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SYMPOSIUM

WORLD TRADE, INTELLECTUAL PROPERTY AND THE GLOBAL ÉLITES: AN INTRODUCTION

*Peter K. Yu**

Traditionally, intellectual property lawmaking is a matter of domestic affairs. Without external interference, governments make value judgments as to what would best promote the creation and dissemination of intellectual works in their own countries. Combined together, these disparate judgments form an intellectual property system that is tailored to the country's level of wealth, economic structure, technological capability, political system, and cultural tradition.

To protect authors and inventors, governments sometimes need to make adjustments to their intellectual property systems in exchange for better protection abroad. In those scenarios, policy-makers often evaluate the adjustments carefully to make sure that they correspond to the country's socio-economic conditions, research and development capabilities, and institutional and budgetary constraints. Thus, most bilateral and multilateral intellectual property treaties tend to focus on a limited range of issues. Even when they seek to harmonize protection by creating international minimum standards, these treaties are designed with such flexibility that allows governments "wiggle room" to develop their own intellectual property systems.

However, with increasing globalization and the establishment of the World Trade Organization (WTO), the control of national governments over the adoption and implementation of domestic intellectual property laws has been greatly reduced. Indeed, inter-

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national lawmaking has begun to replace country-based assessments and domestic policymaking as the predominant mode of intellectual property lawmaking. Through a global process, governments collectively design an international intellectual property system that takes into consideration the diverging interests, histories, cultures, and traditions of the various members of the international community.¹

Undeniably, international lawmaking ensures greater harmonization of intellectual property laws among countries with different conditions, needs, and aspirations. A harmonized regime not only would create certainty and predictability for those engaged in making investment, research, and licensing decisions, but also would prevent “races to the bottom” in which countries compete to attract and retain business investment by lowering their regulatory standards.² In addition, by encouraging participation in collective decisionmaking, the international lawmaking process allows members of the international community to coordinate their intellectual property systems and to resolve disputes and differences in a cost-efficient manner. This process also encourages cooperation, promotes the rule of law, and fosters stability in the international system.

Nonetheless, international lawmaking has limited effectiveness in countries that lack a well-functioning judicial system and the needed enforcement infrastructure.³ It also might undermine the ability of less developed countries to compete in the global economy. Very often, the “universal templates” created in the international lawmaking process are modeled after laws in developed countries and fail to take into consideration the socio-economic

¹ See, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1197 (1994); WIPO Copyright Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/94 (Dec. 23, 1996); WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRNR/DC/95 (Dec. 23, 1996).

² See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 551-52 (2000).

³ See Robert M. Sherwood, *Some Things Cannot Be Legislated*, 10 CARDOZO J. INT'L & COMP. L. ___ (2002); see also Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131, 213-21 (2000) (discussing the need to educate Chinese judges and government officials about intellectual property rights).

conditions of less developed countries.⁴ Thus, by requiring countries to adopt “universal” standards, international lawmaking might deprive less developed countries of the ability to tailor their intellectual property systems to local conditions.

Even worse, the international lawmaking process has become increasingly vulnerable to influences from multinational corporations, trade associations, and value-driven interest groups.⁵ The resulting laws also have ignored such important issues as consumer interests, national sovereignty, cultural diversity, ecological sustainability, and human rights. Moreover, as commentators pointed out, the existing global trading institutions suffer from some basic structural defects. In the case of the WTO, these defects include the lack of transparency of the institution, limited access by non-members to the dispute settlement bodies, technical and financial difficulties confronting less developed countries in their implementation of the treaty obligations, the insensitivity and undemocratic nature of the decisionmaking process, and the lack of accountability of policymakers to the global citizenry.⁶

These criticisms became even more important in light of the recent anti-globalization protests in Seattle, Washington, Prague, Quebec, and Genoa.⁷ Against a background of colonial and semi-colonial history, less developed countries begin to develop resentment toward developed countries and multinational corporations.

⁴ Assafa Endeshaw, *The Paradox of Intellectual Property Lawmaking in the New Millennium: Universal Templates as Terms of Surrender for Non-industrial Nations; Piracy as an Offshoot*, 10 CARDOZO J. INT'L & COMP. L. ____ (2002).

⁵ See Susan K. Sell, *Industry Strategies for Intellectual Property and Trade: The Quest for TRIPS and Post-TRIPS Strategies*, 10 CARDOZO J. INT'L & COMP. L. ____ (2002) (arguing that U.S.-based corporate actors were largely responsible for the TRIPs Agreement and highlighting their political strategies before, during, and after the adoption of the Agreement); see also *U.S. Industries, Trade Associations, and Intellectual Property Lawmaking*, 10 CARDOZO J. INT'L & COMP. L. ____ (2002).

⁶ For sources discussing the structural defects of the World Trade Organization, see Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. pt. I.B (forthcoming 2002).

⁷ For discussions of the failed Seattle Ministerial Conference, see generally Frederick M. Abbott, *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 BERKELEY J. INT'L L. 165 (2000); David A. Gantz, *Failed Efforts to Initiate the “Millennium Round” in Seattle: Lessons for Future Global Trade Negotiations*, 17 ARIZ. J. INT'L & COMP. L. 349 (2000); Renato Ruggiero, *Reflections After Seattle*, 24 FORDHAM INT'L L.J. 9 (2000); Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61 (2001); Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257 (2000).

Eventually, this resentment might spill over to the international intellectual property system and other trade-related areas, thus creating a legitimacy crisis within the international trading system. Alarmed by recent developments in international trade and the failure of the Seattle Ministerial Conference, commentators highlight the need for a better understanding of international trading institutions and the lawmaking process.⁸ Some have even put forward proposals for reforming the international trading system.⁹

Despite the importance of intellectual property to the global economy, legal scholars and political scientists rarely analyze the international intellectual property lawmaking process.¹⁰ To fill this void, we bring together policymakers, legal scholars, practitioners, industry people, political scientists, economists, and development specialists to discuss this important issue. What follows are the papers and remarks delivered at the "World Trade, Intellectual Property, and the Global Elites: International Lawmaking in the New Millennium" Symposium, which was held at the Benjamin N. Cardozo School of Law, Yeshiva University on March 7, 2001. It is our hope that this symposium will create a dialogue that enriches our understanding of the international intellectual property system, the process of harmonization, and the role and impact of intergovernmental and nongovernmental organizations, multinational corporations, and trade associations in international intellectual property lawmaking.

⁸ See, e.g., McGinnis & Movsesian, *supra* note 2; Robert W. McGee, *Legal Ethics, Business Ethics and International Trade: Some Neglected Issues*, 10 CARDOZO J. INT'L & COMP. L. ____ (2002); Michael P. Ryan, *Knowledge-Economy Elites, the International Law of Intellectual Property and Trade, and Economic Development*, 10 CARDOZO J. INT'L & COMP. L. ____ (2002); Paul B. Stephan, *Institutions and Elites: Property, Contract, the State, and Rights in Information in the Global Economy*, 10 CARDOZO J. INT'L & COMP. L. ____ (2002).

⁹ For reform proposals in the intellectual property area, see, for example, Gail E. Evans, *On Why the WTO Needs a Social Chapter: The Case for Putting Intellectual Property and Socio-economic Rights Together*, 10 CARDOZO J. INT'L & COMP. L. ____ (2002); Doris Estelle Long, "Democratizing" Globalization: Practicing the Policies of Cultural Inclusion, 10 CARDOZO J. INT'L & COMP. L. ____ (2002).

¹⁰ For discussions of the international intellectual property lawmaking process, see, for example, MICHAEL P. RYAN, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY* (1998); SUSAN K. SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* (1998); Graeme B. Dinwoodie, *The Integration of International and Domestic Intellectual Property Lawmaking*, 23 COLUM.-VLA J.L. & ARTS 307 (2000).

Speeches

On March 7, 2001 The Benjamin N. Cardozo School of Law held a symposium entitled *World Trade Intellectual Property and the Global Elites: International Lawmaking in the New Millennium*. The following speeches, presented by Jacques Gorlin, Geryn Ritter, Shira Perlmutter, Eric H. Smith and Robert Stoll touched upon the issue of U.S. Industries, Trade Associations, and Intellectual Property Lawmaking. They are included below.

The symposium also addressed the issue of Private Sectors, Public Interests, and International Intellectual Property Regime and a speech made by Robert Sherwood is included as well. Following these speeches are articles submitted by Doris E. Long, Robert W. McGee, Susan K. Sell, Paul B. Stephan, III, Michael P. Ryan and Assafa Endeshaw, all presenters at the symposium.

Peter K. Yu

U.S. INDUSTRIES, TRADE ASSOCIATIONS, AND INTELLECTUAL PROPERTY LAWMAKING

Jacques J. Gorlin

Thank you very much, and thank you for inviting me to this symposium.

First of all, let me say that I share Susan [Sell]'s position. Furthermore, I am not a lawyer even though I am speaking here in a law school about an international agreement. And, I do not want to take a legal perspective.

In fact, I will try to stay away from the substance. However I do want to make one or two points. The biggest problem that those of us who were involved in the take off of TRIPS is that, after the TRIPS agreement went into effect, the lawyers took over.

Most of us who have a background, not in intellectual property, but in trade, looked at the TRIPS agreement not so much as a legal instrument but as more of a political document that included minimum standards of intellectual property protection. That is, to the extent that the agreement is enforced, it is as much a political