisingly, industries consistently publish data purporting to show the economic contribution of industries to the (United States) economy, and the harmful economic effect of piracy.<sup>116</sup> Surprisingly, academic inquirers, and professedly neutral institutions, also concentrate on the perceived problem of putatively sub-optimal, or, alternatively, sub-optimised, copyrights.<sup>117</sup>

*Economic success a marker of exclusion*

16. However, effect on consumers can be deduced by consulting industry figures (which are not compiled by non-aligned independent entities) on ‘the contribution of the copyright industries’ in the International Intellectual Property Alliance’s 2013 report *Copyright Industries in the US Economy*.<sup>118</sup> According to the IIPA:

- ✓ in 2012, copyright industries accounted for 6.48% of US GDP, or \$1,015.6 billion
- ✓ between 2009-12, copyright industries’ growth rate exceeded the national rate by a factor greater than two, 4.73% cf 2.14%
- ✓ in 2012, the average income of the copyright industries’ workforce (4.04% of the total US workforce) exceeded that of the national average by 33%, \$85,644 cf \$64,594 (the ratio of difference is 1.31 from 2009-11 and rises to 1.33 in 2012)

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<sup>116</sup> Stephen E Siwek Economists Incorporated *Copyright Industries in the U.S. Economy: The 2003-2007 Report; 2009 Report; 2012 Report*.

<sup>117</sup> For academic, see, eg, Kenneth C Shadlen Andrew Schrank Marcus J Kurtz ‘The Political Economy of Intellectual Property Protection: The Case of Software’ *International Studies Quarterly* 2005 49 45–71; for institutional, see, eg, UNCTAD-ICTSD *Development Dimensions of Intellectual Property in Uganda: Transfer of Technology, Access to Medicines and Textbooks* UNCTAD/PCB/2009/13 01/06/10 105pp.

<sup>118</sup> Prepared by Stephen E Siwek Economists Incorporated November 2013. The 2013 report is the fourteenth report on copyright industries prepared by Siwek et al (Economists Incorporated) for the IIPA since 1990.

- ✓ in 2012, foreign sales by copyright industries totalled \$142 billion, nearly 8% of total sales, and considerably exceeding sales by most other industries. Software sales constitute 75% (\$106.40 m) of foreign sales. Foreign sales exceed those of the pharmaceuticals and medicines industries by over 180%.

17. The IIPA's statistics point to the economic prosperity of the copyright sector. They also suggest that legal monopolies conferred by copyright laws may restrict competition, and contribute to price inflation, retarded supply and reduced distribution efficiency.<sup>119</sup> The bargaining power of supply behemoths like Amazon now considerably undermines publishers' copyright-conferred power to determine price and terms of distribution.<sup>120</sup> Access corporations like Google seek in principle to facilitate dissemination, a policy which potentially undoes information restriction strategies of copyright industries. On the other hand, no behemoths threaten the suppliers of software products or services, and their copyrights facilitate potentially competition-restricting, or consumer-hostile, practices.<sup>121</sup>
18. In any event, in a mature sector, an annual growth rate exceeding more than double the national rate, and sectoral remuneration one third greater than the national average, arouse prima facie suspicion that regulatory conditions permit pricing and

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<sup>119</sup> On monopoly signals, refer, eg, ADH Kaplan 'Economic Indicia of Competition and Monopoly' *Section of Antitrust Law Vol 7* The Brookings Institute Proceedings at the Annual Meeting 22-24 August 1955 at 132-134, published by American Bar Association. Esp 'Predatory, Preclusive practices' (at 142) and 'Rate of Growth of the Industry or Market' (at 143).

<sup>120</sup> Although the Nobel Memorial Prizewinner Paul Krugman (*New York Times* 19 October 2014) trenchantly criticised Amazon's practice of monopsony, or abusing its market power over suppliers to secure price and other concessions.

<sup>121</sup> The Commonwealth *Competition Policy Review Panel* published its draft report in September 2014, advocating abolition of the exemption for intellectual property licences in s 51(3) of the Commonwealth *Competition and Consumer Act* (2010). The Australian Law Reform Commission's report on *Copyright and the Digital Economy* (2014) advised that repeal of section 51() 'should be considered'.



supply terms that are likely to exclude some potential consumers from the market. The way in which the copyright system has allocated proprietary rights, and the exclusionary effect of that rights allocation can be seen in figure 6, which repeats, and elaborates, the structure of diagram one introduced at the beginning of the chapter.

## FIGURE 6 – ELABORATED MODEL OF PROPRIETARY EXCLUSIONS

### Process of social exclusion

Although the graphic arranges events logically in sequence, the development process involves continuous interaction of the events described.

#### Contest for sovereignty

*Invention of movable type print presses 1450 is followed by licensing system = govt v opponents; then (18<sup>th</sup> century and statutory copyright) publishers v govt; then (18<sup>th</sup>-19<sup>th</sup> century) publishers v authors*



Constitution (constitutive principles of society written or unwritten: source of sovereign authority.

Sovereignty is more likely to endure if source of authority is accepted)

*Berne Convention 1886 = supremacy of authors' rights; Rome Convention 1961 = neighbouring rights supplying rights analogous to authors' rights; 1990s = WTO, TRIPS Agreement, WIPO treaties strengthening economic power of industries*



Control arrangements (laws, institutions, securing/implementing constitutive principles)



*Industries contest the award of rights that permit authors to control the production process. Domestic laws implement authors' rights, compulsory licensing and neighbouring rights; copyright industries establish paratrophic<sup>122</sup> property system: public performance fees; copying and communication fees. Effect of paratrophic system is price inflation, restricted supply, denial of access = burden on educational system = poorer countries denied access to educational materials. Length of copyright term compounds price/access problem.*

Two chief control instrumentalities: political and property systems



Political system = sovereign decision maker (its sovereignty distributed among mini-sovereigns contesting sovereignty)



Property system = distributes sovereignty/power/control among mini sovereigns



*Since 1886 politicians have supported authors' rights as treaty obligations and moral rights; by analogy they supported neighbouring rights; courts, more slowly, followed suit. The ideology of authors' rights appears unshakeable. Politicians make laws, and since the copyright industries (publishing, radio and television broadcasting, film and software, and ISPs, though they do not exercise specific ISP copyrights) are invariably politically influential, they make laws suitable for industries. The disposition of statutory rights, the normative power of international copyright institutions and treaties, the suasion of copyright ideology, and the political-judicial assertion of that ideology ensure that proprietary interest is preferred to public.*

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<sup>122</sup> Derives sustenance from living organic material without supplying providing benefit.



Social exclusion/social inequality

*Price discrimination enabled by copyright law harms consumers in all jurisdictions; most importantly, imposes on copying and communication, and obstacles to compulsory licensing mean that in wealthier countries student access to educational resources is sometimes significantly restricted; in poorer countries supply for many countries is effectively denied altogether.*

### **SUMMARY**

This chapter summarised the phases of copyright history, and discussed how the growth of copyright regulation mirrors the model of control struggle. Contest resulted in constitutional and political settlement, rights allocation, and formation of the copyright system governed by domestic laws implementing treaties. The system created is exclusionary in effect benefitting authors in principle, and producers in practice, but excluding consumers from price or access calculations. The next chapter examines how the copyright system, as it developed according to the complaints or requirements of the producers, a rentier system facilitating profit extraction.

## CHAPTER SIX

### THE RENTIER COPYRIGHT SYSTEM

#### PURPOSE

To outline the characteristics of the copyright system, its evolution and the effect of treaty, politics, policy, legislation, and courts on the growth of a rentier system directed to income transfer. As the outcome of political compact, property systems, by design, distribute benefit to some, and less or no benefit to others. Unless countervailing political force is strong, property systems are liable to become explicitly instruments of economic and/or social oppression. In the case of the copyright system, the rentier system, ratified by international agreement, is economically oppressive, benefiting economic coteries – the industries.

#### HEADINGS

##### **Part 1 Authors' rights and influence of the Berne Convention**

Victor Hugo and authors' rights

Constitutional nature of the Berne Convention

Revision of Berne Convention and further development of copyright system

##### **Part 2 Characteristics and evolution of the copyright system**

The evolving copyright system

Feudal comparison

Key characteristics of feudal, copyright and freehold estate

##### **Part 3 Copyright bargains, markets, and the remuneration right**

The compulsory copyright bargain

Government and the compulsory copyright bargain

The role of courts

A 'market' for public performance

Remuneration right

## Part 1 Authors' rights and influence of the Berne Convention

### *Victor Hugo and authors' rights*

1. Conventional legal narrative correctly characterises the Berne Convention, signed in 1886 by nine contracting parties,<sup>1</sup> as the formative document in the development of modern international copyright law. The Berne Convention did not emerge from a void.<sup>2</sup> Its contents gave effect to principles of moral rights, or *droit d'auteur*, elaborated more than a century before 1886, and the conceptions of German idealism, which suggested separation between the *work* and the *book* (later anything which embodied the work).<sup>3</sup> A specifically French conception of authors as interpreters of a nation's soul motivated the authors' rights movement to assert that government must not permit the author's vocation - and avocation - to be in any way traduced.<sup>4</sup>

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<sup>1</sup> Belgium, France, Germany, Great Britain, Haiti, Italy, Spain, Switzerland, and Tunisia. Colonial nations signed on behalf of their possessions.

<sup>2</sup> Legal historians are inclined to write of the development of copyright law as if the Berne Convention arose autonomically, expressing natural law. Karl Marx wrote of this historiographical tendency: 'History does nothing, it "possesses no immense wealth", it "wages no battles". It is man, real, living man who does all that, who possesses and fights; "history" is not, as it were, a person apart, using man as a means to achieve its own aims; history is nothing but the activity of man pursuing his aims ...' (*The Holy Family* 1846 Chapter 6).

<sup>3</sup> Johan Gottlieb Fichte (b 1762) departed from Immanuel Kant's distinction between *noumena* (reality, or things in themselves) and *phenomena* (appearance) to propose that consciousness of self arises from consciousness encountering the resistance of other sensible subjects. The subjective 'I' becomes conscious of selfhood by apprehending external subjects, and the limitations on self are imposed by those objects. Fichte argued that that which is the original work of an author is inalienable. Property lies in the author's expressive locutions and nothing else. Reprinting a work verbatim infringes the author's property, although the expression itself is not embodied on the page: it is inalienably part of the author. Thus legal protection should cease on death of the author, and unauthorised adaptation and translation should not be restrained. See (Fichte 'Proof of the Illegality of Printing' 1793, discussed in Mario Biagioli 'Genius against Copyright: Revisiting Fichte's Proof of the Illegality of Reprinting', 86 *Notre Dame L Rev* 1847 (2011) 1848-67). Georg Hegel argued that the law could alienate, or recognise, 'inward and mental' objects as the subject of legal protection. Self or 'will' cannot be appropriated: a book, an object, may be bought, but its contents cannot be copied, since they are indivisible from the self or will of the person. (Hegel *Elements of the Philosophy of Right* 1821, trans 1991 Cambridge). Victor Hugo expressed a similar concept in his 1878 Paris speech, saying, 'A writer's thoughts, as such, evade all attempts at capture. They fly from heart to heart. They have the power and gift of *virum volitare per ora* [spreading like wildfire].' (Atkinson and Fitzgerald *supra* at 30).

<sup>4</sup> The idea of moral rights in literature perhaps originated with the *philosophes* and others associated with the French Enlightenment. The first concrete legislative recognition of the literary property is found in the *Décret*

2. The English-speaking philosophical tradition, more concerned with the utility of rights, and the public consequences of their enactment, also influenced the thinking of convention delegates, who were open to allowing for limitation of rights if necessary to protect a notional public interest. English and French speakers could declare unequivocally their opposition to centuries of state licensing or censorship of literature. Victor Hugo, in his 1878 speech to the Paris literary congress – a speech which proposed summoning of a ‘literary parliament’ to declare authors’ rights – explained the reasons to pass laws protecting what he called ‘literary property’.<sup>5</sup>
3. In the history of copyright politics, Hugo’s speech is the outstanding declaration of authors’ rights. Aged 79, he told his audience that legal recognition of authors’ rights would emancipate the authorial voice from centuries of legal repression. Hugo said:

*Gentlemen, you have a noble mission. You are a sort of literary parliament. You have the power to inspire laws, if not to enforce them. Speak justly, speak truth, and if by some mischance no one listens, well, you will prove legislation wrong. You are going to create a foundation for literary property. This is what is right, and you are going to embody it in law. I assure you that your suggestions and advice will be taken into account. You will persuade legislators trying to confine the writer that literature has no boundaries. Literature is the mind leading humanity. Literary property is open to everyone. Royal decrees denied and still deny literary property. And why?*

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*de la Convention Nationale du dix-neuf juillet 1793*, established property in literary and artistic works. That decree did not explicitly refer to moral rights but it prefigured growth of that doctrine in the 19<sup>th</sup> century, inspired by the *Declaration of the Rights of Man and the Citizen*, which stated: ‘Men are born and remain free and equal in rights.’ Applying the logic of this sentence, if the legislature is to uphold human dignity, it must place authorial works above the claims of publishers.

<sup>5</sup> In Atkinson and Fitzgerald *supra* at 30.

*For purposes of enslavement. The writer who owns his work is the writer who is free. Deny ownership and you deny him independence.*<sup>6</sup>

4. Hugo spoke also for the public:

*Let's not forget the twofold principle: a book, as such, belongs to the author, but the ideas in the book belong –without exaggeration – to all mankind. All minds have equal claim to them. If one of these two rights, that of the author, or that of humanity, had to be sacrificed, it would of course be the right of the author, because we are solely concerned with the public interest, and I declare that the public must take precedence. But as I have just said, such a sacrifice is not necessary.*<sup>7</sup>

5. The delegates who later agreed the convention listened to Hugo's injunction to endow authors with legal rights. These would be rights to authorise all technological modes of producing, reproducing and disseminating copyright material. The rights would do little to change existing economic relationships. Authors usually assigned rights to economically powerful publisher intermediaries. Thirty-three years after Hugo's speech to the international literary congress, another renowned literary figure, the Irish playwright George Bernard Shaw, wrote pessimistically to the London *Times* newspaper of the plight of composers of musical works. Shaw feared that in political debate over the right to authorise recording of music, the recording industry would persuade government to curtail the economic value of the right.

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

6. Shaw corresponded in May 1911, opposing arguments in favour of the Commons legislating to provide for a compulsory recording licence. The compulsory licence, which passed into law in the 1911 Copyright Act,<sup>8</sup> permitted phonographic companies to record musical works unauthorised, provided that the copyright owner had previously authorised a recording, and recording companies paid the owner a royalty of 5% of sale price for each recording.<sup>9</sup> Shaw objected to deprivation of the music copyright holder's authorisation right. Explaining his hostility to a compulsory licence he referred to the composer Richard Wagner:

*[Wagner] was far past middle age before he was free of the most humiliating pecuniary anxieties. And now, if you please, the manufacturers who have made more money out of Wagner's music than he ever spent in his whole life, and who never paid him a farthing, want his heirs to compensate them for the loss of their power to steal his music with impunity.<sup>10</sup>*

7. Shaw argued that in policy and legislative debate, government usually listened to the most wealthy and well-connected political importuners. He was right about the political fate of the disaggregated community of authors. He was right about the recording industry. But he failed to observe that, nearly as much as the recording industry, music publishers, the proxies for authors, and frequently assignees of authors' copyrights, exploited the authors on whose behalf Shaw wrote:

*An injustice has to be done either to us artists or to the manufacturers. We, being artists, are poor and politically insignificant. They, being industrialists,*

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<sup>88</sup> Section 19(2).

<sup>9</sup> Section 19(3)(b).

<sup>10</sup> George Bernard Shaw, letter to *The Times* 4 May 1911 at 7.



*are rich and can bully Governments. I suppose we must get to the wall, but I do not see why we should do so without politely informing the public and the Government that we thoroughly understand what is happening to us, and that we submit to injustice because we cannot help ourselves, and not in the least because we are imposed upon by the special pleading of Mr Drummond Robertson and those whom he represents.*<sup>11</sup>

8. John Drummond Robertson, to whom Shaw referred in this letter, was manager<sup>12</sup> of the Gramophone Company Ltd, forerunner of EMI Ltd. He pressed the case for compulsory licensing to diplomatic representatives (at the 1908 Berlin Congress), politicians, and in the letters page of *The Times*. In correspondence to the *Times*, Drummond Robertson debated Shaw and others.
9. He made the argument that continues to win support from politicians asked to award rights to control production and dissemination of copyright material. This is that industry investment makes possible production and dissemination, both considered public benefits. According to the argument, grant of appropriate rights is necessary to guarantee continued investment. Drummond Robertson wrote:

*The reasonableness of the proposal is grounded in the fact that a new right [to authorise sound recordings] and a large new source of profit is being created for the author, to which he contributes nothing from the inventive and*

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<sup>11</sup> *Id.* Near the end of his life, the nonagenarian Shaw wrote to *The Times* (18 January 1949) and asked why 'is property in our creations communised after less than two lifetimes, and that of simple distributors made perpetual? Why is property in turnips made eternal and absolute when property in ideas is temporary and conditional?'

<sup>12</sup> His own designation in correspondence. The tenor of his correspondence, and activism before the 1909 Gorrell Committee, which reported in 1909 on the 1908 Berlin Act revising the Berne Convention, suggest that he performed the role of chief executive.

*artistic side. His work is no more valuable because mechanical reproduction, one of the greatest wonders of the age, has been brought to a high state of perfection by the skill of the inventor and the ingenuity of the mechanic.*<sup>13</sup>

#### *Constitutional nature of Berne Convention*

10. The Berne Convention is the constitution of the copyright system. A constitution, written or not, is the agreement of a group of people about what constitutes a society. A constitution usually evolves. Its constitutive or foundation principles, which explain the meaning and purpose of the society constituted by the constitutional compact, do not usually change. If they do, the society is likely unwinding, since a polity's rejection of social principles hitherto acknowledged as formative and binding deprives that society of legitimising norms, and an agreed source of political authority.
  
11. The normative necessity for each society to acknowledge a source of authority (in the United States ('we the people'), and legitimising norms (in the United Kingdom, the contents of the Magna Carta and Bill of Rights), ensures society's survival for so long as origins and tenets are agreed. The United States' *Declaration of Independence* (1776) and its *Constitution and Bill of Rights* (1778) are declarative of an idea of society and government that may no more be dissociated from that nation's understanding of its constitutive purpose than stars from the night sky. Despite France's history of constitutional failure, the articles of the National Constituent

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<sup>13</sup> Letter J Drummond Robertson to *The Times* 2 May 1911 at 10. Robertson claimed in a subsequent letter that a recording was not a copy of a work 'but a registration of the sound waves of the voice of the singer.' He then said, 'I now turn to Mr Shaw's second proposition ... that makers of records have been stealing the author's work in the past. This, of course, can only start from the premiss that an author's work is property. Whether it ever was so has been the subject of endless argumentation; but it is precisely because the author was helpless to enforce any property right at Common Law in his published work that the Legislature started to find a remedy.' (Letter to *The Times* 9 May 1911).

Assembly's *Declaration of the Rights of Man and the Citizen* are inseparable from the French nation's self-concept.<sup>14</sup>

12. Similarly, the Berne Convention became the copyright system's constitution because of its prestige as a universally agreed expression of authors' rights.<sup>15</sup> The polity of copyright assents to the premise that authors are legally empowered to authorise copying of original works. The copyright system's source of law is the author's putative moral right to authorise copying and other uses of copyright works.
13. Although Victor Hugo's devout view of authors' rights might surprise today's politicians, used to anodyne arguments, no participant in copyright politics queries the Berne Convention's surpassing normative authority. Discussion about the convention is unvexed by agnostic opinion.
14. As the source of copyrights and neighbouring right (to the extent that neighbouring rights may be said to derive from authors' rights), the Berne Convention is also the source of the copyright system's longevity. For so long as the concept of authors' rights is considered inviolable, the copyright system, much criticised, will retain

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<sup>14</sup> Concerning the opponents of France's constitutional principles, Victor Hugo said in his speech to the International Literary Convention: 'These are the enemies of civilisation, of books of freedom of thought, enemies of emancipation, of accountability, of deliverance. The servants of dogma who want to enslave humanity forever. They're wasting their time! The past is past. Nations don't return to their vomit ... Declare your hatred of freedom of conscience, freedom of the press, and of the courts, your hatred of civil law, of revolution and tolerance, your hatred of science, of all progress. Don't flag! Keep dreaming! You have as much hope of creating a suitable program for France as of extinguishing the sun.' (Atkinson and Fitzgerald *Copyright Law supra* at 32).

<sup>15</sup> The convention is an example of how enduring social consensus may occur: in 1886, no one paid much attention when it was announced, and the expectations of at least some of the signatories, as well as prior sponsors, Victor Hugo, who died in 1885, among them, were muted. Yet the convention progressively attracted unwavering international diplomatic support. From an early stage – witness the debates over the 1911 UK Copyright Act reported in this chapter – the legislators and industry representatives who might have opposed the convention acknowledged its moral authority. In doing so, they seemed also to accept the moral authority of the convention's object, a representative figure that is not approved by everyone – the artist. The artist is associated with spiritual discernment and moral witness, and perhaps respect for these archetypal characteristics won for the convention near universal support.

government's support, and the public's more variable endorsement. Assent to the convention has created the essential condition for the growth of a property system: incontrovertibility. Acceptance of the Berne Convention legitimised the elaboration, over more than a century, of proprietary rules governing the creation, production and distribution of copyright material throughout the world.

15. The convention's normative power might be ascribed to the belief that vocational labour is privileged labour, or perhaps more accurately, righteous labour, and the artist too often a righteous victim, easily traduced and deserving protection.<sup>16</sup> Most manifestos of authors' rights could be reduced to a single principle: the law must provide that creators or authors of artistic, literary, dramatic and musical work, ill-used – economically and morally - throughout history, are entitled to authorise the ways in which their works can be copied and disseminated.<sup>17</sup>

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<sup>16</sup> A belief described and rejected in 1911 by John Drummond Robertson, manager of the Gramophone Company Ltd, who, describing public debate over the compulsory recording licence, stated in a letter to *The Times* (1 May 1911) that, 'an appeal *ad misericordiam* for the "poor composer," ... has been constantly addressed to the public ... the author owes a debt to the manufacturer for presenting his work in the best conditions and thereby giving his sheet music – ie, the actual work – the greatest possible advertisement ... The cry of the "poor composer" is, to use Mr Boosey's picturesque phrase, "so much nonsense."'

<sup>17</sup> The World Intellectual Property Organization (WIPO), which administers the convention, states that the convention's articles derive from three principles, and special provisions concerning minimum term of copyright protection and compulsory licensing rights available to less developed countries (see: [http://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](http://www.wipo.int/treaties/en/ip/berne/summary_berne.html)). The three principles are: national treatment (members must accord equal protection to works of authors of other states); no formalities (recognition is automatic); independence (protection in one jurisdiction is granted irrespective of non-existence or non-conformity of protection in protected work's country of origin).

In 2014, the convention text provides that copyright protection applies to 'every production in the literary, scientific and artistic domain, whatever the mode or form of its expression' (article 2(1) of convention). Subject to permitted reservations, limitations or exceptions, the exclusive rights of authorization include rights to: translate; make adaptations and arrangements of the work; perform in public dramatic, dramatico-musical and musical works; recite literary works in public; communicate to the public the performance of such works; broadcast (contracting state may provide for a right to equitable remuneration not authorization); make reproductions in any manner or form (contracting states may permit, in certain special cases, unauthorized reproduction but reproduction must not conflict with normal exploitation of the work, nor unreasonably prejudice the legitimate interests of the author); use the work as a basis for an audiovisual work; and the right to reproduce; distribute; perform in public or communicate to the public that audiovisual work.'

*Revision of the Berne Convention and further development of copyright system*

16. The Berne Convention may be the source of authority for copyright law (and its syllabus of rules), but it is not the entire source. In 1961, agreement of the Rome Convention made possible enactment of laws in member countries that extended the scope of copyright protection beyond authors' rights, as enunciated in the Berne Convention. Henceforward, legislation would protect, in addition to the copyrights of authors, the neighbouring rights of industries. In the 1990s, international treaties for copyright and neighbouring rights created the basis for an extensive international copyright law governing all aspects of production and supply, including digital communication.<sup>18</sup>
  
17. Periodically during the first eight decades of the 20<sup>th</sup> century, the signatories to the Berne Convention met at revision conferences to extend the authorisation right to new technologies for copying (and, if applicable) disseminating copyright works. At the 1908 Berlin revision conference,<sup>19</sup> delegates extended protection to photographs and cinematographic 'productions'.<sup>20</sup>
  
18. They also revised the convention to bestow on authors the exclusive right to authorise the sound recordings of works as well as cinematographic adaptation and

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<sup>18</sup> *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (Rome Convention 1961). *Agreement on Trade Related Aspects of Intellectual Property* (1994) (TRIPS Agreement) administered by the World Trade Organization and the 1996 World Intellectual Property Organization (WIPO) treaties, the *Copyright Treaty* and *Performers and Phonograms Treaty*. WIPO also administers the Rome Convention.

<sup>19</sup> *Convention Creating an International Union for the Protection of Literary and Artistic Union signed 13 November 1908*.

<sup>20</sup> Article 3 (photographs); Article 14 para 3 ('cinematographs').

reproduction of works.<sup>21</sup> At the same time, under pressure from the phonographic industry, delegates permitted member countries to impose reservations and conditions on the author's exclusive right to authorise sound recordings.<sup>22</sup> The 1928 Rome revision conference stated, for the first time, authors' moral rights in works (which, according to the convention, survive the author's death for at least the survival period of economic rights).<sup>23</sup> The conference also declared the exclusive right of authors to authorise the broadcasting to the public of their works.<sup>24</sup>

19. Delegates again agreed a reservation. Member countries could 'determine the conditions under which the rights ... [could] be exercised'.<sup>25</sup> In 1948, at the Brussels revision conference, Union delegates amended the article introduced in 1928 to permit authorisation of radio broadcasts, vesting in authors power to authorise television broadcasts.<sup>26</sup>
20. In 1967, the Stockholm revision conference, as well as establishing the World Intellectual Property Organization,<sup>27</sup> introduced into the convention text the author's reproduction right, for a long time regarded by the BIRPI<sup>28</sup> as implicit in the

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<sup>21</sup> Article 13 para 1 referring to the 'adaptation of these works to instruments serving to reproduce them mechanically'; Article 14 para 1.

<sup>22</sup> Article 13 para 2: 'The limitations and conditions relating to the application of this article shall be determined by the domestic legislation of each country in its own case; but all limitations and conditions of this nature shall have an effect strictly limited to the country which shall have adopted them.'

<sup>23</sup> Article 6*bis*.

<sup>24</sup> Article 11*bis*(1) [applying modern paragraph numbering not adopted in early convention texts].

<sup>25</sup> Article 11*bis*(2).

<sup>26</sup> Article 11*bis*(1)(i) and (iii).

<sup>27</sup> *Convention Establishing the World Intellectual Property Organization* (Signed at Stockholm 14 July 1967 and amended on 28 September 1979).

<sup>28</sup> *Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle* International Bureau for the Protection of Intellectual Property. BIRPI functioned until 1970 when the World Intellectual Property Organization came into existence. BIRPI provided the administrative machinery for WIPO and was the predecessor to WIPO. (See [www.wipo.int](http://www.wipo.int)).

convention's panoply of specific authorisation rights.<sup>29</sup> Reference to a 'general' reproduction right clarified, if doubt existed, the author's super-extensive right to control reproduction (a word assumed to imply, more definitely than the word 'copying', the copying of works in any format).<sup>30</sup>

21. Discussion of the special needs of developing nations dominated Stockholm proceedings. Most, though not all, members voted for a convention protocol that permitted, among other things, publishers in developing nations to reproduce foreign works subject to payment of equitable remuneration.<sup>31</sup>
  
22. Developed nations like the United Kingdom, and especially publishers from the UK, United States and France, objected to the protocol. In 1971, the Convention held its final revision conference (to date). Delegates agreed to an appendix<sup>32</sup> that revised the protocol. The appendix provided, among other things, for compulsory licensing by publishers in poorer countries but imposed restrictions on licensing scope.<sup>33</sup> Protocol

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<sup>29</sup> As well as authorisation rights stated in convention text, article 2 states that the broad range of 'literary and artistic works' 'enjoy protection in all countries of the Union.'

<sup>30</sup> The 1967 revision added to the convention text article 9, which stated:

'(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

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

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.'

Article 9(2) establishing the so-called three-step test for legislative limitation of the reproduction right, in practice makes difficult sufficient fulfilment of the three conditions to permit legislating limitation(s).

<sup>31</sup> *Protocol Regarding Developing Countries* Articles 1-6 Stockholm 14 July 1967; entry into force 29 January-26 February 1970.

<sup>32</sup> *Special Provisions Regarding Developing Countries* Articles 1-6.

<sup>33</sup> Protocol revisions included allowance for copyright in works imported into developing nations to elapse 25 years earlier than the designated elapse date; on payment of equitable remuneration, to reproduce foreign works for educational or cultural purposes; to broadcast or translate works. The appendix permitted compulsory licensing of works by publishers provided that the copyright holder: is permitted to exercise exclusive rights for 1-3 years in the case of translations and 3-7 years in the case of reproductions; has not made the work available in the developing country at a reasonable price; has not responded to, or as rejected, offers for voluntary licensing. The licences could only be issued by the developing country's national copyright authority.

and appendix proved ineffective: most developed nations would not ratify the protocol, and few developing nations sought to take advantage of licensing provisions.<sup>34</sup>

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<sup>34</sup> At 2011, 15/164 convention members, or 9% of members, had notified intent to issue compulsory licences within jurisdiction. Six members had not issued, despite notification. Six implemented systems that do not conform to all Appendix requirements. Three members issue Appendix-compliant compulsory licences systems. Thus 2% of members have issued conforming licences, and 4% non-conforming licences. A total of 6% of jurisdictions have issued licences. See Alberto Cerda Silva 'Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright' *Program on Information Justice and Intellectual Property* Research Paper number 2012-08 American University Washington College of Law 2012.



## Part 2      Characteristics and evolution of the copyright system

### *The evolving copyright system*

23. Descriptions of the development of the copyright system usually take for granted one of the system's important characteristics, which is that it is cognate to systems of land property. Like most real property systems, it is a political compact and performs a distributive or allocative function that is both socially useful and instrumental in hypostatising sovereign power. Like land property, it is said to solve the problem of exhaustion: following John Locke, theorists have for 300 years declared that proprietary rights encourage productive labour.<sup>35</sup>
24. Unlike land property systems, which are not usually creations of diplomatic conventions, and evolve over hundreds of years, the copyright system is the product of zealous premeditation (see Anne Fitzgerald's taxonomy of properties in *Intellectual Property Law/Intellectual Property Law* Book Company 2008). It was not self-actuated by some unknowable indwelling intelligence (as its proponents sometimes appear to

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<sup>35</sup> John Locke *Two Treatises of Government* Cambridge University Press 1688/1988. Rights supply an incentive for humans to mix labour with nature to create property for purposes of self-support and exchange. See Edwin C Hettinger 'Justifying Intellectual Property' *Philosophy and Public Affairs* (1989) 18 at 36: 'Perhaps the most powerful intuition supporting property rights is that people are entitled to the fruits of their labour.' For reception in the UK of Lockean theory as it was applied to copyright and patents regulation see Lionel Bently and Brad Sherman *The Making of Modern Intellectual Property Law* Cambridge University Press 1999 at 149 fns 30-31 and 174-5. However support for the idea that Lockean theory, or the later idea of proprietary rights as incentive to produce, did not receive unalloyed support. *The Economist*, the weekly voice of liberal economic theory, said in 1851 of patents that they: 'are artificial stimuli to improvident exertions to improvident exertions ... they cheat people by promising what they cannot perform ... they rarely give security to really good inventions, and elevate into importance a number of trifles ...'. Among economists who have analysed copyright regulation the leading rejectionist is perhaps Plant *supra* and qualified supporter Coase *supra*.

assume):<sup>36</sup> it is another control system made by humans, albeit one designed and realised systematically in a relatively short period.

25. Creation of the copyright system sowed seeds of conflict, and conflict, which duly arose, ended, over decades, in a proprietary arrangement that allocated most economic power to industries. From 1886, members of the Berne Union sought to secure for authors monopoly over production and distribution of copyright material, and they did not contemplate sharing, or surrendering, of control. But industries rejected attempts to assert absolute authorial control over supply and forced accommodations from the Union at revision conferences in 1908, 1928, and 1948. In 1967, 1971 and beyond, the industry most associated historically with authors' rights, albeit not invariably as the friend of the author – publishing - successfully overturned in practice an attempted legal settlement intended to encourage developing nations to copy educational works under statutory licences.<sup>37</sup>
26. The Berne Union (acting through BIRPI) intended the revision conferences to reserve for authors the right to authorise copying or distribution of works by discrete technologies. At each conference, however, industries secured in-principle accommodations that protected them against the perceived dangers of authorial monopoly, and prepared the way for later enactment of neighbouring rights.

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<sup>36</sup> The observation does not describe the belief of authors of texts on the convention, though it does describe a tendency to treat authors' rights as inviolable, perhaps because of widespread acceptance of the idea of the artist as spirit totem, or conduit to humans' better nature.

<sup>37</sup> Amendment of the Berne Convention in 1971 added an appendix that permitted conditionally compulsory licensing by less developed countries of educational works. For reasons associated with the opposition of publishers in developed nations to compulsory licensing, and institutional incapacity of many poorer countries, the Appendix has proved otiose.

27. The 1908 Berlin conference resolved that member countries could place limitations on the recording right that, in effect, permitted legislated compulsory recording licences.<sup>38</sup> At the 1928 conference, the broadcasting industry negotiated a similar limitation on the broadcasting right, which allowed members to legislate to require price arbitration.<sup>39</sup> In 1948, the industries (although Union resolutions do not disclose the agency of industries) won the Union's approval for its members to 'study' ways to recognise neighbouring rights.<sup>40</sup> An inter-agency copyright committee consulted on neighbouring rights in the 1950s, and its deliberations resulted in establishment of a neighbouring rights convention agreed in 1961 in Rome.<sup>41</sup>
28. Whether contending factions stood for authors' rights or neighbouring rights, it may not be far-fetched to place the proponents of proprietary rights in the historical tradition of appropriating (or privatising) factions that, throughout history, sought to possess land for self-protection, and attainment of political and economic ends. While generalisation concerning a subject of so broad a scope invites caution, the history of

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<sup>38</sup> Berlin Revision Act 1908 Article 13: *The authors of musical works shall have the exclusive right of authorizing: (1) the adaptation of those works to instruments which can reproduce them mechanically; (2) the public performance of the said works by means of these instruments ... Reservations and conditions relating to the application of this Article may be determined by the domestic legislation of each country in so far as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them in force.*

<sup>39</sup> 1928 Rome Revision Act Article 11 *bis*:

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radio-diffusion.

(2) The national legislations of the countries of the Union may regulate the conditions under which the right mentioned in the preceding paragraph shall be exercised, but the effect of those conditions will be strictly limited to the countries which have put them in force. Such conditions shall not in any case prejudice the moral right (*droit moral*) of the author, nor the right which belongs to the author to obtain an equitable remuneration which shall be fixed, failing agreement, by the competent authority.'

<sup>40</sup> The Union delegates agreed three resolutions, set out in abbreviated form. The conference expressed a wish that members 'study the means of ensuring': (1) 'the protection of the manufacturers of instruments for the mechanical reproduction of musical works, without detracting from the rights of the authors'; (2) 'the protection of the transmissions made by the radio broadcasting institutions, for the purpose of preventing any unauthorized utilization thereof, without detracting from the rights of the authors'; and (3) 'protection of the performers.' See *Documents de la conférence réunie à Bruxelles du 5 au 26 juin 1948* (1951) resolutions VI-VIII at 428.

<sup>41</sup> *Id.* See also, '*Neighboring Rights*' *Guide to the Rome Convention and Phonograms Convention* WIPO 1981.

human settlement and property arrangements suggests commonality between different types of property systems. Most property systems, including the copyright system:

- ✓ are the outcome of, and are shaped by, political contest (which may involve warfare)
- ✓ distribute social/economic benefit by distributing control
- ✓ permit the sovereign to institute taxation by right of sovereignty
- ✓ permit the owner to exact rent by right of ownership
- ✓ are durable to the extent that the constituting principles of the system, the locus of constitutive authority, commands systemic allegiance.<sup>42</sup>

### *Feudal comparison*

29. A comparison between two apparently disparate property systems, those of copyright and feudalism illustrates these commonalities. After Roman jurisdiction broke down

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<sup>42</sup> Literature on the *nature* of property systems - as opposed to scholarship about different legal title/tenure arrangements, or the relationship between societies and property arrangements, or the way that different legal systems define property - is relatively scant. See, eg, James E Krier 'Evolutionary Theory and the Origin of Property Rights' *Cornell Law Review* Vol 95 (2009) 139-59. Professor Krier begins his paper, 'For legal scholars, the evolution of property rights has been a topic in search of a theory.' He proposes that legal rules are derived from a competitive process, in which self-interest motivates actors, and, by a process analogous to evolution, proprietary rules are necessarily agreed. The law and economics movement, represented especially by practitioners at Chicago Law School, theorises about the content and utility of proprietary rights (see, eg, Richard Posner *Economic Analysis of Law* Wolters Kluwer (2014 9<sup>th</sup> ed). More recently, the William and Mary *Property Rights Project* instituted a continuing program of conferences and lectures and has begun publishing a related journal. The project, 'affirms that property rights are fundamental to protecting and preserving individual liberty.' Other writers analysing origins and development include Harold Demsetz 'Toward a Theory of Property Rights' *The American Economic Review* Vol 57, No 2 *Papers and Proceedings of the 79th Annual Meeting of the American Economic Association* (May, 1967) 347-359; Robert Sugden *The Economics Of Rights, Co-Operation And Welfare* Palgrave Macmillan 1986/2004; Herbert Gintis 'The Evolution of Private Property' *64 J Econ Behav & Org* 1 (2007).

in western Europe after the 5<sup>th</sup> century, the Frankish Merovingian kings exercised political control over much of western Europe. In the 8<sup>th</sup> century, Charlemagne acceded to the Frankish crown and created the Carolingian or Holy Roman Empire from Frankish, Germanic and Lombard (Italian) territories. Following the empire's 9<sup>th</sup> century collapse into chaos and war, a system of feudal tenure, responding to political instability and threat of violence, began to emerge in western Europe.<sup>43</sup>

30. Landholders, small and larger, pledged themselves vassals to martial protectors, exchanging title to their land for their lords' military protection. The lord became owner and the vassal became tenant of a fief, that is, alienated land in which the tenant holds an estate. A hierarchy of vassalage emerged which determined subordination of one class to another, beginning with peasant or serf and ending in service to the supreme lord, the king (who in turn owed allegiance to God).<sup>44</sup> The practice of subinfeudation permitted grantees of fiefs, from the great lords to lesser nobility, to grant subordinate fiefs, the holders of which owed duties to their lord and king. Some lords, however, received, by direct gift from the king, fiefs unsubordinated to the fiefdom of any other title-holder. These nobles were tenants-in-chief, the peerage, who owed duties to the king alone.

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<sup>43</sup> Some historians of the feudal period contest the meaning of feudalism. Since the 1970s, a dominant school of thought has argued that the word 'feudalism' does not describe the reality of social life in the pre-medieval and medieval periods, when conditions across Europe and within countries varied greatly. The traditional narrative argues the appearance in Europe, over time, and at different times, of a largely uniform phenomenon called feudalism (see, for example, the different analyses of two leading scholars, Marc Bloch *Feudal Society vols 1-2* Routledge and Kegan Paul Ltd 1940/1962 and Elizabeth AR Brown 'The Tyranny of a Construct: Feudalism and Historians of Medieval Europe' *The American Historical Review* Vol 79 No. 4 (Oct 1974) 1063-1088. feudalism, wherever it occurred, instituted a system of social subordination governed by relationship to land, a relationship which enabled those with more land to exert more social control.

<sup>44</sup> The direct hierarchy of allegiance was serf to knight, and knight to baron, and baron to earl, and earl to count, and count to duke, and duke to king.

31. In England after the conquest, political and property systems co-identified the crown as the source of constitutional authority. The crown was, before the 13<sup>th</sup> century, legal innovator, interdicting, or trying to prevent, practices undermining the crown's supremacy of crown, such as franchising, subinfeudation, church land acquisition, and alienation of estates.<sup>45</sup> Courts innovated by recognising a legal device of uses and trusts, disliked by the crown because of its potential to facilitate tax avoidance.<sup>46</sup>
32. The crown, declared by the conqueror source of authority for law, political action, title and conveyance,<sup>47</sup> remains in England, and some other common law countries, title-holder-in-chief, authorising conveyance in fee simple, which, in theory, is a grant of lease.<sup>48</sup> The legal system, instrumentally compelled to uphold constitutional settlement, is, in obeying that settlement, conservative and reactionary. It *conserves* the settlement, as it is constitutionally bound to do, and *reacts* to systemic challenge by doing whatever political consensus deems the constitutional settlement to require, including protecting the property system.

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<sup>45</sup> For the entirety of the feudal period in England the crown contended with the great earls. The same pertained in France, although the centralising authority proved less successful in restraining the power of great nobles. In England, greater nobles and church sometimes established *franchises* and *palatinates*. The great palatinates were not rivals to the king's power, nor insurrectionary. They administered the king's justice semi-autonomously. But they could be loci of insubordination, seeking to avoid dues and obligations owed the crown. Franchises and palatinates were not altogether dissimilar from the territories of gang bosses (Helen Cam 'The Decline and Fall of English Feudalism' *History* [Dec 1940] 216-233).

<sup>46</sup> Uses, abolished by Henry VIII, and trusts, allowed great families to retain beneficial entitlement to land controlled by another and trusts became instruments widely used to avoid tax or to govern beneficial use of property. In the centuries after Henry's death in 1548, as the economic revolution he initiated continued, courts recognised freehold and leasehold, and continued to develop the law of trust. Through the centuries, and the vicissitudes of the crown's contests with nobility and then parliament, courts never varied in accepting the crown's primacy as constitutionally-agreed source of political authority.

<sup>47</sup> William I promulgated only one law during his reign (1066-87). Beginning, 'Here is shown what William the king of the English, together With his princes, has established since the Conquest of England ...' the decree in 10 parts establishes a requirement of loyalty to William and his noblemen, and maintains the existing land system as amended by Norman laws of property. (<http://avalon.law.yale.edu/medieval/lawwill.asp>; source Ernest F Henderson *Select Historical Documents of the Middle Ages* George Bell and Sons 1896).

<sup>48</sup> Since feudal times, the status of land conveyed under the English system is that the office of crown – therefore the monarch – is title-holder-in-chief, meaning that ultimate title to land granted by the crown remains with the crown. Land conveyed is reversionary: it reverts, in theory, to the crown on demand.

33. Under the manorial system that accompanied growth of feudalism, the manorial lord, himself vassal to a greater lord, extracted rent from two classes of small tenants, or serfs, freemen, who were exempt from dues that indicated servility - such as *merchet*, a payment due by the peasant to the lord for permission for his daughter to marry - and villeins, who tilled the lord's land, as well as their own. Although they laboured gratuitously for a lord, villeins owed dues additional to rent. Cottagers owned a cottage dwelling and sufficient land for subsistence. Below them slaves formed part of the lord's manor, and laboured for subsistence.<sup>49</sup>
34. The freeman, who might be obliged to supply military service, paid rent to his lord and he and his household cultivated their acres for themselves. Serfs provided unremunerated labour to their lords for many days of the year. The serf paid other dues including: relief,<sup>50</sup> heriot,<sup>51</sup> *merchet*,<sup>52</sup> tallage,<sup>53</sup> toll,<sup>54</sup> and mortuary.<sup>55</sup> The serf could not quit the lord's manor without permission, and for the privilege to leave must pay a fee.
35. The lord in effect granted his tenants usufruct contingent on satisfying fiscal obligation, but a right of subsistence was not more than a necessary device to

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<sup>49</sup> For a brief sociology of feudal hierarchy, depicted as the expression of 'patriarchal authority' see Max Weber *The Theory of Social and Economic Organization* (Talcott Parsons ed) Free Press 1922/1964 at 373-78 (first publ 1922 as Part 1 of *Wirtschaft und Gesellschaft*).

<sup>50</sup> If a householder's land was heritable, and not merely a life estate, his heir's entitlement to inherit, and the household's to continue to occupy the land as of right, on payment of relief. Until 1267, and abolition (England) of so-called 'premier seisin', the lord could claim the product of the devised estate until the heir paid relief, a right (premier seisin) which caused some lords to claim unreasonable heriot, thus delaying transfer and enabling the lord to profit from the household's output.

<sup>51</sup> The lord's right, on death of the householder, to appropriate the household's best animal or chattel.

<sup>52</sup> Payment payable by a peasant to the lord on marriage when the peasant's daughter married.

<sup>53</sup> Annual household tax assessed on quantum of rent paid/size of rented landholding and livestock owned.

<sup>54</sup> If the lord's exercised his right of refusal to buy any animal that a peasant wished to sell, the peasant was required to pay tax to lord on the price of sale to another person.

<sup>55</sup> On death of the householder, his family was required to donate to the appropriate ecclesiastical authority the household's second best animal.

maintain the obedience of a servile population. It could not be said, as some commentaries argue, to constitute consideration provided by the lord to institute a contract of service.

36. The inferior titles of feudalism were designed always to benefit, and enrich, the lord.<sup>56</sup> Similarly, copyright, and still more, neighbouring rights, create burdensome estates since the intention of both is to benefit the lord only. Additional to procurement price, the consumer, like the serf, must, indirectly or directly, pay imposts: multiple taxes for public performance, copying, communication and (in Europe) on the sale of hardware devices. Pecuniary obligation hedges possession.<sup>57</sup>

*Key characteristics of feudal, copyright and freehold estates*

37. Feudal, copyright and freehold estates (copyright is effective freehold) share one characteristic: each confers a right of possession or occupation. In function, they

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<sup>56</sup> See Jean Froissart *Chronicles of England, France, Spain, and the adjoining countries, from the latter part of the reign of Edward II to the coronation of Henry IV (1361-1400)* John Alden NY 1884 at 283: 'It is customary in England, as well as several other countries, for the nobility to have great privileges over the commonalty, whom they keep in bondage; that is to say, they are bound by law and custom to plough the lands of gentlemen, to harvest the grain, to carry it home to the barn, to thrash and winnow it: they are also bound to harvest the hay and carry it home. All of these services they are bound to perform for their lords, and many more in England than in other countries. The prelates and gentlemen are thus served.' Jean Froissart (d 410) was a French *ex officio* literary courtier at the King Edward III's court and chronicled social and life in France and England in the last third of the 14<sup>th</sup> century, during the period of the 100 Years' War.

<sup>57</sup> The point is illustrated by an extract from Daniel Gervais 'Collective Management of Copyright: Theory and Practice in the Digital Age', chapter 1 in Gervais (ed) *Collective Management of Copyright and Related Rights* Wolters Kluwer (2<sup>nd</sup> ed) 2010 at 2: 'Let us take a concrete example. A radio station (broadcaster) wishing to copy music on its computers and then use that copy to broadcast the music will need to clear two rights: the right to copy (reproduction) and the right to communicate the work to the public. The radio station will need the right in respect to three different objects: (1) the musical work (2) the sound recording and (3) the musical performance of the work incorporated in the sound recording. Our hypothetical broadcaster will need, at least occasionally but probably very frequently, to use works, sound recordings or performances, the rights in which are owned, in whole or part, by foreign nationals and entities. The broadcaster probably uses thousands of songs from around the world each week. However, a typical broadcaster does not know in advance which songs it will play enough in order to seek individual licenses ... In sum, a broadcaster may need up to twenty licenses (or payments) if some of the rights have been transferred to or are split up between rightsholders.'



differ.<sup>58</sup> The function of freehold, and its object, is to confer possession, the right to which may be transferred to a tenant, creating leasehold tenure. The right of possession inhering in feudal and copyright estates is also transferable but the object of the estate is more than simple possession. The object is to procure income without surrendering control.

38. Unlike the leaseholder, the feudal landlord extracted a multiplicity of rents, dues and obligations which could not be called consideration, since they were compulsory, and mostly unrelated to the land tenanted. The person entitled to possess copyright property possesses the mere entitlement of a licensee.
39. Copyright, since it concerns excludable subject matter, confers notional possession, and the owner grants a licence to use, and nothing more. The notional right to occupy is the postulate for grant of licence and imposition of fees. The leaseholder grants, without more, a right to occupy something for consideration. Consideration exchanged is the right to possess and the payment of rent – not more.
40. A feudal landlord and a copyright owner, on the other hand, demand dues unconnected to the thing occupied, actually or notionally. In feudal times, imposition of fees and obligations derived from custom upheld in law. In modern times, statute (supported by common law) upholds imposition of copyright dues. In the case of copyright fees, statutory fiat is necessary because in the absence of legislative direction, contract law could not compel the bargains sought by copyright owners.

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<sup>58</sup> In theory, copyright estate is, because the owner holds copyright absolutely for a term, fee simple, and thus undifferentiated from freehold. For the purpose of discussion the 'copyright estate' is distinguished from freehold because it terminates, and because of copyright property's non-excludable character, which means that it is fungible and useful in ways that real or personal property cannot be.

41. Agreement of freehold leases is voluntary. Voluntariness is not a hallmark of feudal tenure arrangements or copyright agreements reached in accordance with statutory requirements. Feudal tenancy resulted from compulsion – peasants could not negotiate the terms of their social contract – and copyright bargains demanded by law, such as those pertaining to copying and public performance, are compulsory.<sup>59</sup>
42. To suggest in copyright transactions a proprietor-consumer dichotomy that reproduces the lord-serf relationship is to recognise the anti-social, or exploitative, nature of bargains, implicit or explicit, that compel payment unconnected to possession of property in relation to which fees are demanded. Exploitation occurs in many ways. Owners may exploit owners.
43. Classes of copyright producers may sometimes be enemies, and producers within classes are competitors. These classes may try to practise subinfeudation as zealously as classes of feudal lords, and impose taxes and restrictions on each other. Exploitation occurs if proprietary rights are utilised confer benefit to the owner and none to the person burdened.<sup>60</sup>

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<sup>59</sup>Freehold, leasehold and personalty are concerned with possession. The price of possession, though it may be determined unilaterally, is contractually agreed. A freehold estate is conveyed and enjoyed. A lease is a temporal reversionary arrangement that compels payment of a discrete rent (as opposed to multiple rents or dues). Title to personal property, tangible and intangible, confers the least conditional type of ownership, since chattels are usually motile and fungible.

<sup>60</sup> In the case of copyright, the justification for rights is that they encourage continued production. Unauthorised exercise of rights (such as by public performance without permission) does not prevent the owner selling copies of the work performed without consent. Taxation of performance confers pecuniary benefit but unauthorised performance does not infringe the owner's right to profit from sale of copies of the work. Forbidding performance confers no benefit on the owner and harms the performer(s), and, possibly, the public.

44. What binds, in character, feudal and copyright estates is that each permits practices of compulsion and exploitation.<sup>61</sup> Compulsion and exploitation in the exercise of a class of proprietary rights is not possible without government consent. It follows that feudal tenure arrangements expressed the will of the polity, as do characteristic licensing agreements enjoined by copyright industries, or their representatives. If copyright arrangements exclude, indirectly contributing to social inequality, they do so because government consents to such exclusion, and supplies its machinery.<sup>62</sup>

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<sup>61</sup> Probably the strongest evidence in support of Marx's description of the oppressive character of feudal relations is supplied by Froissart *id*, when he seeks to discredit the priest John Ball, a leader of the Peasants Revolt, who was hanged, drawn and quartered in the revolt's immediate aftermath (15 July 1381). Froissart wrote (at 283): 'A crazy priest in the county of Kent, called John Ball ... would say, "My good friends, things cannot go on well in England, nor ever will, until everything shall be in common; when there shall be neither vassal nor lord, and all distinctions levelled; when the lords shall be no more masters than ourselves. How ill they have used us! And for what reason do they thus hold us in bondage? ... and what can they show, or what reasons give why they should be more the masters than ourselves? Except, perhaps, in making us labour, and work for them to spend ... but it is from our labour that they have wherewith to support their pomp. We are called slaves; and if we do not perform our services, we are beaten, and we have not any sovereign to whom we can complain, or who wishes to hear us and do justice.'"

<sup>62</sup> As will be discussed, by legislation recognising copying, communication and public performance rights, and, in the case of copying and public performance rights, establishing tribunals to determine equitable remuneration for exercise of those rights.

### Part 3 Copyright bargains, markets, and the remuneration right

#### *The compulsory copyright bargain*

45. As the jurisprudential writing of William Blackstone established for future generations of property lawyers, property is an absolute grant of right ' ... in the substance of the earth itself; which excludes everyone else ... '.<sup>63</sup> Legal writers are quick to point out that such characterisation of property simplifies both Blackstone's meaning<sup>64</sup> and the reality of proprietary rights as they are exercised and understood in everyday practice.<sup>65</sup> Property is absolute to the extent only that the sovereign wills it to be so, and the sovereign, in the form of constitution or government, expresses or contemplates limitation of absolute holding. A survey of nine European countries in 1990 identified 42 types of tenure.<sup>66</sup> Those 42 types of tenure can be subdivided in two categories of possession: owner-occupier and lessee-renter.<sup>67</sup>
46. Property can readily be understood as an object governed by human relations, its boundaries logically defined by the principle of trespass.<sup>68</sup> It might be argued that the concept of ownership determined by rights does not invariably coincide with concepts

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<sup>63</sup> *Commentaries on the Laws of England* Bk 2 Ch 1 (1765-69).

<sup>64</sup> See Frederick Whelan 'Property as Artifice: Hume and Blackstone' *Nomos* Vol 22: Property New York University Press 101-29.

<sup>65</sup> For example (among many examples), J Martin Pederson 'Properties of Property: A Jurisprudential Analysis' *The Commoner* Chapter 2 Issue 14 Winter 2010 138-210.

<sup>66</sup> Ola Siksio 'Learning from tenure: an international comparison on the meaning of tenure in nine European countries - East and West' in *Housing Evaluation* Rotterdam: CIB proceedings, Publication 118 (1990) at 154.

<sup>67</sup> Marietta Haffner 'Housing Tenures in Comparison - the European Union' *Types of Tenure* Housing Finance Information Network 2014 <http://www.hofinet.org/themes/theme.aspx?tid=94&id=106>.

<sup>68</sup> See Pederson *supra* 166-206 cf James Harris *Property and Justice* Clarendon Press 1996 at 15-32 and 138.

of property determined by duties.<sup>69</sup> Analysis must return to a central proposition: for property to exist, something must be understood to be owned, or ownable, and some law, or laws, must ratify ownership. Ratification can neither be esoteric nor extra-legal: law, be it customary or positive, must declare what is, or may be owned, and while owners may be multiple, the thing owned is singular. Blackstone distils, and specifies attributes of substance (or materiality) and exclusivity.

47. Feudal estate existed, ratified by the state, to benefit the owner, and copyright exists, ratified by the state, to benefit the owner.<sup>70</sup> The feudal estate was an appurtenance, or device, to secure the social object of extracting from the largest part of the population, servility, labour and rents. The feudal tenant's occupancy of land was incidental to obligation to benefit the lord.
48. Feudal estate differs absolutely from freehold estate, which, also ratified by the state, exists to confer possession on landlord or tenant, not primarily obligation on the tenant. The copyright estate, like the feudal estate, is an appurtenance, state-ratified, which permits fee collection. Occupancy or possession of the thing owned is legally unfeasible, since the owner confers rights, not something amenable to legal possession.
49. A consequence of similarity between copyright and feudal estates, and dissimilarity with the freehold estate, is that the copyright holder is placed by law in a position not akin to, but approximating, that of the feudal lord. The copyright holder is a licensor

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<sup>69</sup> In relation to real property and the incorporeal property of copyright, see David Lametti 'Property and (Perhaps) Justice' Review of James W Harris *Property and Justice* and James E Penner *The Idea of Property in Law* (1998) 43 *McGill Law Journal* 663-727.

<sup>70</sup> On feudal fiscal arrangements, see Dennis Hale 'The Evolution of the Property Tax: A Study of the Relation between Public Finance and Political Theory' 47 *The Journal of Politics* 2 (June 1985) 382-404 at 386-87.

who, as noted, offers notional possession and secures fees for issuing various kinds of licence. Varieties of licence, principally connected with public performance, inflate the cost of access, excluding many consumers. The cost of licensed access to educational information raises a problem of social deficit, in developed,<sup>71</sup> and especially, less-developed countries.<sup>72</sup>

50. Analytically, feudal and copyright estates must be distinguished from freehold in another way. Freehold does not confer on the freeholder power to compel a bargain, although a bargain, once struck, permits the landlord to terminate a tenancy. The feudal lord benefitted always from his tenants' compulsory tenure. The copyright holder may sell records, files, programs, discs, books and so on, licensing the use of embodied copyright works, and in so doing, participate in a market, albeit one configured to permit optimum pricing (and transfer the chattel not the work).
51. A type of compulsion is discernible in such a market, or more accurately, a kind of market suppression is perceptible, since copyright law prevents competitors from

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<sup>71</sup> See Statement of Professor Stuart M Shieber, faculty director Harvard Office for Scholarly Communication, before the congressional Committee on Science, Space and Technology, Subcommittee on Investigations and Oversight, 29 March 2012: *Libraries can buy access to a journal's articles only from the publisher of that journal, by virtue of the monopoly character of copyright. In addition, the high prices of journals are hidden from the 'consumers' of the journals, the researchers reading the articles, because an intermediary, the library, pays the subscriptions on their behalf. The market therefore embeds a moral hazard. Under such conditions, market failure is not surprising; one would expect inelasticity of demand, hyperinflation, and inefficiency in the market, and that is what we observe. Prices inflate, leading to some libraries cancelling journals, leading to further price increases to recoup revenue — a spiral that ends in higher and higher prices paid by fewer and fewer libraries.*

<sup>72</sup> Dispersed primary data on the effect of serials' pricing on library subscription practices in less developed/least developed countries is difficult to find. Subscription uptake in some of those countries is reportedly minimal or non-existent. The budgetary difficulties caused by the cost of subscriptions in wealthier jurisdictions predict that price of serials is likely to substantially preclude dissemination via academic serials in poorer countries. On 17 April 2012, in a memorandum on journal pricing to all schools, faculties and units, Harvard University's Faculty Advisory Council advised an 'untenable situation facing the Harvard Library.' Journal costs approached \$3.75 million, and some titles cost \$40,000 annually. The price of two journals inflated 145% in six years. Publisher profit margins reached 35%. (Faculty Advisory Council Memorandum on Journal Pricing re Periodical Subscriptions. Refer <http://isites.harvard.edu/icb/icb.do?keyword=k77982&tabgroupid=icb.tabgroup143448>).

offering for sale imitations/reproductions of the thing sold. However, a consumer is not compelled to purchase. The copyright holder may oppress consumers, but cannot compel them.

52. By contrast, compulsion attends the functioning of most royalties arrangements. Legal obligation to pay royalties resolves, in favour of the collector, problems of scale and dispersion: an intermediary collecting society representing a collective of copyright owners negotiates, on their behalf, royalties for the public performance or copying of works (and separate royalties on behalf of neighbouring rights holders). Royalties are paid by entities with presumed large pockets, broadcasters, entertainment and recreation venues, record companies, online content providers, government, schools and tertiary institutions.

*Government and the compulsory copyright bargain*

53. In the absence of legislative compulsion, collecting societies could collect royalties, supported by court orders.<sup>73</sup> However, unless prospective licensees consented to institution of an administrative machinery for determining volume of performances or copies, and a method for determining royalties, the collecting task could prove unfeasible.<sup>74</sup> From the 1930s onwards, governments intervened in disputes over copyright fees for the reason that collecting societies and selected licensees, first radio

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<sup>73</sup> In Australia, the Victorian Supreme Court found in 1925 that unauthorised broadcast of a copyright musical work infringed the owner's public performance right: *Chappell & Co Ltd v Associated Radio Company Ltd* (1925) VLR 350.

<sup>74</sup> The precipitating factor in the Australian Government's decision to call a royal commission on performing rights in 1932 was the collapse of price negotiations between the Australasian Performing Right Association (APRA), collecting for musical copyright holders, and the Australian Federation of Broadcasting Stations. (Comments of the royal commissioner, Justice Owen, during proceedings: (see transcript of proceedings: NAA A467 SF1/). See also *Report of the Royal Commission on Performing Rights* Commonwealth Government Printer 1933.

broadcasters (and later television), then schools and universities, followed by government itself, could not easily reach terms, terms which radio broadcasters, in particular, bitterly contested.<sup>75</sup>

54. In most jurisdictions, government resolved contest by establishing tribunals under judicial supervision to determine the terms of copyright licences, and, most importantly, the royalty price. The ensuing system, which is local in jurisdictional effect, but facilitates international collection of royalties for licensors (or assignors of licensors), has created a lucrative, sophisticated and entrenched international private tax collection system. In facilitating creation of this system, and providing the quasi-judicial machinery essential to the system's continuation, governments demonstrate how proprietary systems are created as exclusionary instruments.
55. While their predecessors may not have expressed themselves in the same way, contemporary policy-makers would likely assert that the reason for government to establish a copyright tribunal, which compels bargains for payment of royalties, is that government is – putatively – obliged to correct market failure.<sup>76</sup> Reasoned analysis, however, should have informed governments that a collecting society's failure to secure bargains is not market failure.<sup>77</sup>

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<sup>75</sup> APRA did not seek a royal commission on performing rights, nor a copyright tribunal. Its preferred strategy was, in the words of Purcell, the barrister for the Cinematograph Exhibitors' Association (addressing the royal commissioner Justice Owen), to behave, 'like a dragon, devastating the countryside.' (NAA A467 SF1/43). APRA felt confident that if left alone, it could through courts, extract maximal prices from radio broadcasters.

<sup>76</sup> Although see preceding footnote: the royal commission, in recommending creation of a copyright tribunal, forced its goodwill on APRA, which considered itself capable of securing public performance fees without assistance of government or tribunal.

<sup>77</sup> The Australian government's intervention to create a stable commercial environment that allowed for predictable collection of copyright fees took over 30 years to implement. A copyright tribunal did not come into existence until 1968. It would be incorrect to suggest that government set out to favour collecting societies, or specifically, APRA. Its intention was to create commercial stability and bring peace to warring parties. However, its actions were necessarily for the benefit of collecting societies, even if APRA did not



56. If a bargain cannot be struck, a market does not exist. Prior to the institution of tribunal and statutory licensing, markets for public performance of recorded music and photocopying of pages of works did not exist. If markets, governed by the law of contract, do not arise organically, and government edict in effect decrees that parties must reach price agreements, the supposedly sacred idea of a free market is obviated. The seller may be willing but the buyer is not. If we consider the example of photocopying royalties, it might be supposed that if a market exists in copying pages of text, collecting societies would not fail to collect copying fees from corporations, and other private entities that daily copy millions of pages.
57. But collecting societies do not allege a private market for copying works because corporations will not pay fees, and government will not compel them to do so. Government has instead compelled public institutions to pay copying fees. To assist collecting societies, governments conjured (presumptive) markets that would not exist but for the support of legislation and tribunals. It might be argued in defence of government intervention, that government must obey treaty and derivative legislation. The law, consistent with treaty provides that public performance and copying must not occur without the copyright owner's consent. Usually punctilious about observing treat obligations, governments have trod warily concerning copyright. They have sought also to forestall commercial warfare. If the Commonwealth government in the 1930s did not appoint a royal commission on performing rights, it

could be predicted that APRA and radio stations would have made war on each other, harming the public, which avidly listened to radio programs.

58. This likelihood exercised the mind of the federal Attorney General when, following cabinet approval, he appointed a royal commission in 1932.<sup>78</sup> Maintaining commercial peace, however, should not mean endorsement of institution of a system of quasi-feudal payment arrangements. Because a treaty called the Berne Convention made decrees about public performance and copying, and those decrees are repeated in domestic law, government is not obliged to ensure that laws translate into establishment of a royalty system conducive to the welfare of copyright owners but not consumers or public.
59. That government proved tender to the needs of owners is another proof of its instrumental role in shaping property systems according to the objects and solicitations of its primary sodalities. It is observable that in instituting arrangements that made possible the modern royalties system, governments favoured the interests of property – the sodality of owners - and specifically, copyright owners. That government would favour owners is predictable at any time in history. What is not

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<sup>78</sup> In 1932, a bipartisan deputation of politicians in both houses of the Commonwealth parliament asked the acting Attorney General to establish an inquiry into performing rights (the Government referred always to a plurality of rights). Cabinet agreed, and the Attorney General, John Latham, a future chief justice of the High Court and the barrister for the publisher Chappell & Co when in 1925 it won common law affirmation of its entitlement to enforce the performing right (VLR 350), drafted terms of reference. In common with his colleague James Fenton, the Postmaster General, he was conscious of the Government's policy commitment to encouraging the spread of radio broadcasting in Australia, the public unpopularity of APRA, and APRA's determination to claim maximum licensing fees and enforce the performing right against broadcasters in particular. See Benedict Atkinson *The True History of Copyright: the Australian Experience 1905-2005* Sydney University Press 2007 at 183-87.

predictable, is that government would intervene to invoke supposed markets in substitution for a previous void.<sup>79</sup>

60. Direct involvement in proto-market<sup>80</sup> wrangling is conventionally anathema to governments in countries like Australia and the United States. Governments regulate, and may subsidise, industries, but they usually stay aloof from bargaining. For government to compel commercial parties to reach contractual agreement is rare. In the case of Australia, the only analogy appears to be with the Commonwealth's compulsory arbitration system introduced in 1904.<sup>81</sup>

61. Compulsory arbitration is intended to achieve a social purpose, that of protecting labour from capital. In the case of action to create machinery to determine and protect royalties' agreements, governments in Australia, the United Kingdom and United States protected the interests of property. Intervention from the 1930s

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<sup>79</sup> A distinction should be made between enforcement of property rights – a natural function of government, and one advocated by Austrian and Chicago schools as government's principal function (<http://mises.org/daily/2442>) – and government involvement in the bargains of rights-holders, which, in principle, is usually disparaged as inimical to contractual freedom. See, eg, Milton Friedman *Capitalism and Freedom* Chicago University Press 1962 at 11: '... in the complex enterprise and money-exchange economy, cooperation is strictly individual and voluntary provided: (a) that enterprises are private, so that the ultimate contracting parties are individuals and (b) that individuals are effectively free to enter or not to enter into any particular exchange, so that every transaction is strictly voluntary.'

<sup>80</sup> An overlooked feature of discourse on property is that participants in debate usually discuss proprietary rights without distinguishing between excludable and non-excludable subject matter, and by extension, freehold and other estate, such as copyright, which may be called freehold yet is neither conveyed nor leased. Economists talking of property rights are usually concerned with rights of absolute possession, exclusion and disposal, which are critical to the formation of markets. However, rights accruing to the owner of excludable property exceed those of owners of non-excludable property, and the attempted exercise of some rights, such as the public performance right, which is not fungible, will not effectuate markets. Compulsion in the form of government price determination creates only a proto-market, which is another term for enforced payments that might not be made in the absence of compulsion. For the prospective consumer of educational and related information, the consequence is price inflation and consequentially potentially reduced access.

<sup>81</sup> The Commonwealth *Conciliation and Arbitration Act 1904* compelled employers to arbitrate with unions in the Court of Conciliation and Arbitration over working conditions. In *Ex Parte HV McKay* (1907) 2 CAR 1 (Harvester Case), Justice Higgins of the High Court sitting in the Court of Conciliation and Arbitration ruled that employers must pay workers a minimum wage that is fair and reasonable. The criterion for determination was 'the normal needs of an average employee regarded as a human being in a civilized community'. Although the High Court reversed the decision on technical grounds concerned with taxation (*R v Barger* [1908] HCA 43), Higgins J continued to apply *Harvester* in future arbitration decisions, and the court, and its successors, split into arbitral and adjudicative entities from the late 1950s, continued over decades to determine awards.

onwards on behalf of copyright owners disregarded social purpose, unless compulsory remuneration of publishers and record companies (already remunerated by sale of copies in markets) is considered a social purpose.

*The role of courts*

62. As argued, the property systems of settled societies grow from (or are affirmed by) constitutional settlements that supply a source of authority for distribution of that which is declared property.<sup>82</sup> A property system cannot effect distribution autonomously. Institutional actors – in the case of modern common or civil law systems, the legislature and courts - determine delimitation, enforcement and interpretation of property rights. Jointly with a political system making laws, the legal system upholds and elaborates the constitutional settlement.<sup>83</sup>
63. This function of courts is predictable, and, so far as growth of a copyright system is concerned, essential. The role of the legal system in supporting and elaborating a maximal conception of authors' rights (and neighbouring rights) is evident from review of case law. In the early part of the 20<sup>th</sup> century, courts in the United States - which did not subscribe to the Berne Convention until 1989 - and the United Kingdom, rejected the Berne Union's plenary ideal of authors' rights. However, statute,

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<sup>82</sup> As demonstrated in the case of England by the crown's radical title, which emanated from the first constitutional settlement establishing Norman supremacy and assigned feudal tenures. After revolution and restoration, the crown supplied the source of authority for abolition of feudal tenure (*Tenures Abolition Act 1660* 12 Car 2 c 24), and substitution of tenure by fee simple, effecting a new property regime that permitted growth of market economy.

<sup>83</sup> In England, in brief, the argument is demonstrated by a sequence of political events: conquest, institution of feudal relations, emergence of a mercenary economy, abolition of feudalism, development of liberal political institutions, analogous growth of a jurisprudence of rights, in particular property rights, and political acceptance of a second constitutional event, promulgation of the Bill of Rights. Though it neutered the crown's political power, the Bill of Rights reinforced the crown's symbolic role as source of authority for political action in the kingdom.

embracing authors' rights, would shortly sweep away the antique principle that copyright's function is to suppress piracy of books.<sup>84</sup>

64. After new laws progressively recognised the proposition that the author is exclusively entitled to authorise copying or public performance of a work by any copying or performance technology, courts dispensed with the traditional notion that copyright law regulates literary property embodied in books. Consistent with the constitutional intent of the convention, they adopted a new view of scope, interpreting rights to confer widening benefit on authors.
65. However, before enactment of new copyright legislation in the United States (1909) and United Kingdom (1911), judges reacted against copyright owners' assertion of a right to authorise the reproduction of musical works in pianolas and records, and the public performance of those works. Courts rejected the idea that the holder of musical copyright<sup>85</sup> is entitled to authorise mechanical reproduction (or, in the language of the Berne Convention, mechanical 'appropriation') of musical works.<sup>86</sup> Judges reacted predictably – and logically – against legal innovation.

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<sup>84</sup> Section XV of the UK's 1842 *Copyright Act* (5 & 6 Vict. c 45) called 'Remedy for the Piracy of Books by Action on the Case' prohibited unauthorised printing of a book for 'Sale or Exportation' or importation of a book for 'Sale or Hire'. An unauthorised person could not 'sell, publish or expose to Sale or Hire' such a book. The intention of the Act was twofold: to secure for copyright holders exclusive production and distribution rights in all of Britain's imperial possessions, and to prevent piracy of books, an enterprise which previously flourished in France, Ireland and the United Kingdom.

<sup>85</sup> Section 20 of the 1842 UK Copyright Act recognised copyright in sheet music but in *Boosey v Whight* [1899] 1 Chancery 836, the High Court case under discussion, Justice Stirling found that copyright vested in a *book* containing musical scores (or sheet music).

<sup>86</sup> As explored in the subsequent US Supreme Court case *White-Smith Music Publishing Co v Apollo* 209 US 1 (1908), the Berne Convention, which applied the authorisation right to specific subject matter, did not specify a right to authorise mechanical reproduction. According to George Bernard Shaw in a letter to *The Times* 2 May 1911, 'when Switzerland took the lead in establishing International Copyright by giving hospitality to the Berne Convention, the exemption of the musical box manufacturers from the obligation to comply with the Copyright Laws was passed politely as a matter of course, like a vote of thanks.' (See also Michael B Landau "'Publication" Musical Compositions, and the Copyright Act of 1909: Still Crazy After all these Years' *Vanderbilt Journal of Entertainment Law and Practice* 29 (2000) at 29-35).

66. In 1899, in *Boosey v Whight*,<sup>87</sup> Justice Stirling in the English High Court found that perforations on musical rolls played automatically by pianolas were not copies of musical works. Pianola valves, operated pneumatically, or electro-mechanically, automatically manipulated piano keys and pedals to play musical scores designated by the perforations on rolls. Perforations reproduced the elements of a musical score symbolically, not literally, and could be described as performance instructions to the machine. Justice Stirling did not accept that non-literal reproduction of a work could infringe copyright. The law protected copyright in a book containing musical scores. It did not protect code that mechanical process could implement to play a musical score denoted by the code.
67. In 1908, in *White-Smith Music Publishing Co*,<sup>88</sup> the United States Supreme Court also adopted the dual path of reaction and logic. The court, asked to consider alleged infringement by the country's biggest pianola manufacturer of copyright in two musical works, could not accept that music roll perforations reproduced musical copyright. Legislation did not contemplate that legal copying is other than replication or near proximateness: a machine playing a score does not copy the score.
68. Within a few years, the tide of reaction ran out as the United Kingdom and United States passed new copyright acts that recognised the right of the owner of copyright in musical scores to authorise mechanical reproduction. While pianolas continued to sell in volume until the beginning of the Great Depression, by 1909, when Congress passed a new Copyright Act, a huge market, growing for two decades, demanded

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<sup>87</sup> *Supra*.

<sup>88</sup> *Supra*.

increasing production of phonographs or gramophones, and recorded music played on those devices.

69. Legislatures on both sides of the Atlantic qualified the grant of a right to authorise the recording and public performance of musical works, providing in legislation for compulsory recording licences. In the US, Congress restricted the scope of music copyright by granting owners of copyright in musical works the exclusive right to perform their works in public 'for profit'.<sup>89</sup> By implication, copyright-holders could not restrain unauthorised public performances of copyright music if the performances were not 'for profit'.<sup>90</sup>

*A 'market' for public performance*

70. Earlier reaction against the encompassing claims of authors' rights proponents shortly turned, however - following legislative example - to embrace. In the United States, concern to affirm the economic rights of owners of music copyright, resulted in a momentous decision that illustrated how judges, as servants of constitutional and legislative consensus, can radically accelerate the trend of law in a direction consistent with the spirit, if not the intent, of legislators and vested interest.
71. In 1914, a number of composers and publishers residing in Manhattan founded the American Society of Composers, Authors and Publishers (ASCAP). Thereafter, Victor Herbert, a composer and co-founder of ASCAP, filed suit, in his own right, and as proxy for ASCAP, against Shanley's Café. In 1913, the café's proprietor had inspired both the

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<sup>89</sup> US *Copyright Act 1909* Ch 320 1(e) 35 Stat 1075.

<sup>90</sup> For extensive treatment of this subject see Lydia Pallas Loren 'The Evolving Role of "For Profit" Use in Copyright Law: Lessons from the 1909 Act *Santa Clara Computer and High Technology Law Journal* Vol 26 No 255 (2010).

lawsuit and formation of ASCAP when he informed Victor Herbert that since he did not charge an entrance fee to the café, the café orchestra's performance of copyright music was not 'for profit'.

72. Since the US Copyright Act provided for remuneration of public performance only if the performance were 'for profit', fees were not payable for orchestral performances in the café.<sup>91</sup> On the evening of Herbert's conversation with Shanley, the orchestra had played one of his compositions, and he resolved to disprove Shanley's interpretation of the law.<sup>92</sup> Establishment of ASCAP followed, then institution of legal action, which proceeded in Shanley's favour, through district and appeal courts, until reversal by the Supreme Court on 22 January 1917.
73. In *Herbert v Shanley Company*,<sup>93</sup> Justice Oliver Wendell Holmes, delivering the unanimous opinion of the Supreme Court, found the Shanley Company liable to pay fees for the public performance of copyright music by the restaurant orchestra. In one of the shortest important judgments in copyright law-making history (barely two pages), Justice Holmes found that since the restaurateurs paid the musicians to

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<sup>91</sup> Act 1909 35 Stat L1075 at section 1, which granted an 'entitled' person the exclusive right to, among other things, 'perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced.' Accordingly, if an unauthorised performance were deemed not 'for profit', it could not infringe the copyright holder's public performance right.

<sup>92</sup> Herbert reputedly expressed a collegiate, as well as personal, reason for taking action, saying, 'My God, if they'll do this to my stuff when I can afford expensive lawyers, what aren't they doing to the others? We've got to look after the b'ys.' Quoted in Lionel S Sobel 'The Music Business and the Sherman Act: An Analysis of the Economic Realities of Blanket Licensing' *Loyola of Los Angeles Entertainment Law Review* 1 (1983) 1-50 at 3.

<sup>93</sup> (1917) 242 US 591.



perform, their performances were ‘for profit’. That restaurant patrons did not pay directly for the performances he considered irrelevant.<sup>94</sup>

74. The café owner paid performers in order to increase the profits of his business. Justice Holmes appeared to enunciate a *ratio* when he declared that the reason for forbidding a public performance intended indirectly to increase the profits of a business was that such performances ‘might compete with and even destroy the success of the monopoly the law intends the plaintiff to have.’<sup>95</sup> The defendants’ performances were ‘part of the total for which the public pays’. If ‘[m]usic did not pay it would be given up. If it pays, it pays out of the public’s pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.’<sup>96</sup>
75. Justice Holmes expressed his attitude to the copyright owner’s entitlement in an earlier sentence: ‘The defendants’ performances are not eleemosynary.’<sup>97</sup> The word ‘eleemosynary’ means ‘pertaining to alms or charity’. Another word that Holmes could have used is ‘gratuitous’. In his opinion, unless a public performance of music, even if gratuitous, is disconnected from any profit-making activity, the performers, or their procurers, must pay to perform copyright musical works.
76. In common law countries, the original purpose of the public performance right was to enable dramatists or musical composers to derive income from theatrical

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<sup>94</sup> One writer friendly to the judgment suggests that Holmes had reason to recuse himself from the case for bias. See Bruce Pollock *A Friend in the Music Business: the ASCAP Story* Hal Leonard Books 2014: Holmes ‘already the author of a favourable [minority] opinion in *White-Smith v Apollo* in 1908, approached the *Herbert v Shanley* decision of January 1917, having been in 1899 the plaintiff on the losing side of his late father’s copyright battle over his book essays, *The Autocrat of the Breakfast Table*, which had fallen into the public domain over a technicality of the law. (Had he recused himself due to his personal feelings on the subject, would ASCAP, let alone popular music, have recovered and thrived?).’ (At 15-16).

<sup>95</sup> At 594.

<sup>96</sup> At 594-595.

<sup>97</sup> At 595.

performances of their works.<sup>98</sup> Holmes expanded this policy to require that owners of musical copyright be remunerated for most public performances of musical works in any venue. He implicitly avowed a principle that unauthorised public performance, or other unauthorised exercise of copyrights, is remunerable unless the activity is 'eleemosynary' or unconnected to any profit-making activity. Who paid did not matter, as long as the copyright holder received a share of profits (or revenue) generated by the activity.

77. Holmes's judgment helped to inaugurate a paratrophic copyright system which commands payment for unauthorised exercise of copyrights, even though a voluntary market does not exist. It might be supposed that statutory specification of proprietary rights, and judicial enforcement of those rights, is a pre-condition for markets to function, but free markets are defined, not determined, by rights: that is, a free market is created by voluntary exchange, governed by rights, not effectuation of a right for the benefit of one class of economic actor.
78. If the public performance right can only be made effective by legislation and court judgment, more legislation, and then institution of sub-judicial government administrative machinery, it cannot feasibly be argued that the putative market in

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<sup>98</sup> The House of Commons enacted the first public performing right in the 1842 Copyright Act, section XX. The policy of the legislation was to allow dramatists or musical composers, or theatrical impresarios to whom they assigned their rights, to profit from public performance of their works. Legislators contemplated that rights-holders would derive remuneration directly from fees paid by members of the public to watch a performance. See Atkinson *supra* at 114-17. Cf the *Copyright (Musical Compositions) Act 1882* which provided that to retain the performing right, the copyright owner must publish a reservation notice on the title page of every published sheet music. The 1911 Copyright Act did not mention formalities.

public performance of works is free. It is a phantasm conjured into reality by courts and government.<sup>99</sup>

79. Before *Herbert v Shanley*, nothing prevented a rights holder unable to secure public performance fees, from forbidding performance. Without judicial insistence on necessity to pay public performance fees, or government action to make compulsory payment of fees, rights holders would have relied on the power of prohibition to negotiate fees, or refuse performance. Holmes enjoined for the law a duty to protect the owner's 'success of the monopoly',<sup>100</sup> meaning, presumably that government must guarantee payment for exercise of the public performance right, as it guarantees repayment of bonds.
80. For Holmes, the copyright holder must share in the revenue of any activity that in any way involved public performance of the copyright work. He proposed that unauthorised performance might 'compete' with the copyright monopoly,<sup>101</sup> yet neither in *Herbert v Shanley*, nor later disputes over radio broadcasters playing copyright music, could competitors stealing the owners' market be discerned.<sup>102</sup>

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<sup>99</sup> Cf Paul Goldstein *From Gutenberg to the Celestial Jukebox* Stanford University Press 1994/2003. Goldstein argued, in support of Holmes's decision, that, '... the very decision to extend copyright into corners where the transactions costs appear to be insuperably high may galvanize the market forces needed to reduce transaction costs.' (At 202). Goldstein makes an assumption that 'insuperably high' transaction costs should be reduced, presumably by government or court edict. The contrary position is that insuperable transaction costs signal the impossibility of a market.

<sup>100</sup> *Supra* at 594.

<sup>101</sup> *Id.*

<sup>102</sup> Victor Herbert was a commercially successful composer of songs, orchestral pieces and light operas. His income derived mainly from the sale of sheet music copies of his works, and tickets to orchestral or operatic performances of his works. He was thus an actor in markets for the sale of music and tickets: willing buyers purchased copies of his works and tickets to performances of his works. It would be untrue to say that patrons of Stanley's Café were willing buyers of tickets to performances of his works, that they attended the café to hear performances of his works, or that they demonstrated desire to pay to hear performances of his works at the café. In the absence of evidence of willing buyers, it is misleading to adduce a market for public performances of Herbert's works outside a theatre of patrons who paid to hear his works performed.

81. Unauthorised use is not competition. Radio stations, the targets of music publishers demanding fees-for-performance, played music to attract listeners, and, in the case of commercial stations, advertisers. They did not compete in retail markets for records, although record companies alleged that broadcasting undermined sales.<sup>103</sup>

*Remuneration right*

82. In the absence of a market, arguments for remuneration seem to disappear. What economic or other harm did radio stations playing music cause copyright holders? How did stations compete with copyright holders? The same questions could be applied to the facts in *Herbert v Shanley*. Did the orchestras compete in a market with copyright holders? Did their performances cause economic detriment to the copyright owners?
83. The particular social harm caused by Holmes's judgment is that it imputed to copyright law a latent right of remuneration appurtenant to every copyright.<sup>104</sup> Whereas copyrights were previously understood as rights-to-treat, which promised no pecuniary reward to copyright owners, unless negotiated, now some copyrights could be interpreted to guarantee fiscal reward. In future years, broadcasters,

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<sup>103</sup> Whether or not this was the case, radio stations were not competing in a market for sale of records.

<sup>104</sup> Holmes's judgment suggested a presumptive right of remuneration. However, copyright law does not recognise a general right of remuneration. Only phonogram producers and performers have won an explicit treaty right of remuneration. The Rome Convention Article 12 (Secondary Use of Phonograms) provides that users who broadcast phonograms must remunerate the phonogram producers and performers of the recorded work for the broadcast. The WIPO *Performances and Phonograms Treaty 1996* (Article 15) requires that the user who broadcasts phonograms or communicates them to the public must remunerate the phonogram producer and performer of the embodied work for broadcast of the work or its communication to the public. A WIPO Committee of Experts and the Council of Europe (Committee of Ministers) recognised (1989/1990) the right of copyright owners to receive remuneration for reprography and a WIPO group experts affirmed (1984) that the Berne Convention and UCC supported the right of the copyright holder to control all aspects of reproduction, including reprography and private copying for non-commercial purposes.

entertainment and fitness venues, and others, as well as educational institutions, paid compulsory dues for public performances of recorded music, or sound recordings, or recorded films, or communications thereof, or copying of educational works, or their communication.

84. This parasitrophic<sup>105</sup> system caused restrictions on supply and price inflation, and, most importantly, excluded some potential readers of educational material from access to educational information. In addition, it created in copyright owners, chiefly industries, a predatory attitude to pricing instilled by belief that copyright law supports in principle of automatic remuneration of the copyright holder for exploitation of copyright material. The courts acted to benefit copyright owners because the copyright system, specifically, treaty, legislation and political narrative, enjoined them to do so. They performed the function of upholding, as judges saw reasonable, the copyright system's constitutional and political compact.

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<sup>105</sup> Deriving sustenance from a host.

## CHAPTER SEVEN

### THE PARATROPHIC COPYRIGHT SYSTEM

#### PURPOSE

Property systems tend to benefit those who benefitted from the political settlement that created the system. The copyright system is paratrophic – that is, it is designed, by reason of political settlement, to remunerate for use of material, even though use neither economically disadvantages the owner of material, nor is explicitly forbidden by the owner. The copyright royalty system exemplifies paratrophic arrangements and this chapter traces the evolution of that system. Paratrophic arrangements play a significant part in copyright proprietary exclusion, inflating price and contributing to access restriction.

#### HEADINGS

##### **Part 1 Evolution of a paratrophic system**

A paratrophic copyright system

The radio wars

Radio war in the United States

Compulsory licence for educational materials and photocopying

Paratrophic tendency

##### **Part 2 Exclusionary effect and exceptions**

Ownership concentration

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##### **Part 3 Conclusion**

Key elements of copyright system

Paratrophic arrangements

Purpose and effect of royalties

Exclusionary consequences

Exclusionary consequences

## Part 1 Evolution of a paratrophic system

### *A paratrophic copyright system*

1. It can be seen that, for copyright and land title systems alike, contest results in constitutional arrangements, which provide a source of agreed authority for allocation of proprietary rights.<sup>106</sup> Continuing allocation of rights conforms to constitutional requirement (in the case of the copyright system, for example, legislators passed neighbouring rights legislation conferring rights analogous to copyright). The systems are, in one distinct and important way, unlike. Copyright laws govern non-excludable property (identical reproducible abstract subject matter) while land law regulates excludable subject matter (unique and material). Systemically, however, copyright and property systems evolve and function in comparable ways.<sup>107</sup>
  
2. One common trait of abstract and real property systems is their *paratrophic*<sup>108</sup> function. Both are control systems, distributing control between a hierarchy of claimants. They also perform an economic function: markets depend upon delimitation and enforcement of proprietary rights. A tertiary trait is paratrophic. Proprietary rights are justified in theory to the extent that their exercise is socially

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<sup>106</sup> Constitutional authority may be unwritten. What is important is whether the source of authority, and the authority itself, command assent. Assertion of crown immediately followed the Norman conquest, and by compulsion William I enjoined crown authority. Thereafter the crown exercised suasion as source and enforcer of constitutional authority. The Berne Convention proved equally successful as a source of constitutional authority. Other source of constitutional authority exercise weak suasion, and the result is political instability.

<sup>107</sup> That is, the exclusionary effects of different property systems differ but they exclude by exercise of the legal right to refuse.

<sup>108</sup> @dictionary.com: paratrophic: *obtaining nourishment from living organic material.*

useful (facilitates rational voluntary economic exchange).<sup>109</sup> If they are exercised to compel bargains destitute of benefit to any person other than the owner, or bargains that transfer income from one economic actor to another, even though the activity for which payment is made does not subtract from the economic welfare of the second actor, they are paratrophic.<sup>110</sup>

3. In principle, if perfect competition pertains, rental markets shrink or disappear, since perfectly efficient resource allocation acts against distributive exclusion. In practice, rent, whether contract rent (within market) or economic rent (outside market), signals distributive inequality which is reified in rental markets. These may betoken inequality, but they are seen to produce a social good, that of housing people in need of housing. A paratrophic actor is notionally akin to a venal landlord, whose avaricious

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<sup>109</sup> What constitutes a market and appropriate government intervention, both market and social, is a contested question. The school of public choice has analysed these questions for over 60 years, supplying the insight that government, unless subject to external scrutiny, tends to make choices governed by the prerogatives of vested interest. James Buchanan and Gordon Tullock published in 1962 a foundational public choice text *The Calculus of Consent* University of Michigan Press. In 1989, Edwin C Hettinger published an article applying some of their analysis to copyright regulation: 'Justifying Intellectual Property' *Philosophy and Public Affairs* 18. Surprisingly few analysts have examined in depth the different regulatory rationales for excludable and non-excludable property, differences that are relevant to paratrophic behaviour, and regulatory and policy responses to that behaviour. It can be argued, although the argument does not conform to policy orthodoxy, that government would have better served the public interest if it did not involve itself in disputes over performing rights, and allowed commercial chaos to resolve itself, with possibly adverse results for the publishers and record companies seeking paratrophically demanding royalties.

<sup>110</sup> Social selection over centuries, beginning in the feudal period, resulted in legal categorisation of property as definable subject matter held absolutely in fee simple. In this sense, the concept of property as something possessed in total emerged organically from a long social process. By contrast, copyright property is an artificial creature of statute, and the rationales adduced for copyright are after the fact of its creation. The argument that the agglomeration of copyrights lasting, in the case of authors, for a posthumous period of 70 years, creates incentive for production is an assertion, unsupported by evidence. If the social utility of copyrights is assumed, government intervention to ensure effective payment of public performance fees – royalties – may be defensible. If social utility is not assumed, and instead, the policy for enacting copyrights is examined, it can be seen that, in some instances, rights in action have not been socially useful, and their exclusionary effect pronounced.



conduct is politically ratified. Paratrophic behaviour is not possible without political acquiescence, though the paratrophic actor is not a rent-seeker.<sup>111</sup>

4. A paratrophic actor, unlike a rent-seeker, does not solicit from a political decision-maker privileges or benefits, since the activity of rent-seeking, if successful, has secured the foundation privilege to extract rent, and the legal machinery for extraction. The paratrophic actor is the successful rent seeker collecting rent. The privilege or benefit inheres in vested proprietary rights.
5. The paratrophic actor utilises these rights to secure rents. Bargaining with a paratrophic actor is compulsory, not voluntary. The paratrophic actor wants rent and therefore does not obtain court orders to prevent unauthorised use: the activity is countenanced and rent demanded.<sup>112</sup> Legal coercion, if the state establishes a compulsory bargaining process, creates an extra-market administrative machinery, which procures extra-market bargains.<sup>113</sup>

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<sup>111</sup> Rent-seeking involves securing private economic benefit by colluding with political authority to circumvent legal or other rules concerning fairness and transparency, or persuading politicians to pass laws, or make derivative rules, that benefit one person, or group, in preference to others.

<sup>112</sup> Reginald Bonney, senior counsel for the EMI record companies' consortium at the 1932 Australian Royal Commission on Performing Rights hearings, wanted no part of Commissioner Owen's proposal for a copyright arbitration tribunal. The record companies wanted to be left alone to wage war on the radio broadcasters by banning playing of records, and then seeking public performance fees for the broadcasting of recorded music. In 1932, they had not yet secured common law recognition of a record performing right, or its enactment. Bonney said, 'Any interference or control of that sort in a business is in itself an evil. It is a bad thing and should be avoided if possible ... One has to take that view of government interference.' (NAA A467 SF1/85).

<sup>113</sup> It is important to note that while government intervention to resolve the commercial problems caused by aggressive assertion of a right to collect rent may create economic conditions favourable to the rent-collector – by assuring payment of rents – a rent collector may not welcome intervention, and prefer to be left alone to extract, through rights enforcement, maximum payments. In the 1930s dispute between Australian radio broadcasters and (separately) APRA and the EMI record companies, both APRA and EMI wanted to be left alone to act (in the words of counsel for cinema exhibitors) 'like a dragon, devastating the countryside.' (NAA A467 SF1/43). Government mediation and subsequent administrative or legislative action may benefit the paratrophic actor but usually government conforms policy to the circumstances of dispute not the wishes of that actor.

6. It is worth observing that problems caused by rent-seeking and paratrophic behaviour are primary problems of property systems. Each results from a failure of political (constitutional) compact that creates a distributive problem.<sup>114</sup> Consequent upon political decision, benefit is distributed unevenly by allocation of proprietary rights. Economic actors vested with greater proprietary rights strike unequal bargains with those with inferior rights, or without rights, and exact rent, either through bargains made in a market (eg, residential rental bargains) or outside a market (eg, exaction of public performance fees).
7. A market bargain, such as may be expressed in a residential lease contract, can be said to perform the socially useful task of resolving the problem of scarcity, although it does not resolve the problem of unequal distribution. Government-instituted rent controls limit, to some extent, the exclusionary effect of leasehold bargaining by capping rents, but rent controls are usually limited in effect since they are considered to restrict freedom of contract. A non-market bargain, expressed, for example, in a contract for payment of public performance fees, resolves no social problem, although

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<sup>114</sup> It is noticeable that the most renowned advocates of absolute private control of things fungible or transferable (Ludwig von Mises d 1973, Friedrich Hayek d 1992, Milton Friedman d 2006) only superficially describe what property *is*. They argued that property rights secure individual freedom and permit exchange or markets: property's greatest characteristic is that it occludes, which allows an owner to possess or trade a thing. Government's duty is to preserve private rights, and avoid moderating, or interfering with, their scope or exercise. So long as government fulfils its duty, rights protect individuals against oppression, and assure free choice. Von Mises stated the argument most starkly in *Human Action: A Treatise on Economics* (Ludwig von Mises Institute 1949/1998). He was not much interested in 'the legal concept of property rights' (at 78) because government encroachment tended to restrict the proper scope of rights. He defined proprietary rights by reference to market transactions: 'Ownership is an asset only for those who know how to employ it in the best possible way for the benefit of the consumers. It is a social function.' (At 680). This analysis is explanatory, but fails to observe that the 'social function' is determined by the constitutional settlement from which rights are derived, their content, and the politics of their exercise. This triad of factors determines the extent to which property arrangements are exclusionary, although von Mises was preoccupied with the inclusionary benefits of markets rather than the exclusionary characteristics of property systems. Vons Mises, Hayek and Friedman concerned themselves little with the exercise of rights pertaining to excludable property, but, if they applied principle consistently, their analyses could be expected to condemn copyright laws that do not function in 'the best possible way for the benefit of the consumers.' Nor could they have approved government action to cure assumed market failure caused by use of copyright material.

it may conveniently create income transfer to an economic class, such as music publishers.

8. The owner of the public performance right confers a benefit – the right to perform a musical work – but the benefit is factitious, since it could be enjoyed gratuitously without injuring the owner or reducing incentive to create or produce, as the history of public performance before legislation illustrates.
9. Paratrophic function is particularly observable in the copyright system. Commercial battles that erupted over enforcement of the public performance right, especially in the period 1920-1940, international dispute over the right of poorer countries to authorise compulsory licences for copying educational works, and institution of fees for copying, created paratrophic royalties systems, deleterious to public welfare.
10. The institution by government of statutory systems guaranteeing predictable rents to publishers, recording and film industries is comparable to the feudal nobility's legal right to rents and dues. Feudal peasants owed rents, dues or taxes to their lords. They tilled the lord's land in order to pay dues that brought tenancy and protection. Insofar as the concept of feudal contract implies peasant bargaining power, the supposed contractual nature of feudal tenancy is a chimera. The obligation to pay or satisfy rents or dues derived from forms of legal tenure which reinforced the lord's control. Peasants could no more avoid an obligation to pay dues, than a contemporary educational institution can avoid paying, on behalf of staff and students, photocopying dues.
11. As discussed below, in the decades 1920-40 and 1960-80, when copyright holders, in concert with government, instituted statutory arrangements for payment of royalties

for exercise of the public performance right, and copying of works, industries simultaneously contested for sovereignty, a contest which resulted in specification and growth of rights and distribution of control.

*The radio wars*

12. The process of 'wireless telegraphy' patented by Guglielmo Marconi in 1896 developed rapidly during World War One as 'radio telephony'. After the war, the growth of radio broadcasting delighted waves of new listeners, and national broadcasting audiences soon outstripped in number the millions who listened to gramophone records or attended cinemas.<sup>115</sup>
  
13. Ten or more years after they lost the battle over the compulsory recording licence, music publishers scented commercial opportunity in music broadcasting. They collected performance fees from entertainment venues playing records on gramophones, and they could demand that radio stations pay fees for broadcasting recorded music. From early in the 1920s, copyright collecting societies, established principally by music publishers, started to collect fees from radio stations for broadcasting music.<sup>116</sup>
  
14. In 1914, music publishers in the United Kingdom and the United States established the *Performing Right Society* and the *American Society of Composers, Authors and*

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<sup>115</sup> From the beginning of radio broadcasting in the United States 1921-22 until the beginning of the Depression 1929-30 annual production of radio sets in the US reached a peak of 4.5 million in 1929, while in 1930, 45% of households owned a wireless (US Department of Commerce Bureau of the Census *Historical Statistics of the United States: Colonial Times to 1970*, 2 volumes USGPO 1976). In 1922, a US station broadcast the first radio advertisement and by year's end 571 stations were broadcasting news, entertainment and advertising: Atkinson *supra* at 119.

<sup>116</sup> The first collecting society, the *Société des auteurs, compositeurs et éditeurs de musique*, or society of authors, composers and music publishers, began in 1851 to collect fees from some Parisian cafes for public performances of musical works.

*Publishers.* Each expected to collect for the playing of gramophone records in public places such as cafes. Within 10 years, radio broadcasting attracted audiences of millions, and the collecting societies began to collect lucrative dues unanticipated by the founders of the PRS and ASCAP at the time of their formation.

15. Collecting societies are believed to solve a problem of market failure caused by the fact that the population of rights-holders is diffuse. Dispersion is an obstacle to rights exploitation, since individual rights holders are usually unable to bargain effectively for reward, or enforce a bargain.<sup>117</sup> The societies perform the intermediary function of securing collective bargains on behalf of the collective of rights-holders, and enforcing the bargain if necessary. The arrangement is, in theory, beneficial to licensees, since the bargain provides surety that if they honour its terms their use of copyright or related material will not be subject to legal suit.<sup>118</sup>
  
16. Collecting societies administered the collective rights of copyright holders, who assigned their rights to the societies in order for the societies to efficiently collect and distribute dues. Collective administration is controversial because collecting societies

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<sup>117</sup> In the absence of a mandatory tribunal-mediated licensing system, something like commercial chaos might ensue, as it did in the 1930s, but it would be a mistake to assume that agreements reached after conflict would be deleterious to the public. A free market, would permit licensor and licensee to bargain without directive intervention of government, in which case the greater contracting power would probably fall upon the licensee, since most rights holders would be handicapped by the problem of individually procuring and enforcing bargains. Collective administration, supported by government intermediation, vests more bargaining power in the licensor, and the licensee is then handicapped by the necessity to accept terms that may onerous for the licensee, and cause resultant disadvantage to the public.

<sup>118</sup> UNESCO published an idiosyncratic account of collective administration (see UNESCO 2000 CLT-2000/WS/4, author Paula Schepens): 'Collective administration is the only means of ensuring that the legitimate interests of the author are respected when the latter is dealing with a multiplicity of users. How could a composer know what use was being made of his music in the countless bars, cafés and shops, in short in all the public places around the world? And how could he enforce his rights in the courts each time they were infringed? A dramatist might be able to keep track of the performances of his plays by professional actors, at a pinch! But he is totally incapable of monitoring performances by amateurs. An artist will know who has purchased his painting when it is sold for the first time, but if the lucky owner is obliged for reasons beyond his control to part with his acquisition or if he decides to do so wittingly, the successive sales will escape the artist's attention.'

do not publish distribution statements, and critics argue that societies act primarily for publishers. Until the Berne Union, at its 1928 Rome revision conference, recognised the right of authors to authorise broadcasting of works, some broadcasters disputed the applicability of the public performance right to broadcasts.<sup>119</sup>

17. Before and after 1928, governments recognised that a broadcast of music is a public performance of music, for which fees are payable.<sup>120</sup> After 1928, broadcasters accepted government's position.<sup>121</sup> However, the Rome conference allowed member countries to 'determine [in or pursuant to legislation] the conditions under which' the authorisation right could be exercised.<sup>122</sup> In the 1930s, the Australian Government relied on this provision to try to moderate – mainly by calling in 1932 the Royal Commission on Performing Rights – the publishers' maximal demands for public performance fees.<sup>123</sup>

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<sup>119</sup> Atkinson *supra*.

<sup>120</sup> In Australia, for example, the Commonwealth Attorney General, John Latham, sent out in 1926 pro forma letters to correspondents disputing APRA's claim for performing right fees. The letter stated, among other things, 'The owner of the performing right of a musical composition has the exclusive right to perform the composition in public, or to authorize its performance in public. Accordingly any person who wishes to perform in public music in which a performing right exists can do so only with the consent of the owner of the performing right.' (Quoted Atkinson *supra* at 143).

<sup>121</sup> The Berne Convention revision conference held at Rome in 1928 added to Article 11 *bis*(1), which vested in the author the right to authorise broadcasts of works, Article 11 *bis*(2), which permitted members to '... determine the conditions in which the rights mentioned in the previous paragraph may be exercised, ... .' The Australian representative, Sir Harrison Moore, and his New Zealand counterpart, persuaded the British delegation to support addition of Article 11 *bis*(2), leading to its acceptance, in the teeth of French opposition, by a majority of delegates. After 1928, although some individuals continued to question the validity of the performing right, broadcasters in general accepted the legal status of the right. (See Atkinson *supra* chapters 4-5).

<sup>122</sup> Article 11 *bis* (2). Subject to the author's moral rights, and right to obtain equitable remuneration.

<sup>123</sup> Australia was committed to acceptance of such a measure because the Government considered that, unchecked, APRA could demand fees that would prevent broadcasters from extending coverage to remote Australia. The Royal Commission established the principle of compulsory arbitration of performing right fees but it also confirmed to dissentient opinion among broadcasters the government position that APRA was entitled to collecting fees for broadcasting of musical works. (See Atkinson *supra* chapters 4-6.).

18. In 1923, the Performing Right Society (PRS) in the UK began levying public performance fees on the British Broadcasting Company.<sup>124</sup> Since the broadcaster played so much music over the airwaves, PRS revenues rapidly grew larger. PRS levies aroused great opposition and in 1929, the government introduced the *Musical Copyright Bill*, which introduced compulsory licensing of the performing right, and established a fixed maximum fee payable to the copyright owner. The House of Commons Select Committee examining the bill stated that the PRS was a 'super monopoly', controlling over 90 per cent of performing right copyrights. The government, under pressure from the PRS, dropped the bill.<sup>125</sup>
19. In Australia, where the PRS arranged incorporation, in 1925, of the Australasian Performing Right Association (APRA),<sup>126</sup> the fight over enforcement of the public performance right proved more bitter still than in the United Kingdom. The 1932 Royal Commission on Performing Rights, which reported in 1933, recommended establishment of a tribunal to arbitrate disputes over fees and collection practices.<sup>127</sup> The government ignored this recommendation, though the 1968 Copyright Act established a tribunal similar to that envisaged by the 1932 Royal Commission.

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<sup>124</sup> <http://www.prsformusic.com/aboutus/ourorganisation/ourhistory/Pages/default.aspx>.

<sup>125</sup> 'Special Report of the House of Commons select committee to review the *Musical Copyright Bill 1929*'. The Special Report recommended that the Government legislate to allow prospective licensees of the PRS to refer price and supply disputes to a tribunal for arbitration.

<sup>126</sup> APRA came into existence on 4 January 1926 as a company limited by guarantee. Its subscribers consisted of the PRS, Chappell & Co (a major UK musical publisher) and eight other musical publishers, probably all affiliated with UK parents or associates. The objects in the articles included the requirement that APRA enter into an agreement executed on 11 January 1926. The agreement provided for a PRS nominee to sit on the APRA board and for APRA to remit to the PRS 40% of net revenue from non-broadcasting sources. Additionally, APRA was to supply reports of its repertoire of licensed works and monies collected for public performance. In 1926 and thereafter for a number of years, the authors of the considerable majority of works in the APRA repertoire would have been UK nationals.

<sup>127</sup> *Report of the Royal Commission on Performing Rights* Commonwealth Government Printer 1933.

20. In 1931, the Gramophone Company and Columbia Gramophone Company (including its subsidiary the Parlophone Company) merged to form a British recording giant, Electrical and Musical Industries Limited, or EMI.<sup>128</sup> EMI's offshoots also controlled the Australian recording scene.<sup>129</sup> EMI regarded radio as a commercial parasite, freely playing records and thus draining from listeners the desire to purchase records. Between 1927 and 1931, record sales fell by 80 per cent<sup>130</sup> and EMI, casting about for causes, blamed music broadcasting for the decline. Radio, said EMI, released listeners from the necessity of buying records. They could listen all day to songs on radio – why waste money on records?<sup>131</sup>
21. EMI rejected the argument that the onset of economic depression contributed to plummeting sales. In late 1931, it instituted a boycott against the BBC in Britain and radio broadcasters in Australia, banning them from playing any EMI records.<sup>132</sup> EMI justified the ban by claiming that copyright in recordings comprised a subsidiary copyright in the public performance of records.<sup>133</sup> EMI insisted that radio

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<sup>128</sup> In November 2011, Universal Music Group, a subsidiary of Vivendi, bought EMI's music recording business, and a Sony-led conglomerate its music publishing business.

<sup>129</sup> EMI's Australian subsidiaries, the Gramophone Co Ltd, Parlophone Co Ltd and Columbia Gramophone Ltd, the 'associated manufacturers', dominated the Australian recording industry. By 1933, their Australian competition had vanished: Moulded Products Ltd (a subsidiary of Decca Records), the Klippel Co and the Brunswick Co had ceased operations. Between 1926 and the beginning of the Royal Commission in 1932, the associated manufacturers sustained heavy losses annually. (Atkinson at 174-5).

<sup>130</sup> Report of the *Royal Commission on Performing Rights* (Commonwealth Government Printer 1933), quoting figure supplied by Hoffnung and Co principal distributor in Australia of records for EMI.

<sup>131</sup> Reginald Bonney, senior counsel to the EMI consortium of Australian record companies (the 'associated manufacturers'), told the Royal Commission on Performing Rights in 1932 that commercial radio broadcasting in Australia 'has grown up not as a handsome plant but a noxious weed.' (NAA A467 SF1/85).

<sup>132</sup> EMI wrote to radio broadcasters in Australia and New Zealand on 17 November 1931, forbidding them to play EMI records.

<sup>133</sup> In 1928, during discussions with Australia's delegate to the Rome conference to revise the Berne Convention, Sir William Harrison Moore, record company representatives from the United Kingdom agreed with Moore that legislation did not disclose a record performing right. They said that their interest in asserting a record performing right was to deter music publishers from seeking to levy public performance fees on purchasers of records. (Atkinson *supra* at 177). By the time of the Australian royal commission in 1932, EMI, the near monopolist supplier of records in the UK and Australia, had hardened its position. The claimed record



broadcasters should pay fees for the public performance of recordings.<sup>134</sup> Were the recording companies' claim to be validated, broadcasters would be required to pay dual public performance fees: one for performance of musical works, payable to the PRS and APRA, and the other for performance of records embodying musical works, payable to EMI.

22. EMI's aggression reaped dividends. Broadcasters were desperate for music and willing to accommodate demands that were economically feasible. The BBC, and in Australia, the Australian Broadcasting Company, agreed to limit the playing of records.<sup>135</sup> Commercial broadcasters argued for another two decades over the payment of the record performance fee, though they started to meet some of EMI's conditions for the playing of records. EMI's gambit succeeded in the teeth of official opposition. Policy-makers and legislators rejected the claimed record performing right out of hand.
23. In Australia, the 1933 report of the Royal Commission on Performing Rights disparaged the supposed right.<sup>136</sup> EMI looked to the courts to establish a precedent

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performing right both supplied a justification for the radio ban, and promised a predictable source of future revenue.

<sup>134</sup> Reginald Bonney, counsel to the associated manufacturers at the Royal Commission on Performing Rights said of radio stations playing records: 'it becomes necessary to ask whether in fairness the public who gets its enjoyment of those records through a new channel should not be called upon to pay.' He went on, 'There is no escape from that proposition. And if the sources of revenue that have accrued to them in the past have been cut off, then they must look for new avenues of revenue.' When the Royal Commissioner, Justice Owen, said the public should not be required to pay for listening to music on the radio, Bonney said, 'The person who uses that record in public for his own profit, who could not otherwise obtain that profit should pay for it; does not justice require that those who have provided him with those means should be entitled to charge for it?' (NAA A467 SF1/85).

<sup>135</sup> In the United Kingdom, commercial stations did not exist. In Australia, the associated manufacturers would not come to terms with commercial broadcasters, the 'B Class' stations, which they considered a deadly threat to record sales, but they did reach formal agreement with the ABC in September 1932. The ABC could broadcast records for six months. Even after the time period elapsed, the arrangement continued informally. (Atkinson at 176).

<sup>136</sup> The Royal Commissioner Justice Owen stated that two performing rights would have an 'extraordinary' effect on commerce. The playing of a record involved a single acoustic performance and therefore the performing right accrued to the creator of the music not 'the maker of the mechanical contrivance' that caused the performance to be heard.

that it calculated parliament must eventually follow. In 1933, in the test case *Gramophone Co Ltd v Stephen Cawardine & Co*,<sup>137</sup> Justice Maugham accepted the recording industry's interpretation of the relevant provision of the British Copyright Act (section 19(1) and (2)). He said that record companies' invested in the process of recording and production. Section 19(1) contemplated that a 'record' is also, for the purpose of public performance, a 'work', and accordingly a public performance right accrues to the maker of a record.<sup>138</sup>

24. Few people agreed with Justice Maugham's reasoning. But the British recording industry immediately established, in 1934, a collecting society Phonogram Performance Limited to advocate for, and collect, record performance fees. 20 years of importuning and advocacy by record companies won politicians to their cause. The British and Australian parliaments codified the record performing right (in new Acts in 1956 and 1968).<sup>139</sup> The Rome Convention 1961 provided for payment of equitable remuneration to the recording company by a broadcaster of that recording (Article 12).

#### *Radio war in United States*

25. In the 1920s and 1930s, radio broadcasters in the United Kingdom and Australia fought performing right societies, the collecting societies mostly controlled by music

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<sup>137</sup> [1934] Ch 450.

<sup>138</sup> Justice Maugham relied on the 'defective nature of the drafting' (at 460) of the relevant clause of the 1911 Copyright Act (section 19) which he said indicated that the meaning of 'work' for the purposes of the public performance right embraced the meaning of 'record'. He went on to make the observation, which buttressed arguments of EMI and advocates such as Reginald Bonney, against radio broadcasters' unremunerated playing of records, that, 'I can see considerable objection, from that standpoint, to the view that persons may obtain, without doing anything more than buying a record, the advantage of the work, skill and labour expended by the makers of gramophone records for the purposes of a public performance.' (At 461).

<sup>139</sup> Section 12(5) of the *Copyright Act 1956* Ch 74 4&5 Eliz 2; section 85(1) *Copyright Act 1968* Act 63 of 1968 at 24 June 2014.

publishers. Simultaneously, record companies and radio broadcasters engaged in fierce commercial warfare. In the United States, in the 1930s and 1940s, the broadcasting industry duopoly of Radio Corporation of America and Columbia Broadcasting System fought record companies and, most bitterly, music publishers.

26. As in Australia, the radio industry grew prolifically in the United States during the 1920s. Many radio stations were not reliant on recorded music. They played only live music performed in radio studios by hired musicians and singers. But records were the lifeblood of much broadcasting. Between 1929 and 1933, record sales fell by 90%. In 1921 Americans spent \$600 m on records. In 1933, when record industry revenues reached a nadir, sales dropped to about \$10 m.<sup>140</sup> Blaming broadcasting for falling sales, record companies instituted a performance prohibition strategy similar to that adopted by EMI in the United Kingdom and Australia. Most records sold in the 1930s displayed the legend 'not licensed for broadcast'.<sup>141</sup> However, the record companies' attempt to enforce prohibition of broadcasting of records culminated in categorical victory for the broadcasters.
27. In 1940, Justice Learned Hand ruled in the US Court of Appeals (2<sup>nd</sup> Circuit) that the owner of copyright in a sound recording is entitled solely to restrain unauthorised reproduction of the sound recording. Record companies could not restrain broadcasters from playing records unauthorised, including records stamped 'not

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<sup>140</sup> Stan J Liebowitz 'The Elusive Symbiosis: the Impact of Radio on the Record Industry' *Review of Economic Research on Copyright Issues* 2004 Vol 1(1) 93-118 at 105-6.

<sup>141</sup> In *Waring v. WDAS Broadcasting Station* 194 A 631 (1937), the Pennsylvania Supreme Court, in a victory for the recording industry, held that record companies could (or the holder of copyright in records) could restrain the unauthorised broadcast of phonograph records (if the cover of the record(s) in question stated 'Not Licensed for Radio Broadcast').

licensed for broadcast.<sup>142</sup> The Supreme Court refused leave to appeal, with the result that in the United States, unlike the United Kingdom, broadcasters could continue to play records without paying royalties to record companies (although the obligation to pay performance fees to the owner of copyright in the musical work continued).

28. In 1942, the newly formed Capitol records began the record industry's embrace of radio broadcasting. Capitol offered broadcasters a huge repertoire of songs recorded by new artists, and in five years sold over 40 million records. Record companies eschewed the principle that broadcasting shrinks records sales. Music publishers, however, did not join the peace. Representatives of composers demanded higher public performance fees than broadcasters would countenance. The radio industry now disputed bitterly with the American Society of Authors, Composers and Publishers (ASCAP).<sup>143</sup>
29. This dispute involved a third protagonist, government. Although often sanguine about ASCAP's near-monopoly over the licensing of copyright music, government became ASCAP's nemesis. The battle over the public performance right was a battle over fees levied for public performance. Collections increased from about \$380,000 in 1922 (consisting mostly of fees from movie theatres) to about \$960,000 at the beginning of the 1930s and \$7.3 million in 1940. The standard bearers of the performing right pitted themselves against radio, the nation's most powerful new industry.<sup>144</sup>
30. The US radio broadcasting industry, driven by the commercial imperatives of independent and network stations fighting for market share, fought ASCAP

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<sup>142</sup> *RCA Mfg Co. v Whiteman* 114 F 2d 86 (2d Cir 1940).

<sup>143</sup> The US equivalent of the PRS and APRA.

<sup>144</sup> Atkinson and Fitzgerald *supra* at 81.

ferociously. The tenor of dispute differed from that of conflict in Australia and the United Kingdom. In the US, music publishers, many already integrated in amalgamated entertainment companies that published music and produced records, did not automatically identify their economic interests with those of a collecting society like ASCAP.<sup>145</sup>

31. The radio stations, represented by the National Association of Broadcasters (NAB), resented ASCAP's charges, which increased in proportion to revenue and in any case never dropped below 3 per cent of advertising income.<sup>146</sup> They objected to ASCAP's insistence on issuing blanket licences, which resulted in stations paying fees for songs they never played, its shadowy distribution arrangements and its unwillingness to negotiate licence terms.
32. The NAB proposed to undo the performing right by attacking ASCAP's assertion of monopoly. From the mid-1920s, the NAB lobbied the anti-trust divisions of the Department of Justice to enforce the *Sherman Act* to curtail ASCAP's control of collections for the playing of commercial music (ASCAP licensed over 80 per cent of music played on radio).
33. In 1933, the NAB asked the federal court to declare ASCAP an unlawful trade combination. In 1934, the Department of Justice also filed suit, asserting criminal violation of the *Sherman Act*. ASCAP and the broadcasters then made a provisional

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<sup>145</sup> At the end of 1935, four publishers and their subsidiaries, supposedly controlling about 40 per cent of ASCAP's in-demand repertoire, withdrew from ASCAP and promised to levy performing right fees independently. The four companies were offshoots of Warner Brothers Pictures, a giant movie-making enterprise formed in 1918. Warner Bros founded Warner Bros Records in 1958. Note that performing right societies in the UK and other countries such as Australia also allocated up to half of revenue collected to artists.

<sup>146</sup> ASCAP demanded increase in royalty volumes of 300 per cent in 1932 and 70 per cent in 1937 (Sterling and Kitross, 1990).

five-year licensing arrangement<sup>147</sup> before resuming battle. Within two years, ASCAP announced plans to increase fees by 40 per cent, and the NAB began asking states to outlaw ASCAP's activities on anti-trust grounds. The Supreme Court invalidated state laws, finding that they arrogated the federal copyright power.<sup>148</sup>

34. The NAB adopted a new strategy. In 1939, it created its own performing right organisation to compete with ASCAP and in doing so changed the nature of popular broadcast American music. The new organisation, *Broadcast Music Incorporated* (BMI), offered radio stations reluctant to sign ASCAP licences a new music repertoire based on genres shunned by ASCAP: rhythm and blues, country, gospel, folk and latin. The success of BMI proved a precursor to the growth of rock 'n' roll and its dissemination across the airwaves.
  
35. ASCAP responded by lifting public performance fees by 100 per cent. BMI renounced blanket licensing<sup>149</sup> and touted a fairer system of paying by airtime percentage,<sup>150</sup> offering a desirable substitute for ASCAP's repertoire drawn from orthodox genres. The big networks controlled by the National Broadcasting Company (NBC) and

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<sup>147</sup> Daniel Gervais (ed) *Collective Management of Copyright and Related Rights* Wolters Kluwer (2<sup>nd</sup> ed) 2010 at 321, fn 44.

<sup>148</sup> *Gibbs v. Buck* 307 US 66 (1939) and *Buck v. Gallagher* 307 US 95 (1939). For a fuller account of the dispute between the NAB and ASCAP, see Timothy Wu, 'Copyright's Communications Policy' *Michigan Law Review* 103 278-366. The state laws could also be said to be the result of the usurpation of the federal legislature's constitutional power to make laws regulating commerce.

<sup>149</sup> Blanket licensing provided licensees with the right to play any song in the ASCAP repertoire (although stations only played a fraction of total available songs) in return for payment of a fixed percentage of the licensee's advertising revenue.

<sup>150</sup> BMI pioneered the sampling system since adopted by most copyright collecting societies. A comprehensive record or sample of songs broadcast in particular periods supplied a representative snapshot of songs played. Fees were calculated by multiplying per category rates agreed by number of plays of songs. In theory, sampling tied remuneration to actual plays, ensuring accuracy that was absent from the blanket licensing system and preventing overcharging.

Columbia Broadcasting System (CBS), both part of a group of founders of BMI, signed BMI licences.

36. In 1941, NBC and CBS spearheaded a 10-month radio boycott of ASCAP-licensed music. To survive, ASCAP dropped its royalty demands and rates. Anti-trust action by the Justice Department ended hostilities and required ASCAP and BMI to sign consent decrees compelling non-exclusive licensing, provision for per-program payment and optional rights assignment. ASCAP and BMI today jointly control licensing of musical works in the United States, and the consent decrees continue to be periodically updated.<sup>151</sup>

#### *Access and compulsory licensing*

37. Reconstruction activity and a new spirit of international cooperation after 1945, exemplified by the formation of the United Nations (1945), came to have an effect on international copyright affairs, previously most strongly influenced by the Berne Union's revision conferences. Members of the United Nations Educational Scientific and Cultural Organization signed in 1952 the Universal Copyright Convention, which advocated 'wider dissemination'<sup>152</sup> of copyright material. UNESCO did not found the UCC as a rival to the Berne Union but as a complementary organisation concerned principally with ensuring distribution of copyright works in poorer countries.

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<sup>151</sup> The decrees empower certain US courts to act as rate-setting tribunals exercising powers similar to those of copyright tribunals in other jurisdictions such as the UK, Canada and Australia. In 2009, the *Performance Rights* bill entered the US Congress. Instigated by the US recording industry, it proposed a performers' performance right in sound recordings. If successful, the legislation would require radio broadcasters to pay performance fees for playing sound recordings. Fees collected would be distributed in 50 per cent shares between the producer of the sound recording and the performer(s) of the work recorded. The bill encountered strong opposition from the radio industry and stalled in the logjam of legislative business.

<sup>152</sup> See preamble to *Universal Copyright Convention* signed 6 September 1952 (No 9237 United Nations Treaty Series registered by UNESCO 27 September 1955): '... Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding ...'

38. The Berne Union did not oppose the principle of broader access to copyright material and worked with the UNESCO-UCC intergovernmental committee to further the committee's initiative to find ways to enable poorer countries to gain agreed access to educational copyright material produced in richer countries.<sup>153</sup> This initiative began in the 1950s and continued to shape UCC policy through the 1960s. At an intergovernmental copyright conference in Brazzaville, Congo, held in 1963, a large number of less developed nations pressed for agreed rights to gratuitously copy and abridge imported works for educational purposes, and reproduce works without permission after expiry of a much reduced copyright period.<sup>154</sup>
39. The 1967 Stockholm conference to revise the Berne Convention appeared to support the Brazzaville consensus, adopting a protocol which permitted developing nations, in specified circumstances, to institute, for educational purposes, compulsory licensing of foreign works and translate these works without charge.<sup>155</sup> In 1971, joint revision conferences for the Berne Convention and UCC, held in Paris, provided formally for compulsory licensing for reprinting and translating foreign works – on restrictive terms. Provision for conditional compulsory licensing is set out in an appendix to the Berne Convention.<sup>156</sup>

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<sup>153</sup> See Peter Jaszi 'A Garland of Reflections on Three International Copyright Topics' *Cardozo Arts and Entertainment Law Journal* 1989 8 47-72; Barbara Ringer 'The Role of the United States in International Copyright: Past Present and Future' 56 *1055-62*; Peter Yu 'Currents and Crosscurrents in the International Intellectual Property Regime' *Loyola Los Angeles Law Review* 38 323-443.

<sup>154</sup> See 'General Report of the Brazzaville Session' in RIDA (*Revue Internationale du Droit d'Auteur*) [1963] Vol 1.

<sup>155</sup> Berne Convention for the Protection of Literary and Artistic Works, revised Stockholm 14 July 1967, adding *Protocol Regarding Developing Countries* (entry into force 29 January-26 February 1970).

<sup>156</sup> 1971 Berne Convention *Appendix on Special Provisions Regarding Developing Countries* (WIPO Records of the Diplomatic Conference for the Revision of the Berne Convention Paris 5-24 July 1971).



40. A tiny minority of poorer countries notified intention to institute compulsory licensing but the appendix is, for practical purposes, defunct. The failure of poorer nations to institute compulsory licensing is partly ascribable to a failure of domestic governance, and the absence of resources to organise reprinting and translation. At least as large a reason for failure is the hostility of publishers in developed countries to permitting, outside longstanding legislative exceptions, subtraction from their copyrights. In this respect, their concern was not only potential reduction of markets in some poorer countries.
41. The publishers from the United Kingdom, who spoke most strongly against compulsory licensing, continued a four century old tradition of recalcitrance. Publishers benefitted from distribution monopolies in the British Empire, and militantly asserted their domestic copyright monopolies, in their own right, and as upholders of authors' rights.<sup>157</sup> Rules about compulsory licensing of pharmaceuticals are, in some instances, relatively permissive. Since 2015, for instance, law implementing international regulation allows Australian pharmaceutical companies to request the grant of compulsory licences to produce generic versions of patent medicinal drugs to supply to developing countries the populations of which usually cannot afford to purchase pharmaceutical drugs.

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<sup>157</sup> The music publisher William Boosey, and book publisher, Frederick Macmillan, sat on the 1909 Law of Copyright Committee (Gorrell Committee) called to examine the recommendations of the 1908 Berlin Conference amending the Berne Convention. Boosey and Macmillan and other publishers like Alergeron Methuen, TN Longman Stanley Unwin and John Murray actively lobbied politicians about copyright law. Murray, in particular, was vocal during public debate over the 1911 copyright bill, which retained import monopoly provisions.

*Photocopying*

42. One way they asserted rights was by claiming that legislatures ought to pass laws conferring on the copyright holder the right to authorise photocopying. Publishers acted from alarm. From 1959, the sale of commercial photocopiers had revolutionised private and commercial copying. By 1962, citizens in the United States used photocopiers to copy 3.6 billion pages a year.<sup>158</sup> By 1967 Americans copied 27.5 billion pages annually.<sup>159</sup> A decade later they copied 50 billion pages a year.<sup>160</sup>
43. The explosion of copying outraged publishers. Before the 1967 Stockholm amendment conference, the Berne Convention did not confer on authors a general right to authorise reproduction. The convention vested in them the right to authorise the reproduction of literary works in any form<sup>161</sup> but the scope of that right was open to interpretation. No one could say with certainty whether individual pages of a work were themselves works. Confronting the possibilities of photocopying, the proponents of authors' rights faced the problem of securing explicit diplomatic recognition of the author's right to control the modes of copying made possible by a new medium.<sup>162</sup>

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<sup>158</sup> Louise Weinberg 'The Photocopying Revolution and the Copyright Crisis' 38 *The Public Interest* 99 (1975) quoting J Kopeke in Lowell Hattery and George Bush (eds) *Reprography and Copyright Law* Port City Press 1964 at 50.

<sup>159</sup> According John Hans Dessauer, joint developer of the first commercial photocopier the Xerox 914, in a paper called *Establish a Select Senate Committee on Technology and the Human Environment*.

<sup>160</sup> *Id* although no calculation, or direct data, is provided to explain the increased amount. Cf report of Gavin Souter 'Copyright versus photocopying' *Sydney Morning Herald* 27 December 1973, which reported 30 billion pages copied annually. In 1975, the *Report of the Copyright Law Committee on Reprographic Law Reproduction* reported the making of approximately 16.6 m photocopies annually in Australian university libraries.

<sup>161</sup> Berne Convention Article 9(1): *Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.*

<sup>162</sup> The publishers mobilised to respond to the perceived dual threats of compulsory licensing in poorer countries, and photocopying in richer countries. Among many associations and individual publishing houses,

*Compulsory licence for educational materials and photocopying*

44. They secured recognition in two decades. In 1984, an expert joint subcommittee of the Berne Union (subsequently WIPO) and UCC's intergovernmental copyright committee formally declared that the author's right to authorise copying extended to all aspects of reproduction, including private copying.<sup>163</sup> By then, many developed countries, supported by WIPO, had endorsed establishment of reproduction rights' organisations (in effect publisher-established societies for collecting photocopying fees) and established compulsory licensing schemes for photocopying.<sup>164</sup>
45. The publisher collecting societies, supported by government, focused attention exclusively on copying entities subject to government authority or suasion, namely government departments and educational institutions.<sup>165</sup> Legislation, usually establishing a tribunal to determine equitable remuneration,<sup>166</sup> compelled these instrumentalities to agree with collecting societies rates for employee, staff or student

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the *International Publishers Association*, domiciled in Geneva, and the *International Group of Scientific, Technical and Medical Publishers* (founded 1968) lobbied governments to regulate copying.

<sup>163</sup> Governmental deliberations over photocopying began in 1961, when the UCC's intergovernmental copyright committee and the Berne Union's executive committee convened an expert joint subcommittee to make recommendations about policy on photocopying. UNESCO and the Berne Union published a report in 1968 on *Photographic Reproduction of Protected Works*. WIPO assumed policy responsibility, and in 1975 appointed a 'Group of Experts on the Private Copying of Protected Works.' In 1984, the group of experts determined that the reproduction right extended to reprography, including copying for private non-commercial purposes. The group appointed an expert committee to draft model legislative provisions concerning reprography. The subcommittee's work resulted in a document published by the Council of Europe Committee of Ministers in 1990 *On Principles Relating to Copyright Law Questions in the Field of Reprography*.

<sup>164</sup> In 1972, Sweden and the Netherlands introduced the first compulsory licensing schemes for reprography. WIPO encouraged members to encourage founding of reproduction rights' organisations (RROs) to license photocopying of works on behalf of copyright holders.

<sup>165</sup> Unlike societies collecting for public performance of music, or playing or records, the RROs collecting for photocopying did not collect from commercial organisations. Additionally, RROs collected fractionally, ie, they levied per page copying fees, not fees for copying a whole work. Performing right collecting societies collected for public performance of the whole recorded work.

<sup>166</sup> In Australia, the Australian Copyright Tribunal, established under 138 of the *Copyright Act 1968* and administered by the Commonwealth Attorney General's Department.

copying in government agencies, schools and universities. Funds collected represented an inflation-adjusted annual windfall for publishers.<sup>167</sup>

*Paratrophic tendency*

46. The success of publishers in establishing compulsory payment from government, schools and universities for photocopying (fees later applied to digital copying and communication)<sup>168</sup> demonstrated again the paratrophic tendency of ownership. If a collective of proprietors is able to extract rent for the use of property, however costless the use, or indeed beneficial (for example, gratuitous copying of an academic article may create a larger readership than would otherwise be the case), that collective is unlikely to forego the opportunity for rent. Moreover, since this economic rent is not market rent, the collective, or single owner, is likely to demand as much rent as the lessee can pay. No user, however, volunteers to pay rent for costless use. The rentier owner must compel payment (probably illegal) or enlist government's help to make rent payment compulsory.<sup>169</sup>
47. In the case of copyright disputes in Australia, the United Kingdom and United States over public performance and photocopying fees, paratrophic action might have led to

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<sup>167</sup> In Australia, for example, the annual revenue of the Copyright Agency, founded in 1974 grew rapidly from the 1990s after government authorised it to exclusively collect fees from government (it had begun collecting from educational institutions in the 1970s). In the first decade of the 21<sup>st</sup> century, the agency's revenues began to approach those of APRA (founded 1926), which is the revenue leader of the numerous group of Australian collecting societies.

<sup>168</sup> In Australia, after passing of the Commonwealth *Copyright Amendment (Digital Agenda) Bill 1999* enacted September 2000 and commencing March 2001.

<sup>169</sup> The concept of economic rent, ie payment above cost plus competitively determined margin (which perfect competition reduces to zero), is well known. Although not its originator, a major contributor to the theory is Henry George, who observed that taxation should effect distribution. Unproductive use (idle land) should be taxed and productive use not. George's analysis calls attention to the argument that ownership is an object of taxation, not the source of a right to tax. If ownership is exercised to produce and supply something useful, that thing should be sold or rented at a utility price. If ownership is not so exercised, the owner is not entitled to exact rent. See Henry George *Progress and Poverty: An Inquiry into the Cause of Industrial Depressions and of Increase of Want with Increase of Wealth; The Remedy* Appleton 1879/1886 esp Bks IV and VII.

unsustainable inflation, but for the helpful action of government. Particularly in Australia and the United Kingdom (and also the US, during dispute over the public performance right), government interposed itself between rentiers and renters, the industry or group demanding fees, and the 'user' or 'consumer' grouping resisting liability. From the late 1960s onwards, copyright tribunals determined fees in Australian and the United Kingdom for public performance and government and educational copying creating predictable revenues for publishers.

102. Authors' rights enunciated in the Berne Convention compelled governments to determine bargains. In no sense could these compulsory bargains be said to be market-derived, since in the absence of legal compulsion, copiers (or in the case of public performance, music performers or broadcasters), would not contract with copyright owners, and prospective licensors would not find licensees. Publishers feared, possibly correctly, that if legislation did not empower them to enjoin bargains, no market for supply of copyright works would arise. Compulsory price determination precluded possibility of a free market, and substituted paratrophic supply, the consequence of which is price inflation and supply dictated by producer prerogatives not those of consumers.

103. Justice Holmes's decision in *Herbert v Shanley & Co* in 1917<sup>170</sup> proved influential in persuading governments that exclusive rights implied more than the right to treat over terms of supply. Though not explicitly, Holmes affirmed the existence of a right of remuneration. His judgment established that a right to extract remuneration for

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<sup>170</sup> 242 US 591. On Holmes's attitude towards copyright use, see Shiva Vaidhyanathan *Copyrights and Copywrongs: the Rise of Intellectual Property and How it Threatens Creativity* New York University Press New York 2001. Holmes, suggested Vaidhyanathan, could have had contemplated in *Bleistein v Donaldson Lithograph Co* (1903) USC, that use could mean use 'to increase trade and help make money.'

use or exercise of a copyright inhered in the copyright. Subject to legislative exceptions the copyright owner could insist on remuneration for use without first engaging in a contractual process of offer and acceptance preceding use.

104. The advocates, in the 1960s-1980s, of compulsory arbitration to determine fees for copying by government and universities could be distinguished, in one respect, from their predecessors in the 1920s-1950s, who argued for fees for the public performance of music. The former group sought to tax mainly non-commercial copiers, who copied material for bureaucratic or educational purposes.<sup>171</sup> The latter group insisted on payment by commercial performers of music, especially radio broadcasters. Both, however, insisted, usually implicitly, on a right of remuneration.<sup>172</sup>

105. Publishers adopted the view, indicated by Justice Holmes, that the right of authorisation confers more than a mere right to prohibit use, or refuse supply: it also permitted them to hurdle the inconvenience of risk, since government provided for tribunals to fix enforceable price of supply. Acceptance by government of an implicit right of remuneration enabled publishers to argue that charging fees for per page

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<sup>171</sup> See *Report Copyright Law of the Committee on Reprographic Reproduction* October 1976 Australian Government Publishing Service, Canberra (*Franki Report*) at paragraph 2.26. The Australian Copyright Council argued for a photocopying licence for 'public interest' copying in university and school libraries.

<sup>172</sup> For right of remuneration, recognised in treaty only in relation to phonogram producers and related performers, see chapter 6 footnote 104. The attitude of publishers in the United States is summed up by an anecdote in Goldstein *supra* at 64. When informed in 1963 that the National Library of Medicine annually photocopied tens of thousands of articles from the journals of Williams and Wilkins, the medical publisher of which he was president, William Passano became enraged. He said, 'I don't want to be looked on as an easy mark. You know the tramp that puts a mark on a gatepost to say, "The people that live here are soft touches"? I don't want anyone to think that I'm one, that they could take my money and get away with it.' In 1973, Williams and Wilkins instituted legal proceedings against two government libraries, claiming that the libraries' photocopying of journal articles infringed its copyright. In 1975, the case reached the Supreme Court, which split evenly on a question of fair use and dismissed Williams and Wilkins's appeal. The dismissal technically confirmed the finding of the full court of claims that Congress should determine the copyright implications of photocopying. (*Williams and Wilkins Co v United States* (1975) 420 US 376).

photocopying did not offend the historical understanding of a copyright work as the whole of the work, not pages of the work.<sup>173</sup>

106. A right of remuneration implies that any copying, of whatever fraction of the whole, is remunerable.<sup>174</sup> What mattered – borrowing the words of Holmes concerning the public performance right - was that copying ‘might compete with and even destroy the success of the monopoly the law intends [the copyright holder] to have.’<sup>175</sup>
107. In other words, whatever use is made of copyright material, even if a page is copied for private use, that use, in principle, is remunerable. Holmes’s characterisation of the copyright owner’s entitlement is paratrophic. If the subject matter of ownership has commercial value, use of the thing owned by a person other than the owner confers financial benefit on the user, who must compensate the owner for the benefit vouchsafed.

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<sup>173</sup> The idea that each page of a work is remunerable assumes that economic value subsists in each page, and unauthorised copying of a single page deprives the publisher of the value subsisting in the page. This subsistence principle could be called the fallacy of intrinsic value, since no publisher adduced evidence to prove that contents of pages are intrinsically valuable or that copying pages subtracted from the copyright holder’s economic welfare. WIPO, UNESCO, and consequentially, governments accepted that unremunerated fractional copying harmed the economic interests of copyright holders. WIPO declared (1984) that the Berne Convention’s reproduction right contemplated that copyright owners were entitled to control reprography. Thus, copyright owners could exact fees for fractional, or per page photocopying.

<sup>174</sup> See Franki Report *supra* pp 81-84, summarising submission of the Australian Copyright Council, which sought per page remuneration of copying, and opposed in principle dilution of the right of remuneration. The ACC contemplated non-remuneration in the event that it could not offer a voluntary licence, or if copying was insubstantial, or potentially the licensor agreed to permit non-remunerated copying. However, the ACC indicated that in such an instance the Copyright Tribunal would be required to fix terms of remuneration, suggesting that the ACC did not contemplate any gratuitous copying unless copying was insubstantial.

<sup>175</sup> *Herbert v Shanley supra* at 594.

## Part 2 Exclusionary effect and exceptions

### *Ownership concentration*

108. The copyright system, like any property system, distributes advantage, vesting more or less economic and political control in owners. In most modern property systems, ownership is open to any adult, but in reality, most of what is owned usually concentrates in the hands of a minority. Even in countries, such as Australia, in which land ownership is relatively widely distributed, small population cohorts own the majority of available land. Wealth is concentrated.<sup>176</sup>
109. Distribution, as is evident from concentration of copyrights in the hands of corporations associated with copyright industries, is a consequence of political-constitutional settlements, which determine proprietary dispositions. As statistical measures (chapter 4) show, property systems that effect more equal allocation of social benefit, measured by distribution of income and wealth, and indicia of health and educational advantage, usually predict political systems characterised by authentically representative government and the rule of law.
110. The process of representative and accountable government, unless subverted, ought to be inimical to political favouritism, and thus distortion of allocation decisions. In principle, democratic governance is a better prophylactic against exclusionary policy than any other type of government since equal distribution of voting power (one

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<sup>176</sup> The wealthiest 20% of Australian households own 61% of net household wealth. The poorest 20% held less than 1% of net household wealth. The first cohort is 68 times more wealthy than the second. See Australian Bureau of Statistics 6554.0 - *Household Wealth and Wealth Distribution, Australia (2011-12)*. Concerning global wealth distribution, the Credit Suisse Global Wealth Report (October 2013 author Anthony Shorrocks) ranks Australia the second least unequal country after Japan of 27 major countries, and the 12th least unequal of 174 countries. Analysis by Peter Whiteford <http://theconversation.com/income-and-wealth-inequality-how-is-australia-faring-23483>.



citizen, one vote) implies that government allocates in accordance with the wishes of the majority, or at least a diffuse constituency.

*Choice to exclude*

111. The copyright system, however, is governed primarily for a constituency – or perhaps more accurately, polity - of industries. Diplomatic governance arrangements administered by WIPO and the WTO buttress an international economic system for sale and distribution of, and access to, the output of copyright industries. Income and wealth created by this system accretes to the industries. The exclusionary effect of this concentration is not directly economic, since usually consumers and users are economic actors only to the extent that they expend income to secure supply or access.<sup>177</sup> Price may be exclusionary and terms of supply restrictive, but price and supply limitations do not necessarily exclude consumers in the richer countries. In these countries, exclusion is primarily social.

112. Paratrophic practices inflate costs, which may not be passed on to consumers by commercial licensees, such as radio and television stations, who must pay fees for broadcasting or communicating works. Copying and communication fees paid by public and educational sectors cause diversion of financial resources, which reduces the calibre of public service. In poorer countries, paratrophic collection of fees may be unfeasible, since resources for payment and collection may be negligible. But

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<sup>177</sup> It can be argued that especially in the 21st century, file-sharing litigation, the activism of the open source and open access movements, and the success of Creative Commons, have transformed many consumers into users, who have collectively influenced the politics of copyright supply and access. Additionally, the seeming ubiquity online of access corporations like Google has added a new dimension to political calculations, since some access corporations are more economically powerful than most copyright industry corporations, yet present themselves as non-aligned activists in copyright debates.

price, and the difficulty of compulsory licensing, are severe obstacles to access: in many jurisdictions, universities cannot afford the price of foreign journals, and schools are similarly constrained by the access cost of electronic materials and textbooks. Prospective users are excluded from knowledge.<sup>178</sup>

113. Exclusion is the result of political choice, although the origins of pronounced social inequality might more usually be ascribed to rebarbative local conditions, custom and happenstance. A history of unlucky circumstances, however, does not determine a choice to exclude. It is true that retrograde political decisions that harm people may be made unconscious of exclusionary consequences, or at least without intent to exclude. Political compacts distributing benefit through property systems develop over time, and those that benefit most from allocation of proprietary rights may bend themselves to the task of self-advantage heedless of consequential disadvantage to others.
114. In some cases, social exclusion may be unconsciously effected. Formation, background, class affiliation, personal predilection, and so on, influence choices. Yet whatever factors may be said to occlude awareness that the decisions of political actors may result in social exclusion, that exclusion cannot occur without premeditated decision - expressed as political choice - to cause, or permit, harm to others.
115. Similarly, inclusion cannot occur without human choice. As discussed earlier, the judiciary is instrumental in interpreting political choice to reinforce political and constitutional compact. If that compact is exclusionary, the judiciary will elaborate

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<sup>178</sup> See Kunle Ola 'Evolution and future trends of copyright in Nigeria' *Journal of Open Access to Law* Vol 2 No 1 2014.

and uphold the compact, as interpreter and enforcer of laws that derive authority from constitutional arrangement.

*Fair abridgement, fair use and assertion of proprietary domain*

116. In the later 1730s, publishers' 28 year copyrights, recognised under the Statute of Anne (1710), began to expire.<sup>179</sup> The publishers embarked on what seemed in principle a quixotic quest to persuade courts and legislators that statute does not extinguish copyright law. According to the publishers, statute could govern copyright but it could not limit term. The author (publisher) owned a work in perpetuity, and title could be devised. Quixotic as their claim seemed, the publishers almost succeeded.<sup>180</sup>

117. Litigation over copyright term travelled via a number of cases to the House of Lords, which ruled definitively in 1774 that statute extinguished so-called common law copyright.<sup>181</sup> In parallel with cases on perpetual copyright, and beyond, courts in England also considered a string of cases alleging infringement of copyright in works by direct copying of portions of works, or abridgements of works.<sup>182</sup>

118. The latter practice, involving abbreviating, and often superficially rewriting, involved creation of what in modern copyright parlance is known as derivative works. Derivative works are likely to be regarded as infringing unless they can be called

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<sup>179</sup> The Act provided for a 14 year term renewable by surviving authors for a second 14 year term.

<sup>180</sup> For background and summary of cases, see Mark Rose *Authors and Owners, The Invention of Copyright* Harvard University Press 1993 and Lionel Bently and Brad Sherman *The Making of Modern Intellectual Property Law* Cambridge University Press 1999.

<sup>181</sup> *Pope v Curl* (1741); *Millar v Kinkaid* (1750) 98 ER 210; *Tonson v Walker* (1752) 36 ER 1017; *Tonson v Collins* (1761) 96 ER 169; *Millar v Donaldson* (1765) 28 ER 924; *Millar v Taylor* (1769) 98 ER 201; *Donaldson v Becket* 1 Eng Rep 837 (HL 1774).

<sup>182</sup> From *Gyles v Wilcox* 2 Atkyn's Reports 142 to *Tinsley v. Lacy* (1863), 1 H and M 747.

transformative. A transformative work is different in expression and tenor from the first work, with which it share some characteristics, and can be called original.

119. English judges, onwards from the Earl of Hardwicke in *Gyles v Wilcox* in 1740,<sup>183</sup>

established common law friendliness to fair abridgement of books, if the defendant could establish that abridgement showed ‘invention, learning and judgment.’ Later, United States judges developed the doctrine of ‘fair use’, originally a derivative of the concept of fair abridgment, but eventually a more complete exposition, set out in the famous Supreme Court judgment of Joseph Story in *Folsom v Marsh* (1841).<sup>184</sup>

Congress codified fair use principles in the 1976 Copyright Act. The UK Copyright Act of 1911 stated that ‘any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary’ did not constitute copyright infringement.<sup>185</sup>

120. In their modern incarnation fair dealing provisions permit limited unauthorised copying of copyright works for research and study, criticism and review, news reporting, legal advice and parody and satire. Fair use permits copying for purposes including, but not limited to, comment, reporting, criticism, teaching, research or scholarship. Criteria for determining fair use include: purpose and character (including whether the use is commercial or for non-commercial educational purposes), amount copied and how substantially the work is copied, nature of the copyrighted work, and

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<sup>183</sup> 2 *Atkyn's Reports* 142.

<sup>184</sup> 9 F Cas 342 (CCD Mass 1841) (No 4901).

<sup>185</sup> 1&2 Geo 5 section 2(1)(i).

effect of the use upon the potential market for or value of the copyrighted work.<sup>186</sup> In both instances, the scope of exception is limited.

121. A principle is discernible: copyright exceptions must not, in any respect, facilitate undermining of markets available to rights-holders, and a right to unauthorised copying must be confined to certain public purposes that are not undertaken for profit and benefit the public – such as research.
122. Statutory copyright exceptions permit copyright users to perform certain acts not otherwise permitted by the statute. They are framed to safeguard copyright markets and merit of discussion for one reason. The history of the exceptions illustrate how judges give effect to legislative purpose, which in turn effects constitutional compact, to strengthen and assist the legislature's allocation of proprietary rights. In *Folsom v Marsh* (1841), Justice Joseph Story, on the Supreme Court's Massachusetts circuit, decided that the author of a book on George Washington infringed copyright by copying 255 pages from another book on Washington.<sup>187</sup>
123. Most of the material copied consisted of copies of letters written by Washington. Story found 'clear invasion of the rights of property',<sup>188</sup> setting out the elements of fair abridgement, which provided the foundation for the fair use doctrine. A court must, 'look to the nature and objects of the selection made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.'<sup>189</sup>

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<sup>186</sup> *Id* (1)-(4).

<sup>187</sup> 9 F Cas 342 (CCD Mass 1841).

<sup>188</sup> At 349.

<sup>189</sup> At 348.

124. For the first time, a court of final appeal ruling on a question of copyright expressed a principle of proprietary supremacy. Some previous judgments pointed to the public objects of copyright legislation,<sup>190</sup> suggesting that proprietary interest may be auxiliary to public, and others indicated parity between the interests of author and public.
125. Story's judgment allowed the interpretation, subsequently adopted, that even harmless use is trespass, unless the trespasser is shown to have traversed the copyright domain in accordance with Story's formula for fair use.<sup>191</sup> Judicial opinion followed his lead, in England as well as the United States.<sup>192</sup> Since the Story reversal, statutory exceptions have little availed those who wish to freely copy for non-commercial purposes. Little copying is free. It may be paid for by an institution not an individual – for instance copying of students in educational institutions is paid for by the institutions – but a price is exacted by collecting societies.

*Statutory exceptions, copying and proscription*

126. In the 1970s and 1980s, the recording and film industries respectively decried private tape recording of music (and purchase of illicit tapes) and private video recording of television broadcasts. Both copying technologies probably lifted sales.<sup>193</sup> However

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<sup>190</sup> A century before *Folsom*, Hardwicke in *Gyles v Wilcox* (1740) *id* said, '... abridgments may with great propriety be called a new book, because not only the paper and print but the invention, judgment, and learning of the author is shown in them, and in many cases are extremely useful though in some instances prejudicial by mistaking and curtailing the sense of an author.'

<sup>191</sup> A severe critic of Story's judgment, and subsequent interpretations of the judgment, is Lyman Ray Patterson 'Folsom v Marsh and Its Legacy' *Journal of Intellectual Property Law* 5(2) 1998 431–452.

<sup>192</sup> In *Tinsley v. Lacy* (1863), 1 H and M 747 at 754, Sir William Page Wood (later Lord Hatherly) said, 'The Court has gone far enough in the direction of sanctioning fair abridgments; and it is difficult to acquiesce in the reason sometimes given that the compiler of an abridgment is a benefactor to mankind by assisting in the diffusion of knowledge.'

<sup>193</sup> In *Sony Corporation of America v Universal City Studios* 464 US 417 (1984), the United States Supreme Court found, 5-4, that private copying of television programs using video recorders (and copying on to video cassettes) was fair use. The majority rejected the idea, pressed by the minority, that because technology may

file sharing on the internet, beginning in the late 1990s, caused both industries to engage in sustained litigation in the first decade of the 21<sup>st</sup> century.

127. Statute, severely sanctioning unauthorised use, created a problem of proprietary oppression. The effect of rights enforcement was in a distant sense analogous to the effect of the English enclosure acts, since enforcement and enclosure both denied the possibility of public use. The difficulty of policing file-sharing resulted from numbers – millions engaged in the practice – and dispersion.<sup>194</sup> The millions were spread across the United States, and the globe. Additionally, file-sharers resented the proprietary claims of the music industry. In practice, they attacked the idea of a price for music. They felt no moral or other obligation to industries. The record companies responded with a string of legal suits.<sup>195</sup> In the first significant case, an amicus brief of law professors declared that the purpose of ‘copyright law is not ‘to protect existing business models’.<sup>196</sup>
128. Despite successes in court, the music and film industries could not successfully grapple with the protean character of peer-to-peer software, which evolved to distribute music and films in new and more elusive ways. Both recording and film industries introduced watermarking and digital rights management applications to prevent illegal copying. But they could not overcome the internet’s limitlessness.

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undermine proprietary rights, is should be prohibited. After the decision widespread use of video recorders did not affect cinema attendance, and the video rental industry proved a huge financial windfall to movie studios.

<sup>194</sup> During the 18 month life of Napster (1999-2001), the first prolific file-sharing service in the United States, peer-to-peer users downloaded 2.7 billion music files (RS Talab ‘Napster, Distributed Peer Sharing and its Chronology: “You Say You Want a Revolution?”’ *Tech Trends* 46(3) 3-6).

<sup>195</sup> See: *A&M Records Inc v Napster Inc* 239 F3d 1004 (9<sup>th</sup> circuit 2001); *MGM Studios v Grokster Ltd* 545 US 913 (2005); *Arista Records LLC v LimeWire LLC* 2010 WL 1914816 (SDNY 11 May 2010). On the copyright term, see *Eldred v Ashcroft* (2003) 573 US 186.

<sup>196</sup> Amended Brief Amicus Curiae of Copyright Law Professors in Support of Reversal, Consortium of 18 Copyright Law Professors, *Napster Inc v A&M Records et al* (2000).

129. Digital technology and the internet's pervasiveness vanquished obstacles to information supply. Access corporations like Google facilitated supply of limitless information. Online communication overturned the old idea of scarcity, which for 300 years, supported vesting of proprietary rights in publishers and the industries that followed: recording, film, broadcasting, software.<sup>197</sup>
130. Previously, rights were said to prevent crushing of incentive. Now, despite seemingly ceaseless file-sharing, and incontinent, often infringing, information supply, production continued, and industries continued to thrive. It could be seen that proprietary control of the supply of information was not necessary to prevent exhaustion or undersupply. The possibility arose that something like perfect competition in information supply could pertain as proprietary control diminished. At any rate, the logic of the internet, relatively accessible, relatively unconstrained, and available to the multifarious public, could be seen to contradict the policy of proprietary extension.
131. As the peer-to-peer battles demonstrated, industries, especially in the United States, show little sign of abandoning criminal enforcement of copyrights as a means of controlling supply and distribution. The tendency in consumer choice seems increasingly towards licit supply but at nil, marginal or near-marginal cost. Services like You Tube, Beats Music, Pandora, Spotify, and Sony Music stream for free or near-marginal subscription cost, while eMusic and iTunes offer download subscriptions.

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<sup>197</sup> The idea of scarcity informed John Locke's theory – he posited that government must protect property, the product of labour combining with nature, to guarantee continued production – and Thomas Malthus's theory of overpopulation. (John Locke *Two Treatises of Government* Cambridge University Press 1689/1988); Thomas Malthus *An Essay on the Principle of Population* Oxford University Press 1798/1999).



Insofar as distribution technology makes proprietary control ineffectual (as in the case of peer-to-peer networks), proprietary suppliers must supply at prices closer to marginal cost, and accommodate consumer preference (eg, item distribution (one song) not group distribution (one album)).

### Part 3 Conclusion

#### *Key elements of copyright system*

132. Chapters 5-6 illustrate how a system of personal property – the copyright system – is, by allocation of exclusive rights, both distributive and exclusionary. For more than a century of copyright legal expansion, three factors relevant to establishment of a property system are noticeable. The first is constitutionality: the Berne Convention is an archetypal constitution commanding seeming universal assent to a formula of rights, and right.<sup>198</sup>
133. The second factor is political ratification: property systems develop according to political decision. British and Australian politicians implemented a treaty inspired by a great French novelist and the organisation that he also inspired, the International Literary and Artistic Association. Yet governments chose, seemingly for perceived reasons of cultural benefit, to adopt the program suggested.<sup>199</sup> The third factor is social identification: politicians and the judiciary developed and protected the copyright system by responding to the importuning of vested economic interest. They seem to have done so primarily because they believed that property is inviolable.<sup>200</sup>
134. Governments legislated to favour authors, yet they strengthened the economic position of industries before that of authors. George Bernard Shaw wrote of artists in

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<sup>198</sup> A literature search yields one article explicitly critical in entirety of the Berne Convention – Alan Story ‘Burn Berne: Why the Leading International Copyright Convention Must be Repealed’ *Houston Law Review* 40(3) (2003) 763-801.

<sup>199</sup> Examination of the historical record, including Hansard and newspaper accounts indicates that policymakers and legislators took for granted the moral necessity of implementing the convention.

<sup>200</sup> As evinced by the judgments of the two main cases cited in this chapter, *Herbert v Shanley Co* and *Stephen Cawardine & Co*.

1911, not incorrectly: ‘I suppose we shall go to the wall.’<sup>201</sup> The effect of regulatory developments was to bestow on copyright industries economic power, and on a favoured minority of successful authors, economic reward. Regulation mostly disregarded the existence of consumers and facilitated growth of a popular culture shaped by the prerogatives of industries.

135. The matter of social identification invites discussion. Human mental arrangement creates bias towards appropriation and possession. Property confers benefits – privacy, security, fungibility, saleability – that most, if not all, societies and people regard as social goods.<sup>202</sup> If, as discussed in chapter 3, we can deduce that human mental organisation is appropriating and possessive, it is likely that cognitive bias causes decision-makers to overvalue the economic and social benefit of extension to proprietary rights, and underestimate the social cost of such extension.
136. The copyright system, because it is designed to assure private economic welfare, benefits the public to the extent that supply is efficient, which it cannot be, given the length of copyright term, and legislative exemption from competition rules.<sup>203</sup> The system is configured to permit state-sanctioned exercise of proprietary rights that procure private before public benefit.

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<sup>201</sup> Letter to *The Times* 4 May 1911 at 7. The copyright system has delivered wealth to some artists on a scale unforeseeable at the time that Shaw wrote, although Shaw also observed in print that copyright law provided extraordinary economic windfalls to artists lucky enough to write or compose popular works.

<sup>202</sup> Outside nomadic or hunter-gatherer society, is difficult to identify any society that does not embrace private familial occupation of dwellings and trade in goods.

<sup>203</sup> The *Competition and Consumer Act 2010* (Cth) section 51(3) exempts copyright licensors from the majority of provisions in Part IV Restrictive Trade Practices. The Commonwealth *Competition Policy Review* panel chaired by Professor Ian Harper released a draft report in September 2014, recommending, among other things, repeal of section 51(3). Repeal is unlikely ([www.crikey.com.au](http://www.crikey.com.au) ‘Harper’s review suggest gasp! an economy to benefit consumers’ 23 September 2014; [www.guardian.com.au](http://www.guardian.com.au) ‘Peter Dutton says pharmacy ownership and location laws should stay’ 24 September 2014).

*Paratrophic arrangements*

137. The copyright system is the enabler of paratrophic arrangements that result from collusion to create artificial markets: protected by government, rentiers declare that compulsory rent derives from a voluntary bargain. If remuneration is compulsory - because government creates machinery for pricing and quittance - exchange is not voluntary, which makes probable that terms of supply are oppressive. Compulsion makes impossible a voluntary market.<sup>204</sup>

138. The secretary of the Australian Attorney General's Department pointed out in 1928 that nothing in copyright legislation permitted the rights-holder to compel payment of remuneration. He wrote that APRA, 'had the right to take proceedings against any person who without licence performed works in which it owned the performing right.'<sup>205</sup> He said also that APRA could, 'name its price for granting a licence to perform any or all such works.' But, APRA, 'clearly has no right to demand a yearly toll from anyone.'<sup>206</sup>

*Purpose and effect of royalties*

139. This following table containing quotations, under subject headings, from people (or committees) involved, directly and indirectly, in the institution of royalty systems, illustrates the paratrophic attitude which governments accommodated.

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<sup>204</sup> In theory, compulsory bargains – made by the copyright tribunal, which fixes payment rates for public performance and copying and communication – are more vulnerable to government scrutiny than any product of copyright regulation. That government will not scrutinise these bargains demonstrates the argument that a property system is the outcome of political settlement, which is itself the outcome of sovereign contest.

<sup>205</sup> Letter Sir Robert Garran to managing director Union Theatres Sydney on behalf of the Attorney General Sir John NAA A467 SF1/43).

<sup>206</sup> *Id.*

TABLE 5 – QUOTATIONS ON ROYALTIES

SUBJECT	QUOTATION	AUTHOR
Public performance of musical works	<i>My God, if they'll do this to my stuff when can afford expensive lawyers, what aren't they doing to the others? We've got to look after the b'ys.</i>	<b>Victor Herbert</b> co-founder of American Society of Composers Artists and Performers in 1913. <sup>207</sup>
	<i>If [m]usic did not pay it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.</i>	Justice <b>Oliver Wendell Holmes Jr</b> US Supreme Court judgment 1917 <sup>208</sup>
Public performance of recordings	<i>I put the radio on this morning. I heard them playing one of our records. I want to know something: are we getting paid for that?</i>	<b>Louis Sterling</b> managing director of EMI (UK) (joint founder of PPL) 1933: <sup>209</sup>
	<p><i>... it becomes necessary to ask whether in fairness the public who gets its enjoyment of those records through a new channel [radio broadcasting] should not be called upon to pay ...</i></p> <p><i>The person who uses that record in public for his own profit, who could not otherwise obtain that profit should pay for it; does not justice require that those who have provided him with those means should be entitled to charge for it?</i></p>	Mr <b>Reginald Schofield Bonney</b> counsel for the Australian Associated Record Manufacturers to royal commissioner Justice <b>Owen</b> 1933. <sup>210</sup>

<sup>207</sup> Quoted in Lionel S Sobel 'The Music Business and the Sherman Act: An Analysis of the Economic Realities of Blanket Licensing' *Loyola of Los Angeles Entertainment Law Review* 1 (1983) 1-50 at 3.

<sup>208</sup> *Herbert v Shanley Company* 242 US 591. At 594-595.

<sup>209</sup> See *A Short History of IFPI* (<http://www.ifpi.org/downloads/ifpi-a-short-history-november-2013.pdf>). EMI and Decca founded Phonographic Performance Limited in 1934 (after the judgment in *Gramophone Co Ltd v Stephen Cawardine*) to collect fees for public performance of records. The collecting society is now called PPL.

<sup>210</sup> Transcript of address to Owen Royal Commission 1932(NAA A467 SF1/85).

	<i>I can see considerable objection, from that standpoint, to the view that persons may obtain, without doing anything more than buying a record, the advantage of the work, skill and labour expended by the makers of gramophone records for the purposes of a public performance.'</i>	Viscount <b>Maugham</b> judgment in <i>Cawardine</i> 1934. <sup>211</sup>
<b>Unauthorised copying of pages of parts of literary works</b>	<i>... a way must be found of allowing the creators of copyright to share with the users of copyright the benefits of the new techniques.</i>	Australian Society of Authors statement 1974 <sup>212</sup>
	<i>... [photocopying] [c]an be a valuable aid in specific, strictly defined cases, it can likewise be an evil making continually greater inroads.</i>	International Publishers' Association memorandum 1973. <sup>213</sup>
	<i>Virtually the entire object underlying the authors' claim for control over reprographic reproduction is to ensure increased remuneration for this use of their works. The view that 'what is worth copying is worth protecting' has been put to us emphatically and persuasively. However, what this usually means is that 'what is worth copying is worth paying for'. Very few authors want restrictions for their own sake but rather as a means of securing remuneration.</i>	Franki committee report 1976. <sup>214</sup>

<sup>211</sup> *Gramophone Co Ltd v Stephen Cawardine & Co* [1934] Ch 450 Ch D at 461.

<sup>212</sup> Australian Society of Authors submission 11 Oct 1974 to Copyright Law Committee inquiry on reprographic reproduction.

<sup>213</sup> International Publishers Association *Second Memorandum on Reprographic Reproduction* submitted to UNESCO and WIPO for the second meeting of experts May 1973.

<sup>214</sup> *Report Copyright Law of the Committee on Reprographic Reproduction* October 1976 1.20 at 11 (Australian Government Publishing Service, Canberra 1976).

144. The principle uniting the views put forward in Table 5 is stated in the last sentence of the last quote, from the Franki committee report of 1976: 'Very few authors want restrictions for their own sake but rather as a means of securing remuneration.' The primary concern of every person or interest quoted (other than the Franki committee) is to secure remuneration of copyright holders. The copyright holders in question – with the exception of record companies - were not interested in prohibiting use. What mattered was predictable income remittance adjusted usually by tribunal or board determination. Government proved an invaluable co-operator compelling royalty arrangements.

*Exclusionary consequences*

147. Paratrophic copyright arrangements illustrate the exclusionary consequences of copyright laws. By government fiat, licensees pay to exercise rights that pertain to activities that do not cause economic or other harm to the copyright owner or licensor. If unremunerated, the activity represents loss of notional income, but does not subtract from the value of primary remunerable activity for which a voluntary market exists<sup>215</sup> (such as selling dvds, or, previously, records). If the licensee is a corporation, such as a broadcaster, the effect may be to inflate price and divert resources from more efficient use. Public harm is indirect. More importantly, royalties may deny a potential licensee access to information and knowledge, as when

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<sup>215</sup> Although the voluntary copyright markets are distorted by imbalance in bargaining power: when piracy is largely constrained, as was the case before the internet, prices for copyright product is high, because exclusive rights, and the inordinate length of the copyright term, exclude competitors from the market. However digital reproduction and communication has made unfeasible formerly pertaining markets that relied for effectiveness on copyright rules.

libraries in poor countries cannot afford journal subscriptions or photocopying fees.

Public harm is direct and severe.

148. The voluntariness of voluntary copyright markets for the sale of books, records, videos and software products is/was restricted by copyright's restrictive proprietary rules, and, above all, the lengthy duration of copyright. However, these supply markets allow/allowed the possibility of market entry, involve/involved exchange of consideration, and do/did not compel purchasers to buy. Paratrophic arrangements invite especial criticism because they are compulsory and may be anti-social in effect.
149. Both conventional copyright markets and paratrophic copyright arrangements exclude many consumers/users because of price. Both exemplify proprietary operation because the establishment and continuance of both types of legal-commercial arrangement is impossible without political consent, and continued political accommodation. Neither arrangement could exist without, in the first case, copyright laws passed for the benefit of owners, and in the second, government legal intervention to make compulsory payment of royalties.
150. The lesson, which can be applied to any property system, is that exclusion is a political choice. Equally, the choice not to exclude is political. The onus lies on government to regulate fairly, avoid partiality, and, except to the extent that it polices markets for voluntariness and legal compliance, to remove itself from voluntary markets. In a frequently quoted observation, Adam Smith said that:



*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.<sup>216</sup>*

He went on:

*It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.<sup>217</sup>*

A considerable part of the copyright law is testament to the law facilitating conspiracy against the public, as envisaged by Smith. Exclusion and inequality follow from that conspiracy.

## **SUMMARY**

This chapter discusses the paratrophic aspects of the copyright system. If proprietary rights are exercised to compel bargains destitute of benefit to any person other than the owner, or that transfer income from one economic actor to another, even though the activity for which payment is made does not subtract from the economic welfare of the second actor, they are paratrophic. That the copyright system is paratrophic demonstrates the argument that property systems are a product of political compact, which is itself the product of sovereign contest. The consequence of this compact, which distributes social benefit and disadvantage by rights allocation, is, among other things, social exclusion and inequality.

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<sup>216</sup> *An Inquiry into the Nature and Causes of the Wealth of Nations* Chapter X, Part II.

<sup>217</sup> *Id.*

## CHAPTER EIGHT

### REDUCING SOCIAL INEQUALITY: SOME REFORM PROPOSALS

#### PURPOSE

The preceding chapters are concerned with demonstrating the first part of the thesis – that ownership causes social inequality. This chapter is concerned with the second part of the thesis, which posits that reduction of ownership results in reduction of social inequality. Richer countries have instituted extensive social redistribution programs since the second world war and the United Kingdom instituted income tax in 1798. Income and wealth taxes powerfully press against social inequality by, in theory, reducing the scale of ownership and consumption. This chapter is concerned with ways to enlarge the public domain by voluntary property redistribution and surrender of property, especially intellectual property by surrender of IPR before expiry of term.

#### HEADINGS

Preliminary

Domains and duration of right

Reducing the copyright term

Public and private domains

Enlarging the public domain

Suggestions for a public domain

Public domain and term

*Preliminary*

1. This dissertation has focused on demonstrating the thesis that ownership causes social inequality, analysing, in particular, the copyright system to demonstrate the process of proprietary exclusion. The corollary of the thesis is that reducing ownership reduces social inequality. This chapter is concerned with the second proposition, and a derivative question – how, and to what effect, might ownership or control be reduced?
  
2. Social policy in richer countries has, since implementation of widespread reconstruction programs after the second world war,<sup>1</sup> provided direct evidence of how the question might be answered: by taxation. Social redistribution programs were not designed to achieve a theoretical object of reducing ownership.<sup>2</sup> Taxation policy that makes redistribution possible is intended to efficiently raise revenue to finance social welfare programs that social consensus deems necessary.<sup>3</sup>
  
3. Taxation policy is part of conventional discourse on social equalisation, and while new observations could be made on the subject, the topic of taxation is partly traversed and not a primary object in discussion in this text of possible ameliorative action concerning social inequality. A short discussion of taxation is contained in Annex 2.

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<sup>1</sup> Chapter 4 Part 2.

<sup>2</sup> As far as I can ascertain, only Karl Marx articulated a theory of taxation that is not confined to social contract theory or the rationale of fiscal necessity. Marx tied tax to property reduction (or abolition). He outlined a 10 point program for achieving collective society beginning: ‘... in most advanced countries, the following will be pretty generally applicable. 1. Abolition of property in land and application of all rents of land to public purposes. 2. A heavy progressive or graduated income tax. 3. Abolition of all rights of inheritance.’ (Communist Manifesto *supra* chapter 2).

<sup>3</sup> Report of the Royal Commission on the Income Tax HMSO 1920 Part III pp 41-73. See also the 1942 *Report on Social Insurance and Allied Services* (the ‘Beveridge Report’), which proposed creation of a state making comprehensive social provision funded by high fiscal contribution (the ‘welfare state’).

*Domains and duration of rights*

4. Instead, discussion focuses on a voluntary means, perhaps less militant than taxation, to reduce social inequality. By conceiving of private and public domains, depicted in Figure 7, we can more identify bifurcation of that which is private and public, and perceive how the private domain, by its nature, encroaches on the public. Identifying two domains shaped by exclusionary rights (private domain) and unitive rights (public domain) also assists us to see that while the private domain is self-sustaining, or rather sustained by the ceaseless growth of proprietary rights, the public domains is liable to be consumed by proprietary enlargement.
  
5. Domains are notional, although they may describe things actual, and the rights that pertain to them are actualised each day in economic and social life. The *principles* that notionally generate and vivify the domains are, however oppositional. The private domain encloses: enclosure does not admit principles of non-control, non-exclusion, and equality, partly expressed by the United Nations' Declaration of Human Rights (1948).<sup>4</sup> The consequence of antithesis is that domains encroach. Usually, by process of privatisation, the private domain encroaches on the public.<sup>5</sup> The process is also logical: the public domain is non-exclusionary, and should therefore be non-appropriating. By contrast a proprietary right exists because of, or to protect or facilitate, appropriation.

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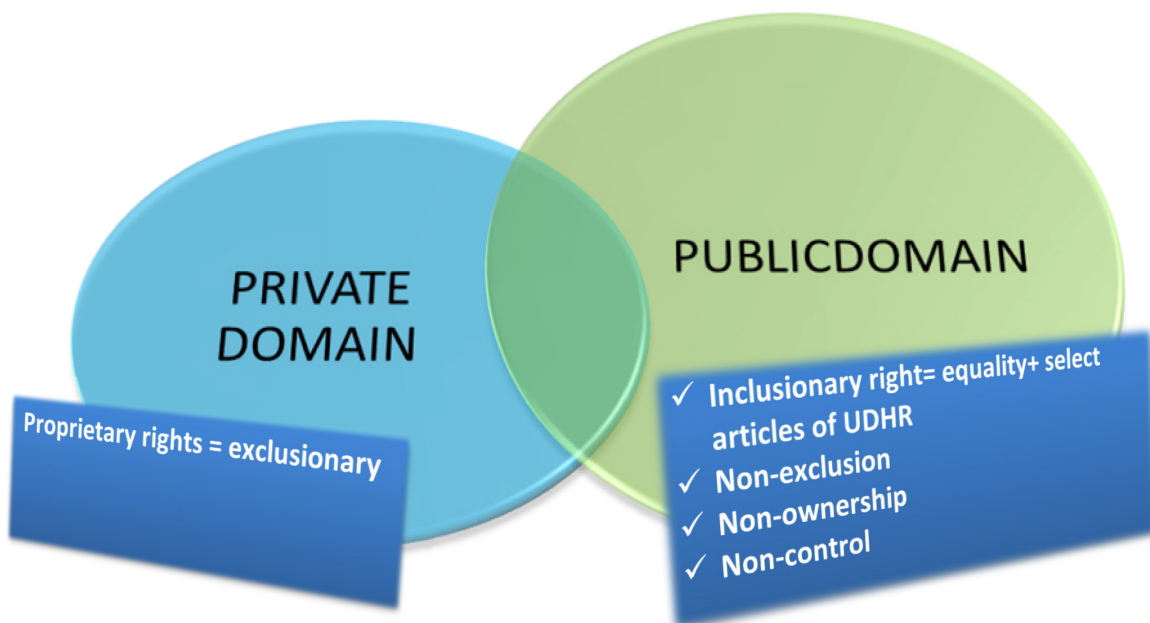
<sup>4</sup> See articles 1 (born free and equal in dignity and rights); 2 (rights and freedoms); 7 (equality); 21 (freedom of representation); 22 (right to realisation of economic, social and cultural rights indispensable for dignity and the free development of personality); 26 (right to education); 27 (realisation of economic, social and cultural rights); 27 (right to participate in cultural life; to protection of moral/material interest for authorial output). Note that article 17 specifies the right to own property alone or in association and states that no person shall be subject to arbitrary deprivation of property.

<sup>5</sup> 20<sup>th</sup> century collectivism reversed the process, although collectivism, maintained by control and repression, cannot be said to have created a public domain.

6. Figure 7 shows private and public domains conceived as bisecting circles.

Representations of the public (or private) domain are usually metaphorical and may be, as in the case of the illustration, figurative. The representation of domains as abstractions is complicated by the reality of physical private and public domains evident everywhere around us. As discussion will show, we principally comprehend and analyse the domains abstractly, and usually with focus on proprietary information (copyright material) and to a lesser extent, proprietary information concerning inventions (patent information). This material is referred to in this discussion as intellectual property rights or IPR.

**FIGURE 7 PRIVATE AND PUBLIC DOMAINS**



7. Since the private domain, in theory, threatens the existence of the public domain, it follows that the latter to survive must be protected in order to enlarge, and thereby reduce exclusion. Its only plausible protector is government. These and other points are discussed later in the chapter. The critical observation, which binds the argument made throughout the chapter, is that sustaining and enlarging the domain must limit depredation by the private domain, and reduce the effect of proprietary exclusion. Critically, the public domain is *not* the government or state domain. State and government must be guarantors or protectors of the domain but they do not control it. It exists for public benefit and wellbeing, not government or state interest, although an alternative view proposes that the public domain is a notional transit post for information destined to be 'propertized'.<sup>6</sup>
8. The public domain as conceived is both physical and abstract, and as an abstraction the product of more than surrender, or circumvention, of proprietary rights. The physical domain, for instance, encompasses terrestrial wilderness and the oceans, both threatened both threatened by private incursion and exploitation. However, for practical purposes, the boundaries of the abstract domain are determined mostly by reference to limitations on access to copyright information. This chapter

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<sup>6</sup> Anupam Chander and Madhavi Sunder 'The Romance of the Public Domain' *California Law Review* (2004) 92:1331. The writers suggest that the idea of a public domain in plant genetic information and traditional knowledge invites western propertizers to enter the domain and assert property in such information. The most sensible strategy for those jurisdictions vulnerable to appropriation of valuable information resources is to pre-emptively assert some kind of property rights (possibly new kinds of property) in the information. The public domain should thus be 'propertized' but pre-emptively and for the benefit of those seeking something like an information commons. The pre-emption options they suggest, including *sui generis* legislation, are not persuasive, an observation with which the authors appear to agree. They conclude pessimistically (and realistically) that, '[t]he unequal tilt in the public domain's exploitation follows naturally from the dynamics of production and commerce in a world characterized by deep inequality' (at 1373).

proposes that so far as IPR is concerned, the cardinal way to reduce exclusionary effect, and facilitate dissemination, is by term reduction.

9. The remainder of discussion is divided in two parts. The first analyses the effects of reduction and how the copyright term (and by extension, for example, the patent term) can be reduced. The second examines definition of the public domain, and ways to enlarge and protect the domain, focusing on term reduction as the sovereign way to achieve dissemination.

*Reducing the copyright term*

10. In the field of copyright regulation, the sovereignty of the rights-allocating sovereign (government/legislature) is intermixed with that of the mini-sovereigns (industries) that benefit from rights allocation. It follows that the sovereign's willingness to reconstitute the property system is negligible.<sup>7</sup> A single beneficial rule change that would, without alteration to any other rule, radically transform the copyright system to reduce the effect of proprietary exclusion is within sovereign power.
11. The theoretically simple expedient of reducing the period of subsistence of copyright and related material would reverse the effect of regulation, transforming the copyright system from an exclusionary to inclusionary instrument.<sup>8</sup> The length of copyright term is, historically, a source of political and legal contention between

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<sup>7</sup> A point illustrated by the role played by the office of the United States Trade Representative, which acts as global advocate and enforcer for the US intellectual property industries, and, judged by its actions and reporting, is intellectually incapable of critically evaluating the industries' policies.

<sup>8</sup> Arguments about duration have been aired since the passing of the first copyright statute in 1710. *The Economist* magazine, a bellwether for neo-classical economic analysis, discussed arguments concerning term in a short cogent article which concluded by suggesting reenactment of the *Statute of Anne's* renewable 28 year term. ('Copyright and wrong: why the rules on copyright need to return to their roots' 8 April 2010).

authors/producers and public.<sup>9</sup> Government supports the argument of producers, who espouse the necessity for long duration.<sup>10</sup> Between 1710 and 1995, the United Kingdom parliament extended the term of copyright from a maximum period of 28 for new literary works to life plus 70 years. Official acceptance of a finite term appears to contemplate that monopoly is desirable until expiry of a certain period, and thereafter, is suddenly undesirable.<sup>11</sup>

12. For the public, the sooner that copyright and related material becomes accessible to the public without restriction, the better. For the minority of producers, such as movie studios, able to commercial exploit copyright and other material for long periods, a lengthy period of legal monopoly is desirable.<sup>12</sup> The 70 year posthumous

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<sup>9</sup> It would be too much to say that the mid-18<sup>th</sup> century legal debates in English courts, culminating in final decision in the House of Lords (*Donaldson v Becket* 1774 *supra*), much involved the public. On the other hand, it could be said that the 'public' did not join debate until the 1990s at commencement of the so-called digital age. The 18<sup>th</sup> century booksellers argued, unsuccessfully, for perpetual copyright, suggesting that a work is forever the author's possession, inviolable and immaterial, an eternal expression of self. Many judges agreed with this argument but it failed ultimately in the Lords, and since 1774, legislatures have accepted that the copyright term must be legislated. After supercession of the Statute of Anne, the legislature changed the duration of literary copyright on three occasions. In 1842 it decreed a posthumous term of seven years, or 42 years from publication, whichever period is longer. In 1911, it declared a posthumous term of 50 years, starting from date of publication. In 1995, it extended the posthumous period to 70 years. In the last 20-30 years of political debate, justification for a long term has settled on argument about incentive: long duration is said to be an assurance to creators, whereas a short term permits free-riders – pirates – to appropriate their creative effort. If free-riding flourishes, incentive to create/produce vanishes. The counter-argument is that copyright works do not usually generate significant returns for more than a short period, and free-riding is concerned to appropriate only investment that will generate returns. Outside the short period of commercial return, copyright protection harms the public interest in dissemination.

<sup>10</sup> Government support was more equivocal prior to the beginning in 1976 of US international copyright policy hegemony, and thereafter government conjoining of trade policy and the export policy of the US copyright industries. See Atkinson *supra*.

<sup>11</sup> As an example of official rationales for the long term, see, eg, *Directive 2006/116/EC of the European Parliament and of the Council 12 December 2006 on the term of protection of copyright and certain related rights*. Article 6 states that, 'The minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants. The average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations.' Article 11 states: 'The level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole.'

<sup>12</sup> The *Copyright Term Extension Act 1998*, which extended the posthumous term of copyright in the US from 50 to 70 years allegedly owed its passage in part to lobbying by Walt Disney Inc, which reputedly wished to



term, or in the case of artistic works, films, recordings and broadcasts a usual monopoly period of 50 years from date of production (or 25 for published editions) does not add to the utility of the right.<sup>13</sup> It follows that reduced duration must tend to undermine producer sovereignty in favour of consumer sovereignty.

13. Unless consumer sovereignty is a synonym for market devastation, it follows also that helping to make possible what Adam Smith<sup>14</sup> (and conventional economists) consider the object of regulation, viz public benefit, ought to be the object of copyright policymaking. Thus term reduction, intended to facilitate dissemination, ought to be a regulatory reform object.
  
14. Governments have preferred the arguments of the mini-sovereigns that the long duration of copyright in works, or other subject matter, is necessary to safeguard production. Unless property in output is guaranteed for long periods, free-riders invade and destroy markets, usurping the investment of industries, in order to produce and supply at lower cost. Unless proprietary rights of lengthy duration are awarded, free-riding kills incentive to invest, thus killing markets.<sup>15</sup>
  
15. The incentive argument is an instance of rationalisation by economic theorists *ex post lex scripta*, justification of the law after it is made. Contrary to the claims of copyright proponents, legislators did not make copyright laws to preserve incentive (although

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extend copyright in Mickey Mouse films (eg, Damien Cave 'Mickey Mouse v The People' *Salon* 22 February 2002) . The Act also increased corporate copyright from 75 to 95 years from publication, extending Disney's copyright in Mickey Mouse by 20 years.

<sup>13</sup> See David Lindsay *The law and economics of copyright, contract and mass market licences* Research Paper prepared for the Centre for Copyright Studies Ltd 2002 pp 38-39.

<sup>14</sup> *Supra*.

<sup>15</sup> See, eg, Pamela Samuelson 'Should Economics Play a Role in Copyright Law and Policy' *University of Ottawa Law & Technology Journal* 2003-2004 pp 1-24. Also, Richard Watt (ed) *Handbook on the Economics of Copyright: Handbook for Students and Teachers* esp Part V 'Copying and Copyright Piracy' Edward Elgar Publishing Ltd 2014 pp 207-86.

the rationale of 19<sup>th</sup> century copyright law in the United Kingdom was to protect publishers from competitors, piratical or otherwise, in all British possessions).<sup>16</sup>

Analysis of the public record of legislative debates in Australia, the United Kingdom and the United States, for most of the 20<sup>th</sup> century, as well as surrounding policy and newspaper discussion, reveals that the word ‘incentive’, or argument about the productive stimulus provided by long proprietary terms, did not enter the public record in those jurisdictions until towards the end of the 20<sup>th</sup> century.<sup>17</sup>

16. The short market currency of hit recordings and movies (allowing for secondary exploitation by on-demand distribution services) reflects the usual short period of high demand for copyright or related material after publication. Theoretical models show that the longer term is either economically inefficient, or exercises nil influence on production decisions.<sup>18</sup>
  
17. It follows that reducing duration to a handful of years would not be economically catastrophic to the former monopolist (noting that economic catastrophe for a monopolist is a matter of political rather market or economic policy concern).<sup>19</sup> Assuming a term shortened to a few years, competitors-in-waiting could, on expiry of monopoly, enter former copyright markets to produce/sell, probably in novel configurations, material now in the public domain. Non-commercial suppliers could

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<sup>16</sup> Atkinson *supra*.

<sup>17</sup> *Id* and Benedict Atkinson *Copyright Law in Australia 1905-1968: Narrative, Counter-Narrative and the Challenge of the Historical Record* LLM thesis, Sydney University 2002.

<sup>18</sup> On the first point, see, eg, Watt *supra*. On the second, see ‘Is Copyright Protection Necessary to Promote Innovation?’ *International Association for the Advancement of Teaching in Intellectual Property* 2007 pp 1-16.

<sup>19</sup> As argued first by the English economist Arnold Plant ‘The Economic Aspects of Copyright in Books’ *Economica* 1 (1934) pp 167-95. Plant proposed compulsory licensing of works from five years after publication, on the basis that sales of the work are by then largely exhausted. (At 193). He envisaged that under his proposed compulsory licensing arrangement, publishers would pay authors a 10% royalty on sales.

make material publicly available.<sup>20</sup> Students in poorer countries, or educational institutions would benefit from supply at marginal cost.<sup>21</sup>

18. What then might be an appropriate shorter term of copyright? From an economic perspective, the period in which publishers etc recoup investment, and make sufficient additional return to risk further investment. Such a period might realistically be said to be five-10 years from publication.<sup>22</sup> More abstrusely, a term could be devised by comparing the relationship of creator and work to that of parent and child. If a copyright work is designated the notional child of its creator, it can be characterised as ward of its creator for 18 years after creation, as a natural child is ward of its parents for 18 years after birth. On elapse of 18 years, the work, like a natural child, is emancipated, ward no longer.<sup>23</sup>
19. Whether the monopoly is five, 10 or 18 years from publication, a short term liberates consumers from oppression that is commercial in origin and social in effect. For industries, a shorter term might not significantly reduce return on investment, since most sales revenue for most output is likely to realised within a few years from

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<sup>20</sup> See Kenneth Arrow 'Economic Welfare and Allocation of Resources for Invention' *The Rate and Direction of Inventive Activity* National Bureau of Economic Research Princeton University Press 1962 pp 609-26. Arrow considered that copyright protection may supply incentive to produce but it does not obviously supply incentive to produce optimally.

<sup>21</sup> On access, see B Aronson 'Improving Online Access to Medical Information for Low-income Countries' *New England Journal of Medicine* 350 2004 at 966-68 and Gavin Yarney MD 'Excluding the Poor from Accessing Biomedical Literature: A Rights Violation that Impedes Global Health' *Health and Human Rights* Vol 10 No 1 (2008) 21-42.

<sup>22</sup> *As with selection of any copyright period, the selection of an appropriate duration is arbitrary.* The purpose of selecting a period of such relatively short duration is that it a term of, say, 10 years would permit the author of a commercially viable work to recoup cost of investment (in time expended and income and opportunities foregone), and, if the work attracted a continuing market, to profit from that market for a considerable period. The economic benefit would mainly come from primary not secondary markets, since the latter (eg, audiences for syndicated television) is smaller and usually arises after closure of the primary market. If works entered the public domain after 10 years, the public benefits from nil or marginal cost dissemination, and is released from secondary costs. The author's return is reduced, but, in most cases, probably not significantly.

<sup>23</sup> Atkinson *supra* at xxi.

production.<sup>24</sup> On the other hand, income from licensing use of product in different media often accrues for much longer than a few years. If the duration of copyrights and neighbouring rights is short, authors and copyright industries could expect substantial reduction in licensing revenue.

20. How might such a change affect cultural output and its social reception? Could a shorter term, said to shrink incentive and return, stymie artist development? No answer could plausibly be suggested as definitive until a shorter monopoly period is tried. The career of the Beatles, for example, provides evidence to suggest that a short term would not materially affect creativity or output.
21. The recording career of the Beatles (1963-70), conspicuous for extraordinary and continuous commercial success, occurred in a period of copyright regulatory stasis. The existence of the long copyright term etc apparently influenced the Beatles' output no more and no less in 1963 than it did in 1970. Copyright law, seemingly, played no part in the Beatles' efflorescence, which contributed inestimably to popular culture. Though the song *Taxman* (1965)<sup>25</sup> criticises high taxation, indicating mercenary concern otherwise not evident in the Beatles' music, nothing in that music suggests a motivation for writing and recording songs that is connected to the length of the copyright term. In 1976, the US federal court found that George Harrison's song *My Sweet Lord* (1970) infringed copyright in the work 'He's So Fine', 'even though [infringement was] subconsciously accomplished.' (*Bright Tunes Music Corp v Harrisongs Music Ltd* 420 FSupp 177 DC SD NY). In the same year, Harrison released

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<sup>24</sup> Plant *supra* wrote: 'As long ago as 1771, David Hume wrote to his publisher William Strahan: "I have heard you frequently say, that no bookseller would find profit in making an edition which would take more than three years in selling."' (At 193).

<sup>25</sup> From the album *Revolver*, author George Harrison.

'This Song' debunking the argument that *My Sweet Lord* is not an original composition ('This song ... as far as I know/Don't infringe on anyone's copyright').

22. In the following decades, infringement suits, some rebarbative, and often instituted in the name of an entity disconnected from the composer, successfully secured damages awards, even though commercial realisations of the work said to infringe did not subtract from the market or takings of the work said to be infringed. In 2011, the Australian full federal court affirmed the single instance decision that notes' arrangements in five (out of 95) bars in 'Down Under' infringed copyright in 'Kookaburra' (*EMI P/L v Larrikin Music FCAFC 47*). *Kookaburra* may be the nadir of decided cases, and illustrates how, within a rentier system, judicial reasoning ratifies rent-collecting by rent-seekers.
  
23. If proponents of copyright incentive theory are correct, then if the legislature had reduced the copyright term to 10 years, John Lennon and Paul McCartney may have decided to give up music and look for jobs in banks. But of course they would not have done so. They would have continued their recording careers from volition rather than because of mercenary calculation. In any case, mercenary calculation would reveal that a 10 year term, while less remunerative to any member of the Beatles than a longer term, would yet return enormous pecuniary reward. Had Lennon and McCartney departed the record industry and joined banks (assuming a 10 year copyright subsistence) they would have made a catastrophic economic (as well as vocational) error. Royalties to Lennon/McCartney from record sales and public performances for any 10 year period beginning in any year since the Beatles' first

number one single in 1963 would have delivered extraordinary returns. Returns in any single year would also be extraordinary.<sup>26</sup>

24. A tiny minority of copyright owners could expect annual royalties approximate to those accruing to the Beatles. Most authors make little or no return.. For academic authors,, too, returns are often negligible. The currency of some legal texts and casebooks may depend on frequent updates. Even articles reporting new medical or scientific research are usually current for short periods.<sup>27</sup> Such material is usually not usually written in expectation of more than meagre financial rewards. It is the journal publishers, who control access and impose subscription fees, who find academic publishing lucrative, since researchers often wish to download articles decades old. A long term does not commonly influence the output of authors. The currency of most material lapses within a year or two of publication.<sup>28</sup>
25. In any event, what seems certain is that legal change that results in earlier public availability of originally copyright material must reduce exclusion and therefore social inequality: what was withheld becomes available. Yet at present, neither government nor legislature, in the richer jurisdictions at least, would contemplate a proposal for term reduction, or making the proposal to a relevant international organisation.<sup>29</sup>

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<sup>26</sup> The Beatles' earnings for 1964, adjusted for inflation to 2014, totalled about USD 190 million (Mark Korba [www.cnbc.com](http://www.cnbc.com) 7 February 2014). In financial year 2013, McCartney received Beatles royalties of USD 47 million. Lennon received USD 12 million (Zack O'Malley Greenburg [www.forbes.com](http://www.forbes.com) 23 October 2013).

<sup>27</sup> Refer discussion in chapter 5.

<sup>28</sup> *Publishers Weekly* (11 January 2010) reported that 282 million books were sold in 2009 in the United States in all adult nonfiction categories combined. The average nonfiction book in a bookstore sells <250 copies per annum and <3000 for the total period of sale.

<sup>29</sup> For reasons stated: the effect of treaties is to bind governments intellectually as well as legally, and alteration is most likely to follow considerable international socio-political change.

*Public and private domains*

26. Conceptually, the most helpful way to analyse reduction of ownership is to differentiate between public and private domains. Control is extrinsic to the public domain and intrinsic to the private domain.<sup>30</sup> Two synonyms for the noun 'control' are 'govern' and 'command'. A public domain as free as practicable from control is one (paradoxically to many of the public domain's critics) that is least governed, least commanded.
27. Reduction in the scope of ownership or *control*, properly speaking, involves reduction or limitation of the private domain, conventionally effected by income and property taxation.<sup>31</sup> Another way to reduce control is to increase the size of the public domain, which, in theory at least, should be a domain in which control exists only to the extent necessary to permit orderly and safe social relations. Figure 7 (page 306) shows overlapping domains, private and public. The public domain is for the time being larger than the private, since humankind has not yet privatised the oceans, space, nor all of the terrestrial world. However, the private domain has, throughout history, consumed the public domain, and will continue to do so.<sup>32</sup>

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<sup>30</sup> It might be objected that if, for instance, a national park is said to be part of the physical public domain, it is regulated by government and thus subject to control. Without repeating earlier arguments about government's proper role as public trustee, it is important to note that properly government regulation of the public domain should be to ensure equal public access and amenity and non-discrimination (exclusion).

<sup>31</sup> As described at the beginning of the chapter, an unambiguous example of a property tax causing enlargement of the public domain is that United Kingdom death duty. To avoid duty imposed on devised estates – usually because they could not pay the impost – some inheritors of great estates, taking advantage of legislative provision, transferred devised property to the National Trust(s) (National Trust of England, Wales and Northern Ireland and National Trust of Scotland). The Trusts have opened a number of great country houses and estates to the public.

<sup>32</sup> International copyright law and the system it created is a near-pristine example of privatisation by global instrument. From 1886, extraordinary diplomatic consensus (as opposed to commercial consensus) has created the private domain of copyright, which has imposed itself on a formerly public domain, shrinking the latter to a handful of legislative exceptions permitting confined access to copyright material.

28. The concept of overlapping domains, depicted in Figure 7, shows that government, like a central bank fixing interest rates, can institute policy to reduce or enlarge domains. For instance, a variety of property taxes could reduce some of the blue area, or, more usually, the overlapping area of blue/green. Figurative depiction of the domains is helpful because it enables us to see the partial tension between private and public, and observe how policy either reduces the private domain (by taxation) or expands the public domain by actions (some discussed below).

*Enlarging the public domain*

29. Reducing the scope for one individual or group to control another is more than redistribution by tax: it involves *enlargement* of the public domain. Conceptually, the aim is to increase the circumference of the green circle in Figure 7, independently of action taken to reduce the overlapping shaded area, or blue circle. This dissertation has focused on the copyright system as an example of an exclusionary proprietary system. This chapter has suggested that significant reduction of the copyright term could, if effected (an unlikely event), greatly reduce the effect of copyright exclusion. Reduction of term would reduce the scope (and exclusionary power) of copyright as property.
30. The simple conceptual schema of Figure 7 informs us that enlargement of the public domain to preserve for society an actual and notional environment of non-control and non-exclusion is a social necessity. Taxation policy, and certain types of legislative restriction are prophylactic, delimiting privatisation. But the obvious way to reduce the effect of proprietary exclusion is to avoid concentration on the intractable



disposition of proprietary rights (exemplified by a copyright system rigidified by treaties), and instead examine how to expand the domain of non-exclusion, viz, the public domain.

31. The public domain, as discussed in the introduction, exists materially and abstractly. A public park is the public domain hypostasised. The abstract domain is usually said to be constituted by works or related material unregulated, or substantively unregulated, by copyright or related rights.<sup>33</sup> I conceive the public domain as a commonwealth void of prepotence or claims of prepotence. In this sense, the domain exists to assist people to attain *eudaimonia*, Aristotle's word for individual realisation, achieved by the cultivation and practice of virtue.<sup>34</sup> English translators in describing the concept of *eudaimonia* often cite the words 'flourishing' or 'human flourishing',<sup>35</sup> and a public domain, precluding exclusion or preferment, is correctly understood to assure human flourishing.

#### *Suggestions for a Public Domain*

32. A domain buttressed by inclusionary and public rights,<sup>36</sup> while likely to attract support of the interested public, is also unlikely, without legislative support, to reduce the

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<sup>33</sup> See Greenleaf and Bond 'Public Rights' in Copyright ...' *supra*.

<sup>34</sup> *Nicomachean Ethics* (350 BC) Book I Chapters 2 and 4; II 2; VII 13; X 6-8; XI 6-8. See the earlier and complementary *Eudemian Ethics*. For Plato's similar treatment of *eudaimonia* which differs from that of Aristotle in its essentialist view of virtue see AW Price *Virtue and Reason in Plato and Aristotle* Oxford University Press 2011 356pp. For Plato, virtue is doing what is morally right, whereas Aristotle connects also to virtue acting rightly to properly realise one's attributes, consistent with one's nature.

<sup>35</sup> Interpretation differs on meaning of *eudaimonia*. John Lloyd Ackrill ('Aristotle on Eudaimonia Oxford University Press 1975 at 13) says the word describes 'doing well, not the result of doing well'. Terence Irwin (*Nicomachean Ethics* Hackett Publishing Co 1985) translates the word in the text to refer to 'happiness'. John Cooper *Reason and Human Good* Harvard University Press 1975), consistent with Aristotle's statement that the word refers to a process not state (X 1176b5), argues that it describes 'flourishing'.

<sup>36</sup> The idea of public rights is consistently espoused in Australia by Professor Graham Greenleaf. See, eg, 'Public Rights in Copyright: Redefining the Public Domain' address to NSW Society for Computers and the Law 5 June 2013, proposing a definition of public rights.

legislated power of IPR. Applying Dworkin's constitutional theory,<sup>37</sup> discussed in the introduction, legislated powers are 'trumps'. If the public domain is to develop it must be protected by trumps. Against the panoply of copyrights and patent rights, public and unitive rights are no more a bulwark than a picket fence in a tornado.

33. For this reason, the public domain should be legislatively defined and protected. If these tasks were accomplished, it follows that a government agency should be established to initiate and manage the task of expanding the public domain. Such an agency could perhaps be called something like the Commission of the Public Domain (CPD). If, as might be expected, the public domain is defined as a domain of non-ownership/control/exclusion, government might confer on the CPD powers to protect and enlarge the public domain.
34. Some ideas of powers that the CPD might exercise are suggested below, not prescriptively, but as examples of appropriate agency functions to secure the object of protecting or enlarging the public domain:<sup>38</sup>
- ✓ interrogating the grant and extension of proprietary rights by other agencies
  - ✓ proposing specific ways to reform legislation and policies that have reduced the public domain (eg, intellectual property laws, which, for

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<sup>37</sup> Ronald Dworkin Taking Rights Seriously *supra*.

<sup>38</sup> Note Graham Greenleaf's comparison in 'The Public Domain' *supra* of the public domain to Albert the 'Cut and Come Again Puddin' of Australian literature (at 185-6). The Magic Pudding is not reducible since it regenerates endlessly no matter how many people take a portion from it. Greenleaf writes, 'He is the inexhaustible self-replenishing public resource, by analogy, similar to our public domain, on which further creativity can be built. He's non rivalrous and inexhaustible.' (At 186). Note also the work of Professor Greenleaf et al in practical implementation of his concept of a domain akin to the Magic Pudding. They established in 1995 the Australian Legal Information Institute (Austlii) an online resource providing access to a broad range of legal materials. Administered by two universities, Austlii is Australia's leading provider of legal information, which is made available to the public gratuitously, and relied upon by professionals and others.

mostly cannot be altered, other than by treaty, and are designed principally to protect the economic interests of owners)<sup>39</sup>

- ✓ proposing laws and initiatives to enlarge the public domain (for example by reducing the duration of copyright protection)<sup>40</sup>
- ✓ proposing initiatives and ways to encourage non-ownership/ surrender of ownership (public transport, public investment in reduction of production/consumption, including research)
- ✓ involving itself in the operations of the voluntary sector
- ✓ devising (and possibly administering) voluntary transfer of property, including intellectual property<sup>41</sup>
- ✓ devising and monitoring rules, laws and measures to effect tax reform to:
  - ✓ increase compliance
  - ✓ reduce avoidance<sup>42</sup>

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<sup>39</sup> It would be a mistake to assume that the network of treaties and domestic laws that constitutes the international copyright legal system is immutable. Concerted and reasoned argument against apparently unassailable intellectual consensus may cause consensus to change. The Mont Pelerin society's opposition to neo-Keynesian orthodoxy (discussed earlier), enunciated most forcefully in the United States by Milton Friedman, *supra*, resulted in governments after 1980 embracing neo-liberal theory in policy formation. It is noteworthy that in the period of Keynesian ascendancy (1950-70), when international institutions committed most dynamically to social and economic upliftment of poorer countries, UNESCO, under the auspices of the Universal Copyright Convention (1953), advocated actively for copyright dissemination and access. It could do so again.

<sup>40</sup> As discussed, significant reduction of the copyright term would change the exclusionary character of the copyright system. Such change would be regarded by even sympathetic policymakers as impossible to achieve. However, an agency like the contemplated CPD could possibly achieve the near-impossible by advocating for discussion by an international commission, perhaps led by UNESCO and WIPO to discuss the history and purpose of the copyright term. By slow process such a commission might achieve consensus to reform treaties.

<sup>41</sup> By establishing an agency that performs more comprehensively the intermediary function of the voluntary sector. A government agency could maintain an online database of national needs that enabled willing donors of property or services to identify nationwide potential recipients of transfers or services. The agency could then facilitate transfer/service provision. A great deal of voluntary assistance (which involves property transfer) probably does not occur because potential donors do not know how to identify needy to whom they wish to donate, nor how to effect donations.

- ✓ refine redistribution policy.

*Public domain and term*

35. My concept of the public domain is a commonwealth of non-control and non-exclusion that makes possible eudaimonia, or flourishing. Since I associate control with the attitude of ownership expressed in rules of property, it follows that in the public domain, as I conceive it, property cannot subsist unless void of exclusionary effect. However, unless, like the Roman law,<sup>43</sup> law codes identify inviolable categories of non-ownership, the putative public domain must be shaped by property restrictions or exclusions. The value of a public domain that contains proprietary output, yet is not accessory to the private domain, highlights the necessity for formal that is legislative, definition of public domain.
36. Discussion of the public domain is informed by the Roman law of property or things as enunciated especially by Gaius (d 180 AD), Ulpian (d 228) and, above all, Justinian (d 565). Justinian's *Institutes* distinguish between things, 'either in the category of private wealth or not.'<sup>44</sup> Things that are not owned by a person are available to everyone in common (*res communes*), or owned by the state (*res publicae*),<sup>45</sup> by no-

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<sup>42</sup> So far as avoidance is concerned, appropriately reform of trust law would radically increase taxation revenue. Two types of trust exist. The first supports the public domain. This is the trust for non-profit objectives, which is itself an instrument of non-ownership. The other kind of trust is in effect, for profit, and is an instrument of ownership: this is the trust intended to avoid tax. Belying their name, these trusts are instruments of hidden ownership or control. The CPD should analyse ways to effect abolition or limitation of such trusts, and advocate internationally for their abolition. If one system exists (taxation) why institute or tolerate an anti-system (private trusts)?

<sup>43</sup> Esp the 6<sup>th</sup> century codification of the Byzantine Emperor Justinian who approved the corpus iuris civilis (529-34) consisting of code, digest, institute and novels.

<sup>44</sup> Christopher Pierson *Just Property: A History in the Latin West Volume One: Wealth, Virtue and the Law* Oxford University Press 2013 at 81.

<sup>45</sup> The term 'public things' does not admit the meaning conventionally ascribed to it; things owned by the state. Publicus 'of the people' is a contraction of populicus, from populous, 'the people'. Res publicae properly denotes things common to the public, meaning things available in common to all members of the

one (*res nullius*) or by a corporation (*universitatis*).<sup>46</sup> While modern property law could be said to permit in principle limitless annexation, the Roman designations – at least those of *res communes* and *res publicae* – could be said to pre-empt limitless privatisation.<sup>47</sup>

37. More importantly, the Roman classifications draw attention to the contingent existence of a public domain. A public domain does not constitute itself: its scope and content, its existence, is exogenously determined by law. The *lawmaker* permits (or forbids) a public domain by declaring what is private. The private domain delimits the public, and, if permitted, might consume it. The private domain of intellectual property laws did not grow endogenously: it is the product of treaty, policy initiative and legislative action described in this dissertation. The public domain, formally undefined, is the shrinking accessory of the private.
38. It could be argued that the public domain is the so-called ‘commons’, which is not unlike *res communes*.<sup>48</sup> The modern commons is substantially the product of private agency, that of the open software, open source and creative commons organisations. These facilitate licensing of mostly gratuitous use of copyright material, with conspicuous success in the case of the creative commons organisation. Licensing, however, must conform to copyright prescripts. The public domain permitted by licensing remains contingent, governed by copyright.<sup>49</sup>

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public. Modern interpretations assert that the term referred to what might be called public or state infrastructure available for the use or amenity of all: highways, byways, waterways, parks, amphitheatre and so on.

<sup>46</sup> *Institutes* Bk II trans Peter Birks and Grant McLeod Cornell University Press 1987 at 55.

<sup>47</sup> See Russ Ver Steeg ‘The Roman Law Roots of Copyright’ 59 *Maryland Law Review* 522 (2000) 522-552 for a lucid statement of Roman law classification of incorporeal property and the public domain (at 530-542).

<sup>48</sup> *Id* at 534-35.

<sup>49</sup> See Chander and Sunder *supra* esp at 1338.

39. Had governments from the 19<sup>th</sup> century onward chosen to invite private alienation of wilderness, instead of legislating to protect that wilderness, national parks would not exist, depriving people of much-sought public domains, in which humans (and wildlife) flourish.<sup>50</sup> By legislation, government can make, in addition to *res commune*, an expansive *res publicae*, one that permits the right of *usufruct*, consistent with the Roman proto-concept of fair use,<sup>51</sup> and thereby stimulates *res commune*.
40. The task is large. But the goal should be greater than encouraging licensing consistent with copyright permissions. Government should first define what is meant by the public domain.<sup>52</sup> Only by vigorously adopting the role of public trustee can any government summon the penetrability to reconsider more than one century of policy sophism. The task can only be accomplished if governments work together internationally sponsored by a powerful international agency such as UNESCO, traditionally a sponsor of initiatives to encourage information dissemination in poorer countries.<sup>53</sup>
41. Assuming legislative recognition of a public domain, governments (or domain authorities) could offer an authoritative imprimatur signifying voluntary reduction by

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<sup>50</sup> The naturalist and conservationist John Muir (d 1914) petitioned for reservation of Yosemite and Sequoia National Parks. He said: 'Thousands of tired, nerve-shaken over-civilized people are beginning to find out that going to the mountains is going home; that wilderness is a necessity and that mountain parks and reservations are fountains not only of timber and irrigating rivers, but as fountains of life.' (Quoted David Pepper *The Roots of Modern Environmentalism* Croom Helm 1984 at 33).

<sup>51</sup> On the usufruct right, see Arthur Emmett 'Roman Law, Private Property and the Public Domain: Lessons for Copyright Policy' in Brian Fitzgerald and John Gilchrist (eds) *Copyright Perspectives: Past, Present and Prospect* Springer 2015.

<sup>52</sup> Note suggestions of Professor Greenleaf in 'The Public Domain' *supra* at 185. He proposes a 'peak body' to advocate for public rights, and 'research based analysis' to suggest how the Copyright Act could most effectively be amended to recognise and make effective public rights.

<sup>53</sup> On UNESCO's role see Atkinson and Fitzgerald Short History *supra* at 87-93, 96-99 and 104.

the individual rights-holder of the term of copyright or patent protection.<sup>54</sup> An author or inventor wishing for a work or invention to enter the public domain earlier than the year indicated by law, could register for legal reduction of term, and the relevant authority, such as the hypothetical CPD, would issue an authoritative mark of term reduction. Thus an author who wished for copyright to subsist for 10 years from publication would be issued the mark 'PD 10' and this mark, signifying, 'enters the public domain 10 years from publication' would be affixed alongside the © symbol in books made available for retail sale. A patent term reduction could be similarly indicated in registration information or on retail products. Thus a retail patent product marked 'PD 5' would disclose that the patent would enter the public domain 5 years after registration.

42. The economic ramifications of such a system could be significant. As noted by the leading Australian public report on innovation policy, award of lengthy monopolies creates '... a classic market failure problem which does not lend itself to a universal solution.'<sup>55</sup> The problem is one that might be resolved by significant contraction in duration of monopolies in the way envisaged. Like software and creative commons licensing initiatives, the system would be voluntary offering willing copyright or patent holders a way to ensure dissemination and early entry into the public domain. Whether or not the foregoing is judged feasible, the necessity for government, and legislative definition of a public domain remains. Without such definition, the private domain, the logic of which is increase and expansion, determines the size and efficacy

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<sup>54</sup> The question of treaty revision is not canvassed here. It is not clear whether voluntary individual derogation from treaty norms, in this instance by eschewing of the various terms of copyright, is prohibited either under treaty or domestic legislation.

<sup>55</sup> *Venturous Australia: Building Strength in Innovation* Cutler Company innovation report for Commonwealth Government (Minister for Innovation, Industry, Science and Research) 2008 at 39.

of a public domain. The public domain is then forever depreciating, and possibilities for human flourishing shrink.

### **SUMMARY**

This chapter principally discussed how the private and public domains, presented figuratively as bisecting circles interact. While one domain can encroach on the other, the principle encroaching action is by the appropriating private domain (by the process of privatisation). If the public domain is valued as a commonwealth of non-control, non-ownership, dissemination and human flourishing, its scope, boundaries and contents should be defined and protected by legislation.

Government agency is critical to the flourishing of the public domain, although the domain is not a government or state domain, and government could contribute to information dissemination – thereby reducing the effect of proprietary exclusion – by establishing a ‘public domain’ designation that enables IPR holders to authorise release of their IPR into the public domain before expiry of the IPR terms. The next chapter is the conclusion, which summarises the premises and findings of the dissertation.



## CHAPTER NINE

### SUMMING UP THE ARGUMENT

#### **PURPOSE**

To distil the parts and purpose of the dissertation, enumerate key findings and propose ways to effect reduction or diffusion of ownership.

#### **HEADINGS**

**Summing up – thesis, dissertation, model, examples**

*Purpose*

*Propositions examined*

*Novelty*

*Summing up*

## The dissertation: thesis, justification, findings and summing up

### *Purpose*

1. The thesis gives rise to four obvious questions:
  - ✓ What is ownership?
  - ✓ What is social inequality?
  - ✓ Why does ownership cause social inequality?
  - ✓ Is ownership reducible?

### *Propositions examined*

2. To answer these questions, I examined ten premises that underlie the thesis. The reasons for adducing these premises are given in the introduction, and I do not repeat those reasons.

The premises are:<sup>1</sup>

- A. Innate desire for control causes humans to seek ownership, which manifests in the subjective declarative state ('he belongs to me') or the objective state that refers to legal title ('that's his car').  
**[Introduction; chapters 2, 3, 5].**
- B. Humans contest for control or sovereignty over other humans and nature. **[Introduction; chapters 2, 3, 5].**
- C. The subject matter of ownership is property (which is formally created by, and exists within, a property system). **[Introduction; chapters 1-2].**

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<sup>1</sup> Corresponding chapter numbers in square brackets.

- D. The disposition of proprietary rights within a property system is constitutional and political. **[Introduction; chapters 1,2, 5, 6, 7].**
- E. The political struggle that allocates proprietary rights is also a constitutional struggle over the source of authority for law and governance **[Introduction; chapter 2, 5-7].**
- F. A property system instrumentally creates social exclusion and thus social inequality. **[Introduction; chapters 1-2; 4-7].**
- G. unless rights' allocation is delimited by considerations of equality and fairness, a property system becomes paratrophic, ie, the system is designed to enable the successful rent seeker to collect rent; a paratrophic system – such as the copyright system, or property systems in certain poorer countries, or the feudal system - creates a right of remuneration (exceeding a right to bargain), and permits the proprietary rights-holder to license and compel payment for activities that do not subtract from the economic welfare of the rights-holder. **[Chapter 7].**
- H. Social inequality is principally determined by reference to statistics on distribution of income and wealth. **[Chapter 4].**
- I. Application of the principle of equality, expressed in *inclusionary* rights, reduces the exclusionary effect of proprietary rights. **[Chapter 1].**
- J. Reduction in the exclusionary effect of ownership occurs in two ways, by:
  - I. change in societal values, from values that uphold dominance, appropriation and exclusivity, to values of inclusiveness, non-appropriation and mutuality. **[Chapters 1-2, 4, 8].**

- II. delimitation of proprietary rights by:
  - i. voluntary de-privatisation
  - ii. government commitment to:
    - a) circumspection in awarding proprietary rights
    - b) maintaining and increasing the public domain. **[Chapters 5-8].**

### *Novelty*

3. The dissertation makes the following findings:
- ✓ Possessive grammar expresses a possessive, appropriating mentality that is innate in humans and predicts conflictual behaviour. Conflictual behaviour results from contest for control or sovereignty, which becomes a political and constitutional struggle that shapes societies (chapter 3).
  - ✓ Political-constitutional contest creates property systems, and these systems instrumentally exclude. Instrumental or objective exclusion is inevitable because the primary function of proprietary rights is to confer on the owner the right to exclude (chapters 2 and 5-7).
  - ✓ The efficacy of a property system, meaning its inclusiveness or non-exclusiveness, is governed by consensus about the source of constitutional authority (chapters 1-2 and 5-7). The more that members of society consent to the constitutional settlement, and accept a source of authority (eg, the crown), the more likely that consent is mirrored in a more distributive, and less exclusionary, property system.<sup>2</sup>

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<sup>2</sup> See again chapters 2, 5-7, and also discussion in this chapter, part 2. A society may be politically oppressive and exclusionary and yet stable if its members agree the source of authority, but in such a society constitutional agreement is unlikely. To the extent that constitutional authority is denied, those denying validity are themselves likely to be excluded.

- ✓ The exclusionary process can be mapped: see in the model of exclusionary process (figure 5 chapter 5) and elaborated model (figure 6). If constitutional and political settlement concentrates benefit, distributing rights to a small number of mini-sovereigns, a property system is likely to become paratrophic (chapter 7).
- ✓ A paratrophic system compels bargains or arrangements that:
- ✓ are destitute of benefit to any person other than the rights-holder
- ✓ enjoin payment of fees to a rights-holder for licence to perform actions that may benefit the licensee but do not subtract from the rights-holder's economic welfare. (Chapter 7).
- ✓ A paratrophic system is an anti-distributive property system, the result of political settlement, intended to permit income diversion to sovereign-approved mini-sovereigns, that is, to empower rent-seekers to collect rent (chapter 7).  
The feudal and hacienda systems were paratrophic (chapter 2 and 6). The copyright system, the realisation of a sovereign-mini-sovereigns compact is similarly paratrophic (chapter 7) upholding a right of remuneration that compels payment of fees irrespective of the absence of voluntary markets.
- ✓ In the absence of social consensus approving equality and fairness as social objects, and legal recognition of equality principles, nothing controverts the evolution of a property system into a paratrophic system: the tendency of property systems to concentrate wealth (made possible by proprietary control), and the anti-distributive logic of those systems is documented by some economists, most notably Thomas Piketty (chapter 4).
- ✓ Put simply anti-distributive logic is a consequence of allocation of proprietary rights. Only government action, inspired by commitment to inclusionary rights,

effects greater distribution and redistribution (chapter 4). The reason that wealth is highly concentrated in all countries (chapter 4) is because wealth is governed by proprietary rights, which are exclusionary, and exercised to exclude (chapters 2, 5-7). In the absence of norms and practices of equality and fairness, and government redistributive action, the anti-distributive pattern of concentration continues.

- ✓ Proprietary rights create the private domain, which appropriates the public domain. The first is governed by exclusion the second by non-exclusion (Introduction, chapters 1 and 8). The public domain, although subject to legal rules, is a domain created by equality, fairness, and human rights pertaining to inclusion. Above all, the private domain is a domain of control, and the public is a domain in which control exists only to the extent necessary to protect the domain (Introduction, chapters 1 and 8).

### *Summing up*

4. The key proposition of this dissertation is that property rights are exclusionary, and exercised to exclude,<sup>3</sup> which means that property systems are anti-distributive<sup>4</sup> unless events (depression, war, reconstruction) or governments re-configure property systems – reallocate proprietary rights – to create distributive process.<sup>5</sup> Extraordinary events such as war or catastrophic economic downturn may upend a property system,

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<sup>3</sup> Exercised to exclude because exclusionary rights invite exclusionary exercise. The potency and logic of a proprietary right lies in the power to exclude. A householder usually insists on privacy within his or her house. The householder may invite guests to visit, but will not invite the indigent to pitch tents on the lawn. The owner of a patent may license uses but insists on total access exclusion of any other person, unless licensed on contractual terms.

<sup>4</sup> Or non-distributive or minimally-distributive.

<sup>5</sup> See chapter 4 – Piketty *supra* argues that with the exception of the period 1945-80, history (or the 2000 years for which some taxation records are available) is weighed down by unyielding concentration of wealth and power.

overthrowing the small class that appropriates most national income and wealth. War or depression does not necessarily cause a property system to become more distributive. New sovereigns may take the place of the old, and accrete to themselves more share of national income and wealth, continuing or worsening a history of concentration.<sup>6</sup>

5. The action of government committed to inclusion in place of exclusion, a commitment that begins with assertion of human dignity and equality, is necessary to transform a non-distributive property system into one that is distributive or redistributive.<sup>7</sup> The great economic and social reformation effected in the United States and western Europe for three decades after the second world war (chapter 4) took place because governments rejected an ancient political settlement (chapter 2) that enabled small classes of people, exercising most proprietary rights, to appropriate most benefit (income, wealth, political control) from national economies and societies. Governments replaced a policy of proprietary preferment with one of social preferment.<sup>8</sup> They could not have done so without vast credit provided by the United States, and willingness to fund social spending by taxing not only income but property.

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<sup>6</sup> History suggests that economic disaster, such as depression or famine, or war does not presage constructive social reformation. The success of reconstruction after the second world war in effecting extraordinary social amelioration and societal transformation – in scale and effect a reformation unprecedented in history – depended on the generosity and foresightedness (also unprecedented in history) of a willing and active external agent, the United States, in providing credit, assistance and security to nations seeking to recover from decades of disaster.

<sup>7</sup> It is noteworthy that the countries ranked highest for human development (chapter 4) espouse values of freedom, equality and inclusion, as well as recognising these values in legislation. Additionally, relatively, most of these countries distribute income more equally than other countries, chiefly by allocating a large proportion of taxation revenue to social spending. However, all countries, including those recording high HDI scores concentrate wealth, and consequently all countries, in varying degrees are socially exclusionary and socially unequal.

<sup>8</sup> See, eg, Karl Polanyi *The Great Transformation: The Political and Economic Origins of Our Time*. Rinehard & Company 1944, a work published at the inception of US-led initiatives to create international institutions to create economic and social welfare, and lasting peace (chapter 1). Also Peter Flora and AJ Heidenheimer 'The Historical Core and Changing Boundaries of the Welfare State' in Flora and Heidenheimer

6. To some extent, property preferment transmuted into property reduction. Later, governments influenced by economists and propagandists hostile to social spending and proprietary restriction,<sup>9</sup> reverted to the age-old policy of proprietary preferment, although rich countries continue to redistribute for social purposes up to a third of national income.<sup>10</sup> The private and public should not be, as they are sometimes characterised, inimical domains.<sup>11</sup> But one (private) is created from the other (public), and as the private domain subsumes the public, so proprietary exclusion shuts out more of the public from the benefits of society, amenity and opportunity (Introduction, chapter 8). Provided that the pattern of distribution changes, reducing the private domain must decrease social inequality, since attenuation of ownership means more rights are allocated among more people and fewer excluded.
7. Immediately, a problem is apparent: what if the effect of proprietary reduction is not to disperse rights but to reinforce existing concentration? Then fewer possess more, and more are excluded. The answer to the problem, as recognised by redistributive policy in richer countries, is progressive taxation that imposes a greater burden on the putatively wealthier, and imposition of varieties of wealth tax.<sup>12</sup> Taking into account the history of redistributive policy in richer countries, it appears that taxation reduces

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(eds) *The Development of Welfare States in Europe and America* Transaction Publishers pp 17-34. See also Peter Flora (ed) *Growth to Limits. The Western European Welfare States since World War II* de Gruyter (4 volumes) 1986-87.

<sup>9</sup> Members of the Mont Pellerin Society founded 1947( by von Mises, Hayek, Friedman, Karl Popper and others), 'in the hope of strengthening the principles and practice of a free society and to study the workings, virtues, and defects of market-oriented economic systems' proselytised successfully against the welfare state and in favour of privatisation (refer [www.montpelerin.org/montpelerin/mpsAbout.html](http://www.montpelerin.org/montpelerin/mpsAbout.html)).

<sup>10</sup> See OECD database on social spending by members for 2007-peak level after 2007-2014 at <http://www.oecd.org/social/expenditure.htm>. (Highest level France at 31% of GDP).

<sup>11</sup> A primary cause of contention is non-definition of domains. Definitional lacunae is useful to proponents of privatising what is public. They have popularised a discourse that declares the public domain feasible to the extent that it supports the private. This theory inverts historical praxis, which subordinates private to public right (see discussion in Introduction).

<sup>12</sup> Chapter 4 Part 2.



exclusion and inequality to the extent that it changes the pattern of concentration or distribution.

8. Piketty envisages imposition of 80% income tax on the wealthy,<sup>13</sup> and were his proposal to be implemented, the exclusionary effect of ownership in a country imposing tax at this rate would reduce, since the distribution pattern would change.<sup>14</sup> The wealthier would possess less, and the less wealthy would receive more.
9. However, while this dissertation supports high progressive taxation and active redistribution policy, the central matter is not one of rights reduction or divesting. Proprietary rights, possessions, and a property system are necessary for the material welfare of people other than renunciates. Private and public are not inimical provided that the appropriating logic of privatisation is recognised and the public domain protected from inordinate subtraction (chapter 8).
10. The important matter is to facilitate conditions that create pro-distributive property systems that disperses proprietary rights, and shrinks proprietary concentration. A key way to achieve this goal, allowing for the natural growth of the private domain - another word for which is privatisation - is to expand the public domain. If private and public are seen as opposed, expansion of one is viewed as threatening the other. The public domain *is* threatened by advocates of privatisation, and for this reason, identification of encroaching privatisation, and concomitant enlargement of the public domain, is necessary.

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<sup>13</sup> Piketty *supra* discussed chapter 4.

<sup>14</sup> If Piketty's proposal were implemented tax appropriations from the wealthiest cohorts, and the revenue available for social spending would approximate the income/expenditure pattern of the 1950-80 period. If imposition of progressive consumption and wealth taxes followed, the national income distribution pattern would probably start to noticeably change.

11. The advantage of enlarging the public domain is that it counteracts the problem of ownership, which is not the existence of proprietary rights or property systems, but rather the power to *control* that is bestowed by proprietary rights. Necessary exercise of control, in accordance with law, allows society to survive and progress, but control wrongly vested and exercised is the enemy of society and human welfare (chapter 2). The public domain is a place principally of non-control, and the larger the domain, the greater the scope for members of society to relate without exclusion and oppression, and in an inclusive environment in which social inequality does not pertain.
  
12. As noted in chapter 8, unless government legislatively defines a public domain, and creates a body to protect and uphold the domain, such as the hypothetical Commission of the Public Domain, the private domain will continue its accretions until the rickety fence of public domain protections is blown asunder by the demands of industries and others insisting on more elaborations of proprietary rights, a copyright term that is infinite, and, above all, government recognition of preferments that derive from the now universally acknowledged 'right to monetise'.

## ANNEX A Case studies in wealth concentration

### *Apple and Pfizer*

The corporate practices of two companies reliant on the exercise and enforcement of intellectual property rights, Apple Inc and Pfizer Inc, illustrate specifically the non-distributive character of wealth accumulation by corporations accruing extraordinary profits. Apple Inc is the world's most highly valued (or capitalised) company.<sup>15</sup> In 2014, its cash reserves grew from USD 159 billion to USD 178,<sup>16</sup> while assets totalled about USD 206 billion,<sup>17</sup> and revenue equalled USD 170.910 billion.<sup>18</sup>

After astounding growth resulting from sale of i-phones, Apple could be said to have become an impresario capitalist, deriving extraordinary profits from markets of devotional consumers (as well as rational). Pfizer Inc is the world's second most highly capitalised pharmaceutical company and its cash reserves (approximately USD 47 billion) surpass those of any other pharmaceutical company.<sup>19</sup>

Offering returns steeply above the economic growth rate both companies will – if Piketty's thesis about capital return is correct – prefer conservation to innovation.<sup>20</sup> This assumption

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<sup>15</sup> Market capitalisation reached USD 566,420.89 billion in July 2014 (source Bloomberg.com).

<sup>16</sup> Financial year ending 2013. Moody's Investor Services report on financial holdings of US companies 2013. Apple reported cash reserves of USD 178 at 27 December 2014 (Guardian online newspaper 'Apple reports record quarterly earnings' 28 January 2015).

<sup>17</sup> Source ycharts.com 31 March 2014. In 2013, Apple held 7,723 patents. (Source appleinsider.com). Most patents are acquired: 'In 2011, Apple spent \$2.4B on R&D but contributed more, approximately \$2.6B, to a single transaction to buy patents from Nortel.' (Colleen Chien 'Reforming Software Patents' Santa Clara Law Digital Commons 2012 at 3-4).

<sup>18</sup> Apple Inc annual report 2014.

<sup>19</sup> Market capitalisation is USD 194.49 billion 2014 (NYSE). (Moody's Investor Services for close 2012).

<sup>20</sup> Apple's expenditure on research and development, historically comparatively low, rose to USD 4.5 billion in FY 2013, or about 3% of revenue (cf Microsoft's 13%), an increase of \$1.1 billion or 32% from 2012. Source Apple annual report 2013 and cnet.com.

turns out to be correct. Apple's focus is on product elaboration and corporate acquisition.<sup>21</sup> It litigates against primary competitors, alleging patent infringement.<sup>22</sup>

Apple's cash mountain and status as the world's most capitalised company could be called self-objects,<sup>23</sup> causing the company to focus on these objects, rather than the task of product development.<sup>24</sup> People and companies predictably objectify perceived signifiers of prestige, success, and power, such as capital value. If maintaining or increasing capital value becomes a preeminent goal, Apple's litigation strategy becomes explicable. Legal suit is seen as necessary to protect the self-objects of wealth or capital, and perceived public regard.<sup>25</sup>

Litigation costs (possibly about USD 250 million 2010-14) are negligible compared to available cash. Assuming a permissive budget, litigation may be an effective device for restricting competition.<sup>26</sup> Apple's demand for Samsung's interdiction for alleged copying of

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<sup>21</sup> To date, the acknowledged period of innovation in Apple's history is associated with the leadership of the late CEO Steve Jobs (Apple's market pre-eminence grew after his death in 2011).

<sup>22</sup> The former Chief Counsel of Apple, sanctioned by the SEC for a five year period for organising in 2006 backdating of Apple stock options, said that Steve Jobs declared an aggressive, litigious policy on patenting: his attitude 'was that if someone at Apple can dream it up, then we should apply for a patent, because even if we never build it, it's a defensive tool.' ('The Patent used as sword' *New York Times* 7 October 2012, quoting Nancy Heinen).

<sup>23</sup> A 'self-object' is a term coined by psychoanalyst Heinz Kohut (d 1981), the founder of self-psychology (Kohut *The Analysis of the Self: A Systematic Approach to the Psychoanalytic Treatment of Narcissistic Personality Disorders* International Universities Press 1971): psychologically, for a corporation such as Apple, cash and capital are self-objects of identity motifs. To preserve self, the objects must be maintained. Risk aversion and aggression (litigiousness) may become corporate strategies.

<sup>24</sup> Jobs's informal mission statement for Apple in 1980, viz, 'To make a contribution to the world by making tools for the mind that advance humankind' (quoted *The Economist* 'Mission Statement' 2 June 2009). Apple's most recent mission statement (2013) declares grandiosely that Apple designs the world's best personal computers, leads the digital music revolution, has reinvented the mobile phone and is defining the future of mobile media with i-pad.

<sup>25</sup> In documents filed in the federal court (northern California) on 5 December 2013, Apple declared that it had spent USD 60 million (presumably in the United States) on its first suit against Samsung Electronics Co for patent infringement, which occupied in total 2.5 years between 2011 and 2013. In 2010 Apple sued Motorola Inc over smartphone patent infringement, settling the case in 2014 with Google Inc, which acquired Motorola in 2012. Apple countersued Nokia in 2009 and sued HTC in 2010. Apple does not report litigation cost.

<sup>26</sup> Apple dominates the market for so-called 'high-end' mobile phones. Before 2014, Samsung, the company against which Apple pursued sustained litigation, offered the only credible potential threat to Apple's dominance of the high-end market.

aesthetic and utility features can be seen as an audacious pre-emption strategy. It also implies more focus on market than product, reinforcing Piketty's argument that capital growth encourages a corporate attitude more disposed to conservation than innovation. Apple's focus on litigation has been less obvious since 2013, although the company has since its early years (1984) embraced litigation as a tool of excluding competition or increasing market share. Pfizer, by contrast, does not focus on litigation, relying on maximising profit from market exploitation of its chief monopolies.

*Non-distributive character of wealth concentration*

Apple's stock price at the time of release of three so-called 'transformative' products,<sup>27</sup> the iPod (2001), iPhone (2007) and iPad (2010), was respectively more than USD 2, 18 and 33. In 2014, after four years in which Apple released several 'new generation' versions of the iPhone and iPad, stock price approached USD 100.<sup>28</sup> In the 2010-14 period, during which legal contention and evidence of creative desuetude did not affect rising profits, Apple's capital value rose by about 170%.<sup>29</sup>

In the final quarter of 2014, Apple introduced to the market two improved i-phones, and promised later introduction of a smartwatch (April 2015) and 'Applepay' functionality.<sup>30</sup>

None of these products is systemically novel, although Applepay promises to make payments easier for consumers. Absence of novelty did not disturb consumers. Apple's

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<sup>27</sup> Transformative or 'disruptive' innovation creates new markets for new products that disrupt and may replace markets for generically similar, but superseded, products (Clayton Christensen and Joseph Bower 'Disruptive technologies: catching the wave' Harvard Business Review January–February 1995).

<sup>28</sup> [www.ycharts.com](http://www.ycharts.com).

<sup>29</sup> [www.Finance.yahoo.com](http://www.Finance.yahoo.com) NasdaqGS.

<sup>30</sup> Applepay permits use of phone handsets to effect a range of swipe payments that can be carried out using credit and other financial transaction card details.

end-of-quarter financial results showed that i-phone sales increased by nearly 50% compared to sales in the previous quarter.<sup>31</sup>

Pfizer has engaged in corporate acquisition to expand its drugs portfolio, simultaneously cutting costs, including research and development costs, partly to finance expansion costs.<sup>32</sup> Like Apple, Pfizer has not, in recent history, brought new products to market.<sup>33</sup> In the past 15 years, its researchers have not invented transformative medicines.<sup>34</sup> To a considerable extent, Pfizer is representative of its industry, and its policy a consequence of a private-public healthcare nexus, created by lobbying and legislation, that increases industry revenue but does not – contrary to narrative - stimulate innovation.<sup>35</sup> Capital value increases, but research into pharmacological treatment of disease is principally performed by universities and other publicly funded research centres.

### *Tax avoidance an anti-distributive strategy*

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<sup>31</sup> Apple reported, for the quarter ending 27 December 2014, profit of USD 18 billion, mostly derived from sale of 74.5 million iPhones, an increase of 46% from the previous quarter. (Sydney Morning Herald 28 January 2015).

<sup>32</sup> Between 2000 and 2014, Pfizer acquired by merger Warner-Lambert (2000), Pharmacia (2006) and Wyeth Pharmaceuticals (2009), and then acquired King Pharmaceuticals (2010), Excaliard Pharmaceuticals (2011), Alacer Corp and NextWave Pharmaceuticals (both 2012). In 2014, it sought to acquire AstraZeneca.

<sup>33</sup> In 1980, Pfizer posted for the first time billion dollar sales of a drug called Feldene, an anti-inflammatory pain medication. From 1997 and 1998, Pfizer sold two so-called blockbuster drugs, Lipitor, a statin drug co-marketed with Warner-Lambert until WL's merger with Pfizer in 2000, and Viagra, developed by Pfizer researchers. Lipitor is the top-selling pharmaceutical product in history (USD 9.6 billion sales 2011).

(<http://www.drugwatch.com/manufacture/pfizer/> and [http://archive.fortune.com/magazines/fortune/fortune\\_archive/2003/01/20/335643/index.htm](http://archive.fortune.com/magazines/fortune/fortune_archive/2003/01/20/335643/index.htm)).

<sup>34</sup> According to the pharmaceutical industry innovation is painstaking: the industry claims that, on average, a new medicine (defined by the US Food and Development Authority's published glossary of terms as a 'new molecular entity') takes 10-15 years to develop, at a cost between USD 800 million and 1.4 billion. (<http://www.innovation.org/index.cfm/insidedrugdiscovery>; <http://www.phrma.org/sites/default/files/pdf/PhRMA%20Profile%202013.pdf>).

<sup>35</sup> Concerning claims made about innovation and cost by the US pharmaceutical industry, see Donald Light and Joel Lexchin 'Pharmaceutical Research and Development: What Do We Get for All that Money?' *British Medical Journal* 7 August 2012 (doi: 10.1136/bmj.e4348) 1-5. The US industry asserts a 'crisis of innovation' but average industry revenues (\$200.4 billion) rose six times faster than R&D costs (\$34.2 billion) from 1995 to 2010. More than 4/5<sup>th</sup> of research funding is from public sources. The industry has not historically stressed innovation: between 1974 and 1994, only 11%-16% of new molecular entities approved were therapeutically and pharmacologically innovative. Up to 90% of annual new drug development costs are incurred developing compounds that replicate or improve the action of existing drug: it is evident that innovation is not an industry priority.

As Piketty might predict, Apple and Pfizer also practise a cardinal technique of income consolidation, tax avoidance.<sup>36</sup> In 2012, Apple paid the United States' revenue tax on income of either 8.2% or 13.8%, depending on method of calculation (cf the US corporate tax rate of 35%).<sup>37</sup> Apple distributed significant US revenue to an Irish holding company, which is also the repository of income accrued by subsidiaries outside the United States. Tax paid on foreign earnings is estimated at under 2% of total income.<sup>38</sup>

Pfizer reported USD14.8 billion losses 2007-12,<sup>39</sup> a result procured by attributing earnings to foreign subsidiaries, usually located in tax havens.<sup>40</sup> However, the company's worldwide revenue for 2010-14 totalled USD240, 994 billion (average \$60,248.5 billion).<sup>41</sup> Total profit was USD193,520 billion.<sup>42</sup> If liability for deferred tax (tax payable on foreign-held income repatriated to the United States) is subtracted from assessment, Pfizer's effective tax rate on worldwide income for 2012 was 3%.<sup>43</sup> In 2010-12, Pfizer received US tax refunds totalling USD3.4 billion.

In 2005-06, Pfizer joined in a US tax amnesty arrangement which allowed companies to pay reduced taxes on repatriated funds in return for investment in employment creation. Pfizer repatriated USD37 billion, then declared redundant 10,000 workers.<sup>44</sup> Apple and Pfizer focus on capital and income increase designed to deliver maximum returns to owners

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<sup>36</sup> See <http://www.taxresearch.org.uk/Blog/2014/05/06/tax-avoidance-is-back-at-cost-to-us-all/>: 'The proposed Pfizer takeover of UK based AstraZeneca has made clear that tax avoidance is still very firmly at the heart of the global corporate agenda. That deal has brought 'tax inversions' back to public [at]tention ... inversion simply means that a corporation is shifting its tax residence from one country to another for the main purpose of saving tax.'

<sup>37</sup> The *New York Times* 4 June 2013 calculated 8.2% and Forbes 2 November 2012 13.8%.

<sup>38</sup> *Forbes* 4 November 2012.

<sup>39</sup> United States Security and Exchange Commission filings.

<sup>40</sup> <http://www.bloomberg.com/news/2014-04-28/u-s-treasury-seen-loser-in-tax-avoiding-pfizer-deal.html>.

<sup>41</sup> <http://www.statista.com/statistics/266171/revenue-of-pfizer-since-2006/>.

<sup>42</sup> <http://www.stock-analysis-on.net/NYSE/Company/Pfizer-Inc/Financial-Statement/Income-Statement>.

<sup>43</sup> [http://www.huffingtonpost.com/martin-sullivan/pfizer-taxes\\_b\\_3490510.html](http://www.huffingtonpost.com/martin-sullivan/pfizer-taxes_b_3490510.html).

<sup>44</sup> Donald Marples and Jane Gravelle 'Tax Cuts on Repatriation Earnings as Economic Stimulus: An Economic Analysis' Congressional Research Service 20 December 2011.

(shareholders). It can be surmised that both companies are preoccupied less with product innovation than protection of the self-objects, capital and profit.

If capital growth, and increasing capital returns, lead to increasing devotion to these self-objects, another consequence of that devotion may be anti-social behaviour. Critics of Pfizer, and especially Apple, argue that both effectually repudiate the idea of corporate social contract,<sup>45</sup> and the more esoteric concept – from a corporate perspective - of human sodality. Exposés of Apple's have examined, among other things, acceptance of abuse of Chinese factory workers, including children, and tax circumvention practices.

In the context of this chapter, these criticisms need only be mentioned. What is most relevant is the indication in the conduct of Apple and Pfizer that wealth concentration is associated with anti-social praxis that must be exclusionary, since its aim is to preserve self-objects, without regard for the needs of others.

#### *Conservation neurosis and proprietary rights*

Media narrative tends to cast Apple as a visionary economic actor. In reality, both Apple and Pfizer manifest the same wealth-conservation neurosis that Piketty observed historically in wealth owners. Apple and Pfizer are wealth conservers, and, seemingly, no longer innovators. Collective retention of cash reserves of about \$235 billion, little or none of which will be distributed to public revenue, or for public benefit, suggests that both companies are agents of social entropy, not distribution.<sup>46</sup>

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<sup>45</sup> Eg, Olufemi Amao 'Corporate Social Responsibility, social contract, corporate personhood and human rights law: Understanding the emerging responsibilities of modern corporations' *Australian Journal of Legal Philosophy* 33 100 - 133 2008.

<sup>46</sup> In relation to pharmaceutical innovation, note that the National Institutes of Health, part of the United States' Department of Health and Human Services, is the world's largest funder of medical research (2014 budget USD 31 BILLION). (<http://www.nih.gov/about/almanac/nobel/index.htm>). The public sector is



Piketty's analysis does not explain why capital appears oriented towards concentration.

This dissertation proposes an answer: non-distributive capitalism is caused by the grant (a political act) and application and enforcement (socio-economic and legal acts) of proprietary rights. The reason for Apple and Pfizer to behave in the way predicted by Piketty's thesis is the creation, over the last century, of an international legal system awarding and elaborating proprietary rights.

The practices that procure for Apple and Pfizer worldwide income tax liability of not more than 3% could be said to have defeated what Adam Smith called 'society' and 'the public interest'.<sup>47</sup> Like the dragon Smaug, recumbent on a hoard of gold, the two companies guard their treasure, and react horrified at reduction.<sup>48</sup> That which might be distributed is immured. Owners obey a dialectic of ownership: increase and exclude.

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responsible for development, 1985-2010, of most FDA-approved vaccines AJ Stevens , JJ Jensen, K Wyller. PC Kilgore, S Chatterjee, ML Rohrbaugh ML 'The role of public-sector research in the discovery of drugs and vaccines' *New England Journal Medicine* 10 Feb 2011 364(6)535-41; BN Sampat, FR Lichtenberg 'What are the respective roles of the public and private sectors in pharmaceutical innovation?' *Health Aff (Millwood)* February 2011 30(2) 332-9.

<sup>47</sup> *Wealth of Nations* (1776) Book IV, Chapter II. At para 9, Smith refers to the individual unknowingly labouring to increase the value of the individual's capital: 'every individual necessarily labours to render the annual revenue of the society as great as he can.' The individual thus, 'promote[s] the public interest' as well as 'that of the society'.

<sup>48</sup> In JRR Tolkien's *The Hobbit* (1937), Bilbo the Hobbit steals a gold goblet from the treasure of Smaug. Smaug awakes and knows that the goblet is missing.

## ANNEX B      Taxation policy

The architects of tax policy have since 1798 recognised government appropriation of a substantial part of national income is necessary.<sup>49</sup> Governments since 1945 differ from predecessors in recognising that such appropriation is a permanent not occasional or intermittent necessity.<sup>50</sup> Since 1798, policymakers have not greatly developed the needs rationale for taxation.<sup>51</sup> Appropriation of national income (primarily by taxation of personal income but also through consumption and wealth taxes), achieves, however inadvertently, a policy goal of social equalisation.

Necessarily, if a greater proportion of income is appropriated from those with more income, economic disparity reduces.<sup>52</sup> More importantly a greater burden of taxation checks proprietary concentration by reducing purchasing power, or indirectly compelling asset disposal.<sup>53</sup> An example of tax causing asset disposal is estate tax introduced in the United

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<sup>49</sup> The prime minister and chancellor of the exchequer, William Pitt introduced the first income tax in the United Kingdom in 1798 to subsidise the war against France: ref *An Act for Granting Certain Duties Upon Income* 39 George III c 13.

<sup>50</sup> Until 1853, when the chancellor of the Exchequer, William Gladstone, in his budget address called the income tax 'an engine of gigantic power for great national purposes' (*Hansard* 18 April 1853 at 1383), politicians, Gladstone included, typically opposed income taxation except for reasons of national necessity. Some politicians thereafter, including Disraeli when introducing the 1858 budget, paid nominal heed to the necessitous theory of taxation. But after 1853, no government opposed the tax. In 1858, Disraeli, a socially reforming prime minister in the 1870s, called income tax, 'unjust, unequal and inquisitorial'. Although necessary for his budget, it was, 'to continue for a limited time on the distinct understanding that it should ultimately be repealed'. (*Hansard* 19 April 1858).

<sup>51</sup> Although property tax, like graduated income tax, is recognised as an equalising tax, to some extent curing distributional inequality - because it falls on what materially separates one person from another - tax policymakers do not appear to recognise the instrumental link between reducing ownership (manifested in property) and social inequality.

<sup>52</sup> Ludwig von Mises took a different view: 'Estate taxes of the height they have already attained for the upper brackets are no longer to be qualified as taxes. They are measures of expropriation.' *Planning for Freedom supra* at 32.

<sup>53</sup> As evident in the previous footnote, von Mises, who endorsed taxation to raise funds used to preserve property, viewed tax on income or property as an attack on property, which means in substance a reduction of property: 'Taxes are necessary. But the system of discriminatory taxation universally accepted under the misleading name of progressive taxation of income and inheritance is not a mode of taxation. It is rather a mode of disguised expropriation of the successful capitalists and entrepreneurs.' See: *Human Action: A Treatise on Economics* Ludwig von Mises Institute 1949/ 1999 (3<sup>rd</sup> rev ed) at 807. Cf 'Estate taxes of the height

Kingdom in 1894. Many inheritors of landed estates could not pay death duties assessed at probate. Legislation permitted them to avoid duties<sup>54</sup> by donating great houses and gardens to the National Trust to maintain for public benefit.<sup>55</sup>

High graduated taxes, and wealth taxes (such as capital gains tax) are criticised on grounds that they reduce productive incentive and forestall investment.<sup>56</sup> Criticism of tax policy is invariably, when reduced to principle, criticism of proprietary restriction.<sup>57</sup> Proprietary rights are said to be inviolable and not reducible: if Magnate's exercise of possessory rights is subject to tax, then Magnate is deterred from exercising the right, with the result that Magnate abstains from productive effort and investment (or invests less). Society is adversely affected.<sup>58</sup> According to Friedman et al, if Magnate's tax burden is decreased, proprietary rights are exercised more productively for social benefit.<sup>59</sup>

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they have already attained for the upper brackets are no longer to be qualified as taxes. They are measures of expropriation.' L von Mises *Planning for Freedom, and Sixteen Other Essays and Addresses* Libertarian Press 1980 at 32.

<sup>54</sup> *National Trust Act 1907* and six successor statutes to 1971, the last in conjunction with the *Charities (National Trust) Order 2005* conferring charitable status.

<sup>55</sup> The National Trust now controls, for public purposes, 1.5% of the land mass of the United Kingdom minus Scotland. <http://www.nationaltrust.org.uk/>

<sup>56</sup> See, eg, Benjamin Barros 'Property and Freedom' *New York University Journal of Law & Liberty* Vol. 4 (36) 2007 pp 37-69. The first axiom of those who argue that taxation, or any kind of proprietary restriction, destroys incentive to work, save or produce, is that axiom is that exclusive rights are bulwarks of liberty because they create domains in which owners are sovereign, and thus enabled to enjoy privacy, or engage in exchange, or consume. Notable adherents to this axiom, such as von Mises and Milton Friedman, do not seem cognisant of the exclusionary effects of proprietary rights. See von Mises *The Road to Serfdom supra* and *The Construction of Liberty supra* and Friedman (*Capitalism and Freedom* University of Chicago Press 1962).

<sup>57</sup> *Id.*

<sup>58</sup> That possession of proprietary rights supplies continuing incentive to productive action is assumed *a priori* by proponents of rights. Accordingly, restriction or reduction must result in diminution of incentive. See, by contrast, Atkinson masters' thesis 2002 *supra* on copyright incentive.

<sup>59</sup> 'There is a strong correlation between the reductions in top tax rates and the increases in top 1% pre-tax income shares, for the period from 1975-79 to 2004-08, across 18 OECD countries for which top income share information is available. For example, the United States experienced a 35 percentage-point reduction in its top income tax rate and a very large ten percentage-point increase in its top 1% pre-tax income share. By contrast, France or Germany saw very little change in their top tax rates and their top 1% income shares during the same period.' Thomas Piketty Emmanuel Saez, Stefanie Stantcheva 'Taxing the 1%: Why the top tax rate could be over 80%' *Centre for Economics and Research's Vox Policy Portal* 8 December 2011 [www.voxeu.org](http://www.voxeu.org).

As discussed in chapter 4, evidence suggests that rights-holders conform to a logic of concentration. They tend to consolidate property and avoid distributive action. Rights are utilised to appropriate benefit and accumulate more benefit. Magnate's investment may create the benefit of jobs but Magnate appropriates more benefit than the beneficiaries of job creation. Magnate's incentive is to accumulate not benefit employees. Possibly Magnate will see self-benefit in providing better working conditions, or be compelled by competitors to do so, but equally or more probably, Magnate will not. In the case of Magnate, unless the state elects to appropriate proprietary rights altogether, the only action that will secure social provision for employees is taxation.<sup>60</sup>

Piketty argues for 80% taxation of the income of wealthy individuals like Magnate, income which is then redistributed. The foregoing shows how taxation, especially high taxation, to varying degrees reduces wealth holdings,<sup>61</sup> which means reducing the appropriating potential of proprietary rights, and by this means also reduces – in some degree – the exclusionary power of proprietary rights. Taxation is more than the chief means of effecting redistribution. It is also, as its opponents declare, a chief means of reducing ownership. According to William Gladstone, it is 'an engine of gigantic power.'<sup>62</sup> It is also a militant instrument, the most powerful of means of social amelioration.

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<sup>60</sup> Chapter 4 Part 2.

<sup>61</sup> To the chagrin of opponents. See von Mises *Human Action supra* at 741. 'The metamorphosis of taxes into weapons of destruction is the mark of present-day public finance.'

<sup>62</sup> Budget address UK Parliament 18 April 1853.

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