

**LIBERTY AND PROPERTY:
HUMAN RIGHTS AND THE PROTECTION
OF INTELLECTUAL PROPERTY**

By
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I. CELEBRATING HUMAN RIGHTS

Last year – 2008 – was celebrated in many venues as the 60th Anniversary of the Universal Declaration of Human Rights, the first important, comprehensive, modern, international charter of human rights. The aim of the Declaration was to announce principles that properly apply to all people at all times, to raise awareness of human rights, and to lay the groundwork for encouraging broad international support for those rights.

By their nature, human rights are not bound by specific demographic, geographic, temporal, or technological circumstances. Although there may be debate about the particular definition of those rights, human rights properly understood command respect not because they are universally embraced but because they should be – these are the rights that allow individuals to flourish and societies to prosper, rights that support progress and liberty. These rights are in service to humanity, not to any temporary political agenda. Any proper celebration of human rights, then, must understand their full scope and

celebrate the triumph of their recognition broadly, not only in service to one subset of views and values.

This WORKING PAPER reminds readers that one set of rights, the right to intellectual property, that has been under assault by some self-styled “human rights activists” actually was included within the scope of rights recognized by the Universal Declaration, by cognate documents, and by those whose efforts set the framework for thinking about human rights.

II. BASICS AND ORIGINS OF HUMAN RIGHTS

Although a growing body of treaties and international accords has taken up the banner of human rights, the notion of universal human rights is not new. In 1776, Thomas Jefferson, in the American Declaration of Independence, wrote, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness.” Jefferson’s phrasing, while one of the most memorable aphorisms on this (or any) subject, tapped into an already established vein of discourse about human rights. Jefferson stood most directly on the shoulders of John Locke, whose design of government for the protection and promotion of “life, liberty, and property” was a foundation stone of the American constitutional system. Locke, in turn, built on far older religious and philosophical antecedents.

The older writings on human rights, from ancient times through the founding of the United States, consistently included among the listed rights the rights to marry, to raise a family, to safeguard one's property, and to pursue a calling. Property often was closely linked to marriage, family, and related institutions.¹ Rights to property were conceived in many societies as part of the constellation of rights properly guaranteed to assure familial success. Over time, property rights were assimilated to individual rights, as the individual came to have identity and to enjoy rights, independent of family, an essential component of the changes in thought associated with the Western European intellectual movements that have been labeled the Enlightenment. These became critical components of the constellation of rights thought to be integral to individual development and success.

Over time, in addition to migrating (or, perhaps, expanding) from a familial to an individual base, the concept of property rights developed several distinct but related strands. One strand encompasses the right to own property and to control its use and disposition. Another strand focuses on the right to work, to retain the fruits of one's labor – in essence, to translate labor into property. A third strand addresses the rights associated with enjoyment of the benefits from contributions to scientific and intellectual advancement. All of

¹See, e.g., Leonard P. Liggio & Alejandro A. Chafuen, *Cultural and Religious Foundations of Private Property*, in Enrico Colombatto ed., *THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS* (Edward Elgar Pub. 2004).

these strands are intertwined and share common roots. All of these strands also play important roles in modern economies.

III. HUMAN RIGHTS' MODERN CHARTERS

The identity of property rights with basic human rights continued in modern times. The original modern charter of human rights is the Universal Declaration of Human Rights, adopted by the United Nations in 1948. This remains the core statement of what we understand as human rights today and was expressly reaffirmed in the Millennium Declaration of the United Nations. The Universal Declaration of Human Rights specifically protects rights of property, of work, and of artistic and scientific creativity.

Article 17 of the Universal Declaration, which immediately follows the provision guaranteeing rights of marriage and family, declares: "Everyone has the right to own property alone as well as in association with others." The second clause in Article 17 states: "No one shall arbitrarily be deprived of his property."

The Universal Declaration also contains more specific protections of rights that have been treated as, or assimilated to, rights to property. So, for example, Article 23 of the Universal Declaration provides that "everyone has the right to work." Article 27 guarantees the right "to enjoy the arts and to share in scientific advancement and its benefits" and also asserts that "everyone has the right to the protection of the moral and material interests resulting from any

scientific, literary, or artistic production of which he is the author.” These are protections of the rights to property associated with labor in general and with the sorts of labor that are critical to creative and inventive success.

The protection of property rights continued in the succeeding formal international announcements on human rights. The next major treaty concerning human rights after the Universal Declaration – the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly in 1966 – continues the linkage of economic advancement and human rights. Article 6 of the Covenant provides the undertaking of each signatory nation to “recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses,” and also commits signatory nations to pursue “policies and techniques to achieve steady economic, social and cultural development and full and productive employment.”

Article 15 of the Covenant repeats the guarantee of Article 27 of the Universal Declaration, committing signatory states to recognize rights “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Additionally, Article 15 of the Covenant provides that states will take steps “necessary for the conservation, the development and the diffusion of science and culture” and will also “respect the freedom indispensable for scientific research and creative activity.”

The international accords on human rights are not like domestic statutes. They are not sources of legally binding, individually enforceable rights.² Instead, they are political statements of national governments that aspire to implement the rights identified in the documents, that hope other governments will implement them, or that want credit from either domestic or international audiences for embracing these rights (a hope that at times makes the embrace a cynical, strategic one, which explains some of the anomalous signatories to these documents). But the accords nonetheless reflect the way important international constituencies define the scope of human rights. The modern record clearly continues the historical understanding of those rights as comprehending property rights – including intellectual property rights – along with liberty rights such as rights of conscience.

IV. PROPERTY RIGHTS' FUNDAMENTAL IMPORTANCE

The rights to property, to the fruits of one's own labor, and to the benefits from contributions to scientific advancement recognized in the basic charters of the international human rights movement are part of the basic constellation of human rights for reasons that go beyond the historic connection of property to family and to the individual and the sense of entitlement to property secured as a consequence of human effort. These property rights also are central human

²Of course, individual nation-states may choose to create legally binding rights predicated on the rights identified in these accords and grant individuals authority to bring enforcement actions in their courts. Such decisions, however, are strictly matters of national choice rather than of international law.

rights because they provide the predicate for so much of what allows us to enjoy other rights and because any effort to diminish rights of property threatens the basis for protection of other human rights.

At the most fundamental level, basic property rights are an extension of the self and of the prohibition on slavery. An essential attribute of personal autonomy – ownership of one’s own body – implies ownership of one’s own labor. That point has been made repeatedly over the past eight centuries, with eloquent and famous expositions by Thomas Aquinas and by Locke, among others. Although there are additional instrumentalist explanations for protections of property rights, all of the other property rights protected as core human rights share a connection with the autonomy of the individual and widely shared understandings of the legitimate scope of that autonomy.

Together, these rights allow individuals to exercise a measure of control over their surroundings. They allow each of us to plan our lives with some security, not that we have full control over everything that may affect us, but that we can decide for ourselves how best to invest our energies, based on our own values and expectations without fear of subsequent imposition by those who would take from us the products of our endeavors.

The importance of property rights to individual self-development is related to, though different from, their contribution to societal wealth and, derivative of that, to society’s capacity to promote a wide variety of other rights and interests. The cornerstone of this relationship, as Aristotle explained, is

that property tends to be most productive when it is owned individually rather than collectively. “When everyone has his own separate sphere of interest, there will not be the same ground for quarrels [as where there is ownership in common]; and the amount of interest will increase because each man will feel that he is applying himself to what is his own.”³ Aristotle drew the same conclusion respecting other aspects of human endeavor, concluding that individual rights of possession or control prompted a level of attention and investment that could not be expected of interests held in common.⁴ Although these conclusions point to property rights as important to the sorts of economic development that generates societal wealth, Aristotle’s central concern instead was the moral development of the individual and the moral good of the polity. His argument is that rules promoting individual industry and engagement are conducive to both the fullest development of the individual and to the overall good of society.

The modern story of property remains one that combines both wealth-creation and the enhancement of individual attainments. The twentieth century offers something as close as one gets in real life to a controlled experiment on the virtues of collective versus individual ownership. The unambiguous lesson of the century is that greater individual ownership has a marked advantage over

³THE POLITICS OF ARISTOTLE 49 [1263a] (Ernest Barker ed., Oxford Univ. Press 1969).

⁴*Id.*, at 44 [1261b].

greater collective ownership in producing wealth for society, and that it is also associated with increased individual freedom.

Although that lesson appears in many forms, one need only look at the stark divergence between the communist German Democratic Republic (commonly referred to as East Germany) and the market-oriented Federal Republic of Germany (West Germany). The two Germanys were a single nation at the end of World War II, with the same population, education, and attributes on both sides. During the forty years that they were divided, however, the two Germanys followed radically different paths. Just prior to reunification, per capita Gross Domestic Product in East Germany, with an economy based on Soviet-style collective ownership, was estimated at roughly one-third that of West Germany, with its western-style market economy based on private ownership.⁵ The difference between an economy based on private property and one based on collective ownership – that is, on the state abrogating rights to private property – was sufficient to produce three times the personal wealth in one half of Germany as in the other.

The advantage of private property over collective property traces only in part to the point Aristotle made. Aristotle's emphasis was on incentives, noting that the wider the ownership, the more one counted on the investment of others' efforts to secure the property's productive outputs; individual ownership

⁵Charles Wolf, Jr., Commentary: One Korea?, WALL ST. J., June 30, 2005 (republished: <http://www.-rand.org/commentary/063005WSJ.html>).

naturally tended to induce individual investment in making the most of a property's productivity.

Another advantage of private property and of economies based on markets for private transactions is that these institutions give greater play to individual judgments about value and to individual knowledge (and, hence, expectations) about circumstances. Collective ownership and command-and-control organization of economies substitute centralized estimations of value and of the steps that will best increase value for individual decisions. The interplay of knowledge and information from many sources is a better guide to directing resources to their best uses than is the top-down direction from even the most sophisticated and beneficent planner.

In any economy in which there are numerous goods and numerous choices to be made respecting the best way to increase value for them, reliance on many individuals who can make specific decisions is likely to produce far better outcomes, far better congruence between what is made and what is desired. Think of just an infinitesimal subset of the issues that arise in a modern economy: How much corn should be planted on a given parcel of land in Iowa? How many shirts should be produced in a particular factory, using what inputs, to be shipped where? Should more small cars or large cars be made, with what features, and by what processes, using which suppliers? The larger and more complex an economy is, the greater the advantage of decentralized decision-making. Centrally controlled decision-making can never

replicate the full information set that moves decisions in a decentralized economy. Further the centralized economy inevitably will lack most of the “feedback loops” that help minimize and correct mistakes in decentralized economies based on individual ownership. Incentives and information flows work in tandem to produce greater efficiency and greater wealth in economies with strong protections of property rights.⁶

The virtues of decentralized decision-making and individual property rights, of course, do not assure ideal outcomes. Any observer of economies built on these elements knows that “herd mentality,” “bubble psychology,” problems associated with asymmetric information, difficulties of risk analysis, and other cognitive, analytical, and emotional phenomena can distort decisions in ways that cause substantial divergence from what, *ex post*, can be seen as preferable both for the individuals and for the society. These distortions lead to periodic, and at times dramatic, cycles of expansion and contraction – once known as periods of boom and bust – that can impose substantial costs on both the society and the individual. Yet the polar alternative for economies that do not respect property rights and individual decisions based on them is not the elimination of these problems but instead is a systematic divergence from ideal decisions and a concomitant diminution of liberty.

⁶The correlation of strong property rights with economic success is shown, among other places, in the statistics gathered in Gerald P. O’Driscoll et al., INDEX OF ECONOMIC FREEDOM (Heritage Found. 2002).

The contribution of strong property rights to economic success does not make optimal organization of the national economy a human right. The Universal Declaration of Human Rights and other treaties that can be looked to in defining human rights do not forbid socialism of any particular variety, although they do forbid arbitrary infringements on property rights that might be associated with moves toward greater socialism.

If a particular form of economic organization is not mandated, however, the relation of strong property rights to economic success does underscore another reason – beyond their contribution to individual self-fulfillment – that property rights have been seen as fundamental human rights. Although human rights are not conditioned on societal wealth, most human rights are facilitated by increased societal wealth. This is true, for example, with declared rights to remuneration consistent with “an existence worthy of human dignity” (Article 23 of the Universal Declaration), to rest and leisure (Article 24), to an adequate standard of living (Article 25), or to education (Article 26). It is true as well for rights related to health. Indeed, the basic assertion of such a right was expressly predicated on a connection to wealth: the right was not directly to health but to “a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care” (Article 25).

The connection of societal wealth to health, for example, is not simply a matter of common sense. Any number of examples or statistics can be marshaled to demonstrate the connection. Look, for instance, at the correlation

of health indicators, such as life expectancy, with per capita GDP from a 209-nation sample based on World Bank data.⁷ The correlation is extremely robust and dominates other correlations such as employment/unemployment, health expenditures per capita, number of physicians per 1,000 of population, or number of hospital beds per 1,000 of population. In other words, wealth correlates even more strongly with increased life expectancy than the various individual, identifiable factors that seemingly would have a more direct and immediate connection. This fact suggests that societal wealth helps promote health in many different ways, including both the obvious ways (such as increased availability of traditional medical services) and less obvious ways that do not show up in the discrete factors that are looked to as most likely to explain health and longevity.

The same is true in many other contexts, as wealth supports other human ends in ways that are not always evident. This does not make all wealth-creating policies human rights, but it does underscore the importance of rights, in particular rights to property, that advance wealth.

V. INTELLECTUAL PROPERTY RIGHTS AS HUMAN RIGHTS

The three different strands of property rights included within the set of basic human rights identified by the major international human rights accords consisted of rights to ownership and control of property; rights to the fruits of

⁷Cynthia Ramsay, *BEYOND THE PUBLIC-PRIVATE DEBATE* (Marigold Found. 2001).

one's own labor; and also a right to enjoyment of the benefits from contributions to scientific and intellectual advancement. This third strand of property rights would seem to be encompassed within the first two. A right to the fruits of one's own labor certainly implies that those who invest their energies and efforts in developing inventions or new creative works should control and profit from their innovations. And a right to ownership and control of property implies that those who contract with innovators – those who purchase the rights to their innovations – should enjoy the rights associated with property ownership. That would include broadly the rights to determine how the property is used, on what terms others have access to it, and how the property is disposed of (including not only royalty terms but also decisions on when and how to license or sell rights associated with the innovation).

While rights to intellectual property (the term generally applied to the class of properties associated with innovation and creativity) are implicit in the other property rights recognized as human rights, international charters of human rights such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights also expressly grant protection to intellectual property rights. The separate and specific recognition of intellectual property rights as human rights may reflect an understanding of intellectual property rights' historic pedigree as derivative in part of rights not ordinarily identified as property rights. Intellectual property rights in fact have a complex legal background with roots in tort law

(misappropriation, unlawful competition) and in consumer protection law (misrepresentation, fraud) as well as in property law. Some intellectual property rights also initially had more than a little coloration from the guild systems which limited who could engage in certain activities (such as printing).

The dominant sources among the legal and philosophical origins for intellectual property rights, however, are property rights more generally, and the basic claims for protection of property rights as human rights also extend to protection of intellectual property rights. Even though the two classes of property rights are not entirely identical – primarily because some characteristics of intellectual property have been thought to call for a somewhat different structure of rights than is optimal for, say, real property – the basic considerations supporting protection of the rights and also supporting their inclusion within the class of human rights are the same. Just as Aristotle and Aquinas, Locke and Jefferson, saw the ownership of property as implicit in recognition of the autonomy of the individual, the ownership of the property produced by creative effort follows from that reasoning. Just as the right to control property includes rights to contract, license, lease, or sell the property on terms the owner deems suitable, the case for protections of intellectual property rights tracks the same line. While most modern explanations for the benefits of both property rights generally and intellectual property rights specifically emphasize practical consequences of these protections, their

identification as human rights (in both instances) owes more to the connection of these entitlements to individual autonomy.

For both the broad run of property rights and the special case of intellectual property rights, of course, the exact contours of the rights that qualify as human rights are not definite. A right to property ownership and control does not prohibit all forms of regulation. My right to control the disposition and use of my property does not give me unlimited rights to use it as a stockyard in the middle of a residential neighborhood or to blast loud music into the neighborhood during the night. That fuzziness around the edges of the rights is a characteristic of most rights, whether classified as liberty rights or property rights. In exactly the same fashion, rights of conscience do not give unlimited license to actions that are believed in good faith to be morally right (or even religiously inspired or required) and rights of speech do not give unconstrained freedom to make any statement in any manner in any setting at any time. Justice Oliver Wendell Holmes, Jr.'s dictum about causing a panic by falsely shouting "fire" in a theater is an especially accessible, if peculiarly American, expression of the point.⁸

At the same time, there must be *some* substantive content to the protection of property rights. Certain types of interference with the use and control of property must be forbidden by the safeguards given to property rights. So, for instance, a declaration that property rights are protected would

⁸See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

be incompatible with a system that permits redefinition at the ruler's whim of what property could be used for, who could own it, or how it could be disposed of.⁹ If the state attempted to justify these restrictions on property ownership and control as part of the baseline definition of the rights to property that one could enjoy – a definition that could be claimed to be separate from the question of how a state protected the property rights it recognized – any meaningful concept of human rights, or of substantive legal rights more generally, would reject that claim.

VI. THE CONTOURS OF INTELLECTUAL PROPERTY RIGHTS

The optimal contours of intellectual property rights are matters of debate. How robust the protections should be for intellectual property, what the particular shape of those protections should be, how long protections should last, and what remedies should be available for infringements of those protections – all of these can be, and are, contested matters among thoughtful commentators. But the fundamental importance of intellectual property rights and their similarity to other property rights should not be debated. Yet even these matters are subjects of controversy today.

Some commentaries stress that intellectual property is intangible and, so, can be used by many people at once. You and I can both use the idea of making

⁹See, e.g., Ronald A. Cass, *Property Rights Systems and the Rule of Law*, in Enrico Colombatto ed., *THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS* (Edward Elgar Pub. 2004).

Coca-Cola by mixing certain ingredients in particular proportions and we can do this at the same instant, in contrast to us both trying to wear the same shirt simultaneously or to use a particular property for a picnic and a ballgame at the same time. In this sense, intellectual property is, to use economists' terminology, "non-rivalrous." Because it is non-rivalrous, some scholars and pundits suggest that the scope of rights to intellectual property should be severely limited.¹⁰ After all, why do you need protection against others' use of your property if it doesn't diminish your ability to use it yourself?

No one disputes that there are differences between property that is non-rivalrous and more traditional types of property, but the difference between intellectual property and other property on that score is frequently overstated. For example, while many people could simultaneously use the formula for Coca-Cola to manufacture that drink – there is no physical conflict involved – having many (uncoordinated, unlicensed) makers of the drink would have significant consequences for the value of the formula and, potentially, for the product itself.

At the most obvious level, allowing unlimited numbers of Coca-Cola producers – that is, allowing production without approval of the owner of the formula, including production by those who would sell in competition with one another in the same locales – would have an obvious impact on the ability of those who came up with the formula to profit from its success. That, in turn, affects incentives to invest in innovations, as investment tends to track expected

¹⁰See, e.g., Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Vintage Books 2002).

opportunities for profit, and reduced prospects for profits almost inevitably reduces investment.

Beyond that, production unconstrained by approval from the formula's owners would remove an important incentive to maintain the product's quality, consistency, and purity. The formula's owners have a strong interest in maintaining its long-term value, but those who are but one among many competing producers do not enjoy the same incentive. Unless they are able to distinguish their own, specific version of Coca-Cola from the other versions, any investment they make in assuring product quality, consistency, or purity benefits the other producers and only yields a small portion of the benefit for the one making that investment – that is, for any dollar invested, the individual producer in a competitive, multi-producer market could expect to gain only a few cents worth of gain. That hardly is conducive to investment.

The Coca-Cola example illustrates the central issues respecting intellectual property and the reason that arguments based in intellectual property's non-rivalrous nature tend to be overstated. As this example suggests, even without physical rivalry, the absence of strong property rights protections for intellectual property leaves ample scope for both economic rivalry and free-riding that can diminish an innovator's ability to profit from innovation and can reduce rights owners' incentives to maintain an innovation's value over the longer term.

Although some writings on intellectual property question whether the ability to earn profits is a significant motivation for innovation, no one should doubt that the profit motive is a central incentive to invest in the sorts of activities that generate innovations. Popular images often connect technological progress with some solitary genius' "Eureka" moment, and, indeed, some important innovations have been the product of such unpredictable or serendipitous insights. Most innovations, however, including the great bulk of major innovations, are the result of enormous investment in research and development over extended periods of time.

Consider, for one example, spending by pharmaceutical companies on the development of new drugs to help prevent and combat disease. A study of investment by American pharmaceutical companies states that these firms spent \$26 billion on research and development in 2000, an amount that equates to over \$960 million for each new drug approved for use.¹¹ Another study found that for every 5,000 drugs that appeared promising enough to pursue research in animal studies, only five would be approved for human clinical trials and only one would prove suitable for human use.¹² That means that innovation in the pharmaceutical industry is both costly and risky – even a substantial investment in research and development of a promising drug is likely to come to naught. While the U.S. has less than five percent of the globe's population, the

¹¹Merrill Matthews, Jr., *From Inception to Ingestion: The Cost of Creating New Drugs* (Inst. for Policy Innovation, Sep. 9, 2002).

¹²Report of Joseph DiMasi, Tufts University, described in Matthews, *supra*.

investment made by American pharmaceutical firms is roughly one-third world-wide expenditures on research and development for drugs and drug therapies. That is testament not only to America's wealth but also to the existence of strong protections for patented pharmaceuticals in the U.S. The continued investment in identifying new drug possibilities and getting them through the process needed to bring one to market depends critically on the prospect that a successful effort will provide the opportunity to recoup the firm's expenditures.

Given the critical contributions of pharmaceuticals to improved health, narrowing the prospect for successfully innovating firms to secure rights that will cover the costs of investment – discouraging investment in creating and developing new drugs and new drug therapies – would be terribly unfortunate. Advances in pharmaceuticals, biologics, vaccines, and hygiene, together with improvements in transportation, communication, and agriculture, helped propel a dramatic increase in life expectancy in the twentieth century along with a remarkable decrease in infant and childhood mortality. American life expectancy rose more than fifty percent over the century, and childhood mortality in America at the end of the century was one-fifteenth its level at the century's outset.¹³ These changes are signal accomplishments of a society that values and rewards innovation.

Similarly, the last century saw a revolution in other fields driven by entrepreneurs' ability to reap the rewards of investment in creation of

¹³ See Bernard Guyer, et al., *Annual Summary of Vital Statistics: Trends in the Health of Americans During the 20th Century*, 106 PEDIATRICS 1307-1317 (2000).

intellectual property. Personal computing, cellular telephony, and a host of other IP-intensive technologies boosted productivity and improved both safety and access of many communities – including the disabled as well as the geographically remote – to a host of goods and services formerly unavailable. According to the U.S. Bureau of Economic Analysis, the information-communication-technology sector (one of the heavily IP-dependent sectors) accounted for fifteen percent of U.S. economic growth in 2004, triple its share of the economy.

The information-technology sector, led by firms such as Microsoft, IBM, Intel, and Hewlett-Packard, invests an even larger amount in research and development than the pharmaceutical industry. In 2006, the top fifty U.S.-based firms (ranked according to their investment in information-technology research and development) spent roughly \$45 billion to create new technologies and develop new products.¹⁴ A single innovative new product in this industry can cost billions of dollars and take years in development. Those investments have driven the cost of computing and communicating, of seeking, storing, and using information ever lower (captured most notably in “Moore’s law,” predicting the exponential growth in computing power).¹⁵ While the benefits of advances in information technology and related industries are widely shared,

¹⁴See Robert Hertzberg, I.T.’s Top 81 R&D Spenders, April 17, 2007, available at <http://www.cioinsight.com/c/a/Past-News/ITs-Top-81-RD-Spenders>.

¹⁵In 1965, Gordon Moore predicted that the number of transistors that could fit on a semiconductor chip economically (the number of components per integrated circuit) would double every year, a number soon after extended to every two years. That prediction has proved incredibly accurate over a forty-plus-year span.

the costs of innovation are borne by firms seeking to profit from their inventions.

Certainly, the incentive to continue investing in innovation is central to economic progress. Although no one with confidence can assert that a particular set of intellectual property rights definitively provides the right trade-off between investment in innovation and maximum diffusion of the innovation – maximum use of the innovation – no one should doubt the importance of strong intellectual property right protections to the initial creative successes that are essential to any vision of social advancement.

This is also true of the need to protect intellectual property following the initial innovation. While the right to profit from an innovation is an indispensable spur to the investments that produce innovations, the right to control intellectual property's subsequent use is indispensable to protect its long-term value – which in turn is a critical input to determining how much investment in innovation is worthwhile. The lesson of the Soviet-collective system in part was that, as Aristotle saw in his own day, collective ownership diminishes incentives to maintain property and to support its productivity. That is no less true of intellectual property than of other property.

Moreover, the very intangibility that advocates of greater limits on intellectual property rights rely on for their arguments makes those rights especially fragile and makes protection of those rights especially important. That in large measure explains the special protections afforded intellectual

property, in addition to those afforded the larger class of property that encompasses them, in the basic documents defining human rights.

VII. THREATS TO INTELLECTUAL PROPERTY RIGHTS

Recently, some commentators have advocated limitations on intellectual property rights in order to protect other interests, such as economic development in less affluent nations or health in poorer populations. Those efforts should be viewed with an extraordinary degree of skepticism.

The claim that property rights should be restricted in order to promote some other interest, such as economic development, is neither new nor limited to intellectual property rights. President Robert Mugabe of Zimbabwe, for example, has been accused of blatantly violating property owners' rights, justifying his conduct by declaring it necessary to advance economic development and justice in this former colonial nation.¹⁶ Yet, as discussed above, economic development is enhanced, not restrained, by recognition of property rights.

The same is true of intellectual property rights. Access to intellectual property and to goods and services embodying intellectual property facilitates economic development. Respecting intellectual property rights encourages owners of the rights and producers of goods that incorporate those rights, to provide greater access to the products built on them.

¹⁶See discussion in Cass, *supra*. As this paper is written, a proceeding challenging the actions of Mugabe's government is pending before an arbitral panel convened under the auspices of the World Bank.

The connection to health also should be seen in this light. Health, as already noted, is strongly correlated with increased societal wealth. Steps that encourage economic advancement will serve interests in health more securely for a longer time than short-run efforts to expropriate intellectual property. That does not mean that increasing wealth should be the sole focus of those who are interested in improving health. A variety of investments – in health care infrastructure, in trained personnel, in improved communications, in preventive measures (such as mosquito netting in poor African nations or improved diet in wealthy Western nations) – can improve health even holding wealth constant.

The assault on intellectual property rights by groups and officials ostensibly concerned about promoting health, however, at best is misguided. Many of the most important contributions to improvements in health and in life-expectancy are direct results of investments in the very sorts of intellectual property that will be diminished if the assault succeeds. Moreover, some of the officials most aggressively pressing the case for improving health by reducing protections for intellectual property cannot be taken seriously as health advocates.

Consider, for example, the government of Thailand which, after a military coup, dramatically increased military spending and salaries of top government officials while cutting health spending. At the same time, the government announced that it would impose compulsory licenses – essentially commandeering the intellectual property of patent owners – in order to save

money on drugs and, consequently, to improve health in Thailand. Yet the projected savings from this move amounted to only two percent of the increase in military spending. Plainly, for that government, health was not a priority.¹⁷

Of course, the disconnect between the expressed aim of the Thai government's action and its likely effect does not mean that all advocates of reducing protections for intellectual property are disingenuous, that health or other goals are never advantaged by actions that are in tension with the strongest protections for intellectual property, or that no limitations on intellectual property protections are supportable as better balancing societal interests. As noted above, there is no definitive answer to the proper contours of intellectual property rights: all proposed regimes for intellectual property rights necessarily rest at bottom on estimates about the effects of particular elements on innovation rates, on diffusion of innovations, and on the interaction of these effects with other interests. Legitimate arguments can be, and are, advanced for both increasing and decreasing protection for intellectual property rights and for altering them in specific respects.

However, the basic case for intellectual property rights – and for their protection as human rights – is in tension with some of the recent assaults on those rights. In the same vein, some of the regimes that have been most aggressive in their challenges to property rights have also been most suspect in their treatment of other human rights. The question is not whether actions such

¹⁷See Bangkok's Drug War Goes Global, WALL ST. J. ASIA, Mar. 7, 2007.

as the Thai government's compulsory licensing initiative can find colorable cover in declarations of other public officials. Thailand and activist groups promoting expansive compulsory licensing urge a reading of international law they say supports that initiative, while others argue that this misconstrues the relevant law.¹⁸ The more important question for those attending to the celebration of this human rights anniversary is whether projects such as Thailand's fundamentally conflict with the promise of human rights charters, especially those charters' guarantees of rights to the fruits of one's labor, to ownership and control of property, and to enjoyment of the benefits from contributions to scientific and intellectual advancement.

There is always an opportunity to advance some other interest temporarily at the expense of property rights. Commandeering my home can lower the cost of putting up a hotel. Conscripting doctors – or even kidnapping doctors from other nations (as some nations used to impress sailors from other nations on the high seas) – to provide free services can lower the cost of medical care. Both acts would violate core protections of human rights. Both acts also would undermine longer-term interests in development – and with that, undermine advantages for societal wealth, for housing, and for health that come with protection of property rights.

¹⁸*Compare* Ronald A. Cass, *Compulsory Licensing of Intellectual Property: The Exception that Ate the Rule?*, Washington Legal Foundation WORKING PAPER No. 150, Sep. 2007, with Martin Khor, *Global Trends: Getting Cheap Medicines to the Sick*, posted on Third World Network, Apr. 26, 2004, available at <http://www.twinside.org.sg/title2/gtrends11.htm>.

Frequently, policy advocates are tempted to try and find a short-cut to some end. So, for example, some people who are concerned with health issues but are unable to persuade a government to invest in adequate medical care endeavor to conscript pharmaceutical companies to serve poor communities without the remuneration the companies otherwise would receive. It is beyond the scope of this paper to explore the full implications of such efforts, but it is clear that these efforts, even if undertaken with the best of intentions, are a direct assault on the human rights protected by the Universal Declaration and the International Covenant. These efforts stand in the same position as taking private property without compensation or depriving individuals of their right to the fruits of their own labor. However much advocates hope that these violations of basic human rights will be seen as justified by their contribution to some immediate policy goal, these steps contravene established law and have consequences for future behavior that no one should want.

CONCLUSION

Declaring basic human rights and concluding international treaties in support of such rights help frame the understood set of universally applicable freedoms to which all governments, at all times, should adhere. Property rights, including rights to ownership and control of property, to the fruits of one's own labor, and to enjoyment of the benefits from contributions to scientific and

intellectual advancement, are included within the core set of rights protected as human rights by international law.

Recent suggestions that nations are free to derogate from protection of intellectual property rights in order to secure short-term gains along policy margins of importance to some advocates run directly contrary to the understanding of human rights included in the charter documents on human rights. They are at odds with historic notions of property rights and freedom dating back to Aristotle and beyond.

Those who are concerned with human rights should reject calls to impinge on them, no matter how heartfelt the plea or how attractive the cause. The causes of human advancement, of personal security, and of the rule of law that under-gird the historic definition of human rights ultimately should prove more compelling than quick fixes for today's problems.