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The values of sharing

A world of bits in pieces

Abstract

There is a war raging in our world, our country, our streets and our homes, fought in arenas sizing from courthouses down to the currently smallest electronic devices capable of upholding an internet connection. It is a battle of ideas fought by representatives of the notions that said ideas, respectively, are or are not priceless, a battle in the midst of which the state is held hostage by commercial interests, public opinion and super-governmental forces. This essay strives to crystallize what the clashing values of this debate are. This is done by applying an argumentative analysis that seeks to identify the justifications that the essential arguments rest upon. The overall ambitions of the essay is to promote the value of spreading and producing ideas as well as to provide an extensive descriptive presentation of general arguments and the values that lie therein.

Key words: Ideas, Intellectual Property, Protection, Globalization, Values, Copyright, Patent

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1 Introduction

He who receives ideas from me, receives instruction himself without lessening mine; as he who lights his taper at mine receives light without darkening mine

-Thomas Jefferson

With the words of Thomas Jefferson as an introduction I would like to argue that we now live in a world that is better equipped to facilitate new ideas than ever before. Not only do we possess the necessary tools to distribute them but the amount of producers, people, is as high as it ever has been.

But, perhaps most importantly, we have more than ever to benefit from good ideas, for as Mr. Jefferson hints, part of the value of an idea lies in the ease with which it is spread and the number of recipients. To say that things are better than ever before is not the same thing as to say that they are the best they ever can or will be however. The debate of how to proceed offers a selection of alternatives as to how improvements can be achieved. Imagine how the patents on medicine today prevents hundreds of thousands of people in the developing world from getting the cure for deceases such as HIV, a decease that isn't even considered deadly in the rich OECD countries (thus; cure) any longer. Imagine what cultural riches digital libraries could bring to the people. However, the protection of these ideas does not come without cost. What will be placed on the altar in order to protect ideas? What amount of privacy is Sven of Sweden prepared to sacrifice on the altar of ideas in order to keep the economic incitement of research and development at a level that secures the production of mad cow-decease vaccine where the feces to hit the famous fan? Given that protectionism really grants a higher production of ideas, that is.

1.1 Aim of the thesis

Intellectual Property protection is a widely debated topic at the moment, affecting everyone who in one way or another encounter Intellectual Property, and considering that this includes the chair you sit on, the coffee you might be drinking and the words you are reading, its large extent is beyond doubt.

What I want to accomplish with this thesis is to present a graspable overview of the battle of ideas. A struggle that contains both the file-sharing/copyright

debate that primarily concerns rich western nations but also more vital matters such as ones regarding medicine-patents that prevents people in developing countries from getting the aid they maybe could and should be getting. The two main points that I would like to stress are quite simple and consists firstly of, as stated in the introduction, the value of an idea varying positively with the amount of people it can reach. The positive effect of further spreading lies both in the benefit that each recipient gets out of the idea and the effect that this idea has on the re-creation of ideas.

By comparing the growing value of ideas that a growing and seemingly increasingly interconnected world would imply (given that we accept the proposition that the growing number of receivers increases the general value of ideas) with the development of Intellectual Property rights and enforcement there off I will discuss the possibility of a wedge between the aim of the legislation and the effect.

Secondly I will try to trace and classify the arguments presented in the argumentative analysis to a number of ideal-types by crystallizing what I perceive as the core arguments and the underlying values that these rest upon. I would also like to add that I neither aim to advocate the increase nor the decrease of protection but mainly strive to visualize the values that are clashing when choosing between the alternatives. In conclusion, the primary ambition of the thesis is to describe the current debate of ideas and the prominent values therein.

1.2 Disposition

I have divided my analysis into three chapters in order to give it a clear structure. The first chapter focuses on the present state of the world compared to 15-20 years ago. The point of this chapter is to establish a general idea of just how different the world is today compared to before the technical advancements that has led to what is sometimes referred to as *the digital revolution*, and how this has changed the conditions for spreading ideas.

In chapter two, I will discuss the mechanisms put in place to administrate the creation and protection of ideas such as patent and copyright laws. I will give a brief summary of how they have evolved during the last decades by reviewing the TRIPS and ACTA agreements. Though the latter is still under negotiation which limits the amounts of information there is to be had. Special attention will be paid to the most recent changes in copyright legislation in response to more publically accessible file-sharing services.

Finally, in chapter three, I will compare the development of the two previous parts. By applying a summarizing argumentative analysis I will analyze the core-arguments put forward by each side (Based on a somewhat simplified assumption that there indeed are two reasonably clear-cut *sides*).

The first two chapters will be of a more descriptive nature where the practical conditions are depicted leaving the philosophical reflections and the clashes between theory and practice to be discussed in the third chapter where I will develop four ideal-types based on the core values that I identify within the debate.

1.3 Method

Firstly, it is unfortunate that the world is such an imperfect simulator when it comes to testing theories and one has to realize that assessing contra-factual situations (such as a world with a less extensive intellectual property protection than the one we are experiencing) is hazardous at best. This is perhaps extra true when considering the multitude of uncontrollable variables that conducting an analysis at this level of abstraction means. What this high level of abstraction does, however, is that it mirrors the ambition to comment on the general with the trade-off being that its conclusions might not apply to each and every specific case.¹

Regarding more concrete methodological choices I will make use of several tools in my analysis. In chapter 1 and 2 I will use a comparative analysis in a time-series perspective. There is a slight difference in the manner in which these two chapters will be analyzed, though. For as chapter 1 deals with variables that changes continuously, not so much in easily dividable phases, chapter 2 deals with political agreements that are activated at specific dates, making them easy to place on a timeline. Consequently, chapter 1 will have a more diachronic approach while chapter 2 is a comparison of more static settings and will be treated as such.²

Common for these first two chapters is that I have strived to give them a descriptive character in order for them to function as a base for further discussion in chapter 3.

Finally, in chapter 3 I will be using a modified version of an argumentative analysis as suggested by and attributed to Arne Naess, exemplified and structured in the book *argumentationsanalys*³. More specifically I will conduct two separate argumentative analyses that in addition to reviewing the logic and origin of each

¹ Lundquist, p.64

² Hay, p.145-150

³ Björnsson, Kihlbom, Tersman, Ullholm, 1994.

argument also identify the value/ideal that the argument is based upon. The first concerning copyright and the second concerning patents as the conditions, and therefore the arguments, surrounding these two debates are somewhat different.

1.4 Restrictions

I do realize the hazards in taking on the world, which in a sense is what I'm doing by choosing a global perspective. But there really are no alternatives if one wants to comment on the present situation. The world of ideas and communication is a pressurized collection of interconnected and not too airtight compartments, which means that good ideas eventually will spread.

Returning to the fact at hand, what the analysis lacks in case-specific depth it makes up for in range. I will not go into specific cases or discuss each country's legislation to any greater extent except to exemplify. Instead the strength of the analysis lies in its scope.

In order to limit myself to *ideas*, in a broad sense, I will concentrate on patents and copyrights, excluding such protected property as Geographic Indicators (Champagne, Tequila etc.) and Trademarks (The brand aspect of products such as Nike, Coca cola etc.) from my analysis.

The reason for the chosen timeframe in the first two chapters, 15 years ca, is both, as will be shown, the advancements in technology and growth in population but also the fact that it coincides with the international agreements concerning the protection of Intellectual Property.

1.5 Material

For the statistical aspects of the analysis I have used various electronic databases such as the *UN-database*⁴, the *International Telecommunication Union*⁵ etc. When analyzing the protecting mechanisms I will use the TRIPS (Trade-Related Aspects of Intellectual Property Rights) and ACTA agreements (Anti-Counterfeit Trade Agreement).

⁴URL: <http://unstats.un.org/unsd/default.htm>

⁵ URL: <http://www.itu.int/net/home/index.aspx>

For the argumentative analysis in chapter 3, the material in the preceding chapters as well as external material such as scientific reports, political debates, newspapers etc. will be used to capture the full scope of the debate.

1.6 Proposition

What I am about to propose is really a series of propositions, some of intuitive nature, intuitions that I will try to verify by statistics and the argumentation that follows. First I would like to propose that the value of an idea lies in the number of people it can reach, partly because of the benefit each recipient enjoys from it and partly because of the cultivating effect on the idea that another mind has. The first is a more direct value and easier to calculate while the value of the last lies in the effect that it has on the re-production of ideas.

Secondly I claim that the world is better equipped to administrate the distribution of ideas today than a few decades ago. If these two propositions are correct then ideas are of bigger value to the world than ever. Finally, the proposition that the value of idea varies with the amount of people it can reach should neither be seen as a proposal to increase nor decrease present protection, in itself. It merely stresses that there is more to be gained from maximizing the spread of ideas than ever before. Lending support to the value of an optimized production and spreading of ideas, relative the competing values that will be discussed in the concluding chapter.

2 Chapter 1 - The state of the world

The world of today is a world radically different from the world of only fifteen years ago. This of course comes as no surprise to anyone that is old enough to have experienced it, have access to the History Channel or simply has googled it. But how different is it in numbers? I would, in a simplified interpretation, like to claim that the spreading and impact of ideas can be said to rely on four major factors besides the quality of the idea and the controlling barriers; population, the means to communicate, cultural friction and financing. In the following paragraphs I will account for the progress of these factors over the last decade or so in order to paint a picture of where we are today compared to 1995 ca.

The reason for choosing this period is the remarkable change in many of the factors mentioned that the world has experiences during the specified period.

2.1 The population

Let us start with the realization that least there should be any revolutionary breakthroughs in the field of Artificial Intelligence, man is still the most essential component in the creation of ideas.

This is perhaps the easiest factor to account for as it relies on one single variable and enjoys the advantage of having reliable, official sources. In 1995 the world population was estimated to 5 719 045 000 people.⁶ 2010, fifteen years later, it is predicted to have reached 6 906 558 000.⁷ That means roughly 1.2 billion people more will be eligible to receive ideas, where there no other limiting obstacles or barriers. It also means that another 1.2 billion people will be able to create ideas.

⁶ UN-database, URL;

<http://data.un.org/Data.aspx?q=world+population&d=PopDiv&f=variableID%3a12%3bcrID%3a900>

⁷ URL: Ibid

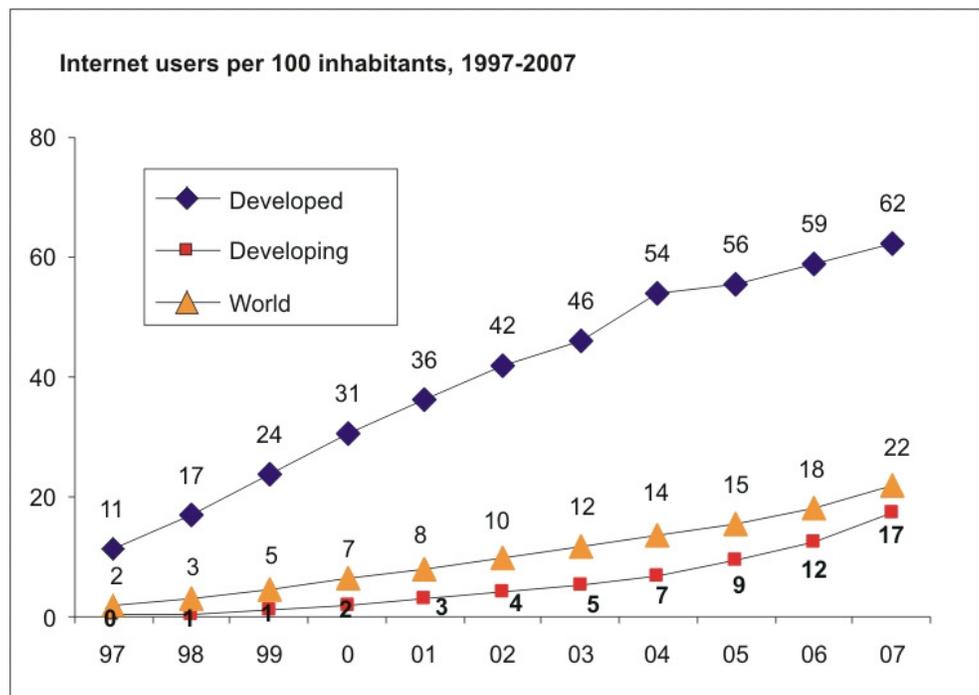
2.2 The communication

I will limit this chapter to the exploration of *new* electronic communication presuming that the changes in *old* communication such as daily social interactions can be estimated to having been, if not constant then at least static enough to disregard.

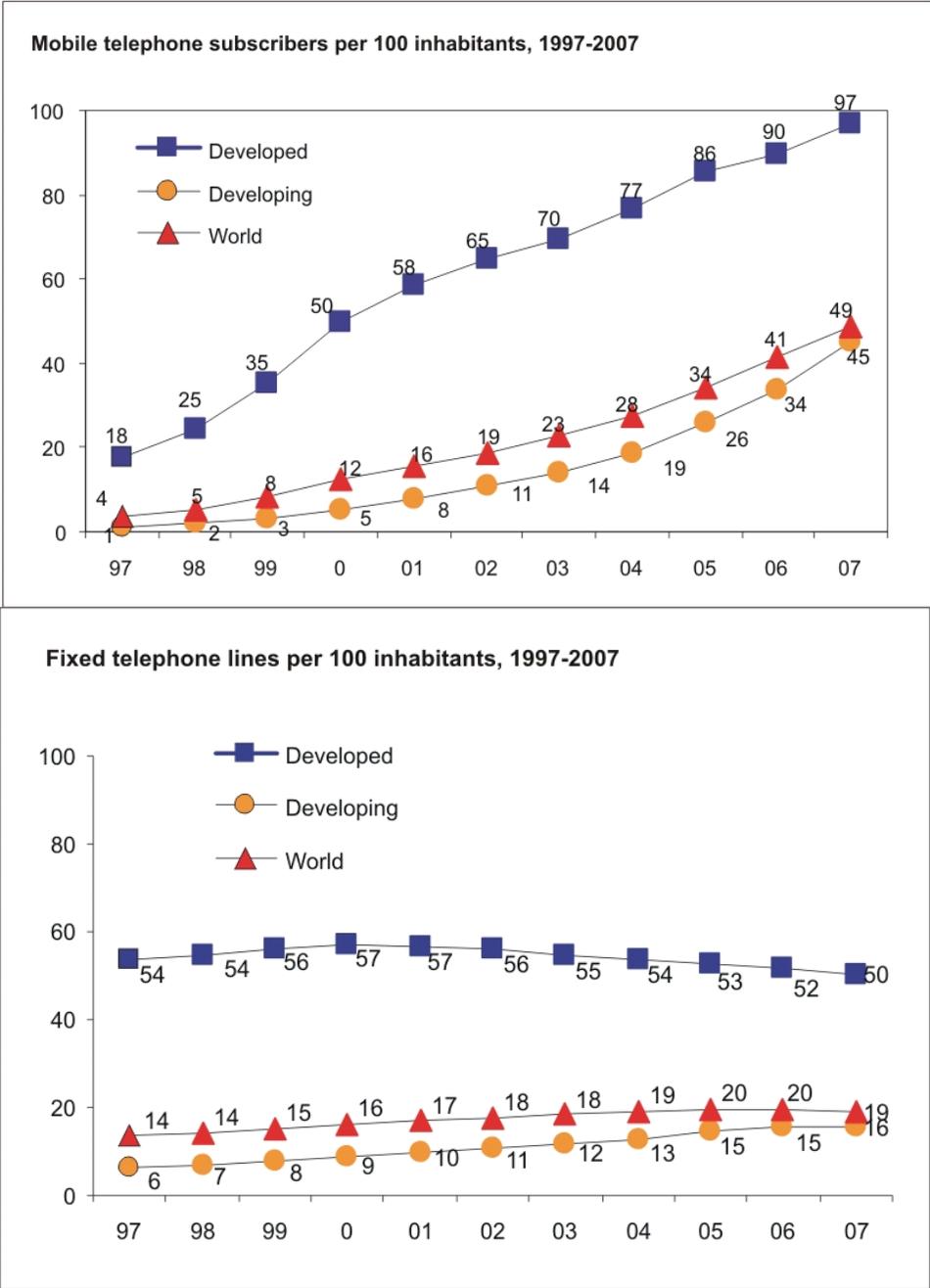
2.2.1 New communication

In order for an idea to be transferred from one person to another some sort of communication will have to take place. Now it might be a bit unfair to name what I'm about to present as *new communication* but then again, the world in which we live is vastly different to that of 1995 in terms of communication. The digital revolution has catapulted us into a reality where music, video, literature, news and, essentially, ideas are exchanged at an instant.

To compile a complete statistic representation of a concept as extensive as *communication* has its difficulties, however. Because of its significance to the specific period in time that we are studying I will use the world internet usage as an indicator of how world communication has evolved and then complement that picture with statistics from other communication-sectors.



As can be seen in the diagram above there are big differences between regions in the world but the overall increase is still a remarkable 20% rise over the ten years span that is covered in the diagram. But to be sure that this communication is not just replacing other forms of communication we will have a look at statistics regarding other types of communication. First let us have a look at other forms of electronic communication.



While the mobile phone sector has experienced a development similar to that of internet usage the conventional phone sector seems to have stifled, nevertheless there is no data in these sectors that suggests any clear substitution effects.

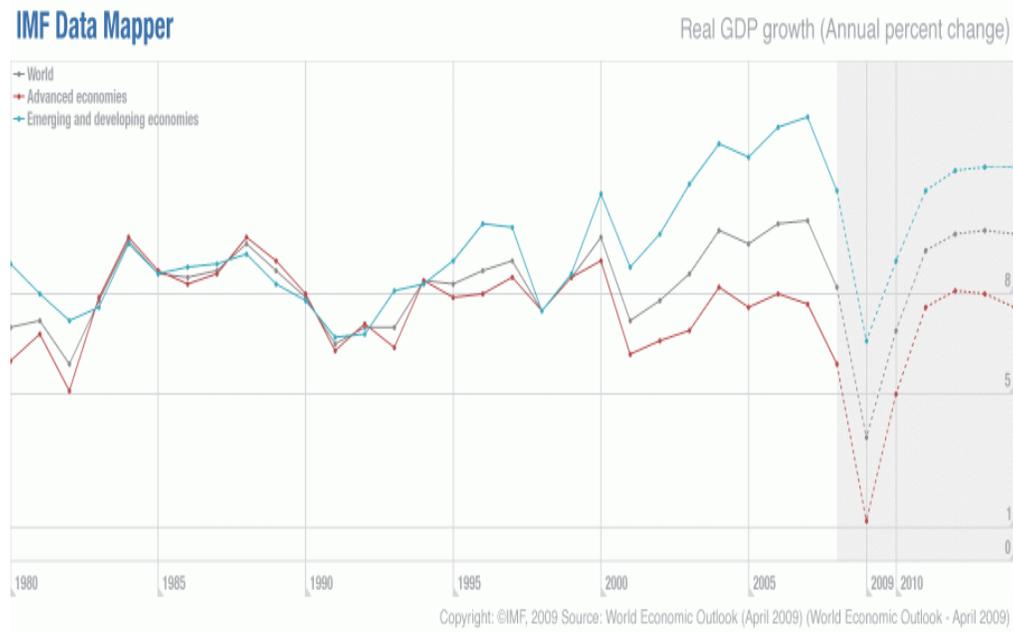
2.3 The cultural mainstreaming

The population of the world has become less geographically static due to factors such as a globalized economy that places production where it is most profitable, the reduced price on transportation, wars that force people to seek refuge in other parts of the world and people seeking a better quality of life. One of the effects of this is the cultural diversity it has created throughout the nations of the world. As an effect of this more people than ever master a second, third or even fourth language and are aware of customs and religious beliefs beyond those of their own. This of course lessens trade and communication obstacles but it also renders demand, in terms of types of products demanded, more similar, resulting in ideas becoming more compatible across borders. While the last argument also applies to patents it is extra significant in regard to the spreading of western culture in the form of music, film etc.

2.4 Money

If people are the engine of the idea production process then it can be argued that money is the fuel. This is of course a simplified assumption. Naturally the high-end research necessary to put a man on the moon is far more costly to produce than another Pete Doherty album (The blood art-work included). Bearing that in mind this paragraph mainly concerns the patent debate, partly for the reason stated above but also for incentive reasons that will be discussed further in chapter 3.

2.4.1 Economic growth

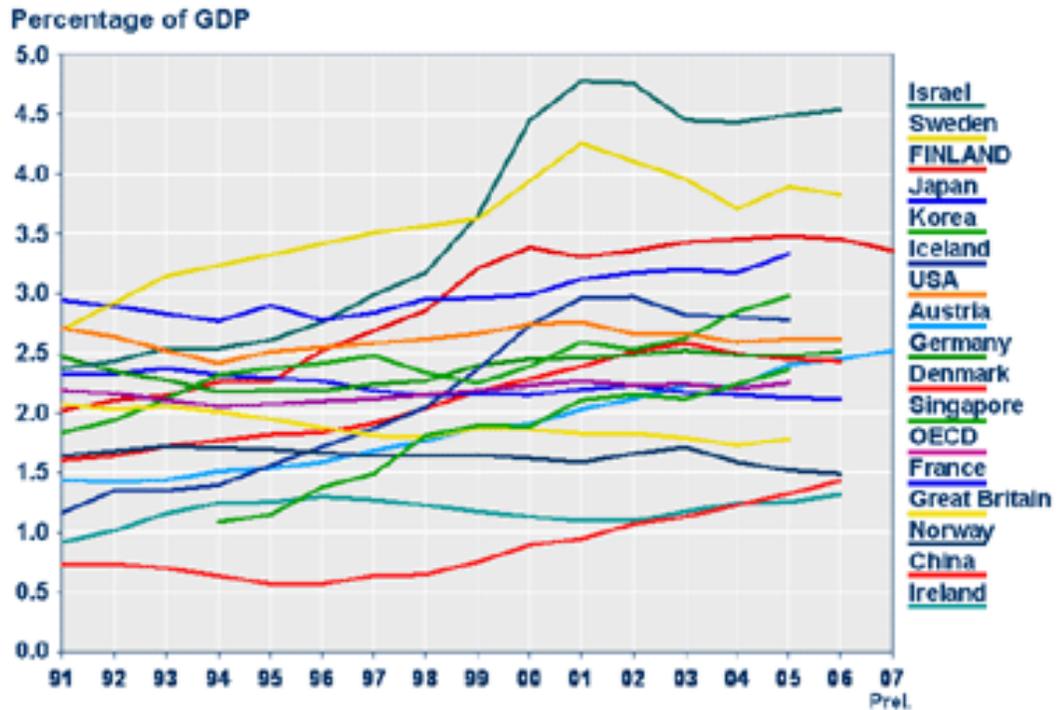


As seen in the chart extracted from official International Monetary Funds statistics ⁸ the world economy has been growing constantly during the specified period. Furthermore the statistics indicates that the growth of non-advanced economies exceeds that of the advanced economies. This fact neutralizes the reversed development in communications somewhat. However, it is important to realize that even though more economic resources benefits a society as a whole and might create a positive idea-creation effect a more specific analysis requires a closer look at the resources allocated to research and development.

⁸ URL: <http://www.imf.org/external/datamapper/index.php>

2.4.2 Research and development

Perhaps more true to this than the previous paragraph is the argument stated earlier that these statistics mainly concern patents. The graph below shows the research and development expenses for the OECD countries from 1991-2007.⁹



As illustrated in the graph the proportion of GDP spent on research and development has increased slightly during our selected time frame, indicating improved conditions for creating ideas.

⁹ URL: http://www.tekes.fi/eng_uusi_xxx/innovation/comparisons/statistics.htm

2.5 Conclusions act 1

It seems to stand beyond doubt that the supply of raw materials for constructing ideas is at an all time high. There are more people in the world than ever before, they communicate to a larger extent and cultural barriers such as language and religion are still present but constitute less of an obstacle. On top of this, the economic conditions are better today, with both world economic growth as well as grants for research and development being up. Given that one accepts the proposition that the value of ideas rests upon the amount of people it can reach it seems clear that the value of ideas is higher today than 10-15 years ago.

Finally I would like to point out that the statistics presented in this section are by no means sufficient to give a fully complete picture of the world today but hopefully they supply an adequate foundation to support the fact that, given the proposition that a large part of the value of an idea lies in its spreading the, world has without any doubt raised the value of ideas. Again, emphasizing the value in maximizing their spread.

3 Chapter 2 – Bricks and mortar

In this act I will discuss the various barriers, mechanisms and administrative tools that have been put in place to regulate the idea market. I would like to point out, however that the somewhat playful title does not refer to them as being strictly negative and limiting. What is meant by *Bricks and mortar* is rather the fact that these factors are *man-made* and deliberate attempts to control conditions for ideas to a larger extent than the factors discussed in the previous act that can be said to have a more *natural* and non-deliberate role in regard to ideas. As article 7 of the *General Provisions and Basic Principles*, in regard to the TRIPS (Trade-Related Aspects of Intellectual Property) agreement, states;

*The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*¹⁰

As stated earlier I will avoid going into nation-specific cases. Instead I will use the World Trade Organization (WTO) agreements as my main material in this part. Although not every nation is a member and thereby subjected to the agreements of the organization I believe that a large enough number is, in order to use these agreements as representative for the global idea market. In addition to the WTO agreements I will also discuss the recent *Anti-Counterfeiting Trade Agreement* (ACTA).

3.1 Short historic resume

The birth of modern time Intellectual Property protection began with the Paris Convention for the Protection of Industrial Property of 1883 and the Bern Convention for the Protection of Literary and Artistic Works of 1886. The most essential characteristic of these conventions is that they granted nationals of all its member states equal rights and protection, creating an international framework for

¹⁰ URL: http://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm

Intellectual Property regulations.¹¹ And even though the original form of the conventions have been revised a number of times till this day they still constitute the core of modern Intellectual property protection.

3.2 Actors

Naturally this matter concerns nearly everyone as pretty much all products that we encounter on an everyday basis are protected by Intellectual Property legislation. This section will not deal, to any extent, with actors such as nations (at least not in a direct sense), interest- and lobbyist groups or individuals. What will be discussed here is mainly the international legal framework that regulates Intellectual Property. These actors include the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO).

3.2.1 The World Trade Organization

The World Trade Organization is, as the name suggests, a trade organization with 153 member states that regulate international trade. It succeeded the GATT (General Agreement on Tariffs and Trade) system in 1995 and one of the commodities regulated by its agreements is intellectual property, ideas.¹²

3.2.2 The World Intellectual Property Organization

The World Intellectual Property Organization is an agency of The United Nations with 184 current member states. The organization was established by the 1967 WIPO Convention and it is mandated to promote Intellectual Property protection on behalf of its members.¹³

¹¹ Bently & Sherman, p.5-6.

¹² URL: <http://www.wto.org/index.htm>

¹³ URL: <http://www.wipo.int/portal/index.html.en>

3.3 International agreements

The main concern of this analysis is the international agreements that most of nations of the world are subjected to. Among these the TRIPS agreements is the most important which is why I will go through its content. And as the ACTA agreement might come to play an important role later on, as/if it gets ratified by the nations of the world a summary of what is known about it will be given as well.

3.3.1 The TRIPS agreement

Intellectual property trade regulations assumed something resembling its present form through the 1986, eighth GATT round, commonly called *the Uruguay round*. The agreement regarding Intellectual property was conceived during this 7 years long round and is called the *Trade-Related Aspects of Intellectual Property Rights* (TRIPS). TRIPS came into action on the 1st of January 1995 and it has three main features, to set the minimum standards of protection that all members are expected to provide for their intellectual property, to deal with the enforcement of the agreement and to settle disputes between members concerning Intellectual property. Furthermore, the agreement states the minimum required protection.¹⁴

In addition to patents and copyrights the agreement also covers property such as trademarks and geographical indicators. As these are of little or no importance to this analysis I will not discuss them at any length. Instead I will focus on patents and copyright.

3.3.2 Patent

TRIPS states a number of demands regarding what is expected of its members when granting patents among which the essential one is that; *patents shall be available for any inventions, whether products of processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.*¹⁵ The list below is a summarized compilation of other demands.

¹⁴ URL: http://www.wto.org/english/tratop_E/TRIPS_e/intel2_e.htm

¹⁵ URL: http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm#art30

- Patented products are prohibited to make, use, offer to sell, sell, or import by third parties without the consent of the owner.
- The owner of the patent may transfer the patent and conclude licensing contracts.
- Protection for ideas should last for at least 20 years, in almost all fields of technology.
- The invention must be sufficiently complete.
- If a patent is abused, for example by failure to supply the product to the market then the member (nation) may issue a so called “compulsory license” to another producer.

3.3.3 Copyright

Copyright protection includes a variety of products ranging from literature, sound recordings, motion pictures to computer programs and databases. The copyright aspects of TRIPS leans heavily on the Bern Convention of 1971 as a starting point and members must comply with article 1 through 21 from said convention. As with the previous patent section I will here present a summarized list of some core conditions and principles that apply in copyright matters, according to the TRIPS agreement, starting with a summary of article 1 through 21 of the Bern Convention. As stated this is a summary and the paragraphs have been condensed to capture its core. For a full review of the Convention advise the reference;

The Bern Convention (1971) ¹⁶

- The signers of the Convention constitute a Union.
- Every production within the literary, scientific and artistic domain is included.
- Translations enjoy the same protection as originals.
- Collections such as encyclopedias enjoy protection for their arrangements and selections.

¹⁶ URL: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

- Works included in this protection will enjoy it in all nations of the union. The protection will strive to benefit the creator.
- Daily news and material of press character are not included.
- The protection applies to: Works of creators that are nationals in one of the countries of the union, published or not; Non-nationals if the work is published first, or simultaneously, in a nation of the union.
- The general protection time is the life of the creator plus 50 years. The members of the union can chose to extend this time, however. If there are more than one creator then the 50 years starts at the death of the last creator.
- Translations have to be authorized by the creator.
- The creator has exclusive rights to reproduce his/her work.
- The creator has exclusive rights to accept or decline alterations to his/her work.
- The creator has the right to interest at re-sale of his/her work.
- Infringing copies of a work can be confiscated in accordance with the legislation of concerned country.
- The Convention is to be seen as a minimum, extensions are allowed.
- Bilateral agreements between members are allowed as long as these don't contradict the Convention.

TRIPS amendments¹⁷

- Computer programs are to be regarded as literary works and treated as such. Furthermore, the authors of computer programs have the right to allow or prohibit their works to be made available in the form commercial rental to the public.
- Databases may be protected by copyright if the selection and arrangement of data can constitute intellectual creation (Protection of the form, not the data itself), much like the protection of encyclopedias mentioned in the Bern Convention.

¹⁷ URL: http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm

3.4 The ACTA agreement

ACTA stand for the *Anti-Counterfeit Trade Agreement* and it is, as its name hints, an agreement that seeks to prevent piracy and counterfeiting. The treaty was launched by the United States and Japan in 2006 and is presently up for discussion in a number of countries around the world. The full content of the agreement is not yet known as it is still being negotiated but the European Commission, among others, have published a summary of what can be expected to be included in the agreement. I will, when presenting and discussing the agreement use this summary as my guideline.¹⁸

Regarding the content of ACTA the EU stresses its three primary components; International cooperation, transnational mechanisms and the strengthening and alignment of enforcement practices.

More concretely it suggests improvements in; Border measures, civil enforcement, criminal enforcement and internet distribution and information technology.

- Regarding **Border measures** mechanisms in line with those of the EU Customs Regulation of 2003 are suggested. This includes e.g. confiscating infringing goods at the borders, a more extensive control of import and export transit goods and an increased cooperation with rights holders.
- The mechanisms available in the EU Enforcement Directive of 2004 are exemplified as possible **Civil enforcements**. This includes an availability of preliminary measures, preservation of evidence and fixed legal fees and damages costs.
- The **Criminal enforcements** are emphasized as crucial to the effectiveness of ACTA. Among other things, a clear standard for actions against criminal counterfeit is advertised.
- In the matter of **Internet distribution and information technology** the mechanisms of the EU e-commerce Directive of 2000 is referred to as possible solution. These contain a definition of the responsibilities of ISP:s (Internet Service Providers)

¹⁸ URL: http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142039.pdf

Again, it's important to remember that the ACTA agreement is still under negotiations and the fact sheet referred to is vague at best. What will be included in the final version is still unclear but the general opinion seems to be that there will be an extension of the measures allowed to enforce the protection Intellectual Property once the agreement comes into action.

3.5 Conclusions of chapter 2

The direct amount of protection doesn't seem to have been altered much from the original TRIPS agreement to this day. What constitutes a patentable idea is pretty much the same today as it was then. Regarding copyright, it has had to make a few adjustments in order to accommodate new members of its family but the general rules of protection time, rights of the author etc. are still pretty much the same today as then, although the wheels are set in motion in order to raise the protection time.

What has changed however are the measures taken to enforce the laws, the tools available to do so and the multilateral cooperation that regulates the laws. This raises the question of what price the enforcement of the laws comes at. Are we willing to pay for a maximized idea production with our privacy and integrity? Is a maximized idea production really the actual return for that sacrifice? This topic will be discussed further after the argumentative analyses in the next chapter.

4 Chapter 3 – Values & Justifications

In the preceding chapters I have strived to describe the conditions under which the analysis that will follow here is subjected. What has been depicted earlier will now stand as a base for the argumentative analyses that will be conducted in this chapter. After the two analyses are concluded I will compare the result of each in a general discussion of ideas that will result in an analysis of ideal-types that are based on which of the values, identified in the debate, are prioritized. The argumentative analyses that are applied here are done so with the ambition to bring structure to the debate in order to get a clear picture of what values are clashing when arguments are broken down and condensed. For these reasons the analyses will be kept quite simple, leaving elaborations and further discussions to the concluding paragraph.

4.1 About the analyses

The following argumentative analyses are condensed versions of the global debates in which the most essential and relevant arguments will be considered. I will derive a main thesis from the debate and then proceed to list the arguments as either *pro* (supporting) or *contra* (objecting) in relation to this thesis. As the preceding chapters act as presentations of both the topic and the substance therein I will move straight on to establishing a thesis and listing the *pro*- and *contra* arguments without further ado.

4.1.1 Structure of the analyses

As stated in the *Method* paragraph, I will be using an argumentative analysis in accordance with the form usually attributed to Arne Naess. The form is quite simple in its structure. The point of departure is the central thesis, **T**, in relation to which the arguments presented are either *pro*, **P**, (supporting) or *contra*, **C**, (opposing). Following the listing of the arguments I will then proceed to analyze the arguments by tracing and commenting their origin and discuss their general logic partly by referring to the earlier chapters, statistics etc.

4.1.2 Selecting the arguments

As my ambition is to capture a global debate the process of selecting arguments for my analysis has been a cumbersome and time consuming one. To select a single debate from one single source would expose the analysis to the risk of missing crucial arguments. To try to, or claim that I have succeeded in, capturing all possible arguments, on the other hand, would be hubris to say the least. Having reviewed both material from official protectors of IP rights (such as WIPO, WTO), official opponents of its present form (Such as The Swedish Pirate-Party, *The future of ideas* by Lawrence Lessig.¹⁹) and news articles etc. I am fairly confident, however, that I have tossed my net wide enough to capture enough of what I have perceived as the core arguments in order to identify what the essential values of the debate are.

4.1.3 Weighting and analyzing the arguments

To assess whether or not arguments of IP protection are sound or not relies on whether or not one accepts the justifications supporting them. *Intellectual property Law*, Bently and Sherman²⁰ states what they see as the most important justifications as;

Natural Rights; Basically means that the works of the creator can be seen as an extension of the creator granting him the exclusive rights to decide how his/her material is used.

Reward; It is only fair that the creator be rewarded for his/her work. This differs from the incentive-theories in the aspect that the reward is an end in itself.

Incentive-Based Theories; Relies on the thought that copyright gives creates a necessary incentive that helps maximize the production of ideas that would otherwise not have taken place.

Neo-Classical Economics; Based on the thought that private ownership is preferred over common ownership as private ownership renders optimal exploitation of resources.

Democratic Arguments; Sees copyright as a defender of diversity, quality and creative autonomy.

¹⁹ Lessig, 2002.

²⁰ Bently & Sherman, 2009, p34-39.

While all these justifications can be said to apply to both patents and copyright there is little doubt that the incentive-based (with emphasis on economic-incentives) theories is extra relevant as a justification for patents as there is a significantly more costly process involved in researching and producing technically advanced products. I would like to state that a full logical evaluation of each of the arguments would require a tool with crystal ball abilities. My ambition is simply to by the means of an argumentative analysis depict a reasonable description of the core-debate, if possible, what the main justification for IP protection are and which values can be said to be clashing.

4.1 Copyright analysis

4.1.1 Thesis

As I don't intend to suggest any elaborate or concrete alternatives to the present state of things, but merely to test its soundness, I will formulate the thesis in a general way, as such;

T. *Present copyright legislation should be less protective*

There is no hidden agenda to be derived from the fact that the thesis suggests a change. The thesis might as well have been; *Present copyright legislation should NOT be changed*, in which scenario the arguments that are now *pro* would simply be *contra* and vice versa.

4.1.2 The pros

P1. Present protection time of copyright laws enrich the industry surrounding the artist rather than the artist.

P2. Present copyright laws restrict culture from spreading.

P3. It is practically impossible to enforce the law.

P4. It is costly to enforce the laws

P5. Artists are overcompensated for their work.

6.2.2 The contras

C1. Artists would suffer.

C2. Less protection would harm the incitement for cultural creation.

4.1.3 Analyzing the arguments

P1. *Present copyright laws enrich the industry surrounding the artist rather than the artist.*

Origin; The argument that record companies, movie studios etc. are the ones profiting from the present state of things is a widespread idea that can be derived from statements such as;

*“But others also see the record companies as greedy middlemen whose interests aren't necessarily aligned with those of musicians anyway”*²¹

This is a passage from a New York Times article published in 2001 but a great number of sources expressing the very same essence could easily be found simply by reviewing a few daily newspapers under a not to extensive period of time or by acquiring material published by any one of the multitude of anti-copyright groups throughout the world.

Logic; The implicit meaning of this argument is that there is no value for society in protecting and thereby enriching an industry least it should yield a reasonable return, in the form of culture in this case. Now, it stands to reason that there is an economic incentive for the middle-hands to supply the people with culture otherwise they wouldn't do so. Furthermore, there is little doubt that distribution represents a smaller proportion of the total cost involved in producing and making culture available for the public today than it did only a few decades ago which raises the question of the necessity of this industry. In an essay from 2006, Ulf Pettersson concludes that, In the case of Sweden, the creator gets a very small portion of his/income as a result of copyright and an insignificant amount from direct copyright.²²

If we accept that the industries role as distributor is lessened and that the conclusions of the essay mentioned above, that copyright does not yield any substantial income for the creators, are correct then the justification for protecting the industry (and indirectly the present state of the copyright) lies as I see it solely in its ability to use the resources that doesn't reach the creators to cultivate and reproduce culture. It is hard to assess the effect of lesser protection.

²¹ New York Times, April 16, 2001, URL:
<http://www.nytimes.com/2001/04/16/technology/16NECO.html?scp=7&sq=greedy record companies&st=cse&pagewanted=1>

²² URL: <http://uu.diva-portal.org/smash/get/diva2:131856/FULLTEXT01>

Justification; This argument claims that present legislation funnels the resources in the wrong direction, pointing to the proposition that the incentives aren't working in the manner they are supposed to.

P2. *Present protection time of copyright legislation prevents culture from being spread.*

Origin; This is a broad argument whose emphasis lies in a criticism of the current extent of the protection time but also the suggestion to extend it even further that has been expressed by both musicians and politicians.

*“To prolong copyright locks music up and makes it more difficult to create new music”*²³

The sentence above is a quote by the Swedish left party EU parliamentarian, Jens Holm. But the warning against a too extensive copyright protection is also expressed in more copyright-friendly contexts such as the article; *Upphovsrätt är bra för skapande*²⁴, published in the Swedish newspaper *Svenska Dagbladet*.

Logic; The logic behind this argument is that old material that isn't commercial enough will not be made available and instead locked up in archives. At the same time it is argued that whether the protection time is 20, 50 (as it is now), 70 (as has been voted in favor of in the EU parliament) or 95 years (as the original suggestion that was up for vote in EU parliament earlier) doesn't change the incentive for the creator in practice. In a short term perspective, given a fixed consumption a shorter protection time would undeniably decrease the total income of the industry. The question is how it would affect the overall culture production. Again, if we accept the conclusions that a small portion of the incomes go directly to copyright owners, meaning that the incentive for creating is not affected by the shorter protection time, then it boils down to the efficiency of the industry in terms of spending that surplus on activities such as discovery of new talent, promotion of current culture etc.

Justification; Again, this is a criticism against the incentive-based justification of copyright.

P3. *It is practically impossible to enforce the law.*

²³ Dagens Nyheter, April 24th, 2009, URL: <http://www.dn.se/kultur-noje/musik/langre-upphovsratt-for-musik-1.850992>

²⁴ Svenska Dagbladet, Mars 14th, 2009, URL: http://www.svd.se/opinion/brannpunkt/artikel_2593783.svd

Origin; Impossible might be a too strong term but enforcing the copyright laws has proven more and more difficult as modern technology has advanced. Current laws can today be broken at push of a button. The argument and the problem that lies therein can be derived from a famous statement by the Swedish Prime Minister, Fredrik Reinfeldt, who, in regard to the copyright debate, claimed that he didn't want to...;

"...criminalize a whole generation of youths"

Even though the PM might disprove of my interpretation I feel that this statement catches the hazards of and difficulties in formulating laws that are precise enough to define exactly who is breaking them without infringing upon individual rights and the privacy of citizens.

Logic; Let's start with realization that, to lay every question of what is right and wrong entirely in the hands of the immediate public opinion is not always the right solution. That is how mobs (and regrettably, much of today's opportunistic party politics) work. On the other hand, political decisions without an adequate support from the public is not a desirable solution either.

Justification; This could be seen as a democratic criticism against copyright.

P4. *It is costly to enforce the laws*

Origin; This argument is in many aspects the same as the one above. The cost is not just strictly economic but the creation of an extensive control apparatus creates mistrust of authorities that undermines the social capital that exists between state and citizen.

Logic; There are two sorts of costs involved here, both the social capital mentioned above and the economic investments involved in maintaining and enforcing laws that aren't regarded as valid, and thus broken to a larger extent, by the public. Assessing and regulating the directly economic aspects of the laws is rather simple as the fines, in theory, might be adjusted to a level that reflects the costs. Assessing the cost of a discontent public is a bit more tricky, but there is little doubt that there are costs involved.

Justification; Given that the costs outweigh the gains this is also criticism against incentive-based theories.

P5. *Artists are overcompensated for their work.*

Origin; Logic; This is an often used argument that relies on a sort of *Robin Hood* –logic that isn’t fully compatible with the market economy system that we live in. This argument usually refers to well known artists (Remember the Metallica vs. Napster law suit.). I believe that we can embrace the fact that cultural creators, on a whole, doesn’t belong to a very well paid profession. Sure there is a top to the pyramid in which the reward seems to be un-proportionately high but there is also the base where the low-income proletarians of the cultural world struggle.

Justification; Criticism of the *Natural Right* –justification.

C1. *Artist would suffer.*

Origin; That less protection would lead to less income for the industry at large and thereby the creators, is a commonly used argument. Expressed below, for example, by the Screen Actors Guild (SAG);

*“Copyright infringement on the Internet harms individual actors, directors, musicians, vocalists and writers. Sound recordings, movies and television programs are the unique artistic creations of the individual performers who make them and those same performers depend upon income from legitimate distribution networks to earn their livings and continue creating.”*²⁵

Logic; The implicit argument is that a suffering artist, contrary to popular belief, is an unproductive artist. And unproductive artist leads to a decrease in the production of ideas.

Justification; Practically this argument rests upon incitement theories, but it also leans on *Natural Rights*, and *Reward* thinking.

C2. *Less protection would harm the incitement for cultural creation.*

Origin; This is a common argument put forward by representatives of the industry as well as politicians.

Logic; The argument straight forward in and its logic as simple as the assumed justification.

Justification; Incentive-based theories

²⁵ URL: <http://www.sag.org/content/internet-piracy-hurts-individual-creators-not-just-industries-say-entertainment-unions>

4.2 Patent analysis

The arguments supporting and opposing a strict patent legislation are in essence the same as the ones concerning copyright with the slight difference that a heavier emphasis is put on the necessity of protecting patents in order to establish an economic incentive for costly research and development. Therefore the arguments presented here should be regarded as a complement to the previous section. As the logic, justification and origin of these have been discussed under the *copyright* paragraph I will just add a short comment to each of the arguments presented here.

4.2.1 Thesis

T. *Present patent legislation should be less protective*

4.2.2 The pros

P1. Present protection benefits the developed world on the expense of the non-developed world.

P2. The rigorous protection apparatus constitute an insurmountable barrier for improving ideas, thus limiting the production of ideas.

4.2.3 The contras

C1. Without protection of patents the lack of incitement for research and development would have a negative effect on the production of ideas.

4.2.4 Analyzing the arguments

P1. *Present protection benefits the developed world on the expense of the non-developed world.*

Origin; This opinion is widespread and stressed by a number of human rights organizations. Statements such as...;

“While patients in the West enjoy widely accessible treatments that allow them to live longer, fuller lives, treatment in Africa is practically non-existent. The drugs, manufactured by U.S. and European pharmaceutical companies with exclusive patents, are priced far out of the range that even Africa's most developed nations - including South Africa - can afford.”²⁶

...captures the essence of this argument.

Logic; If we stick to the medicine matter, it is a simple fact that where the protection of patents to be decreased it would probably benefit people in desperate need of medications. The question raised by the opponents of a decreased patent protection is what this would mean in the long run? The mortality in sub-Saharan Africa might drop now but if the world is faced with some new epidemic e.g. but how does one weigh such a thing against a scenario in the future when research and development has decreased as a result and we stand before the threat of a new epidemic for which we have no efficient medicine. Considering that human lives are at stake these are delicate speculations. There are suggestions that patents that deal with moral implications such as this should be state owned.

P2. *The rigorous protection apparatus constitute an insurmountable barrier for improving ideas, thus limiting the production of ideas.*

Origin; Among the sources for this argument is Michael Heller of Columbia University, New York, who in an article titled....;

“Too much IP protection causes economic gridlock.”²⁷

...argues for stifling effect on innovation that a too extensive protection of IP might lead to.

Comment; This argument is similar to ones stating that the enforcement of IP laws is costly (to an extent exceeding the profit they generate.).

C1. *Without protection of patents the lack of incitement for research and development would have a negative effect on the production of ideas.*

²⁶ URL: <http://www1.american.edu/tesd/aidstrips.htm>

²⁷URL: http://www.theregister.co.uk/2008/08/29/outlaw_ip_protection/

Comment; The reoccurring argument regarding the economic incitement needed for the production

4.3 Conclusions – identifying the central values

The justification of IP protection seems to revolve around the effectiveness of its incitements. The problem is that both sides claim that any alternative to their solutions prohibits the optimal spread of ideas. There seems to be four key values that the debate discusses, *optimizing the spread and production of ideas*, *protecting the privacy and integrity of the individual*, *protecting the creator* (for the sake of protecting the creator, see *Natural Rights* above) and assuring that the system is *non-discriminatory towards the non-developed parts of the world*. Regarding *optimizing the spread of and production of ideas* and creating a system that is *non-discriminatory towards the non-developed parts of the world*, again, both sides seems to argue that these values are most important and that their solutions offers the best solutions.

The clearest difference that set the advocates and opponents of the present state of things apart are (from what can be gathered by following the debate) the substance of the suggested solutions where there is clear a distinction between collective and private ideals. While the protectors of a strong IP protection advocate private ownership as the optimal solution that would optimize the benefits, the other side argue that there are aspects of this matter that aren't satisfied by private ownership.

Insofar as this might function as an indicator of the possibility to divide the question into a more classical political division there seem to be some ground for regarding the values of the protectors as leaning to the right and ones opposing as leaning to the left.

5 Final conclusions

Most arguments regarding IP protection (whether supporting or opposing) hold the maximized spreading and producing of ideas as their central ambition. How this is to be done is not agreed upon however. The attention from the media that the question has received recently, however, vouches for its ever growing importance to the world as the proposition in chapter 1, in combination with the statistics presented in chapter 2 would suggest.

Finally, there are suggestions that the patent system be abolished due to it being a source of injustice, preventing people in need to get medicine for example. The Swedish Pirate-Party suggests that doing so on a European level would benefit the creative climate. However, the incitement-issue apart, there are other moral aspects to consider as well, when analyzing a possible abolishment of the system.

For as a realist would gladly (and rightly so) point out, the United States, that up until the second half of the 20th century (They joined the Berne Convention in 1988) considered themselves net consumers of intellectual property avoided IP agreements, for this very reason. Believing that the protection of foreigner's rights would only harm their economy, a fact that had annoyed, among others, British copyright owners.²⁸

This is the same kind of annoyance that the United States are now directing toward China and their counterfeit markets, for example. In a historical context such as this it is hard for the countries of the developed world to point a finger at the developing and emerging economies of the world and claim that they are doing so in the name of justice. Furthermore, it is no secret that an allowing patent legislation played a part in the creation of the successful Japanese (Another initiator of the ACTA agreement) automobile industry in the decades that following the WWII.

²⁸ Bently & Sherman, 2009, p.6

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