SYMPOSIUM

INTELLECTUAL PROPERTY AT A CROSSROADS: THE USE OF THE PAST IN INTELLECTUAL PROPERTY JURISPRUDENCE

INTRODUCTION

INTELLECTUAL PROPERTY AT A CROSSROADS: WHY HISTORY MATTERS

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It is part of life and business to question ourselves about where the future is leading. Where possible, we all make an attempt at it. However, predicting the future must necessarily be based on knowledge of the past. Future events must have some connection with past events, and this is where historians come in . . . . Historians can attempt to uncover those elements of the past which are important, and identify the trends and the problems.

—Eric Hobsbawm[1]

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1. ERIC HOBSBAWM, ON THE EDGE OF THE NEW CENTURY 1 (Allan Cameron trans., 2000).

> *In his novel 1984, Orwell wrote that those who control the present control the past and those who control the past control the future . . . . Thus people(s) in the present need antecedents to locate themselves now and legitimate their ongoing and future ways of living . . . . Thus people(s) literally feel the need to root themselves today and tomorrow in their yesterdays.*
>
> —Keith Jenkins[2]

> *The past is not discovered or found. It is created and represented by the historian as a text, which in turn is consumed by the reader. Traditional history is dependent for its power to explain like the statue pre-existing in the marble . . . . But this is not the only history we can have. By exploring how we represent the relationship between ourselves and the past we may see ourselves not as detached observers of the past but . . . participants in its creation. The past is complicated and difficult enough without the self-deception that the more we struggle with the evidence the closer we get to the past.*
>
> —Alun Munslow[3]

Intellectual property is at a crossroads today. As the Commission on Intellectual Property Rights noted in its final report, "[o]ver the last twenty years or so there has been an unprecedented increase in the level, scope, territorial extent and role of IP right protection."[4] From the rapid privatization and commodification of information to the creation of property rights in bioengineered microorganisms and lifeforms, recent developments in the intellectual property field have sparked major controversies, calling into questions our values, worldviews, and the way society protects and incentivizes human creations and innovations. To grapple with

2. KEITH JENKINS, RE-THINKING HISTORY 22 (1991).

3. ALUN MUNSLOW, DECONSTRUCTING HISTORY 178 (1997).

4. COMM'N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 2 (2002).

these difficult questions, courts and commentators have turned to history for guidance and support.

A case in point is the recent United States Supreme Court decision of *Eldred v. Ashcroft*,[5] to which this Symposium owed its origin. Writing for the majority, Justice Ruth Bader Ginsburg looked to history to determine whether the Copyright Clause empowers Congress to extend the terms of existing copyrights. As she observed, "History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime."[6] In addition, Professors Tyler Ochoa and Mark Rose submitted an *amici curiae* brief in support of the petitioners' positions, documenting the British experience with patents and copyrights prior to the framing of the United States Constitution and the influence this experience had on the Framers and the drafting of the Copyright and Patent Clause.[7] Many legal commentators also examined the history of the Clause both before and after the *Eldred* decision.[8] All of a sudden, courts, litigants, and commentators seem to have rediscovered the use of history in intellectual property jurisprudence.

History has many functions. For the originalists, it informs the interpretation of existing law and provides the contexts needed to evaluate how and whether courts should apply existing law to

5. 537 U.S. 186 (2003).

6. *Id.* at 200.

7. Brief Amici Curiae Tyler T. Ochoa, Mark Rose, Edward C. Walterscheid, The Organization of American Historians, and H-Law: Humanities and Social Sciences Online, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618). The brief was subsequently expanded in Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPYRIGHT SOC'Y U.S.A. 675 (2002).

8. *See, e.g.*, LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968); EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE (2002); Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19 (2001); L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909 (2003); Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001).

unforeseen circumstances, such as those concerning the Internet, new communications technologies, and biotechnological innovations. For example, "a judge might turn to [legislative history] in search of the subjective legislative intent, or to divine the overall legislative purpose, or to 'imaginatively reconstruct' how the legislature would have answered a particular question, or to determine whether a word was used according to its ordinary or technical meaning."[9] Even for those who do not believe in originalism, history provides the needed backgrounds and contexts to evaluate whether an existing law or policy was appropriately designed for the newly-perceived problems. By bringing insights or drawing lessons from the past, history thus enables judges and policy makers to find more attractive solutions and make better decisions.

Moreover, the study of history itself can result in the finding of new facts and ideas that challenge our understanding of the existing world. Consider, for example, the wheel, which has been "[p]opularly perceived as one of the oldest and most important inventions in the history of the human race."[10] Although most people consider the use of wheeled transportation "a signal of civilization,"[11] historical records seem to suggest otherwise, calling into question some of our traditional wisdom and unquestioned assumptions. As Professor George Basalla noted insightfully in *The Evolution of Technology*:

> Mesoamericans did not use wheeled vehicles because it was not feasible to do so given the topographical features of their land and the animal power available to them. Wheeled transport depends on adequate roads, a difficult requirement in a region noted for its dense jungles and rugged landscape. Large draft animals capable of pulling heavy wooden vehicles, were also needed, but Mesoamericans had no domesticated animals that could be put to that use. Men and women of Mexico and Central America traveled along trails and over rough terrain carrying loads on their backs. It was unnecessary to build roads for these human carriers of goods.

9. EVA H. HANKS ET AL., ELEMENTS OF LAW 357–58 (1994).
10. GEORGE BASALLA, THE EVOLUTION OF TECHNOLOGY 7 (1988).
11. *Id.* at 8.

> An even more persuasive case can be made against the universal superiority and applicability of the wheel by returning to its place of origin in the Near East. Between the third and seventh centuries A.D., the civilizations of the Near East and North Africa gave up wheeled vehicular transportation and adopted a more efficient and speedier way of moving goods and people: They replaced the wagon and cart with the camel. This deliberate rejection of the wheel in the very region of its invention lasted for more than one thousand years. It came to an end only when major European powers, advancing their imperialistic schemes for the Near East, reintroduced the wheel.[12]

According to Professor Basalla:

> The more we learn about the wheel, the clearer it becomes that its history and influence have been distorted by the extraordinary attention paid to it in Europe and the United States . . . . Th[at] history . . . began as a search for a significant technological advancement that was produced in response to a universal human need. It has ended with the wheel seen as a culture-bound invention whose meaning and impact have been exaggerated in the West.[13]

Titled "Intellectual Property at a Crossroads: The Use of the Past in Intellectual Property Jurisprudence," this Symposium brings together six intellectual property law scholars to explore the use of history in intellectual property laws and jurisprudence. In the first article, *Everything Old Is New Again: Dickens to Digital*,[14] Professor Joseph Beard compares the copyright issues we face in the digital world today with those confronting Charles Dickens and his contemporaries in the analog world of the nineteenth century. The first half of his article focuses on the similarities between the nineteenth-century concept of "re-origination" and the late twentieth-century concept of "transformative use," which the United States Supreme Court emphasized in *Campbell v. Acuff-Rose Music, Inc.*[15]

12. *Id.* at 9–11.

13. *Id.* at 11.

14. Joseph J. Beard, *Everything Old Is New Again: Dickens to Digital*, 38 LOY. L.A. L. REV. 19 (2004).

15. 510 U.S. 569 (1994). In *Campbell*, the Court stated:

> Although such transformative use is not absolutely necessary for a

The article discusses the litigation concerning *The Wind Done Gone*, a parody of Margaret Mitchell's *Gone with the Wind*, and the dispute between Chapman & Hall and Edward Lloyd over Charles Dickens' *The Pickwick Papers*. By exploring how judges in *The Wind Done Gone* case would have resolved *The Pickwick Papers* dispute, and vice versa, the article illustrates, interestingly, a remarkable consistency of Anglo-American copyright jurisprudence.

In the second half of the article, Professor Beard focuses on the copyright term extension bill pushed by Serjeant Thomas Noon Talfourd, the eighteenth-century Sonny Bono and a close personal friend of Charles Dickens. By comparing key testimonies and commentaries on the Talfourd Act of 1842 and the Sonny Bono Copyright Term Extension Act,[16] Professor Beard demonstrates the striking similarities between arguments made by both proponents and opponents of the two pieces of legislation. Reminding us "there are lessons to be learned from days long gone,"[17] he closes the article with the eloquent and widely-cited speech Lord Thomas Babington Macaulay delivered in the House of Commons on February 5, 1841.[18]

In *Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia*,[19] Professor Lionel Bently ventures beyond intellectual property law to look at its cousin, information law. The article traces the successful enactment of the Victorian Telegraphic Messages Act in 1871 and the Telegraphic Acts of Western and South Australia in 1872 and rehearses arguments for and against the extension of protection to cover news sent by telegraph. The article also examines why similar laws were rejected

> finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

Id. at 579 (citations omitted).

16. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 304 (2000)).

17. Beard, *supra* note 14, at 19.

18. *Id.* at 68-69.

19. Lionel Bently, *Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia*, 38 LOY. L.A. L. REV. 71 (2004).

in New South Wales, Tasmania, and Queensland and the impact of telegraphic property laws in and outside Australia.

Unlike Professor Beard, Professor Bently does not seek to draw any historical lessons from the past; indeed, he finds it "virtually impossible . . . to draw any conclusions as to the impact of [telegraphic property] laws."[20] Nevertheless, he suggests that the discussion of these laws will enable us to better understand our own condition and become sensitive, while being simultaneously distant from, the legal developments we encounter today. As he maintains:

> [The article's] purpose is not to teach any particular lesson. Instead [it] is based on the premise that history rarely, if ever, reveals immutable laws about human behavior, or about the necessary relationships between practices and ideas, or between technology and the law. Rather, stories from the past, such as this one, are resources which enable us to understand our own condition. Knowledge of these stories from the past can provide us with a sensitivity to, and simultaneously a distance from, the types of developments taking place today. The past provides us with some kind of perspective from which to evaluate the present. We can make this evaluation through careful comparison of past circumstances . . . with those of the present. Such a comparison enables us to establish similarities and to identify differences between past experiences and current developments or proposals. It is through these processes that historical method affords us a particular technique for understanding the seemingly intractable challenges we face today.[21]

At the end, the article notes three similarities between the story of telegraphic property laws and the concerns raised by the Internet and digitization. First, both stories concern how to "ensure that people will put effort into the creation and dissemination of information products through new electronic distribution systems."[22] Second, the two stories prompt a reconsideration of the appropriate "units" of protection or "objects" of property—for example, whether

20. *Id.* at 162.
21. *Id.* at 170-71 (footnote omitted).
22. *Id.* at 171.

data should be protected per se. In both cases, "[t]echnological developments, more accurately particular social and cultural uses of technology, have caused us to rethink how properties are mapped."[23] Third, the two stories provide illustrations of legislative captures by interest groups and reflect strong reactions to claims of property in information.

Notwithstanding these similarities, the two stories differ in two significant ways. First, while the problems raised by the telegraph required national—and initially state-wide—solutions, the problems of the Internet and digitization require global solutions. Policy makers need to be cautious about adopting these solutions, as globally-imposed one-size-fits-all solutions may take away opportunities for legal experimentation in response to newly perceived problems. Such solutions also may result in undesirable legislation in countries or regions having different commercial structures, traditions, rivalries, and politics.

Second, while the response to the telegraph elicited technologically-specific solutions, the Internet and digitization have called for the development of technology-neutral solutions. For example, European database laws apply to all databases, electronic or otherwise, while recent British law has replaced a technologically-specific "broadcasting right" with a general "communication right." Ultimately, this drive for technologically-neutral solutions, as Professor Bently argues, will create laws of unintended consequences that bring "perfectly acceptable social practices into the realm of law, unintentionally replacing traditions with negotiations, and unnecessarily juridifying life worlds."[24] As Professor Bently concludes aptly, "A review of the story of the telegraphic property laws reminds us that technological neutrality is not always ideal."[25]

In *The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care*,[26] Professor Oren Bracha tracks the institutional development of patents from their early

23. *Id.* at 173.
24. *Id.* at 175-76.
25. *Id.*
26. Oren Bracha, *The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care*, 38 LOY. L.A. L. REV. 177 (2004).

origins in England in the late sixteenth century to their ultimate transformation in the United States in the mid-nineteenth century. This article traces the origins of the modern framework of patent rights and illustrates how these rights have been transformed "from case-specific discretionary policy or political grants of special privileges designed to achieve individually defined public purposes, to general standardized legal rights conferring a uniform set of entitlements whenever predefined criteria are fulfilled."[27]

Although commentators generally trace the origin of American patent law to the Statute of Monopolies, the article points out that "the institutional model of patents [at the inception of the American federal regime] was . . . quite different from the modern one."[28] Indeed, it was not until the mid-nineteenth century that patent rights had acquired their modern form—thanks largely to the Patent Act of 1836, which, as Professor Bracha maintains, "created the first real examination system in the United States."[29] As he observes:

> While other parts of patent law were still to undergo important changes, by the mid-nineteenth century the aspect of the institutional model of patents surveyed here acquired its modern form. A new ideology and practice of patents as individual rights and of the market as the only proper measure of the invention's value took over. The Patent Office became the "examiner" of standardized patentability criteria. Courts assumed the sole role of the enforcers of patent rights and deserted almost completely any pretensions some of them had entertained earlier of engaging in substantive evaluations of the public desirability of specific inventions or patents. The conversion of patent privileges to patent rights was complete.[30]

Professor Bracha concludes his article by discussing some possible implications of the historical development of the modern patent rights. As he cautions, "the history of Anglo-American patents should serve as a caveat to lawyers about the legitimate uses

27. *Id.* at 181.
28. *Id.*
29. *Id.* at 235.
30. *Id.* at 238–39.

of history and historical materials."[31] This historical account also may demonstrate the futility of, and perhaps danger in, attempting to derive from the past direct answers to contemporary legal questions. According to Professor Bracha:

> What early legislators or bureaucrats thought about and did with respect to patents is often irrelevant for supplying direct answers to modern questions, given the fact that they operated in a thoroughly different ideological and practical context. Worse still, a particular view that made perfect sense in the world of patent privileges might prove to be of little coherence or adequacy in the very different context of patent rights. Hence, at least when attempting to derive direct answers to current legal questions, past attitudes and views are likely to be of limited utility.[32]

Even for economic historians who are more concerned about the connection between patents and innovation, Professor Bracha observes that "the term 'patents' denotes very different sets of institutional arrangements in different periods."[33] Nevertheless, he finds it "plausible" that these different institutions have had varying effects on innovation and welcomes further research that "integrate[s] the narrative of transformation from patent privileges to patent rights into the examination of the historical connection between patents and innovation."[34]

Finally, Professor Bracha suggests that the historical account of the modern transformation of patent rights "may serve to remind us of those aspects of patents that were obscured and repressed in our modern consciousness."[35] As he points out, the transformation process has obscured the political, cultural, and social dimensions of patent rights and has reduced them to "standardized general rights [that are] legitimized by the claim of the universal patent regime to maximizing social utility."[36] To avoid ideological biases and a narrow focus on the utilitarian aspects of patent rights, one therefore

31. *Id* at 239.
32. *Id.*.
33. *Id.* at 240.
34. *Id.*
35. *Id.* at 244.
36. *Id.* at 243.

must have a better appreciation of the historical roots of patent rights. After all, as the article points out:

> [T]raditional patent privileges were openly political. They were political decisions of the sovereign, exercising its discretion and making case-specific determinations in the name of the public good. The legitimacy of each patent grant was dependent on the plausibility and legitimacy of the governmental assertion attached to it that, taking all relevant considerations and interests into account, the grant served the public good. Moreover, the "public good" in this context was not limited to a narrow conception of economic or technological innovation. Patent privileges existed in an age with no sharp distinction between "economic" (in the modern sense) and "other" public considerations.[37]

In *Digital Property / Analog History*,[38] Professor Susan Scafidi questions whether the use of the past in American intellectual property jurisprudence remains tethered to the nineteenth-century view of history, which tends "'to emphasise certain principles of progress in the past and to produce a story which is the ratification if not the glorification of the present.'"[39] As she explains, "[h]istorians are warned to exercise caution not only with respect to anachronistic interpretation of the past, but also in regard to claims of linear, teleological movement and sequential improvement."[40] Thus, the article underscores the need to reevaluate some of the underlying assumptions of intellectual property jurisprudence in light of developments in the field of history.

Professor Scafidi illustrates her arguments with two stories. The first story focuses on the United States Supreme Court case of *Marconi Wireless Telegraph Co. of America v. United States*,[41] which involved patents used in the early radio industry. Using insights from scientific, social, cultural, and political history, this story illustrates how "historical methods could benefit the study and

37. *Id.* at 243 (footnotes omitted).

38. Susan Scafidi, *Digital Property / Analog History*, 38 LOY. L.A. L. REV. 245 (2004).

39. HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY, at v (Norton 1965) (1931), *quoted in* Scafidi, *supra* note 38, at 246.

40. Scafidi, *supra* note 38, at 246.

41. 320 U.S. 1 (1943).

practice of intellectual property law."[42] The story also demonstrates the shortcomings of existing patent jurisprudence, which focuses unduly on the romantic concept of inventorship and "operates via largely unquestioned assumptions regarding factual truth and objectivity."[43]

The second story concerns the copyright dispute between Barbara Chase-Riboud, a prize-winning African-American novelist, and Dreamworks, Inc. over her historical account of the slave ship Amistad. In this story, Professor Scafidi illustrates how existing copyright jurisprudence had clung to the anachronistic "scientific" approach of history, which assumed that historians were engaged in a search of objective truth. As she explains:

> Historians no longer unanimously subscribe to the belief that they are engaged in a search for objective truth, and few would claim to discern universal laws of history. The proportion of historical research that yields concrete, unassailable facts is dwarfed by the amount of expressive material generated by historians. Even the names, dates, and places that apparently comprise the most straightforward part of the historical record are often written in pencil—especially if the handwriting is not one's own but that of a colleague in the field.[44]

By clinging to an anachronistic historical tradition, courts therefore have ignored the many choices historians had to make concerning what to include in the narrative and how to characterize or portray the past. Existing copyright jurisprudence also devalues the industrious efforts undertaken by historians to generate historical narratives and theories, which often require "years of advanced study, months spent in dusty archives scattered around the world, and countless solitary hours reading crumbling old tomes, faded letters, or endless spirals of microfilm."[45]

Professor Scafidi concludes her article by calling for a more contemporary understanding of the historical profession and the need to incorporate this new understanding into our intellectual property jurisprudence. As she explains:

42. Scafidi, *supra* note 38, at 258.
43. *Id.* at 246.
44. *Id.* at 263 (footnote omitted).
45. *Id.* at 261.

> Intellectual property law . . . should not be content to settle for an analog version of history. Like other areas of jurisprudence, intellectual property must instead incorporate a useable theory of the past informed by current scholarship. Only then can legal practice begin to reflect a more subtle understanding of history as both an arbiter and an object of human creativity.[46]

According to Professor Scafidi, modern historiographical trends not only can affect the courts' treatment of the past, as in the case of contested inventions or works of history, but also challenge the basic notions of progress and creativity that underlie the development of existing intellectual property law and jurisprudence.

In *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*,[47] Professor Susan Sell offers a critical history of intellectual property rights, discussing "key moments in the development of intellectual property law when particular ideas and economic circumstances converged to privilege particular agents and alter institutions."[48] As she maintains, "the history of intellectual property rights is [essentially] a history of contestation [in which] the inherent tensions in the idea of intellectual property recurrently resurface under philosophical, technological, or institutional pressure."[49] According to Professor Sell, what ultimately constitutes property, or piracy, "depends upon time, place, geography, constellation of interests, degree of competition present, stage of economic development, and power."[50]

Like Professor Scafidi, Professor Sell acknowledges that "[h]istorical change is not linear . . . [and] is contingent, rife with unintended consequences, path dependence, and awkward patches in which institutions no longer serve their original aims."[51] As she explains:

> The history of intellectual property protection reveals a complex yet identifiable relationship between three major

46. *Id.* at 265.

47. Susan K. Sell, *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267 (2004).

48. *Id.* at 268.

49. *Id.*

50. *Id.* at 267–68.

51. *Id.* at 268.

> factors. First, it reveals shifting conceptions of ownership, authorship, and invention. These ideas denote what "counts" as property, and who shall lay claim to it. Second, this history reflects changes in the organization of innovation and the production and distribution of technology. Third, it reflects institutional change with these shifting ideational and material forces.
>
> Legal institutionalization of these changes in law alters power relationships and inevitably privileges some at the expense of others. Property rights both are situated within broader historical structures of global capitalism and serve to either reproduce or transform these structures. Particular historical structures privilege some agents over others, and these agents can appeal to institutions to increase their power.
>
> Depending on the world in which one lives, piracy may be construed as theft or as an important tool of public policy.[52]

Professor Sell begins her list of contestations and settlements with British inventor Richard Arkwright, whose story highlighted the contestation between patentees and users of patented technologies. She then examines the diverse intellectual property protection offered by countries in the nineteenth century, the resolution of the patent controversy of 1870–1875 (which Professor Sell considers "a key settlement"), and the multilateral institutionalization of intellectual property rights under the Berne and Paris Conventions. She also discusses Thomas Edison's "predatory patenting strategies," the rise of the new German business model, the emergence of patent cartels, and the transformation of the United States' position from ambivalence and skepticism about intellectual property protection and monopoly power to vigorous advocacy for dramatically expanded global property rights. Professor Sell closes her list with the multilateral intellectual property settlement in the World Trade Organization in the early 1990s and the emerging contestation in its wake.

Like Professor Beard, Professor Sell finds that the recent developments in intellectual property policy have demonstrated that

52. *Id.* at 267.

"everything old is new again."[53] Although the current era, as the article notes, has been widely criticized for its broad property rights and heavy economic concentration in leading industrial sectors, these characteristics were also present in the nineteenth century. Indeed, as the article demonstrates, intellectual property rights "have evolved as a result of shifting conceptions of property rights, technological change, and institutionalization of legal settlements . . . [, and t]he mobilization of private actors has played an important role in shaping this evolution."[54]

At the end of the article, Professor Sell expresses concern about how "the baseline for property rights has moved quite far in the direction of private reward over public access" in recent years.[55] Thus, she calls for the mobilization of private actors to protest the broad expansion of property rights interests and to restore the historical balance in the intellectual property regime. As she concludes somewhat optimistically:

> Each new round of contestation and settlement produces new winners and losers. History has shown that depending on how well mobilized and badly threatened the losers are, they can rise up to challenge the settlement. Sometimes they prevail, which helps to redress egregious imbalances. Thus, history provides some hope for a more balanced future for intellectual property rights.[56]

In the final article of this Symposium, *Currents and Crosscurrents in the International Intellectual Property Regime*,[57] I trace the historical development of the international intellectual property regime and seek to address concerns about the "new world intellectual property order" raised by commentators and intellectual property rights holders. While commentators sympathetic to less developed countries fear that the increasing use of bilateral free trade agreements and technological protection measures will roll back the substantive and strategic gains made by less developed countries during the negotiation of the TRIPS Agreement, many intellectual

53. *Id.* at 319.
54. *Id.* at 321.
55. *Id.* at 320.
56. *Id.* at 321.
57. Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323 (2004).

property rights holders feel threatened by the recent developments in the international arena, such as the establishment of the Declaration on the TRIPS Agreement and Public Health, the emphasis of global public access rights in the World Summit on the Information Society, the adoption of the Geneva Declaration on the Future of WIPO, and the creation of the WIPO Development Agenda.

This article argues that the recent developments are neither new nor surprising, but rather reflect a recurring conflict and interaction between currents of multilateralism and the resistance to these currents, which I term "the crosscurrents of resistance."[58] While the currents push the international intellectual property regime toward uniformity and greater harmonization, the crosscurrents protect the autonomy of the member states and their ability to experiment with legal rules and innovation systems. By bringing together these currents and crosscurrents, this article demonstrates that the international intellectual property regime remains an ongoing project that provides opportunities and crises for both developed and less developed countries, as well as for both rights holders and individual end users.

This article begins by discussing how countries became dissatisfied with the use of bilateral agreements to protect authors and inventors in foreign countries. It traces the origins of the Berne and Paris Conventions, the TRIPS Agreement, and the 1996 WIPO Internet Treaties and discusses how the international intellectual property regime came to its current form. The article then explores five crosscurrents that have emerged and influenced the international intellectual property regime in recent years: reciprocization, diversification, bilateralism, non-nationalization, and abandonment. It suggests that these crosscurrents may undercut international harmonization efforts and will pose new challenges to the existing regime. The article concludes by providing observations in five different areas: bargaining frameworks, regime development, global lawmaking, harmonization efforts, and judicial trends.

More than eight decades ago, Justice Oliver Wendell Holmes remarked famously, "a page of history is worth a volume of logic."[59] If Justice Holmes is right, these six articles will provide volumes of

58. *Id.* at 328.
59. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

logic that inform the current intellectual property debate, draw insights and lessons from the past, and offer guidance for the future development of intellectual property laws and jurisprudence. I hope you will enjoy this Symposium.