

The Propertisation and Internationalisation of Culture in the 20th century

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RESÜMEE

Der Aufsatz problematisiert die Rolle internationaler Organisationen bei der Propertisierung kultureller Güter seit dem späten 19. Jahrhundert. Die Autorin argumentiert, dass die internationalen Organisationen die Einführung eines weltweiten Autorenschutzes maßgeblich beförderten, indem sie den grundsätzlichen Konflikt zwischen Kultur exportierenden und Kultur importierenden Staaten, der die Internationalisierung geistiger Eigentumsrechte von Beginn an begleitete, zu Gunsten der Rechteinhaber lösten. Die Funktion der internationalen Organisationen bestand vor allem darin, Befürwortern und Gegnern einen institutionellen Ort für den Streit über die kultur- und wirtschaftspolitischen Vor- und Nachteile eines eigentumsförmigen Managements kultureller Güter bereitzustellen, ohne dabei jedoch den Umgang mit Kultur und Wissen in Eigentumskategorien grundsätzlich infrage zu stellen. Obwohl diese politischen Kontroversen die Ausdehnung eines internationalen Autorenschutzes bisweilen verkomplizierten, trieb diese Praxis die Einführung weltweit gültiger Autorenrechte langfristig voran, indem sie die Verknüpfung von Kultur und Eigentum stärkte und die Ausarbeitung alternativer Strategien zur Regelung von Kultur und Wissen marginalisierte.

In 1994, the foundation of the *World Trade Organisation* (WTO) encouraged contemporaries to discuss controversially whether the WTO signified a watershed in the international regulation of trade. The consequences of the so called TRIPS Agreement (Trade Related Aspects of Intellectual Property Rights), which established rules for trade with knowledge-based and cultural goods in the broadest sense, were and still are in the spotlight. While proponents strongly welcomed the TRIPS Agreement as a badly needed instrument to fill in loopholes in international law, critics found fault with the predominantly economic foundation of intellectual property rights (IPR) which TRIPS intro-

duced into the handling of knowledge and cultural goods on a global scale. Advocates, mostly from the knowledge-based and cultural industries of Western states, especially favoured the new international agreement insofar as it remains the most comprehensive international agreement on intellectual property to date. On the other side, critics, overwhelmingly from developing countries, academics and Non-Governmental Organisations, complain that TRIPS is biased towards copyright and patent holders.¹ They claim trade liberalisation and increased market access are not the paramount goal of international regulation of access rules to knowledge and cultural goods and, consequently, they emphasise the need to critically reflect on the relationship between property-based handling rights and other policy fields orientated more towards public interests such as cultural and educational policy.

When it comes to providing reasons for this inexorable rise of private property as the key category for the handling of culture and knowledge across national borders, most commentators concentrate on the last thirty years, thereby igniting a politicised debate on the shortcomings and the Western origins of the present IPR regime that holds neo-liberalism and proponents of private property in wealthy countries to be responsible. However, these debates do not take into account the fact that TRIPS only marks the temporary end of a long series of multilateral agreements on international copyright law beginning at the end of the 19th century, which initiated a continuous and long-term process of extending the Western concept of private property: firstly, to a growing variety of goods based on knowledge and culture, and secondly, to a particular regime of international law, which nowadays comprises nearly all countries and regions worldwide. Additionally, the unrelenting conflicts between developed and less developed countries over the calibre of IPR are rich in tradition, as they can also be traced back to the 1880s. Therefore, the question arises of whether the adoption of the TRIPS agreement can truly be interpreted as a watershed marking the fundamental step of knowledge-based societies towards the propertisation of immaterial goods.

The present chapter assumes that this particular master narrative does not go far enough, as it concentrates primarily on the subject-matter of trade liberalisation. Critics and proponents thus neglect historical patterns of propertisation processes and in this way conceal the complex institutional and social dynamics which have led to this long-term implementation of privatised and individualised property in culture and knowledge. Instead, the chapter indicates that the underlying causes of the continuous rise of private property as the main category to regulate culture and knowledge are to be found in the organisational structure of this particular field of international politics, set up for the first time at the end of the 19th century. Following recent research on the role international organisations played in setting international norms and standards from the middle of

1 See, for example, R. Wade, *Welche Strategien bleiben den Entwicklungsländern heute? Die Welthandelsorganisation und der schrumpfende „Entwicklungsraum“*, in: S. Randeria/A. Eckert (eds), *Vom Imperialismus zum Empire*, Frankfurt am Main 2009, pp. 237-269; T. Voon, *Cultural Products and the World Trade Organization*, Cambridge 2007; a detailed introduction to the knowledge regime of the WTO gives: C. Arup, *The World Trade Organization Knowledge Agreements*, Cambridge 2008.

the 19th century onwards, it will be argued that the establishment of literary and artistic property in international law was closely connected to the foundation of specialised international organisations – the *Berne Union for the Protection of Literary and Artistic Property* founded in 1886, the League of Nations' *Intellectual Co-Operation Organisation* in the interwar years, UNESCO in 1945, the *World Intellectual Property Organisation* (WIPO) in 1967 and finally the WTO. Their main purpose was to link national propertisation strategies with the cross-border trade of cultural goods by several means. Firstly, they made IPR an integral part of international law; secondly, they decisively developed this particular field of international politics institutionally; thirdly, they have the task of harmonising the international agenda with the social elites of the countries involved; and finally, they have the task of settling conflicts by providing a general normative framework that provides information about the needs and overall advantages of integrating culture and knowledge in a property-related set of rules and handling rights.

The first step will be to briefly examine the relationship between the processes of propertisation and internationalisation of cultural goods from the 19th century onwards. Then, we will analyse the construction of international copyright law with a main focus on how the Berne Union and the League of Nations contributed to establishing the concept of private property in the realm of cultural goods, and how they were prepared to resolve the controversies over an extensive IPR regime on a global scale. The final section will provide an answer to the question of what role international organisations played in the continuous rise of intellectual property rights and how we are to critically reflect on the determining effects which their social and institutional framework imposes on the propertisation of culture and knowledge.²

1 The propertisation and internationalisation of culture in the 19th century

Modern intellectual property law is a bundle of individual rights developed in a secular market economy and liberally organised societies. This law was intended to guarantee and standardise the rights of authors, publishers, performing artists, the public and the state to engage in scientific, cultural and social competition and provide a secure contractual foundation for cooperation in the production, dissemination and reception of culture and knowledge.³ Crucial to the codification of intellectual property rights was a rapidly intensifying consumption of and trade in books, works of art and music which occurred during the 19th century: a development due to growing literacy within broad sections of the population, the emancipation of the middle classes, and new technical opportunities to produce and reproduce cultural works. As a consequence, modern liberal

2 The paper will focus on literary and artistic property leaving aside the history of both patents and trademarks. For a detailed analysis of patents see the contribution of M. Seckelmann to this volume.

3 L. Bently/B. Sherman, *Intellectual Property Law*, Oxford 2008; H. Siegrist, *Geschichte des geistigen Eigentums und der Urheberrechte: Kulturelle Handlungsrechte in der Moderne*, in: J. Hofmann (ed.), *Wissen und Eigentum. Geschichte, Recht und Ökonomie stoffloser Güter*, Bonn 2006, pp. 64-80.

societies increasingly had to deal with questions involving ownership of goods that were at once cultural, political and mercantile.⁴

The concept of proprietisation of culture and society interprets property rights, and particularly IPR, as a fundamental vehicle for artists, distributors and those using their art to extend their initial rights to copy and publish literary works.⁵ Due to authors' and publishers' desire to protect their interests and market access as much as possible, intellectual property became the main legal category for handling and regularising culture and knowledge in the course of the late 18th and 19th centuries. But the presence of such a process does not necessarily indicate the prevalence of a liberal and individualistic approach to property and property rights regimes. Rather, the concept of proprietisation acknowledges the immaterial character of cultural goods, which means the presence of a heterogeneous set of actors (creative artists, users of artworks, the public and the state) and a fundamentally different legal framework for intellectual property rights as compared to material property (for example in the temporal limitations at work in the former category). For this reason, the concept underscores how embedded IPR is in a wider institutional and socio-cultural framework. Once established as a legal, social, economic and also aesthetically reflected category, such rights provided an ordering principle in the construction of knowledge regimes; they would also determine how societies established their cultural institutions, rules and norms, in a process involving the restriction of access rights and assignment of a range of roles and functions to relevant actors in culture and society.

Thus, what was crucial to the management of culture and knowledge was not only a certain property rights regime but also a link to alternative institutions which sometimes weakened the individual and exclusive rights of authors or publishers in favour of the public or state: the state's interest in maintaining its educational and cultural policies; the interest of professional organisations in restricting access to the reproduction of cultural goods; that of people with education, wealth, appropriate social background or cultural capital (for example in the case of authorship) in maintaining exclusive property rights or access to professional positions.⁶ Proprietisation thus conceptualises IPR as a fundamental category contributing decisively to the shaping of modern society by integrating a complex ensemble of social, cultural, political, economic and legal institutions, relationships and values.

But to explain the predominance of intellectual property rights during the 20th century despite harsh criticism regarding its international imbalance, we also need to examine

4 F. Barbier, *Histoire du livre*, Paris 2000; J. Feather, *Publishing, Piracy and Politics. A Historical Study of Copyright in Britain*, London 1994; D. Finkelstein / A. McCleery (eds), *The Book History Reader*, London 2002; D. Vincent, *The Rise of Mass Literacy. Reading and Writing in Modern Europe*, Cambridge 2000.

5 For the following, see H. Siegrist, *Die Propertisierung von Gesellschaft und Kultur. Konstruktion und Institutionalisierung des Eigentums in der Moderne*, in: *ibid.* (ed.), *Entgrenzung des Eigentums in modernen Gesellschaften und Rechtskulturen (= Comparativ (2007), no. 5/6)*, Leipzig 2007, pp. 1-52.

6 For the concept of intellectual property as public policy, see C. May / S. K. Sell, *Intellectual Property Rights. A Critical History*, Boulder 2006, pp. 108-111.

international politics more closely and ask how propertisation strategies were connected to strategies for internationalising IPR. It turned out that legislators in various European states needed not only to draw up laws to protect these rights but also to set up international regulations for distributing and handling cultural goods (at the time this meant books and other printed works), once these began to be exchanged between different states and different legal and linguistic areas in significant quantities.⁷ An early attempt to solve this problem involved bilateral trade agreements, which, from the mid-nineteenth century onwards, prevented reprinting from occurring in different European states. However, the implementation of such bilateral and multilateral agreements was uneven, and some were also restricted to the short term. It thus became increasingly necessary to introduce long-term, universal legal standards in Europe covering the largest possible area.⁸

From the 1860s, the main European book trading countries such as Great Britain, France, Germany, Switzerland and Belgium pushed for a multilateral agreement acknowledging the rights of publishers and authors on the European continent. In 1886, these efforts resulted in the Berne Convention, the first multilateral treaty for the legal protection of literary and artistic works.⁹ Although European initially, the convention marked the starting-point of a global implementation of the originally Western idea to standardise the use of cultural works in terms of a property rights regime describing social relations between owners and third persons by means of exclusive rights of disposal.¹⁰ The Convention was embedded in a union of states known as the Berne Union, one of several such organisations established in the second half of the 19th century to oversee the technical, legal, social and economic tasks resulting from the increasing cross-border movement of people, goods and ideas.¹¹ The general intention of these organisations was to provide a framework for rules not only to govern transnational trade but also to minimise transaction costs and spur commercial-industrial, cultural, and social activities

7 M. Vec, *Weltverträge für Weltliteratur: Das Geistige Eigentum im System der rechtssetzenden Konventionen des 19. Jahrhunderts*, in: L. Pahlow/J. Eisfeld (eds), *Grundlagen und Grundfragen des Geistigen Eigentums*, Tübingen 2008, pp. 107-130.

8 S. P. Ladas, *The International Copyright Protection of Literary and Artistic Property in Two Volumes*, New York 1938, pp. 44-68; S. von Lewinski, *International Copyright Law and Policy*, Oxford 2008, pp. 15-23; C. Seville, *The Internationalisation of Copyright Law. Books, Buccaneers and the Black Flag in the Nineteenth Century*, Cambridge 2007, pp. 41-77.

9 J. Cavalli, *La genèse de la Convention de Berne pour la protection des œuvres littéraires et artistiques du 9 septembre 1886*, Lausanne 1986; S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, London 1987; J. Secretan, *L'évolution structurelle des unions internationales pour la protection de la propriété intellectuelle*, in: *Bureaux internationaux réunis pour la protection de la propriété intellectuelle* (ed.), *Les unions internationales pour la protection de la propriété industrielle, littéraire et artistique, 1883-1963*, Genève 1962, pp. 15f.

10 In 1886, founding states were Belgium, Germany, France, Great Britain, Spain (the last three mentioned including the territories of their colonies), Switzerland, Tunisia, Haiti and Liberia. By 1914, eight new member states had joined the union, amongst them Denmark, Japan, Luxembourg, Monaco, the Netherlands including the colonies, Norway, Portugal and colonies and Sweden.

11 R. Wolfrum, *International Administrative Unions*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam 1995, pp. 1041-1047.

between states and world regions.¹² Well-known international public unions, some of which are still in existence, were the International Telegraph Union (founded 1865), the Universal Postal Union (1874), the Paris Convention for the Protection of Industrial Property (1883), the International Union for the Publication of Customs Tariffs (1890) and the Central Office of International Railway Transport (1890).¹³

Recent research has stressed the significantly new elements these unions introduced into national and international politics from the 1860s onwards.¹⁴ The most important innovation in our context was the implementation, with the Berne Union, of an institutional and organisational infrastructure allowing both state and non-state actors to cooperate in a field that not only took in private groups such as publishers, intellectuals and lawyers but also the states' cultural and educational policies.¹⁵ Moreover, in providing these groups with the means to influence the handling and perpetuation of cultural goods beyond their own national territory, the Union made it possible for state delegates, the cultural industries and intellectuals to introduce the regulation of culture and knowledge, in terms of property, into international politics.¹⁶

The participation of interest groups and professional associations was one of the essential features of the international public unions, with states considering these transnational actors to be fulfilling an important function,¹⁷ contributing to a fundamental reform of both national and international politics. Simultaneously, this new organisational structure to implement international norms on literary and artistic property allowed authors and the cultural industries to extend their initial rights to copy and distribute cultural goods. That is to say, with the Berne Union new means emerged to anchor the idea of individual ownership in culture and knowledge as the ordering principle for cross-border trade with these goods. At the same time, the national legislative monopoly was

12 W. Fischer, *Die Ordnung der Weltwirtschaft vor dem Ersten Weltkrieg: Die Funktion von europäischem Recht, zwischenstaatlichen Verträgen und Goldstandard beim Ausbau des internationalen Wirtschaftsverkehrs*, in: *Zeitschrift für Wirtschafts- und Sozialwissenschaften* 1 (1975), pp. 289-304; C. Strikwerda, *Reinterpreting the History of European Integration. Business, Labor, and Social Citizenship in Twentieth Century Europe*, in: J. Klausen/L. A. Tilly (eds), *European Integration in Social and Historical Perspective: 1850 to Present*, Lanham 1997, p. 55.

13 C. N. Murphy, *International Organization and Industrial Change: Global Governance Since 1850*, Cambridge 1994, pp. 46-49.

14 M. Herren, *Internationale Organisationen seit 1865: Eine Globalgeschichte der internationalen Ordnung*, Darmstadt 2009; A. Iriye, *Global Community. The Role of International Organizations in the Making of the Contemporary World*, Berkeley 2004; B. Reinalda, *The Routledge History of International Organizations*, London 2009.

15 For the institutional and political innovations of the public unions see G. Ambrosius, *Regulativer Wettbewerb und koordinative Standardisierung zwischen Staaten: Theoretische Annahmen und historische Beispiele*, Stuttgart 2005; M. Vec, *Recht und Normierung in der Industriellen Revolution: Neue Strukturen der Normsetzung im Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung*, Frankfurt am Main 2006.

16 S. Ricketson/J. C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Oxford 2006, pp. 41-83; M. Vec, *Weltverträge* (annotation 7), pp. 107-130.

17 G. Ambrosius, *Regulativer* (annotation 15), p. 48; T. J. Röder, *Rechtsbildung im wirtschaftlichen "Weltverkehr": Das Erdbeben von San Francisco und die internationale Standardisierung von Vertragsbedingungen, 1871-1914*, Frankfurt am Main 2006, pp. 42 f.

subsumed in this context into a system of global governance linking national policy, intergovernmental agreements and transnational business activities.¹⁸

2 The Berne Union: unresolved conflicts over intellectual property rights

Bearing in mind the continuous rise of IPR during the last century despite serious critics, especially from countries depending on the import of cultural and educational goods, the Berne Union is of clear importance in two respects in explaining the formation of international IPR and its anchoring in national culture and society in the course of the 20th century. Firstly, it is important to analyse the organisational structures the Berne Union provided and the main acting group it addressed in order to develop this new field of international law and politics. Secondly, we will briefly examine the underlying conflicts over the distribution of culture and knowledge and how the Union handled them.

The foundation of the Berne Union owed much to the commitment of the interest groups of authors and publishers it primarily concerned, who were strongly interested in obtaining a sound contractual basis for the transnational reception of and trade with their works. From the 1850s onwards authors and publishers, mainly from the European book trading countries France, Great Britain, Germany, Switzerland and Belgium, pushed their national legislators to introduce long-term legal standards.¹⁹ They sought multilateral agreements that would overcome the existing bilateral trade agreements in favour of international legal doctrines that would introduce their property right claims on knowledge and culture on a European level.²⁰ For these reasons, the Union pursued its goal of establishing private property rights to immaterial goods as the principal category in the global governance of culture and knowledge right from the outset. The strong pressure the professional associations applied led to an international convention in favour of the property rights holders: The Berne Union represented the cultural and economic interests of the culture producing groups manifest in societal pressure groups, comprising authors, publishers and lawyers, and in the book producing and selling countries of Western Europe.²¹

This socio-cultural focus on the interests of the cultural industries was translated into legal practice by applying the principle of national treatment – the crucial part of the convention. This principal stipulated that each citizen of any of the convention's member states who published his works in another member state had equal legal standing with that state's authors. By harmonising national and international law offering both authors

18 M. Zürn, Global Governance, in: G. F. Schuppert (ed.), *Governance-Forschung. Vergewisserung über Stand und Entwicklungslinien*, Baden-Baden 2005, p. 127.

19 F. Ruffini, *De la protection internationale des droits sur les œuvres littéraires et artistiques*, in: *Recueil des cours de l'Académie de Droit International de La Haye*, Paris 1926, pp. 444-456; C. Seville, *The Internationalisation* (annotation 8), pp. 52-54.

20 H. Püschel, *100 Jahre Berner Union. Gedanken, Dokumente, Erinnerungen*, Leipzig 1986, p. 18.

21 C. May/S. K. Sell, *Intellectual* (annotation 6), pp. 115-122.

and publishers binding rights covering distribution and reception in the entire territory of the Berne Convention, cross-border trade was meant to become easier to calculate.²² In this way, while the states expanded the scope of their citizens' legal rights, they also handed over part of their function in institutionalising culture to a specialised international organisation. At the same time, they applied the concept of private property in cultural goods to international law and charged the Berne Union with supervising and pushing ahead with the proprietisation of culture in international trade, law and politics.

From the outset, however, the Berne Union had to struggle with asymmetries regarding the quantity of printed works that were produced in the member states. From the 1840s onwards, the cultural industries of the main founding states Belgium, France, Germany, Great Britain and Switzerland exhibited two basic trends: A permanent increase in the book production rates per year, and a reduction in price per book in order to respond to growing literacy across broad sections of the population.²³ The Berne Union provided these states with valuable tools to support this growth market by means of international legal standards ensuring legal protection at home and abroad – a strategy that brought the cultural industries the reproach of protectionist behaviour at least in the early 19th century.²⁴ Consequently, the idea of institutionalising the concept of exclusive property rights in cultural goods in an international organisation was not generally welcomed. The concept of protecting authors and publishers from societies whose educational systems and cultural scenes were already flourishing implied severe disadvantages for societies depending on the import of cultural and educational works, since they had to renounce their right to reprint or translate these works without permission or the need to pay royalties to the copyright holders.²⁵ This proved to be the main weakness of the Berne Union and resulted in the absence of important countries such as the USA, the Latin American states and the multicultural and multilingual Russian, Austro-Hungarian and Ottoman Empires.²⁶

From the outset, therefore, international copyright law had to struggle with opposing views regarding the benefits of a property-related handling of cultural goods, and thus suffered from severe conflicts between those countries with extensive and those with less developed cultural industries already in existence since the 1880s. The Berne member states tried to resolve the problem by introducing special provisions into the convention.²⁷ Having a dual interest in establishing a high-level protection of author's rights and in including as many countries as possible in the Berne Union, they tried to convince

22 B. Mentha, Berne Convention, in: H. L. Pinner (ed.), *World Copyright. An Encyclopedia*, Leyden 1953, pp. 1029-1070.

23 G. Menz, *Der europäische Buchhandel seit dem Wiener Kongreß*, Würzburg 1941, p. 114.

24 D. Klippel, *Historische Wurzeln und Funktionen von Immaterialgüter- und Persönlichkeitsrechten im 19. Jahrhundert*, in: *Zeitschrift für Neuere Rechtsgeschichte* 4 (1982), pp. 139f.

25 W. Dillenz, *Warum Österreich-Ungarn nie der Berner Übereinkunft beitrug*, in: E. Wadle (ed.), *Historische Studien zum Urheberrecht in Europa. Entwicklungslinien und Grundfragen*, Berlin 1993, pp. 167-189.

26 Pays membres de l'Union, in: *Le Droit d'Auteur* 25 (1914), p. 1.

27 S. Ricketson/J. C. Ginsburg, *International Copyright* (annotation 16), pp. 100f.

the non-members to accede to the union by allowing certain rights to be reserved. From 1908, states could gain membership on the compromise that they generally accepted the copyright rules, with the reservation that they did not have to apply the translation rights.²⁸ The desired effect did not materialise, however, as the said states remained absent: They continued to emphasise the severe social and economic differences between their cultural industries and those of the Berne member states.

3 Political resistance to and economic demands for a global copyright standard

The inter-war period represented a significant step towards the transformation of the Berne Union into a forum for the continuous settlement of conflicts over the concept of private property. While the historiography on IPR normally focuses on the development of the legal doctrines and thus interprets the inter-war years as coming to a standstill regarding the internationalisation of individual intellectual property rights,²⁹ a closer look in fact reveals significant changes in the way international norms were negotiated and set up, a subcutaneous development that from a long-term perspective led to the irreversible anchoring of the concept of private property in cultural goods in international law and politics. With the League of Nations a new actor emerged during the 1920s which had institutional, personal and financial resources at its disposal to remedy the shortcomings of the Berne Convention – the missing balance of interest between states with well- and lesser developed cultural industries and its euro-centrism. The League of Nations assisted the Berne Union in two respects: Firstly, the League provided an organisational infrastructure which linked the professional groups and their propertisation strategies even more closely to the process of setting up international legal standards. Secondly, the League managed to reconcile the gap between the Berne Convention and its counterpart, the copyright agreements of the Pan-American Union, and thus transformed international copyright law into a global affair integrating all world regions.

Though the Berne Union covered most of the territory of the European, African and Asian continents, except for Turkey, the Soviet Union and China, the majority of the 37 member states, including the union in 1928, were European, so that its geographical reach stemmed back to European colonial rule: the British, French, Spanish, Portuguese and Dutch colonies were an integral part of the Berne Union due to colonial law and

28 B. Mentha, Berne (annotation 22), p. 1039

29 Except for the works published up to the 1950s: A. Bogisch, *La convention universelle sur le droit d'auteur. Exégèse*, Paris 1953; E. Heymann, *Das panamerikanische Urheberrecht und die Versuche seiner Einbeziehung in die Berner Übereinkunft*, in: *Zeitschrift für ausländisches und internationales Privatrecht* 14 (1942), pp. 18–60; S. P. Ladas, *The international* (annotation 8); C. Royer, *La protection internationale du droit d'auteur en Amérique et les tentatives de rapprochement des conventions panaméricaines et de la Convention de Berne*, Toulouse 1942; M. Saporta, *La conférence intergouvernementale de Genève (18 août - 6 septembre 1952) et la convention universelle du droit d'auteur de l'UNESCO (6 septembre 1952)*, Paris 1952; an exception in recent literature makes: S. Ricketson/J. C. Ginsburg, *International* (annotation 16).

its legal as well as political dependence on the mother country.³⁰ Major non-European member states such as Japan (entry in 1899), Brazil (1922) and Australia, New Zealand and Canada, who joined the union as independent signatory states in 1928, were the exception to this, whereas the majority of states with extensive cultural industries and who thus profited from the acknowledgement of the creative artist's individual rights abroad were European.³¹

In order to mitigate the convention's European focus, the signatory states proposed unifying the convention with the multilateral copyright agreements of the Pan-American Union at their revision conference in 1928.³² Following a conference of the American states in Montevideo in 1889, the Pan-American Union had placed the multilateral copyright protection on its agenda, subsequently passing a whole series of multilateral conventions: the Convention of Montevideo in 1889, Mexico in 1902, Rio de Janeiro in 1906, Buenos Aires in 1910 and, finally, the Convention of Havana in 1928.³³ For the European states committed to the Berne Union, it was important that nearly all of these conventions were restricted to the American continent, so that non-American states were rigorously excluded from joining.³⁴ Alternatively, authors and publishers in Europe would have to push their governments for bilateral agreements on their own if they wished their works to be protected against unauthorised reprints or translations in America. However, this was also not a satisfactory solution, as both bilateral and multilateral negotiations with American states proved to be difficult and tended to fail. In 1913, for example, the Chilean government refused to conclude a bilateral agreement for the mutual acknowledgement of intellectual property rights with France. The reasons the Chilean government gave for their negative response resembled those already advanced by critics of the Berne Union: Such a bilateral agreement would be advantageous to the French publishing houses, as they could sue for royalties, whereas Chilean society could only suffer from the decreasing sale of cultural goods coming from France.³⁵

Even though these political and administrative difficulties worked more to deter European states than to advance any dialogue between the European and American property rights regimes, the Latin American book markets were clearly important to the predominantly culture-exporting states such as Great Britain, France, Spain and Germany,

30 Tableau des pays de l'union au 1er novembre 1928, in: Union internationale pour la protection des œuvres littéraires et artistiques, Actes de la conférence réunie à Rome du 7 mai au 2 juin 1928, Neuchâtel 1929, pp. 9f; L. Bently, Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries, in: *Chicago-Kent Law Review* 82 (2007), pp. 1181-1240.

31 Union pour la protection des droits d'auteurs sur leurs œuvres littéraires et artistiques. État au 1er janvier 1929, in: *Le Droit d'Auteur* 42 (1929), pp. 1 ff.

32 Union internationale pour la protection des œuvres littéraires et artistiques, Actes de la conférence réunie à Rome du 7 mai au 2 juin 1928, Neuchâtel 1929, p. 350.

33 M. Canyès/P. A. Colborn/L. Guillermo Piazza, Copyright Protection in the Americas. Under National Legislation and Inter-American Treaties, Washington D.C. 1950; E. Röthlisberger, Der interne und internationale Schutz des Urheberrechts in den Ländern des Erdballs, Leipzig 1931.

34 C. Royer, La protection (annotation 29), p. 120.

35 Letter of the French ambassador in Chile to the French Foreign Minister H. Poincaré, November 18, 1912, in: Archives nationales (F/17/13491/6).

as Latin American states did not have an extensive level of cultural production at that time, thus making them dependent on imports from European and, on a smaller scale, US American publishers.³⁶ Due to the widespread dissemination and reception of their cultural goods, the members of the Berne Convention had a special interest in ensuring their cultural industries were remunerated in the territories of the Latin American states by means of legal protection. Therefore, in 1928 the member states formulated their efforts to harmonise European and American copyright law by means of a global copyright convention closing the legal gap between the two continents.³⁷

The League of Nations entered the stage due to the restricted room the Berne Union had to extend its copyright regime to the entire globe. Although World War II did not threaten the legitimacy of the Berne Convention,³⁸ it became apparent that the Union had not achieved its initial goal of assembling all states world-wide. Even though the joint efforts of the Berne Union and the League of Nations failed to create a universal legal standard for the international protection of authors' rights, the League did leave its mark in a much more far-reaching way: It succeeded in integrating the American states in the European dominated discourse on the modalities and limits of the propertisation of culture and knowledge, even though they explicitly rejected the European concept of strong exclusive rights as the dominant framework for the handling of cultural goods. Thus, the League fundamentally contributed to institutionalising and globalising the links between culture and property.

4 The League of Nations: institutionalising conflicts over intellectual property rights

What was decisive in establishing private property as the key concept to statutorily regulating the trade of culture and knowledge on a global scale was the institutional framework the signatories of the Berne Convention took into account especially in order to convince the aloof Latin American states to join in a global copyright convention. The member states decided to entrust the League of Nations. The League seemed fit to assume responsibility for the project, since it maintained a thematically specialised sub-organisation, the Intellectual Cooperation Organization (ICO), which was necessary to engage the American and European governments and interest groups in negotiations.³⁹ It was composed of the International Committee on Intellectual Cooperation, created in 1922, and the International Institute of Intellectual Cooperation seated in Paris. The

36 Entry for Central and South America, in J. Kirchner (ed.), *Lexikon des Buchwesens*, Stuttgart 1952, pp. 23-26; H. Calvo, Latin America, in: S. Eliot / J. Rose (eds), *A Companion to the History of the Book*, Malden 2007, pp. 138-151.

37 Union internationale pour la protection des œuvres littéraires et artistiques, *Actes* (annotation 30), p. 350.

38 I. Löhr, *Transnational Cooperation in Wartime: The International Protection of Intellectual Property Rights During World War I*, in: N. P. Petersson / C. Dejung (eds), *Power, Institutions and Global Markets* (forthcoming); for patents see F. Mächtel, *Das Patentrecht im Krieg*, Tübingen 2009.

39 For the role the ICO played in the propertisation of scientific authorship, see the contribution of G. Galvez-Behar to this volume.

Committee consisted of outstanding intellectuals – for example Henri Bergson, Marie Curie and Albert Einstein – who had the task of supplementing the League’s disarmament policy by establishing close cooperation between the member states in the field of culture.⁴⁰ The Institute in Paris in turn executed the Committee’s projects: a group of permanent civil servants and a budget for research, congress organisation and travel costs should enable it to build up thematically based networks inside and outside of the League’s member states, including experts, professionals and representatives of civil society.⁴¹ These networks would help to disseminate the Committee’s ideas on how to peacefully reconcile the League’s member states. Therefore, the ICO aimed at broadening cooperation between the League and its members beyond any purely intergovernmental discussion. In the tradition of the international public unions, the League placed emphasis both on intergovernmental cooperation between states, in order to pass international resolutions, and on the incorporation of professionals and experts, who it was hoped would make substantial contributions to the drafting of international conventions, their practical implementation and, above all, to the canvassing of acceptance and recognition for these norms in their home countries.⁴²

This conception paid off for the introduction of property in literary and artistic works to all countries in the world. The ICO put the plan of a global copyright convention into action by operating independently on all the aforementioned levels.⁴³ The ICO consulted the states involved, assembled in the Berne and Pan-American Unions, both being independent of the League of Nations. At the same time, the Institute searched for cooperation beyond the intergovernmental level. Besides attempting to consult expert opinions so as to secure the legal construction of the new convention, this particular kind of cooperation aimed at obtaining approval of politically influential persons outside official diplomatic networks. Thus, the League followed a twofold strategy: firstly, to officially push the project on by engaging the Pan-American states in diplomatic negotiations, and secondly, to influence the Pan-American discussion by finding prominent proponents of the idea to regulate culture and knowledge primarily in terms of property who would campaign for the project independently of the League’s efforts.

These ties beyond conventional diplomatic channels proved to be of major importance during the 1930s. As the idea of a global copyright convention was elaborated by the member states of the Berne Union, due to unfavourable experiences with their copyright claims in the Americas, the ICO was expected to convince the members of the Pan-American Union to consent to a global copyright convention that would further

40 For the foundation and the structure, see *Secrétariat de la Société des Nations, La Société des Nations et la coopération intellectuelle*, Genève 1926; C. André, *L’Organisation de la Coopération Intellectuelle*, Rennes 1938.

41 For a concise overview, see *Institut international de coopération intellectuelle, L’Institut international de coopération intellectuelle 1925-1946*, Paris 1946.

42 J. Kolasa, *International Intellectual Cooperation. The League Experiences and the Beginnings of UNESCO*, Wrocław 1962, p. 41; Pham-Thi-Tu, *La coopération intellectuelle sous la Société des Nations*, Genève 1962, p. 62.

43 For the authority, the ICO disposed on, see H. Bonnet, *L’Œuvre de l’Institut international de coopération intellectuelle*, Paris 1938, pp. 27f; J. Kolasa, *International (annotation 42)*, p. 164.

the acknowledgement of a property-related regime for the handling of cultural goods. From the point of view especially of the Latin American states, the Berne Convention was not suited to being universalised. Rather, on their first deliberation of the project at a conference of the Pan-American Union in 1933 in Montevideo, the member states reacted with a fair amount of reserve.⁴⁴ This ranged from unreserved consent from the Brazilian government to serious doubts articulated by the Chilean and U.S.-American governments – which finally gained the upper hand – and thus the conference revealed fundamental asymmetries regarding the cultural and economic interests of the parties involved.⁴⁵ While the American states emphasised the legal differences caused by the Anglo-Saxon legal copyright tradition they followed in contrast to the continental European model of the *droit d'auteur*, the civil servants of the ICO identified much more substantial reasons for their remaining aloof from harmonising the European and American copyright law standards.⁴⁶ With the exception of the USA, the ICO argued, most of the American states did not have any extensive production of literary, artistic and scientific works, and therefore had to fall back upon cultural goods coming from Europe and North America to promote their educational systems and their cultural scenes. Had they agreed to a global copyright convention, however, following the European conception with the author as a strong and exclusive property rights holder, the usage and reception of these works in Latin America would no longer have been free but instead charged with royalties and fees they would have to pay the European property right holders.⁴⁷ In the face of these serious disadvantages which lesser developed countries had to expect, the ICO had to proceed strategically and was well-advised to provide good reasons for the global implementation of the concept of private property as the dominant framework to treat culture and knowledge.

Even though the Pan-American Union did not abandon its serious objections to a globalised IPR regime in the course of the 1930s, a majority of its members nevertheless appeared willing to participate in an international conference which the ICO and the Berne Union planned for 1938 or 1939 in order to inaugurate the new global copyright convention.⁴⁸ How can we explain their consent, however, even when the propertisation of culture and knowledge on a global scale did not promote their own interests? The explanation has to consider the organisational structures the League provided, which

44 Institut international de coopération intellectuelle, Rapport général du directeur à la commission internationale de coopération intellectuelle et au conseil d'administration de l'institut 1935, C.A.47.1935, pp. 173-176.

45 For a summary of the discussion of the League's suggestion, see Telegram of the French ambassador in Uruguay to the French foreign ministry, December 9, 1933, in: Archives diplomatiques de France à Paris (Société des Nations/IN – Coopération intellectuelle/1879).

46 R. Weiss, Les premières étapes d'une charte mondiale des droits intellectuels, Paris 1947, pp. 52f.

47 R. Weiss, Le mouvement américain en faveur d'un statut universel du droit d'auteur, in: Nouvelle Revue du Droit International Privé 3 (1936), p. 232; P. Azevedo, L'Amérique et la Convention de Berne, in: Geistiges Eigentum. Copyright. La Propriété Intellectuelle. Internationale Zeitschrift für Theorie und Praxis des Urheberrechts und seiner Nebengebiete 4 (1938), p. 6.

48 Les résolutions de la conférence de Lima, décembre 1938. Universalisation de la propriété intellectuelle, in: Geistiges Eigentum. Copyright. La Propriété Intellectuelle. Internationale Zeitschrift für Theorie und Praxis des Urheberrechts und seiner Nebengebiete 4 (1938), pp. 239f.

aimed to engage the American states and to convince critics. In order to find supporters for their project in the ranks of the American states, the ICO relied on its non-governmental networks. In particular, the ICO activated the North American National Committee on Intellectual Cooperation, which was composed of proponents of a strong international copyright regime. Hoping that the League's project would help to change attitudes within the U.S. American government, which continuously refused to accede to the Berne Union, the members of the national committee lobbied strongly for the League's suggestions.⁴⁹ Thanks to its secretary J. David Thompson, who was at the same time appointed to the advisory council of the department of intellectual cooperation of the Pan-American Union, in 1932 the national committee finally succeeded in inscribing the global copyright convention on the agenda of the next conference of the Pan-American Union in 1933.⁵⁰ Although the members of the Pan-American Union discussed the project controversially and kept their reserve for the aforementioned reasons, they agreed to consider advantages and disadvantages and thus consented to establish a committee of experts to study appropriate strategies with which to achieve a global copyright convention.⁵¹

This minimum concession by the Pan-American Union was sufficient for the League's ICO to use as a back door in order to influence deliberations within the Pan-American Union in favour of an extensive IPR regime. Once again, the ICO profited from its organisational structure. It persuaded some Latin American delegates who were assigned to the Institute for Intellectual Co-operation of the benefits of a global copyright convention comprising the Berne and the Pan-American regulations, so that they finally agreed to organise a meeting with the president of the American committee of experts and the representatives of the League of Nations. Regarding the question of how we can explain the establishment of an international regime to re-contextualise culture in terms of property, this meeting is of special significance. Although the first meeting in 1935 in Rio de Janeiro took place due to the initiative of the Brazilian government, and without the agreement of the Pan-American Union,⁵² it nevertheless marked the beginning of diplomatic negotiations which from a long-term perspective led to the conclusion of the Universal Copyright Convention in 1952. For José Antuña, the president of the Pan-American committee of experts, declared his support for the project despite fundamental

49 Huitième réunion du comité des institutions s'occupant des droits intellectuels (Paris, 22 juin 1938), Memorandum sur l'état de la protection internationale du droit d'auteur présenté au comité du droit d'auteur de la commission nationale américaine de coopération intellectuelle, par le Professeur Francis Deak, de la Faculté de Droit de l'Université Columbia, pp. 5 f., in: League of Nations Archive Geneva (R 4032: 5B/23171/8174).

50 Two letters of J. D. Thompson to R. Weiss, head of the legal section of the International Institute of Intellectual Cooperation, February 15 and April 18, 1932, in: UNESCO Archives (E.IV.28_1).

51 Résolution de la VIIe conférence internationale des Etats américains (Montevideo, 16 décembre 1933), in: Administration belge/Institut international de coopération intellectuelle, Conférence diplomatique pour la préparation d'une convention universelle sur le droit d'auteur. Fascicule 1: Documents préliminaires, Bruxelles 1938, pp. 9 f.

52 Telegram of the Brazilian delegate, assigned to the Institute of Intellectual Co-operation, E. F. de Montarroyos to the head of the department of intellectual co-operation of the League of Nations, Massimo Pilotti, August 2nd, 1935, in: Unesco Archives (E.IV.28_2).

scepticism from the Pan-American members. He justified his deviating position as the result of his personal conviction that unauthorised reprinting should not be interpreted as a minor offence but as synonymous with piracy.⁵³ Due to his prominent position within the Pan-American Union, he was able to give the project his whole support so that it remained on the agenda of the Pan-American Union. In April 1936, Antuña was officially invited to Paris. Under the auspices of the League of Nations, Antuña, the legal experts of the ICO, the director of the international office of the Berne Union and representatives of the international associations of authors and publishers worked out a draft for a global copyright convention that was in a sufficiently advanced state to be submitted for intergovernmental debate.⁵⁴ The draft was officially announced to the members of the two unions involved in the summer of 1936, along with an invitation to an international conference to pass the new convention, scheduled for 1938 or 1939 in Brussels⁵⁵ – a plan that was prevented by World War II.

5 International organisations and the setting of IPR as a field of global policy

Contemporary discussions concerning the imbalances of IPR normally view TRIPS as ushering in a new era of expanding private property rights to the realm of culture and knowledge. The assumption that we are witnessing the rise of something historically new is mainly based on a critical analysis of IPR contents, and in this respect the combination of intellectual property rights and international trade liberalisation does indeed mark a substantial strategic shift in policy goals. When searching for the reasons that made this shift possible, however, observers mostly refer to the pressure powerful lobby groups applied especially in the USA so as to extend their exclusive property and handlings rights to the whole globe. While it is not our intention to downplay the constitutive role of interest groups in drawing up the TRIPS-Agreement, the critique is one-sided as it mainly relies on the category of political and economic power, but ignores broader historical patterns that made the acceptance of private property possible as a core category for the handling of culture and knowledge over recent decades.

As we have seen, a closer look at the embeddedness of IPR in its institutional and socio-cultural contexts reveals the mechanism that made conceptualising serious alternatives impossible and promoted the acceptance of an IPR regime that became more and more exclusive. The international organisations not only attributed culture and knowledge to

53 J. Antuña, Comité d'experts pour l'étude d'un statut universel du droit d'auteur, organisé en commun par les Instituts de Rome et de Paris, 1^{re} réunion, Paris 1^{er} et 2 avril 1936, in: *Nouvelle Revue de Droit International Privé* 3 (1936), p. 430.

54 Avant-projet de convention universelle pour la protection du droit d'auteur, élaboré par le comité d'experts pour l'étude d'un statut universel du droit d'auteur, réuni à Paris les 1^{er}, 2 et 25 avril 1936, in: *Administration belge/Institut international de coopération intellectuelle, Conférence* (annotation 51), p. 48-52.

55 *Administration belge/Institut international de coopération intellectuelle, Conférence* (annotation 51).

a property-related set of handling rights, but gradually assumed political leadership without losing sight of state sovereignty. The ICO allowed private and state actors to increase their individual claims for better international protection of literary and artistic property and thus contributed decisively to the shaping of this new field of international policy. The difference the Berne Union and the ICO of the League of Nations made was that they assembled the property right holders, coordinated the internationalisation strategies with their interests and took these particular interests as a starting point for setting up international norms and laws. Although it was not until 1952 that a Universal Copyright Convention saw the light of day, it was the League which anchored the idea of individual ownership of knowledge and cultural goods irrevocably in international politics. Firstly, the League reformulated the international agenda on IPR by presenting the legal gap between the Pan-American and the Berne Unions as a problem that had to be resolved. In this way, the League launched a moralised discussion that proposed a certain sense of fairness as the main argument for its claim to acknowledge the author's individual rights world-wide. Secondly, by integrating only the professional associations, legal experts and explicit proponents of property in literary and artistic works concerned, the League primarily echoed the positions of the property right holders. As a consequence, their arguments could not principally be sidelined by the severe objections which the Latin American states in particular articulated regarding the inclusiveness or exclusiveness IPR should have in order to balance the conflicting interests of culture exporting and culture importing states. Thirdly, the League institutionalised this discourse with a far-reaching consequence: The appropriateness of individual property in culture became an integral part of an, albeit disputed, international agenda.

This becomes particularly apparent if we take a brief look at developments after 1945. UNESCO, the institutional successor to the League's ICO, restarted the project in 1946. Although UNESCO succeeded in passing the Universal Copyright Convention in 1952, it inherited the severe conflicts the League had to deal with. Stronger than before, the developing countries announced resistance towards an only marginally modified version of the Berne Union as a global standard for IPR. As previously, UNESCO had to mediate between an author-centred copyright law and a legal conception focused more on public interests.⁵⁶ For these reasons, UNESCO insisted on applying a different ideological framework in comparison to the ICO: At first, UNESCO understood intellectual property rights as a barrier for the free flow of culture and knowledge and pleaded for the integration of IPR in multi-faceted policy measures regarding the promotion of culture, education and science.⁵⁷ The idea of social responsibility found expression in the

56 F. Hepp, *Les perspectives actuelles de l'universalisation du droit d'auteur*, Paris 1952 pp. 6-8; M. Saporta, *La conférence intergouvernementale de Genève (18 août – 6 septembre 1952) et la convention universelle du droit d'auteur de l'UNESCO* (6 septembre 1952), Paris 1952, pp. 25 f.

57 F. Hepp (Expert-Conseil), *Rapport introductif aux travaux de la Commission Provisoire d'Experts en Droit d'Auteur convoquée à Paris du 15 au 20 septembre 1947 au siège de l'UNESCO*, in: UNESCO, *Documents de travail concernant le droit d'auteur dans le monde et la préparation de la Convention universelle du droit d'auteur, 1947-1951*, Paris 1947-1951, p. 7.

regulation of a compulsory licence lesser developed countries were allowed to issue in case they did not obtain the permission to translate or publish a protected work that was considered to be important for education.⁵⁸

The subsequent developments were faced with severe controversies over the justification and nature of IPR. Although the League had successfully reached its aim and included lesser developed countries in the elaboration of one global copyright standard, this also meant a shift from a majority of industrialised to an increasing number of developing countries, whose number grew during decolonialisation. Since then, global copyright law has had to struggle with tensions between parties pushing for the enforcement and protection of IPR and parties emphasising their dependence on the transfer of knowledge, culture and technology and thus claiming a less exclusive and economically focused IPR regime.⁵⁹ The aforementioned international organisations play a central, though dialectic, role in these controversies. Founded on behalf of the 'propertied countries', they have the task of introducing and enlarging IPR on a global scale with the aid of two means: Firstly, their task is to irreversibly link up international legal standards to the social and economic dynamics of national and cross-border trade with cultural goods; and secondly, they promote exclusive IPR by acknowledging criticism from lesser developed countries and searching for an appropriate political balance. Thus, it is the interplay of a strong European tradition of IPR, its early establishment as an international legal standard, its linking up with the professional interests of the property right holders, and the setting up of an institutional framework to promote IPR excluding serious alternatives that have made IPR a highly controversial part of a global agenda. Consequently, a reorganisation of this field of international law and politics in favour of a more inclusive IPR regime has to critically tackle the UNESCO, WIPO and WTO agencies, their generative power and their impact on the setting of IPR norms and future agendas.

58 S. Ricketson/J. C. Ginsburg, *International Copyright* (annotation 16), pp. 1187; A. Bogensch, *The Law of Copyright Under the Universal Convention*, Leyden 1968.

59 C. May, *The World Intellectual Property Organization. Resurgence and the Development Agenda*, London 2007.