FOXES AND HEDGEHOGS AT THE INTERSECTION OF HUMAN RIGHTS AND INTELLECTUAL PROPERTY

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The fox knows many things, but the hedgehog knows one big thing.

—Archilochus

Before the 1990s, human rights and intellectual property operated more or less autonomously, mutually oblivious to each other's concerns. Human rights being by nature 'universal' had their natural home in international law; intellectual property being quintessentially territorial remained the preserve of domestic law. Today, however, not only do human rights imperatives regularly penetrate the domestic law domain, intellectual property has returned the favour by going universal and encroaching on human rights' international law domain. The result is a rapid proliferation of intersections and entanglements, many of which are harmonious, even synergistic. Other intersections, however, are ravaged by intractable inter-regime and intra-regime conflicts that are still largely under-theorised. Beginning with the diagnosis that these conflicts are principally strategic — rather than ontological — this article argues that resolution can be found both in the nature of legality and in recent scholarly insights into commensurability, comparability, and balancing of norms and interests in law.

I INTRODUCTION

On 24 August 2012, the United States Court of Appeals for the District of Columbia Circuit dismissed the Obama Administration's appeal against a federal district court decision blocking a requirement for tobacco companies to display graphic warnings on cigarette packages by September 2012.[1] The appeal was the latest salvo in a battle that began with the *Family Smoking Prevention and Tobacco Control Act* which, for the first time, brought tobacco products under the regulation

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1 *RJ Reynolds Tobacco Co v US Food and Drug Administration* (DC Cir, Nos 11-5332 and 12-5063, 24 August 2012).

of the Food and Drug Administration ('FDA').[2] The Act also directed the FDA to prescribe colour images depicting the dire health consequences of smoking. The FDA selected nine images — all market tested to be as shocking as possible — including technically enhanced pictures of diseased lungs, a man blowing smoke through a hole in the neck, and the sewn-up corpse of a former smoker.

The United States District Court for the District of Columbia granted the tobacco companies relief on the grounds that the graphic-packaging regulation violated their fundamental right to free speech and appropriated their 'real estate' on the packages. Since the decision of that court (now affirmed by the DC Circuit Court of Appeals) conflicts with another district court decision from Kentucky — recently affirmed on this point by the United States Court of Appeals for the Sixth Circuit[3] — this drama is likely to have its grand finale in the United States Supreme Court.

The US litigation over tobacco packaging echoes similar litigation in Australia over the (far tougher) Tobacco Plain Packaging Bill 2011 (Cth) and Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth) which require tobacco products to be sold in drab, plain packaging starting from 1 December 2012. As in the United States, the tobacco companies responded with litigation framed in terms of fundamental rights, this time of property and expression (in addition to alleged obligations under various treaties). This conflict between the sanctity of property in trade marks and regulation of tobacco advertising in the interests of health is, by no means, unique to Australia or the United States.[4] The tobacco companies waging this war worldwide[5] are also well aware that it is ultimately unwinnable *anywhere*, and most emphatically not in Australia as the High Court's 15 August 2012 ruling against them now attests,[6] and despite the temporary uncertainty in the United States noted above.[7] But for these companies the expectation is not for ultimate victory; their goal is the more modest one of buying time. They hope that the legal challenge 'could delay the new warning

2 Pub L No 111-31, 123 Stat 1776 (2009).

3 *Discount Tobacco City & Lottery Inc v United States of America* (6th Cir, Nos 10-5234 and 10-5235, 19 March 2012).

4 'Cigarettes Meet International Law: Will Tobacco Use Go up in Smoke?' (2011) 14(1) *New York Law School International Review Newsletter* 14. As discussed in Part IV(A)(2), both interests can, of course, be framed in human rights terms. See generally Peter Yu, 'Reconceptualising Intellectual Property in Human Rights Terms' (2007) 40 *University of California Davis Law Review* 1039.

5 David Donovan, 'Cigarette Companies and Their Underhand Tactics', *Independent Australia* (online), 29 April 2012 <http://www.independentaustralia.net/2012/life/health/cigarette-companies-and-their-underhanded-tactics/>.

6 *JT International SA v Commonwealth* [2012] HCA 30 (15 August 2012) <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2012/hca30-2012-08-15.pdf>. On the merits, this outcome was predicted by leading experts, eg Mark Davison, 'Plain Packaging of Cigarettes: Would It Be Lawful?' 23(5) *Australian Intellectual Property Bulletin* 109; Mark Davison, 'Big Tobacco's Huff and Puff is Just Hot Air', *The Age* (online), 4 May 2010 <http://www.theage.com.au/opinion/society-and-culture/big-tobaccos-huff-and-puff-is-just-hot-air-20100503-u3p0.html>.

7 See above nn 1 & 3 and accompanying text.

labels for years [which is] likely to save cigarette makers millions of dollars in lost sales and increased packaging costs'.[8]

The more fundamental puzzle is what this battle instantiates: increasingly relentless conflicts between human rights and intellectual property. This is a puzzle because human rights and intellectual property are not enemies by nature: indeed, there are so many synergies and convergences between them to make for an eminently congenial relationship. Yet, it is the conflict, not the convergence, which is quickly becoming emblematic of the intersection between them. The conflict, moreover, is increasingly regarded as of their very essence. This is the central enigma that this article seeks to unravel.

In this task, I have enlisted the metaphor of 'foxes and hedgehogs' to illuminate the two competing images — of 'conflict' and 'convergence' — at the intersection of human rights and intellectual property. The metaphor is, of course, from the Greek poet Archilochus's line — 'the fox knows many things, but the hedgehog knows one big thing' — made famous by Isaiah Berlin to underscore his commitment to value-pluralism (the fox knows *many* things) and suspicion of grand unifications of values into the hedgehog's *big* thing to which he attributed the tragic totalitarianisms of the 20th century.[9] In his latest book, *Justice for Hedgehogs*, Ronald Dworkin uses the metaphor for a contrarian view that defends a 'large and philosophical thesis' of 'the unity of value' while cautioning that this 'overall thesis is unpopular now [because] the fox has ruled the roost in academic and literary philosophy for many decades, particularly in the Anglo-American tradition.'[10]

With equal daring and caution, this article takes a decidedly hedgehog view of human rights and intellectual property. It seeks a kind of 'unity of value', an image of law with room big enough for both regimes. It argues that while they may sometimes compete — and when they do, require careful balancing — their values and ends are eminently reconcilable. With specific examples, the article seeks to demonstrate that the 'foxy' conflicts at the intersection of human rights and intellectual property are not of the essence of either one, but are almost entirely attributable to three extraneous 'distortions' to which the three successive parts of this article are devoted.

Part II, titled 'Instrumentality', is devoted to the first distortion, which is the root of the other two. This foundational distortion flows from a recent tendency to frame the intersection between human rights and intellectual property in developed versus developing country, North versus South, terms. This tendency, thereby, holds the intersection of human rights and intellectual property hostage

8 'While the tobacco industry's latest legal challenge may not hold up, it could delay the new warning labels for years. And that is likely to save cigarette makers millions of dollars in lost sales and increased packaging costs.' Michael Felberbaum, 'Graphic Cigarette Warning Labels Blocked by Judge', *The Huffington Post* (online), 29 February 2012 <http://www.huffingtonpost.com/2012/02/29/graphic-cigarette-warning-blocked-judge_n_1311422.html>. Apart from Australia and the United States, other targets have included Canada and Uruguay: 'Cigarettes Meet International Law', above n 4, 25–8.

9 Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (Weidenfield and Nicholson, 1953) 3.

10 Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 1, 2.

to this perennial conflict. Part III, titled 'Legality', is devoted to the second distortion, which is a progeny of the first. In law, this antagonistic posture, born of instrumentality, quickly assigns human rights and intellectual property to opposite poles of the ancient chasm between natural law and legal positivism at their most intransigent. The last distortion is the focus of Part IV, titled 'Parity'. It is this final distortion that renders the values and interests in both regimes irreconcilable and threatens to eviscerate the signature role of law as a mediator between competing interests.

II INSTRUMENTALITY

The battles now raging at the intersection of human rights and intellectual property encompass all of the latter's three main branches: trade marks, copyright, and patents. In the case of trade marks, the most dramatic example is the transpacific litigation over cigarette packaging noted earlier — plain packaging in Australia,[11] and graphic images in the United States.[12] A second battleground is the draconian intellectual property protection measures — the Stop Online Piracy Act ('SOPA'),[13] and the Protect IP Act ('PIPA')[14] — which touched off a firestorm of activism that forced the US Congress to abandon them on 20 January 2012. That activism has now gone global to confront the equally draconian *Anti-Counterfeiting Trade Agreement* ('*ACTA*'), a plurilateral treaty largely negotiated in secret and signed by several countries including Australia, the United States, and the European Union.[15] These battlegrounds echo a third — the global battle of a decade ago over access to patented pharmaceuticals.

This ferment, however, only became daunting when both human rights and intellectual property experienced unusual stirrings and fully blossomed into global legal regimes in the 1990s. In the case of human rights, the impetus was the end of the Cold War, the collapse of the Soviet empire and of scourges like apartheid;[16] for intellectual property, the driver was globalisation of markets and

11 *Tobacco Plain Packaging Act 2011* (Cth); *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth). These legislative initiatives require tobacco products to be sold in plain packaging from 1 December 2012.

12 US Food and Drug Administration, *Tobacco Products: Cigarette Health Warnings* (24 February 2012) <http://www.fda.gov/TobaccoProducts/Labeling/Labeling/CigaretteWarningLabels/default.htm>.

13 Stop Online Piracy Act, HR 3261, 112th Congress (2011–2012).

14 Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S 968 (2011–2012) ('Protect IP Act').

15 *Anti-Counterfeiting Trade Agreement*, signed 1 October 2011, [2011] ATNIF 22 (not yet in force). On compatibility with human rights in Europe, see Douwe Korff and Ian Brown, *Opinion on the Compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights and the EU Charter of Fundamental Rights* (8 October 2011) Act on ACTA <http://rfc.act-on-acta.eu/fundamental-rights>.

16 Samuel K Murumba, 'Grappling with a Grotian Moment: Sovereignty and the Quest for a Normative World Order' (1993) 19 *Brooklyn Journal of International Law* 829, 829:

> By 1993 it had become clear that the world had changed more rapidly and more fundamentally in two years than in the previous forty. Who could have anticipated, five years ago, the collapse of the Soviet empire, the end of the cold war … Nelson Mandela's release, the South African regime's renunciation of apartheid as a tragic perversion …?

the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('*TRIPS Agreement*').[17] Prior to these momentous events, human rights and intellectual property operated more or less autonomously, blissfully oblivious to each other's concerns. Although this historical separation between them was partly attributable to differences in their legal and policy concerns, it was also due to their location on opposite sides of the national/international law divide. Human rights, being 'universal' by nature had their natural home in international law; intellectual property, being quintessentially 'territorial', remained the preserve of domestic law.

It was this orthodox divide which the last two decades have seen breached, bringing the two regimes dramatically together. Human rights have now crystallised into a richly textured body of law that regularly penetrates the domestic law domain; and, with the World Trade Organization ('WTO'), the *TRIPS Agreement* and related treaties and institutions, intellectual property has returned the favour by encroaching on human rights' international law domain. The result is a rapid proliferation of intersections and entanglements that will compel careful attention from lawyers, legislators and policymakers in both camps for decades to come.

A *A Hegelian Twist to the Human Rights/Intellectual Property Encounter*

The historic encounter just noted really poses no unique challenges unknown to similar intersections elsewhere in the law. What complicates matters at this particular juncture is the purely instrumental or strategic exploitation of it for selfish interests from the start. It is this foundational 'distortion' that has turned the encounter between human rights and intellectual property into a deeply troubled relationship.

Some years ago, leading human rights scholar Louis Henkin used the famous Hegelian 'thesis-antithesis-synthesis' dialectic to illustrate milestones in the development of the human rights idea over the last 300 years.[18] The dialectic is a useful interpretive model for temporal developments in ideas and events. It adapts these developments to a triad that begins with an assertion or proposition ('thesis'), which is then opposed by its contradiction or negation ('antithesis'), culminating in a reconciliation of the two at a higher level in the third proposition ('synthesis'). This synthesis then becomes the new thesis to be opposed by a new antithesis, resulting in yet another synthesis, and so on. Henkin's Hegelian account of human rights begins with an 18th century *thesis* of libertarian rights consisting of essentially 'negative' freedoms through a 19th century *antithesis* of affirmative welfare rights and on to a 20th century *synthesis* of liberty and welfare rights that is our modern body of human rights.[19]

17 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*'). See below Part II(B)(1) '*TRIPS* and the Intellectual Property Revolution'.

18 Louis Henkin, *The Rights of Man Today* (Westview Press, 1978) 1–30.

19 Ibid.

A similar Hegelian dialectic can illuminate the evolving relationship between human rights and intellectual property. This illumination is available even if — indeed for the very reason that — a 'synthesis' here has so far proved elusive.

B *The Global Intellectual Property Thesis*

1 *TRIPS and the Intellectual Property Revolution*

The *TRIPS Agreement* marked a sea change in the development of intellectual property. I have characterised this change elsewhere as a shift from the *international* phase to the *global* phase of that development.[20] As I use the term, *globalisation* of intellectual property means the deep integration of intellectual property principles into domestic law making for a (relatively) unified global system. In this sense, *globalisation* is qualitatively different from the earlier *internationalisation* phase, and the *global* is correspondingly different from the *international*.[21] I use *international* and *internationalisation* to refer to the occasional traversing of state boundaries by (domestically protected) subject matter and the modest international measures designed to accommodate such modest border crossings.[22]

Largely a product of intense lobbying by intellectual property industries and pressure from their governments (principally the United States and the European Union),[23] *TRIPS* wrought a tectonic shift from international to global intellectual property by working unprecedented expansion in several ways. The first was by 'legislating' beyond *international* intellectual property's modest notions, such as 'national treatment' (which merely prohibits adverse discrimination against nationals of a fellow member state), to mandated strong substantive and procedural norms. The substantive norms created a 'floor' of *universal minimum standards* of protection. The procedural norms ensure robust enforcement through specified measures such as injunctions, seizure, and, in some cases, even criminal penalties. *TRIPS* then went on to give this system real teeth through two main strategies: one that Laurence Helfer famously dubbed 'regime-shifting',[24] and the other now known as 'linkage'.[25] The industrialised countries effected a 'regime-shifting' of intellectual property issues from the World Intellectual Property Organization ('WIPO') to the gutsier GATT,[26] because the GATT/WTO's institutional features

20 Samuel Murumba, 'Globalizing Intellectual Property: Linkage and the Challenge of a Justice-Constituency' (1998) 19 *University of Pennsylvania Journal of International Economic Law* 435, 438–9.

21 Ibid 438.

22 Ibid.

23 Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2011) 35.

24 Laurence Helfer, 'Regime Shifting: The *TRIPS Agreement* and the Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale International Law Journal* 1.

25 See generally Murumba, above n 20.

26 Helfer and Austin, above n 23, 37.

'facilitated the adoption of more expansive intellectual property protection rules, enforcement mechanisms, and sanction opportunities'.[27] 'Linkage', on the other hand, made the new regime truly universal by *linking* it to trade and offering both as a package deal; in this way, the near-universal participation in the trade regime ensures that almost all states would be on board for the intellectual property regime as well.[28] The effective harmonisation that *TRIPS* imposed upon all its member-states is thus 'nothing short of revolutionary'.[29]

2 *Post-TRIPS Diminishing Flexibilities and Normative Brinkmanship*

Domestic intellectual property regimes have built-in flexibilities for reconciling intellectual property rights with other values such as those of free competition or human rights. These flexibilities include subject matter exclusions, exceptions and limitations, compulsory licences,[30] as well as interpretive leeways of choice embodied in 'principle-like'[31] (as distinct from rule-like) metrics such as 'novelty' or 'non-obviousness' in patent law, originality and the idea-expression dichotomy in copyright law and 'distinctiveness' in trade mark law. The role of these flexibilities in reconciling intellectual property and human rights, however, faces two hurdles. The first is that the flexibilities are, at best, necessary but insufficient for this role:

> Stated another way, intellectual property flexibility mechanisms expand the regulatory space available to governments. Yet they offer at best only limited guidance for restructuring creativity and innovation policies to promote human rights, including treaty obligations and customary rules that the vast majority of states have ratified and recognized as legally binding.[32]

The second limitation is even more serious and has to do with the habitual maximalist inflation of global intellectual property norms. *TRIPS*, as we have seen, inaugurates this maximalism by creating a floor, rather than a ceiling, so member states only have 'freedom' to grant greater rights, not to limit existing ones; however acutely this may be required by competing values or their own unique public interest.

When the 'industrialized countries and their intellectual property industries' pushed the envelope further by instituting proceedings in the WTO and national courts against measures designed to allow access to life-saving HIV/AIDS drugs,[33] public pressure not only forced the embarrassed withdrawal of the proceedings; it also resulted in the 2001 *Doha Declaration on the TRIPS*

27 Ibid 19–23.

28 See generally Symposium, 'Linkage as a Phenomenon: An Interdisciplinary Approach' (1998) 19 *University of Pennsylvania Journal of International Economic Law* 201.

29 Helfer and Austin, above n 23, 39.

30 Ibid 508.

31 See below n 143 and accompanying text.

32 Helfer and Austin, above n 23, 508–9.

33 Ibid 41.

Agreement and Public Health,[34] which asserts that *TRIPS* 'can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all'.[35] The Declaration also reaffirms 'the right of WTO Members *to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose*'.[36]

But these flexibilities, intended to soften *TRIPS*' hard edges and to make it palatable to developing countries, are being rapidly foreclosed by a proliferation of bilateral and plurilateral treaties. An example of the former is the *Australia-US Free Trade Agreement* ('*AUSFTA*'); examples of the latter include *ACTA* and the *Trans-Pacific Partnership Agreement* ('*TPPA*') now being negotiated. These '*TRIPS*-Plus' agreements often contain even more stringent protection of intellectual property than that found in *TRIPS*, require developing country implementation of *TRIPS* before the end of the specified transition period, or require accession to other multilateral intellectual property treaties. The result, which some deride as 'one-size (extra-large) fits all',[37] is not only a systematic elimination of the flexibilities axiomatic of domestic intellectual property regimes; it is also a progressive remake of the new global 'thesis' of (the already expansive) intellectual property law until it comes to resemble a system of *commands* backed by sanction — an extreme positivistic image of law that is 'Austinian' to the hilt.[38]

C *The Human Rights Antithesis*

The relentless foreclosure of flexibilities designed to alleviate the harshness of the new global intellectual property regime has now given birth to further 'regime-shifting' (by opponents of maximalist intellectual property protection, mainly developing countries and their supporters). The shift, this time, is from the trade regime to the human rights regime. This is the Hegelian 'antithesis' opposing or negating the global intellectual property thesis described earlier.

1 *The Global Human Rights Revolution*

Although the underlying values and norms have ancient roots, the modern law and institutions of human rights are really a post-World War II invention,[39] but it has grown in leaps and bounds so that by 1990 a leading scholar would declare that 'human rights is the idea of our time'.[40] For convenience, these modern human

34 *Ministerial Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN (01)/DEC/W/2 (14 November 2001).

35 Ibid para 4.

36 Ibid (emphasis added).

37 Helfer and Austin, above n 23, 40, quoting James Boyle, 'A Manifesto on WIPO and the Future of Intellectual Property' [2004] *Duke Law and Technology Review* 9, 3.

38 See below n 71 and accompanying text.

39 Samuel K Murumba, 'Cross-Cultural Dimensions of Human Rights in the Twenty-First Century' in A Anghie and G Sturgess (eds) *Legal Visions of the 21st Century* (Kluwer Law International, 1998) 207, 223.

40 Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) xvii.

rights norms are often divided into 'First', 'Second', and 'Third' generations.[41] First Generation human rights encompass civil and political rights listed in the first 21 articles of the *Universal Declaration of Human Rights* ('*UDHR*') and articulated with greater specificity in the *International Covenant on Civil and Political Rights*. Second Generation human rights are principally economic, social and cultural rights listed in Articles 22–27 of the *UDHR*, and the domain of the *International Covenant on Economic Social and Cultural Rights*. Third Generation human rights — sometimes described as 'solidarity rights' because they are essentially rights of 'collectives' — include such rights as the right to self-determination (included in both Covenants), the right to development, the right to peace, the right to a healthful environment,[42] and diverse rights of indigenous peoples.[43] All three generations of human rights intersect with intellectual property at various points.[44]

Now, if the global intellectual property *thesis* is becoming all command and sanction, untroubled by moral concern, its human rights *antithesis* is all morality, with little in the way of sanction or retribution. But what the human rights *antithesis* lacks in sanction or coercion, it more than makes up for in moral power. In an era of instantaneous communication, social networks, and associated activism, the capacity of this moral capital to yield swift results cannot be overestimated. Two dramatic examples attest to this: the current contention over draconian intellectual property enforcement measures, and the battle over HIV/AIDS and other life-saving drugs.

2 *Response to Draconian Measures: The Case of SOPA, PIPA, and the ACTA*

In 2011, a pair of bills — touted as bulwarks against intellectual property piracy and counterfeiting — were introduced in both houses of the United States Congress. The Senate Bill, PIPA,[45] was introduced in June of that year; its House Counterpart, SOPA,[46] was introduced in October. Backed by the major intellectual property industries — including the Motion Picture Association of America ('MPAA'), the Record Industry Association of America ('RIAA'), pharmaceutical companies, and the US Chamber of Commerce — SOPA and PIPA proposed draconian measures against not only the impugned internet sites, but also various intermediaries such as advertising networks, payment facilities, and search engines that link to such sites.

The impetus behind SOPA and PIPA came from two imperatives: a practical one and a moralistic one. The practical imperative is the explosive growth of digital networks that facilitate instantaneous access, duplication, and worldwide

41 See Louis Henkin, *International Law: Politics and Values* (Kluwer Law International, 1995) ch 11.

42 Ibid.

43 See generally Helfer and Austin, above n 23, ch 7.

44 Ibid 90–502.

45 Protect IP Act S 968 (2011–2012).

46 Stop Online Piracy Act, HR 3261, 112th Congress (2011–2012).

dissemination of information, including information protected by intellectual property. Without this ease of duplication and dissemination, there would be no need for intellectual property at all. Copyright, for example, has its origin in the invention of the printing press with its 'ability to disseminate works widely and inexpensively'.[47] A sensible and measured response to this practical, technological challenge, however, has been pre-empted by the 'moralistic' imperative. The moralistic imperative is largely contrived and strategic and, for the most part, a function of 'framing'. In order to justify 'over-the-top' enforcement measures, the intellectual property industries have framed what are essentially technological threats to their interests in the high moral language of truly grievous wrongs: theft, piracy, and even serial murder.[48]

The rhetorical strategy of linking violations of intellectual property rights to 'theft' and 'piracy' is indeed central to PIPA (whose alternative short title is 'the Preventing Real Online Threats to Economic Creativity and *Theft* of Intellectual Property Act of 2011') and, of course 'piracy' features prominently in SOPA (the Stop Online *Piracy* Act).[49] The rhetorical moralising reached new heights in the 1982 testimony of the then head of the MPAA, Jack Valenti, before a House Judiciary Sub-Committee: 'I say to you,' he said, 'that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone'.[50] Analogising invasion of intellectual property to theft and piracy also features in advertising and media campaigns.

But as Stuart Green explains in an incisive *New York Times* op-ed, 'we should stop trying to shoehorn the 21st century problem of illegal downloading into a moral and legal regime that was developed with a pre- or mid-20th century economy in mind'.[51] Nor do illegal downloaders belong to the same company as the deadly armed pirate off the coast of Somalia whom, along with the torturer and the slaver trader, Judge Kaufmann of the United States Court of Appeals for the Second Circuit famously branded *hostis humani generis,* an enemy of all humankind,[52] much less Jack Valenti's serial killer. Thankfully, despite this overheated moralistic language, the VCR was not outlawed in the 1980s, and both SOPA and PIPA were hurriedly abandoned in January 2012 amidst concerted activism bearing the banner of 'human rights' — principally, freedom of

47 Marci A Hamilton, 'The Historical and Philosophical Underpinnings of the Copyright Clause' (1999) *Occasional Papers in Intellectual Property from Benjamin N Cardozo School of Law* 5.

48 See below n 50 and accompanying text.

49 Emphases added.

50 Home Recording of Copyrighted Works: Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 97th Congress, 2nd Session on HR 4783, HR 4794 HR 4808, HR 5250, HR 5488, and HR 5705 (1982) (testimony of Jack Valenti).

51 Stuart P Green, 'When Stealing Isn't Stealing', *The New York Times* (online), 28 March 2012 <http://www.nytimes.com/2012/03/29/opinion/theft-law-in-the-21st-century.html>.

52 *Filartiga v Pena-Irala* 630 F 2d 876, 890 (2nd Cir, 1980).

expression and opposition to internet censorship. Their international counterpart, *ACTA*, is similarly encountering popular resistance worldwide.[53]

3 *The Battle for Access to Patented HIV/AIDS Drugs*

As already noted, the current activism against draconian intellectual property protection measures builds on an earlier battle over patents and access to HIV/AIDS drugs. A little over a decade ago, the conventional wisdom was that these drugs were permanently out of reach of the pandemic's Third World victims.[54] At around US$15 000 a year, these drugs hardly featured in the programs of many organisations, including WHO and UNAIDS.[55] On the view that it was 'naïve and unrealistic' to assume that poor Africans 'should receive expensive state-of-the-art AIDS drugs', priority for these organisations shifted from treatment to prevention — even though 28 million people in sub-Saharan Africa were already infected.[56] Advocacy for lower-priced drugs was regarded as 'an unacceptable violation of corporate patents' and the rules of the international trade regime to which intellectual property was now tethered through *TRIPS*.[57] To those involved in the global fight against AIDS, however, lack of access by poor countries to the very antiretrovirals ('ARVs') now slashing AIDS deaths in the west became increasingly unsustainable until matters came to a head in 2001.

The tipping point was a landmark case in South Africa that pitted intellectual property rights in patented drugs against the human right to health.[58] Reeling under one of the largest AIDS epidemics, South Africa had proposed legislation to make AIDS drugs more affordable through, among other ways, parallel importation. The United States and some 40 pharmaceutical companies quickly reacted with trade pressure and litigation to stop the legislation. The pharmaceutical companies went to court with the argument that the proposed legislation violated the *TRIPS*

53 Nancy Scola, 'Protest Drags Down Europe's SOPA: Hollywood Heads for Defeat as the Online World Rejects an Anti-Counterfeiting Proposal', *Salon* (online), 21 February 2012 <http://www.salon.com/2012/02/21/protest_drags_down_europes_sopa/singleton>. In the latest development, Jacob Anbinder in *The Wall Street Journal* reports:

> European legislators dealt a blow to the *Anti-Counterfeiting Trade Agreement*, rejecting by a large margin the controversial treaty designed to better protect intellectual property around the world. The decision on Wednesday makes it highly unlikely that the 27-nation bloc will approve the treaty in its current form and increases the likelihood that the global agreement, which the US has strongly supported, will never come into force. The pact, known as *ACTA*, aims to create an international system of anti-counterfeiting and property-rights protection measures.

Jacob Anbinder, 'EU Parliament Rejects Anti-Counterfeit Pact', *The Wall Street Journal* (online), 4 July 2012 <http://online.wsj.com/article/SB10001424052702303962304577506784228773546.html>. The rejection was by a decisive vote of 478-39, with 165 abstentions: Liz Gannes, 'In Latest Internet Policy Win, *ACTA* Rejected by European Parliament' on *AllThingsD* (4 July 2012) <http://allthingsd.com/20120704/in-latest-internet-policy-win-acta-rejected-by-european-parliament/>.

54 Helfer and Austin, above n 23, 145, quoting Lisa Forman, '"Rights" and Wrongs: What Utility for the Right to Health in Reforming Trade Rules on Medicines?' (2008) 10 *Health and Human Rights* 37, 39, 43–5.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid.

Agreement as well as South Africa's constitutional right to property. As with the anti-counterfeiting measures a decade later, the South African government and activists eventually deployed the 'human rights antithesis' — specifically the right to health — against the intellectual property claims, to great effect. Joining the South African government's case was a South African advocacy group, the Treatment Action Campaign ('TAC'), but the activism quickly went global. The TAC and other advocacy groups became the hub of a massive global movement that included *Médecins Sans Frontières*, the European Union, Dutch, German and French governments, WHO — not to mention the towering moral stature of Nelson Mandela.[59]

The first crack in the coalition defending patent rights came during the 2000 US Presidential campaign. AIDS activists used every opportunity to embarrass Vice-President Al Gore during his bid for the Presidency, a strategy that led to US withdrawal of trade pressures against the South African legislation.[60] The global advocacy then went on to engulf the pharmaceutical companies involved in the South African litigation until their intellectual property arguments became morally and embarrassingly unsustainable, leading them, too, to drop the case in April 2001.

Although this drama had its epicentre in South Africa, its impact did not stop there. It became the impetus for a major revisiting of the *TRIPS* intellectual property *thesis* at the Doha Conference and the Declaration mentioned earlier.[61] These results were, therefore, a major triumph for the human rights *antithesis* and its protagonists, leading to the price of AIDS drugs dropping from US$15 000 to US$148–$549 per annum in many low-income countries, and access to ARVs surging from 1 per cent to 28 per cent.[62] It is this 'norm-cascade' which has, in turn, provoked a backlash of bilateral and plurilateral treaties seeking to reverse the trend.

D *Whither the Synthesis?*

In the Hegelian story that Professor Henkin tells about human rights, the 18th century individualist-libertarian 'thesis' and the 19th century equalitarian-social 'antithesis' fused into the 20th century synthesis that is our modern human rights regime. This synthesis did not come easily. It was forged in the cataclysm of the Second World War and had to overcome the long stand-off of the Cold War and the heady liberation struggles for decolonisation. But it has held firm and now commands near-universal respect and allegiance. However, a similar synthesis has yet to emerge for the corresponding 'intellectual property thesis' and its 'human rights antithesis'. The intellectual property-human rights dialectic is still mired in the intransigent thesis and antithesis positions that have now fought each other to a standstill. This impasse means that even the instrumental deployments

59 Ibid.

60 Ibid.

61 *Ministerial Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN (01)/DEC/W/2 (14 November 2001).

62 Helfer and Austin, above n 23, 148.

at the intersection of human rights and intellectual property are, ironically, also a strategic failure.

There are two explanations for the failure of even these modest strategic objectives. The first is that they are predicated on a simplistic 'North-South' logic that is getting more and more murky. That historical axis of inequality has, of course, not altogether disappeared, but it is continually being reconfigured in ways that no longer respect national borders. The result is that one can now encounter some 'South' in the 'North' and some 'North' in the 'South' (as in rapid economic growth 'developing' countries such as China and India).[63] The second and more fundamental explanation, however, is the one central to this discussion. It lies in the deeply conflicted image of law torn apart by the strategic logic just noted. That North-South image has thus created formidable impediments to the emergence of a functioning and more enduring legal system that must, of necessity, embrace both human rights and intellectual property norms beyond national borders. This problem is the focus of Part III.

III LEGALITY

The image of law which emerges from the strategic battles between the 'intellectual property thesis' and its 'human rights antithesis' described in Part II is a bruised and schizophrenic one. It is driven by a deep — but still grossly under-theorised — internal chasm that resurrects contentious debates about the nature of law itself, and the ancient quarrel between legal positivism and anti-positivism. It is thus another iteration of what Ronald Dworkin recently described as 'no doubt the hottest of the chestnuts burning lawyers for centuries: What is the relation between law and morals?'[64]

This part of the article first sketches the basic contours of the historical legality-morality divide. Then it shows how the 'foxy' conflicts between intellectual property and human rights have, inadvertently, been shaped by respective adaptation to opposite extremes of that divide. Finally, from that historical competition for the very soul of law, it identifies insights that can provide a matrix for resolving the conflict.

A *The Law/Morality 'Chestnut' in Perspective*

Dworkin's hot 'chestnut' of the relation between law and morals has historically revolved around the debate between legal positivism and natural law, where 'natural law' was regarded for the most part as synonymous with morality. Like

63 See generally Robert Reich, *The Work of Nations: Preparing Ourselves for 21st Century Capitalism* (Random House, 1991).

64 Dworkin, *Justice for Hedgehogs*, above n 10, 400.

morality,[65] natural law was always seen as universal and necessary, not contingent.[66] As Aristotle would say, natural law is immutable and valid everywhere, 'as fire burns both here and in Persia',[67] unlike the rules of *human justice* which 'are like corn and wine measures' that 'are larger in wholesale and smaller in retail markets'.[68] The other characteristic attributable to morality — and therefore to natural law — was that it was censorial, in the sense of wielding a 'veto [power] over law' so that immoral laws were not just bad; they were also *invalid* or not law at all.[69] The Enlightenment and 17th and 18th century European and American Revolutions marked a shift in natural law thinking from the transcendent to the anthropocentric, from the universe of duty (of natural *law*) to that of entitlements (of natural *rights*) — the forerunner to our modern doctrine of human rights. Natural law, of course, did not disappear; it was now pressed into the service of natural *rights*. Many of its features, including its censorial posture, simply carried over to its anthropocentric natural *rights* phase. Indeed, the modern view of human rights as 'trumps' — Ronald Dworkin's idea[70] that is now so widely accepted — is a faint echo of that pre-eminence.

The legal positivist rejoinder — just as confident and uncompromising — originated with Jeremy Bentham who famously derided 'natural rights' as 'nonsense upon stilts'. But it was John Austin's notion of law as the command of the sovereign,[71] which laid the foundation for modern legal positivism and its manifesto of law as *fact* — even the 'brute' fact of general *commands backed by sanction*. In Scott Shapiro's words:

> According to Austin, all rules are commands. A command is the expression of a wish backed by a threat to inflict an evil in case the wish is not fulfilled, issued by someone who is willing and able to act on the threat. Austin calls the evil resulting from the violation of a command a 'sanction'. Simply telling my daughter to pick up her toys, therefore, is not a command in Austin's sense. Only if I sincerely threaten to sanction her if she fails to listen and am able to carry it out have I *commanded* her to pick up her toys.[72]

65 Ibid.

66 Ibid 400–1.

67 C G Weeramantry, *The Law in Crisis: Bridges of Understanding* (Capemoss, 1975) 185.

68 Ibid.

69 Hugh Baxter, 'Dworkin's "One-system" Conception of Law and Morality' (2010) 90 *Boston University Law Review* 857, 858, identifying this 'veto [power] over law' as characteristic of the version of morality that Ronald Dworkin selects as emblematic of the genre in the manuscript for *Justice for Hedgehogs*. He also cites Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Bonnie Litschewski Paulson and Stanley Paulson trans, Clarendon Press, 2002) as another contemporary adherent.

70 Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984) 153.

71 John Austin, *The Province of Jurisprudence Determined* (1832).

72 Scott J Shapiro, *Legality* (Belknap Press of Harvard University Press, 2011) 53 (emphasis in original).

B *Legality and Morality at the Intersection of Human Rights and Intellectual Property*

Over the years, numerous refinements and concessions from both camps have softened the hard edges of the positivist and anti-positivist positions just described. From these refinements, one can begin to piece together a 'synthesis' capable of accommodating *both* human rights and intellectual property. For that to happen, however, they need to extricate themselves from the arms of the extreme poles into which the imperative of strategic advantage has inexorably driven them. As foreshadowed, intellectual property now occupies the legal positivist end while human rights hails from the morality end. Here is how:

1 *Intellectual Property's Positivist Turn*

The central tenet of legal positivism, we have seen, is the conception of law as *fact*, with no *necessary* connection to morality. Law's facticity can range from the cruder Austinian command-backed-by-sanction conception — a kind of 'gunman writ large'[73] — to the more refined notion of law as a system of rules grounded in social practices or conventions as conceived by H L A Hart.[74] This article has argued that the intellectual property law inaugurated by the *TRIPS Agreement* is increasingly positivist in the extreme Austinian sense of law-as-command-backed-by-sanction.[75] This continued orientation of global intellectual property towards the Austinian command-sanction model is a product of several features. Principal among them, as observed in Part II, is the 'one-way ratchet' in the universalisation of higher standards and enforceability of intellectual property norms, as well as effectiveness of sanction for non-compliance. All these, we saw, were achieved in one fell swoop through 'regime-shifting' from WIPO to the WTO trade system. But the 'command' paradigm has also been consolidated through the unidirectional flow of directives from 'law-giver' to 'law-receiver' reminiscent of the Austinian image of sovereign command-giver and her compliant subjects. This is succinctly captured in the words of a leading 'participant-observer' of international intellectual property lawmaking:

> There are two broad sets of 'State' players in the international economy — we could refer to them as the 'paradigm-setting States' (P-SSs) and the 'paradigm-receiving States' (P-RSs). The P-SSs, exemplified by the United States and other highly industrialised economies, are those that largely determine the content of the rules by which the international economy must operate. The second set, the P-RSs, by virtue of their inadequate economic-human-capital resources and their historical incorporation into the international economy as colonies or dependent territories, have much

73 Ibid 54.

74 H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1997).

75 See above n 71 and accompanying text.

> less input in determining the content of the rules of the game they must inevitably play.[76]

This one-way ratchet towards Austinian positivism, driven by the imperative of self-interest and strategic advantage on the part of rich countries and their intellectual property lobbies, is often compounded by more banal realities associated with poverty. Even in the few instances where the process is not self-consciously biased against poor countries, or where a forum exists through which they could press their own interests, endemic disabilities associated with poverty can get in the way.

Here is a representative example:

> There are several [poor countries] which do not have Permanent Missions at the United Nations Office in Geneva. Such countries normally cover the issues at the WTO or elsewhere in Geneva by occasionally sending a representative from some nearby Mission. It is common knowledge, for example, that a few African countries frequently send their representatives based in Brussels to Geneva meetings.[77]

Even those poor countries lucky enough to have a Permanent Mission in Geneva may still lack sufficient personnel. A lone trade attaché may simultaneously have to cover trade issues at the WTO, intellectual property discussions at WIPO, and deliberations at UNCTAD![78] By contrast, some developed countries may have a special Ambassador to the WTO (in addition to their Ambassadors to the UN Geneva office) and 20 or more officers exclusively dedicated to the WTO.[79] The United States often has some 13 officers covering WTO negotiations, while Japan sometimes has as many as 22 each devoted to a separate agreement at the same body.[80]

In summary, we have seen that the intellectual property 'thesis' started out in a mild command-sanction mode, the mildness coming from the leavening of *TRIPS*'s rigor by internal flexibilities to sweeten the deal for developing countries. The attempt by developing countries to avail themselves of the benefits of these flexibilities at Doha,[81] however, has quickly led to their progressive elimination through bilateral and plurilateral agreements.[82] The result is a relentless trajectory of intellectual property law towards more and more extreme versions on the ancient Austinian command-sanction brand of legal positivism. This brand of positivism is a caricature of law as a thinly disguised Rousseauean transposition of might into right and obedience into duty — and just as unworkable.

76 Edward Kwakwa, 'Regulating the International Economy: What Role for the State?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, 2000) 227, 232.

77 Ibid 233–4.

78 Ibid 234.

79 Ibid.

80 Ibid.

81 See above nn 36–7 and accompanying text.

82 Ibid.

2 *Morality and the International Human Rights 'Antithesis'*

Hailing from the morality end of the legality-morality divide, the powerful idea of human rights has been 'weaponised' against the relentless march of intellectual property and, in some key battlegrounds noted in Part II, it has successfully stopped that march in its tracks. The power of the human rights idea which has achieved all this is a function of its universality and compelling moral force. Human rights are quintessentially rights which human beings have solely by virtue of their humanity:

> They do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development. To call them 'human' implies that all human beings have them, equally and in equal measure by virtue of their humanity — regardless of sex, race, age; regardless of high or low 'birth', social class, national origin, ethnic or tribal affiliation; regardless of wealth or poverty, occupation, talent, merit, religion, ideology, or other commitment.[83]

International human rights, as their name indicates, answer to all three components of that name: they are *international* (ie *universal* entitlements), *human* (in the sense of being predicated upon their bearers' *humanity*) and *rights* (that is to say, claims *as of right* — not from grace or kindness). But the compelling moral force of human rights does not reside only in these definitional attributes. It is also rooted in that idea's monumental historical achievement of gaining wide acceptance not only as 'the idea of our time',[84] but also as the 'ethical lingua franca'[85] of our day. The power of human rights is also attested to by their pre-eminence as 'trumps' (a characterisation we owe to Ronald Dworkin)[86] in the sense that the interests they protect 'are so important' as to be 'protected even from policies that would indeed make people as a whole better off'.[87]

Yet the power of human rights which derives from their compelling universality and moral force is, ipso facto, also limited: it seems they work only in extremis, as a weapon of last resort. The battles over access to life-saving drugs, and against draconian measures and censorship already noted are dramatic examples of this signature potency in extreme cases. This is partly due to the fact that the modus operandi of human rights practitioners can only deploy their universality and moral force largely through 'exposure and shame' which involve 'a different

83 Henkin, *The Age of Rights*, above n 40, 2–3.

84 Ibid ix.

85 Joseph Raz, 'Human Rights without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 321, quoting John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press, 2007) 75.

86 Dworkin, 'Rights as Trumps', above n 70.

87 Dworkin, *Justice for Hedgehogs*, above n 10, 329. This presumption of supremacy tends to orient the normative order in which it features towards vertical hierarchy. As to this, see Erica De Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press, 2012) 1–12.

dynamic' from 'enforcement of law in regular courts'.[88] In particular, as in access to life-saving drugs or activism against internet censorship above:

> When it comes to enforcing [human rights] through shaming rather than litigation, public morality plays an even more important role. To put it simply, there can be no shame if the public approves of the conduct in question. The law may say that certain conduct is wrong, but if the public disagrees, if it applauds the conduct, the government will feel no pressure to comply with the law.[89]

In a word, human rights work most effectively as a 'backstop' or 'a law of last resort'[90] when normal 'legality' fails because of governmental tyranny or abuse of power in the lawmaking process observed in the 'intellectual property thesis' above. They are just no substitute for a comprehensive 'synthesis' in our dialectical model described above.

C *Prospects of 'Synthesis' in the Concept of Law as a Fact-Value Complex*

1 *Positivism and Its Discontents on the Road to Law as a Fact-Value Complex*

Legal positivism aspires to objectivity, foundations, and identity. To do this, it partakes of modernism's empiricist turn and, in this respect, has strong affinities with the other 'positivisms' including the sociological one and the much-discredited logical one.[91]

> A version of each of these dichotomies, the fact/value dichotomy ('is' versus 'ought') and the analytic-synthetic dichotomy ('matters of fact' versus 'relations of ideas'), was foundational for classical empiricism as well as for its twentieth-century daughter, logical positivism. Thus to

88 Kenneth Roth, Executive Director of Human Rights Watch, 'What are Human Rights for: Three Personal Reflections' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2010) 8, 9.

89 Ibid.

90 Ibid 8. Another relevant issue is that so many of the conflicts between IP and human rights relate to economic, social and cultural rights, which had long been viewed as lacking definitive content. Only in the last decade have courts and treaty bodies developed greater normative precision with respect to these 'Second Generation' rights. In fact, one might reasonably conclude that the pressures of expanding IP protection contributed to the particularisation of Economic, Social and Cultural Rights. I'm grateful to Laurence Helfer for this important insight.

91 In Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Harvard University Press, 2002) 10, there is a reminder of how

> [t]he logical positivists famously introduced a tripartite classification of all our putative judgments into those that are 'synthetic' (and hence, according to the logical positivists, empirically verifiable or falsifiable), those that are 'analytic' (and hence, according to the logical positivists, 'true [or false] on the basis of the [logical] rules alone'), and those — and this, notoriously, included all our ethical, metaphysical, and aesthetic judgments — that are 'cognitively meaningless' (although they may have a practical function as disguised imperatives, ways of influencing one another's attitudes, and so on).

> come to think without these dogmas is to enter upon … a whole new field of intellectual possibilities in every important area of culture.[92]

Legal positivism also shares with the other 'positivisms' an enduring eschewal of moral claims and a constant impulse to 'design them out' — hence, legal positivism's central attribute: the separability thesis.

> Beginning with the second half of the nineteenth century, positivism invaded all branches of the social sciences, including legal science. Legal positivism shared with positivistic theory in general the aversion to metaphysical speculation and to the search for ultimate principles. It rejected any attempt by jurisprudential scholars to discern and articulate an idea of law transcending the empirical realities of existing legal systems. It sought to exclude value considerations … The legal positivist holds that only positive law is law; and by positive law he means those juridical norms which have been established by the authority of the state.[93]

The separability thesis is the claim that there is no necessary connection between law and morality. It insists that what the law *is* one thing; what it *ought* to be (or be for) is quite another. What legal positivists seem to cherish most is to be able, straightforwardly, to describe, elucidate, explain, what law is — unfettered by the messiness of questions about what it ought to be. Whether legal positivism could succeed at even this reductionist task seems doubtful in light of the sustained challenges mounted against it.

The first of these was the famous Hart-Fuller debate.[94] In his groundbreaking book,[95] Fuller argued for the connection between law and morality by showing not only that law often operates as an instrument for attaining moral ends, what he termed the 'external' morality of law but, more significantly, that law also had an 'internal' morality, embedded in its very essence.[96] The internal morality of law consisted of such imperatives as that law should be clear, consistent, accessible, amenable to compliance, and prospective.

Hart's reply was that these tenets of the so-called internal morality of law were not a morality at all but prudent measures for making law work, in the same way that murder by poisoning might require prudential measures like avoiding poisons that make the victim vomit, and so on.[97] But Hart's response here seems

92 Ibid 9.

93 Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (Harvard University Press, revised ed, 1974) 94.

94 There have been several major conferences around the world commemorating this historic debate or the legacy of H L A Hart, among them: 'Symposium on the Hart-Fuller Debate at Fifty', held at New York University School of Law, 1–2 February 2008; 'The Hart-Fuller Debate Fifty Years On' held at the Australian National University, 17–19 December 2008 and published in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing, 2010); 'The Legacy of H L A Hart', held at Cambridge University, 27–28 July 2007.

95 Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969).

96 Ibid 33.

97 H L A Hart, 'Book Review: The Morality of Law' (1965) 78 *Harvard Law Review* 1281, 1286. See also Marshall Cohen, 'Law, Morality, and Purpose' (1965) 10 *Villanova Law Review* 640, 651; Ronald M Dworkin, 'The Elusive Morality of Law' (1965) 10 *Villanova Law Review* 631, 634.

unconvincing. He was right in the view that the relationship between Fuller's internal and external moralities was a 'means-ends' relationship but, surely, not every 'means-ends' relationship could be described as a *morality*. One could characterise the external function of a car as motion — *moving* people from one place to another. One could also observe that in order to produce this *external motion*, cars typically need to have an *internal motion* — for instance, the engine and various other internal motion-producing systems. The fact that the relationship between the internal and external activity here could be intelligibly described as a 'motion' does not mean that every means-ends relationship can be so characterised. For law, morality is at the heart of its very essence and viability. In this, Fuller has been vindicated by recent discoveries in moral psychology[98] and cognitive science.[99]

It was the next debate, however, the Hart-Dworkin debate, that created the most serious problems for legal positivism. Like Fuller, the reigning critic of legal positivism, Ronald Dworkin, showed that morality was not so much an external censor (a tenet of the older natural law) as a *resident* at its very heart. His initial strategy consisted of looking at law as made up not just of rules that apply in an all-or-nothing manner, and whose important feature is validity, but also of legal 'principles' whose most significant feature is weight.[100] Over the years, Dworkin used another methodology, interpretation, which came into full bloom in the 1980s[101] and is now one of the central tenets of his *Justice for Hedgehogs* — to make trouble for legal positivism's cherished facticity.[102] The result of Dworkin's sustained challenge was an internal split in legal positivism between 'inclusive'[103] or 'soft' legal positivism (which sometimes goes under the name of 'incorporationism') and 'exclusive'[104] or 'hard' legal positivism. But this split did not really solve the problem. As Dworkin himself points out:

> Exclusive positivism, at least in Raz's version, is Ptolemaic dogma: it deploys artificial conceptions of law and authority whose only point seems to be to keep positivism alive at all cost. Inclusive positivism is worse: it is not positivism at all, but only an attempt to keep the name 'positivism' for a conception of law and legal practice that is entirely alien to positivism. If I am right in these harsh judgments, a further question arises. Why are legal positivists so anxious to defend positivism when they can find no successful arguments for it. [At least part of the answer is that] positivists are drawn to their conception of law not for its inherent appeal, but because

98 Owen Flanagan, Hagop Sarkissia and David Wong, 'Naturalizing Ethics' in Walter Sinnott-Armstrong (ed), *Moral Psychology* (MIT Press, 2008) vol 1, 1.

99 See generally Michael Gazzaniga, *Human: The Science Behind What Makes Us Unique* (Harper Collins, 2008).

100 Ronald Dworkin, *Taking Rights Seriously* (Gerald Duckworth, 1977) 22–8.

101 Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986); Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 1985) 119–77.

102 Dworkin, *Justice for Hedgehogs*, above n 10.

103 Kenneth Einar Himma, 'Inclusive Legal Positivism' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 125.

104 Andrei Marmor, 'Exclusive Legal Positivism' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 104.

> it allows them to treat legal philosophy as an autonomous, analytic, and self-contained discipline.[105]

The more fundamental problem which survives even legal positivism's split into 'exclusive' and 'inclusive' camps remains its avowed facticity and concomitant aversion to the normative — in the sense of 'ethical'[106] — realm. All brands of legal positivism still share a commitment to the *descriptive* ontology of law as ultimately *social fact*. As it now emerges, however, this claim to pure, morally neutral 'descriptiveness' is also unsustainable. 'Descriptions' can never be *wholly* morally neutral because human orientation to the world and its contents is inherently normative. When a description looks purely factual, it is usually because agreement about, or acceptance of, its normative or purposive aspect is so deep as to render that aspect unconscious or 'natural'. Legal positivism, as we have seen, takes Hume's is-ought[107] dichotomy seriously. It divides the world 'between solid facts "out there" like Grand Central Station, and arbitrary value-judgments "in here" such as liking bananas or feeling that the tone of a Yeats poem veers from defensive hectoring to grimly resilient resignation.'[108] But let us follow this line of reasoning, that Hart and legal positivists have made such an anchor of their theory, with Terry Eagleton:

> Facts are public and unimpeachable, values are private and gratuitous. There is an obvious difference between counting a fact, such as 'This cathedral was built in 1612,' and registering a value-judgment, such as 'This cathedral is a magnificent specimen of baroque architecture.' But suppose I made the first kind of statement while showing an overseas visitor around England, and found that it puzzles her considerably. Why, she might ask, do you keep telling me the dates of the foundation of all these buildings? Why this obsession with origins? In the society I live in, she might go on, we keep no record at all of such events: we classify our buildings instead according to whether they face north-west or south-east. What this might do would be to demonstrate part of the unconscious system of value-judgments which underlies my own descriptive statements. Such value-judgments are not necessarily of the same kind as 'This cathedral is a magnificent specimen of baroque architecture,' but they are value-judgments nonetheless, and no factual pronouncement I make can escape them. Statements of fact are after all *statements*.[109]

Ronald Dworkin has been making a similar point in relation to law since at least the 1980s: that all theories about law — including legal positivism — must

105 Ronald Dworkin, 'Book Review: Thirty Years On' (2002) 115 *Harvard Law Review* 1655, 1656.

106 Legal positivists sometimes use the term 'normative' in the narrow sense as in Kelsen's pure theory of law as a hierarchy of 'norms': See generally Jeremy Waldron, 'Normative (or Ethical) Positivism' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford University Press, 2001) 411.

107 For an enlightening discussion of the meaning and abuses of the distinction, see Putnam, above n 91.

108 Terry Eagleton, *Literary Theory: An Introduction* (University of Minnesota Press, 2nd ed, 1996) 11.

109 Ibid (emphasis in original).

themselves be moral accounts.[110] As for law itself, his most holistic account[111] now regards it not just as an interpretive concept or even as 'a rival system of rules that might conflict with morality but as *itself a branch of morality*'.[112]

2 *Between Order and Justice: An IP/Human Rights Synthesis in Law*

In any event, if both law and morality are interpretive concepts, and interpretation is at least *both* factual and evaluative in the sense of trying to make the best sense of our practices, rules, principles, etc, the image of law that emerges is at the very least not the positivistic one of *pure fact* nor its opposite of law as *pure value* — but of law as, at bottom, a *fact-value complex.* This highlights a unique role for law in general, and in the specific dispute between human rights and intellectual property.

The argument here — which builds on the discussion so far — is that the dialectic between 'order' and 'justice' holds the key to an enduring harmony and fruitful synergy between human rights and intellectual property.[113] As conceived here, 'order' and 'justice' represent each side in the divide that has previously manifested itself as between legality and justice (morality) or fact and value, and the contingent, strategic assignment of intellectual property and human rights interests to either camp. *Order,* as I conceive it here, belongs to the side of 'fact' or the 'is' in the fact-value stakes. It is the reality of existing institutions, interests, power arrangements, stability, and settled expectations. *Justice*, by contrast, belongs to the realm of 'value' or the 'ought', constantly challenging the existential order to be transformed in accordance with the ever evolving normative standards of justice. It presses for continual change and revision of inherited dispensations. Like 'tomorrow', therefore, justice never fully arrives; it is always in the process of becoming, always unfolding.

The realms of order and justice are thus in constant tension. Justice continually throws up alternative visions of potential orders that rival the current one. Left to themselves, order and justice can therefore quickly degenerate into repression or revolution. I suggest that the phenomenon of alternate 'regime-shifts' by intellectual property and human rights interests discussed in Part II are an attenuated version of this 'repression-revolution' brinkmanship. The problem with this state of affairs is that it ultimately benefits no one. The traditional conceptions of law as either fact (as does orthodox legal positivism) or value (as does traditional natural law) cannot obviate this clash, because positivism and natural law simply map onto its antagonistic sides. The conception of law as a fact-value complex, however, being a kind of synthesis of order with justice,[114] may do that.

110 Andrei Marmor, 'The Nature of Law' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter ed, 2011) <http://plato.stanford.edu/archives/win2011/entries/lawphil-nature/>.

111 Dworkin, *Justice for Hedgehogs*, above n 10.

112 Ibid 5, 405–15 (emphasis added).

113 The conception here has affinities with Bodenheimer, above n 93.

114 For an earlier version of the relationship between law and justice, see ibid.

Law as a fact-value complex thus combines the existential 'is' of the existing order with the normative 'ought' of the demands of justice. Because it is partly rooted in justice, it does not have the option of being completely indifferent to demands of justice as legal positivism would render it; and because it is partly rooted in order, it can only absorb demands of justice in a systematic, *orderly* manner. Law has this capacity in proportion to the built-in limits and leeways of choice upon those, such as judges, charged with working it. The limits are those built into the system through explicit directives, doctrines, and other regularities such as the common law doctrine of precedent; the leeways consist of flexibilities already observed.[115]

Intellectual property and human rights laws, too, must ideally take the form of fact-value complexes, embracing *both* law's facticity and its normativity. It is in this integrative notion of law as a fact-value complex that the *intellectual property thesis* and its *human rights antithesis* above can, finally, find a reconciling and enduring *synthesis*. As outlined in the final part of this article below, this harmonising synthesis, in turn, provides a platform for continually adjusting competing values and norms across the regimes of human rights and intellectual property and within each — thus resolving not only *inter-regime* but also *intra-regime* conflicts.

IV PARITY

Once the intransigent 'strategic' conflicts discussed in Part II and their 'legality' progeny in Part III are settled, the relationship between human rights and intellectual property will, for the most part, trend towards convergence and synergy because the interests and policies they represent often converge. As with other areas of law, however, the intersection will also produce its fair share of genuine conflicts. Using the cigarette advertising controversy this article opened with, the rest of this part suggests possible avenues for resolving these residual conflicts. These approaches are divided into two categories. The first discusses possibilities of rapprochement through inter-regime translatability and value-hierarchy, which may resolve a considerable portion of these conflicts. The second category draws on insights from recent scholarship on 'commensurability, comparability, and balancing' to resolve the remainder.

115 See generally Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1968); Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, 1985).

A *Inter-Translatability, Value-Hierarchy, and Inter-Regime Conflicts*

1 *Inter-Translatability*

Once the duelling 'strategic' postures discussed in Part II and the antagonistic 'legalities' in Part III are pacified, many intellectual property and human rights interests can yield to inter-translatability in the manner famously suggested by Roscoe Pound's jurisprudence of interests.[116] In Pound's scheme, interests — including those classed as human rights or intellectual property — are, in the end, all de facto human claims,[117] though Pound also divided them into 'individual interests', 'social interests' and 'public interests'.

Since human rights are characteristically regarded as *individual* human interests while intellectual property is often viewed as rooted in *social* policy, the two regimes may, at first blush be expected to defy inter-translation. The genius of Pound's approach, however, is that it treats *all* interests — individual, social, public — as *individual* human claims. Indeed, Pound was also 'unambiguously insistent that interests, however labelled, must be mutually translatable to one level to allow comparison',[118] and to avoid prejudging the issue:

> In weighing or valuing [interests with respect to other interests we] must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance in our very way of putting it.[119]

In the cigarette advertising controversy, for instance, Pound would insist that claims on both sides be translated into individual interests or social interests before being compared. Thus one could see the conflict as involving *individual* rights to intellectual property versus *individual* rights to health, or as between *social* policies promoting intellectual property goals versus *social* policies protecting public health.

2 *Value-Hierarchy*

While the Poundian approach could resolve some conflicts, however, there may be contexts where core values at the heart of each regime defy translatability. Core values at the heart of intellectual property may sometimes present themselves as irreducibly *social and consequentialist*, while those at the heart of human rights may present as irreducibly *individual and deontological*. Here, Dworkin's notion of human rights as 'trumps',[120] and a vertical value-hierarchy that accords them

116 Roscoe Pound, *Jurisprudence* (West Publishing, 1959) vol 3, 15–324.

117 Ibid 15.

118 Julius Stone, *Social Dimensions of Law and Justice* (Wm W Gaunt & Sons, 1966) 172.

119 Pound, above n 116, 328.

120 Dworkin, 'Rights as Trumps', above n 70 and accompanying text.

precedence,[121] would be more apt. Rochelle Dreyfuss takes a similar view in relation to human rights and patent law:

> My thesis is that the equation of intellectual property rights generally — and patent rights in particular — to human rights is belied by the historical evolution of these rights and negated structurally by the manner in which claims to intellectual property are recognized in legislative enactments and international instruments.[122]

She goes on to suggest that 'elevating intellectual property rights to human rights has unfortunate consequences [since], presumably, human rights can be outweighed only by other human rights'.[123] On this view, the cigarette advertising dispute would be resolved by the fundamental human right to health trumping — at least presumptively — the conflicting tobacco companies' intellectual property interests.

But even a vertical value-hierarchy such as that envisaged in the Dworkinian notion of rights as trumps and echoed in Dreyfuss's view above, cannot solve all the remaining conflicts between human rights and intellectual property. For one thing, Dworkin now allows for the human rights trumps themselves to be trumped, albeit only in exceptional circumstances, such as 'cases of emergency: when the competing interests are grave and urgent, as they might be when large numbers of lives or the survival of a state is in question'.[124] For another, some intellectual property rights themselves may also be human rights — by nature not by dint of strategic framing. This complication raises the spectre of *intra-regime* conflict — say between two human rights or between two intellectual property rights — which cannot be resolved even through *inter-regime* hierarchies. We must, therefore, seek solutions from insights elsewhere, such as from recent discourse on commensurability, comparability and balancing.[125]

B *Commensurability, Comparability, and Balancing*

Scalia J of the US Supreme Court has likened balancing incommensurable interests to 'judging whether a particular line is longer than a particular rock is heavy.'[126] Comparison between some human rights and intellectual property interests could well be of the Scalia 'lines and rocks' variety. But would even that preclude comparison and rational choice between them in a given context? I think, not, because of two final possibilities elaborated in the subsections below:

121 De Wet and Vidmar, above n 87.

122 Rochelle Dreyfuss, 'Patents and Human rights: Where is the Paradox?' in Willem Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar, 2010) 72, 73.

123 Ibid 74.

124 Dworkin, *Justice for Hedgehogs*, above n 10, 473.

125 See, eg, Ruth Chang (ed), *Incommensurability, Incomparability and Practical Reason* (Harvard University Press, 1997); Symposium, 'Law and Incommensurability: Introduction' (1998) 146 *University of Pennsylvania Law Review* 1169.

126 *Bendix Autolite Corporation v Midwesco Enterprises Inc*, 486 US 888, 897 (1988).

the possibility of 'matching intensity across domains' and the possibility of 'comparability, proportionality, balancing'.

1 *Matching Intensity across Domains*

The first possibility — matching intensity across domains — is a surprising 'hot off the press' insight from cutting-edge cognitive psychology recently articulated by Daniel Kahneman,[127] recipient of the 2002 Nobel Prize in Economics and who — with the late Amos Tversky and Richard Thaler — is one of the founders of behavioural economics.[128] That insight, the focus of intense attention from psychologists for several decades, begins with the discovery that thinking consists of two distinct modes of mental operation that Kahenman labels: *System 1* and *System 2*.

System 1 is quick, automatic, effortless, and mainly unconscious; *System 2* is slower, more controlled, effortful, usually conscious, and the one that comes to mind when we think of agency, choice, and concentration.[129] Although *System 2*, the deliberate and mainly conscious one, has always believed itself to be 'where the action is',[130] the automatic and largely unconscious *System 1* is the 'hero' of Kahneman's new book.[131] *System 1* seems to have come into its own with the increasing appreciation of the 'unconscious' as useful and 'adaptive' rather than pathological.[132] Of course, the notion 'that a large portion of the human mind is unconscious is not new and was Freud's greatest insight'.[133] What is dramatically new is the understanding of the preeminent role — the genius of *System 1* — that the adaptive unconscious plays in thinking and cognitive tasks:[134]

> The mind operates most efficiently by relegating a good deal of high-level, sophisticated thinking to the unconscious … [which] does an excellent job of sizing up the world, warning people of danger, setting goals, and initiating action in a sophisticated and efficient manner.[135]

For our commensurability analysis, the most intriguing aspect of Kahneman's two systems is that only *System 2* finds it difficult to make comparisons or match intensity across different domains, like Scalia J's 'length of a line and weight of a rock'. *System 1,* on the other hand, seems to have no such difficulty at all. For instance, on being told that Julie could read fluently at four years old, *System 1*

127 Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Strauss and Giroux, 2011).

128 For most of their relevant research and findings, see generally Daniel Kahenman and Amos Tversky, *Choice, Values, and Frames* (Cambridge University Press, 2000).

129 Kahneman, above n 127, 19–30.

130 Ibid 21.

131 Ibid.

132 Timothy D Wilson, *Strangers to Ourselves: Discovering the Adaptive Unconscious* (Harvard University Press, 2000).

133 Ibid 4.

134 Ibid 17–42.

135 Ibid 6–7. This insight has also been popularised by Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* (Little, Brown and Co, 2005).

will easily match this degree of reading prowess to some unrelated domain such as someone else's height or level of income![136]

> Here we encounter a new aptitude of System 1. An underlying scale of intensity allows *matching* across diverse dimensions. If crimes were colors, murder would be a deeper shade of red than theft. If crimes were expressed as music, mass murder would be played fortissimo while accumulating unpaid parking tickets would be a faint pianissimo. And, of course, you have similar feelings about the intensity of punishments. In classic experiments, people adjusted the loudness of a sound to the severity of crimes; other people adjusted loudness to the severity of punishments. If you heard two notes, one for the crime and one for the punishment, you would feel a sense of injustice if one tone was much louder than the other.[137]

It is not hard to see why in our paradigmatic cigarette advertising dispute, *System 1* would have no difficulty at all weighing and giving comparative values to the competing human rights and intellectual property interests involved.

2 *Comparability and Balancing*

But *System 2* — the conscious logical kind — would not necessarily be left speechless in the comparability stakes either. To see why, one needs first to draw a distinction between two notions that are often conflated, commensurability and comparability; and then, second, to see how balancing can rationally apply to comparability — even comparability of *incommensurable* values. Here is how the notions of commensurability and comparability may be distinguished. Commensurability is generally understood to mean that items can be 'measured by a single "scale" of units of value'.[138]

So, for instance:

> Ten dollars and $100 can be confidently placed on a single metric, so that $10 is simply a small quantity of the same thing of which $100 is a substantial amount. If two goods are fungible, they are also commensurable.[139]

By contrast, comparability of two items only requires that they be amenable to comparison with respect to a 'covering value'.[140] Thus taking 'creativity' as the 'covering value', one could easily find Mozart and Michelangelo *comparable* despite the radical diversity of their creative realms.[141] In this respect, comparability, at which *System 1* effortlessly excels, is also within the powers of *System 2*, via a different route.

136 Kahneman, above n 127, 94.

137 Ibid.

138 Ruth Chang, 'Introduction' in Chang, above n 125, 1.

139 Cass R Sunstein, 'Incommensurability and Kinds of Valuation: Some Applications in Law' in Chang, above n 125, 238.

140 Chang, above n 125, 5.

141 Ibid 14–15.

Comparability of values can be further refined into a tool of greater precision through the notions of balancing and proportionality analysis.[142] On one view, balancing here would proceed in four stages. The first stage involves construction of the relevant human rights and intellectual property norms as *principles* rather than *rules*.[143] Rules, as we saw in Part III,[144] 'require something definitively. They are *definitive commands*' and 'their form of application is subsumption'.[145] Principles, by contrast, are 'optimisation requirements'[146] and the central modalities of their application are weight, proportionality, and balancing.

Following the formulation of the relevant conflicting human rights and intellectual property norms, balancing can then proceed in three stages as suggested by Robert Alexy.[147] Here is how: Let us say that two principles are in conflict and the question is whether to give one priority over the other. The first stage is to determine the *intensity* of detriment to the overridden principle, along Alexy's scale of 'light, moderate, or serious'.[148] The second stage is to calibrate the corresponding *importance* of the preferred principle along the same scale.[149] The third and final stage is then to determine whether the *importance* of the principle satisfied justifies the *intensity* of the detriment to the unrealised principle.[150]

Here again, our cigarette advertising litigation provides a pertinent template for the application of these insights. Let us use the Australia version of the dispute — involving the requirement that tobacco companies market their products in plain packaging — for this purpose. The tobacco companies claim that this restriction is a violation, inter alia, of their right to *use* their trade marks under the *TRIPS Agreement*.[151] If we assume that this is a genuine Hohfeldian 'claim-right'[152] as their argument presupposes (which it isn't),[153] the logic of balancing

142 Robert Alexy, 'The Construction of Constitutional Rights' (2010) 4(1) *Law & Ethics of Human Rights* 1; Paul-Erik N Veel, 'Incommensurability, Proportionality, and Rational Decision-Making' (2010) 4(2) *Law & Ethics of Human Rights* 1; Henning Grosse Ruse-Khan, 'Proportionality and Balancing within the Objectives Intellectual Property Protection' in Paul L C Torremans (ed), *Intellectual Property and Human Rights* (Wolters Kluwer, 2008) 161.

143 There is a succinct summary of the vast literature on principles and rules in James J Park, 'Rules, Principles, and the Competition to Enforce the Securities Laws' (2012) 100 *California Law Review* 115, 130–2.

144 Above n 100 and accompanying text.

145 Alexy, above n 142, 3.

146 Ibid.

147 Ibid 10.

148 Ibid.

149 Ibid.

150 Ibid.

151 Mark Davison, 'Smoke and Mirrors: Big Tobacco's Last Gasp Legal Challenge to Plain Packaging', *The Conversation* (online), 18 May 2011 < http://theconversation.edu.au/smoke-and-mirrors-big-tobaccos-last-gasp-legal-challenge-to-plain-packaging-811>.

152 Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.

153 This a curious claim. The bundle of rights that the law gives intellectual property owners — indeed owners of *any property* — include various Hohfeldian 'claim rights', 'liberties' 'powers' and 'immunities'. An intellectual property owner, like an owner of any other property, for instance has a *claim right* to exclude others from using her property; but *use* of property — a trade mark, a copyright song, a patented invention, a house — is not an affirmative claim right; it is a Hohfeldian liberty whose correlative is not an affirmative duty on anyone, and *TRIPS* does not change this fundamental reality.

would require determination of whether the *intensity* of interference with it in order to secure the competing principle of protecting Australians against the dire health risks of tobacco products is unjustified. For that, one would have to first assess the *intensity* of the detriment to the overridden principle on Alexy's triadic scale of "'light", "moderate", "serious"' already mentioned. Here one could argue that unlike an outright ban on tobacco products or expropriation of the trade marks, the *intensity* of requiring plain packaging only rates as 'light' or perhaps 'moderate' on Alexy's triadic scale above.[154] What about the *importance,* on the same scale, of upholding the competing principle requiring protection of the health of Australians against the devastation of tobacco products? If it is true that 15 000 Australians die from tobacco-related diseases every year,[155] the importance of the health-protection principle would, surely, qualify as 'serious' on that scale. Both the importance and the seriousness of this principle are, moreover, underscored by the widely-ratified *WHO Framework Convention on Tobacco Control*.[156] The health-protection principle should, therefore, 'trump' the other one hands down.

V CONCLUSION

The international lawmaker faces several challenges from which their domestic counterpart is usually absolved: precarious legitimacy, legal polycentricity, and grudging compliance. The severity of these, however, can either be alleviated or exacerbated by the way the lawmaking exercise itself is conducted. If it is not done well, these challenges can conspire to frustrate the whole enterprise. This is what seems to be happening with respect to human rights and intellectual property. But the process can be done well, and there is desperate need for the sake of both human rights and intellectual property — and the important global interests they represent — that it be done well. Beginning with the 'strategic' stalemates in Part II, progressing to their progeny in competing visions of legality in Part III, and on to scholarly insights from translatability of values, matching intensity across domains, and comparability of interests in Part IV, this article has sketched the main contours of how this might be done. There may be other ways to be explored. The task, however, is far too important to be left to chance.

154 Alexy, above n 142.

155 Davison, above n 151.

156 *WHO Framework Convention on Tobacco Control*, opened for signature 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005).