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The Global Intellectual Property Order and its Undetermined Future

Peter K. Yu^{*}

 Developing countries; Intellectual property; International trade

Today, the intellectual property system is at a crossroads. Developed countries are concerned that the protection and enforcement levels provided by existing multilateral treaties are insufficient to protect their growing intellectual property interests. Meanwhile, less-developed countries—which include, in WTO parlance, both developing and least-developed countries—are frustrated by the fast-growing protections that stifle access to essential medicines, knowledge, information and communication technologies, and other key development resources. More problematically, the development of new bilateral, plurilateral, and regional trade agreements outside the multilateral process has threatened to take away the limited “policy space” less-developed countries have retained notwithstanding their memberships in a number of international treaties.¹

At the micro level, rights holders are eager to stop the widespread unauthorised use of their intellectual property assets in the relatively lawless cyberspace and the piracy-filled developing world. Meanwhile, user communities and consumer groups are frustrated by their lack of access to law- and policy-making processes at both the national and international levels. Some also view the globalisation process with great fear and discomfort. To complicate matters, the rapid evolution of digital technologies and the arrival of the internet, new business models and open access arrangements have upset the dynamics within existing intellectual property industries. Such a change, in turn, has resulted in the formation of new, and sometimes unexpected, allies in the intellectual property arena.²

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¹ Peter K. Yu, “The International Enclosure Movement” (2007) 82 *Indiana L.J.* 827.

² Christopher May, “Afterword” in Jeremy de Beer (ed.), *Implementing WIPO’s Development Agenda*,

If these developments are not complicated enough, the traditional international legal order, which was built upon the Westphalian nation state model, has now morphed into a more pluralistic order that includes a wide range of state, sub-state, and non-state actors.³ Many recent developments in the intellectual property area, for example, have been initiated from the bottom and at the grass roots level, as compared to the top. A growing number of alliances, partnerships, and cross-border networks have also emerged in both the north and the south and between the two.

Most recently, the uncertainty brought about by the economic crisis has aggravated concerns on both sides of the intellectual property debate. While tension between developed and less-developed countries is already high, the crisis has created many serious domestic problems that make political compromises difficult to strike at the international level. Corporate downsizing has also led to a significant reduction in investment in research and development, although the changing economic structure does open up new opportunities for entrepreneurs, innovators, consultants, start-ups and other newcomers.

In short, regardless of one's vantage point, the intellectual property system is at a crossroads. As an introduction to this new journal, this essay highlights some of the key recent developments in the intellectual property field. The essay begins by discussing the increasingly complex, and at times incoherent, international legal order governing the protection and enforcement of intellectual property rights. It shows how much the system has been transformed since the launch of the Paris and Berne Conventions in the 1880s.

The essay then examines the increasingly polarised debate on intellectual property law and policy. Although the debate's growing divisiveness is understandable, given the rapid expansion of intellectual property rights and the highly contentious nature of boundary drawing, this essay pleads for a more constructive debate that is based on empirical research, historical and comparative analyses, interdisciplinary insights and holistic perspectives.

Finally, the essay concludes by pointing out that the international intellectual property system is not facing a crisis, as some commentators have claimed. Rather, it has been presented with a new opportunity. Many high-income developing countries are now approaching a crossover point at which they switch over to the more promising side of the intellectual property divide—the proverbial gap between those who benefit from the existing intellectual property system and those who do not. This crossover process is likely to have significant implications for the future development of the intellectual property system.

(Waterloo: Wilfrid Laurier University Press, 2009), pp.172–173; Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries* (UNCTAD-ICTSD Project on IPRs and Sustainable Development, 2006), p.6; Peter K. Yu, "A Tale of Two Development Agendas" (2009) 35 Ohio N.U.L. Rev. 465.

³ Peter K. Yu, "Access to Medicines, BRICS Alliances, and Collective Action" (2008) 34 Am. J.L. & Med. 345, 375–376.

The complex intellectual property order

The cornerstones of the international intellectual property system are the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works.⁴ These conventions were established in the 1880s at a time when European countries were exploring ways to establish an international order to patch up the divergent intellectual property protections offered in different national systems. Although some countries preferred to have greater harmonisation—or even universal standards—others declined and insisted on reserving a considerable amount of sovereign discretion in the conventions.⁵

In the end, what we have today is a system created out of political compromise. The system started with the introduction of limited minimum standards. These standards were gradually strengthened through revisions conducted every two decades or so. Notwithstanding these multiple revisions, countries still maintained a high degree of autonomy and a considerable amount of policy space to implement intellectual property laws and policies. For example, they could determine how much additional protection they wanted to offer in excess of the modest minimum standards. They could even decide whether they wanted to offer protection in the first place. Although Switzerland and the Netherlands did not offer patent protection when the Paris Convention was established, they were allowed to become the Union's founding members on July 7, 1884.⁶

The Paris/Berne Convention-based system, however, changed drastically in the mid-1990s with the arrival of the Agreement on Trade-Related Aspects of Intellectual Property Rights⁷ (TRIPS Agreement) of the World Trade Organization (WTO). By requiring high minimum standards for intellectual property protection and enforcement, and by marrying intellectual property to trade, the agreement has ushered in a new era in which key activities in intellectual property governance slowly migrate from WIPO to the newly-established WTO. As the successor to the General Agreement on Tariffs and Trade (GATT), the WTO is now front and centre in the intellectual property law and policy debate.

Since the establishment of the mandatory WTO dispute settlement process, TRIPS-related developments have attracted the policy attention of many developed countries, all of which have established intellectual property industries by the time the TRIPS Agreement entered into effect. Thus far, the process has been used to address disputes that range from copyright exceptions to pharmaceutical patents and from geographical

⁴ Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, revised at Paris July 24, 1971, 828 U.N.T.S. 221; Paris Convention for the Protection of Industrial Property, March 20, 1883, revised at Stockholm July 14, 1967, 828 U.N.T.S. 305.

⁵ Peter K. Yu, "Currents and Crosscurrents in the International Intellectual Property Regime" (2004) 38 *Loyola L.A. L.Rev.* 323, 348–350.

⁶ Eric Schiff, *Industrialization Without National Patents* (Princeton University Press, 1971).

⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, (1994) 33 I.L.M. 1197.

indications to intellectual property enforcement.⁸ Although developed countries used the process predominantly in its first few years, less-developed countries have recently become more active in the process.⁹

Meanwhile, the growing dominance of the WTO in the intellectual property arena and the resulting competition have helped rejuvenate WIPO. Although the negotiation of a number of recent WIPO treaties—such as the Substantive Patent Law Treaty and the Treaty on the Protection of Broadcasting Organisations—remains stalled, the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty¹⁰ have introduced significant changes to the copyright landscape. Along with the WIPO Internet Domain Name Process,¹¹ these internet treaties successfully put the organisation back to the forefront of the intellectual property law and policy debate. The organisation's revitalised role has also benefited from the active work in the WIPO Arbitration and Mediation Centre, the services the organisation provides to rights holders, the soft law recommendations on the protection of well-known and internet-based marks,¹² and WIPO's active and well-co-ordinated efforts to promote worldwide awareness of intellectual property rights.

Today, it is fair to say that both WIPO and the WTO have a joint mandate to set international intellectual property standards. Notwithstanding this relatively settled structure, there recently have been many intriguing developments in other international regimes, such as those governing public health, human rights, biological diversity, food and agriculture, and information and communications.¹³ These developments have resulted in what I have described as the “international intellectual property regime complex”—a non-hierarchical, decentralised conglomerate regime that includes not only the traditional area of intellectual property laws and policies, but also the overlapping areas in related international regimes or fora.¹⁴

One can glean three key insights from the development of this regime complex. First, with the arrival of many different international fora, countries—even the weaker

⁸ “Canada—Patent Protection of Pharmaceutical Products”, Report of the Panel, March 17, 2000, WT/DS114/R; “United States—Section 110(5) of the US Copyright Act”, Report of the Panel, June 15, 2000, WT/DS/160/R; “European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs—Complaint by the United States”, Report of the Panel, March 15, 2005, WT/DS174/R; “European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs—Complaint by Australia”, Report of the Panel, March 15, 2005, WT/DS290/R; “China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights”, Report of the Panel, January 26, 2009, WT/DS362/R.

⁹ William J. Davey, “The WTO Dispute Settlement System: The First Ten Years” (2005) 8 J. Int'l Econ. L. 17, 24.

¹⁰ WIPO Copyright Treaty, December 20, 1996, (1997) 105–17 S. Treaty Doc. 1; WIPO Performances and Phonograms Treaty, 20 December 1996, (1997) 105–17 S. Treaty Doc. 18.

¹¹ WIPO, *The Management of Internet Names and Addresses: Intellectual Property Issues: Final Report of the WIPO Internet Domain Name Process* (Geneva: WIPO, 1999).

¹² “Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks”, September 20–29, 1999, WIPO Doc. A/34/13; “Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet”, September 24–October 3, 2001.

¹³ Yu, “A Tale of Two Development Agendas” (2009) 35 Ohio N.U.L. Rev. 465, 522–540.

¹⁴ Peter K. Yu, “International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia” [2007] Mich. St. L. Rev. 1, 13.

ones—now have the opportunity to move from one forum to another.¹⁵ It remains unclear which countries, or group of countries, will be the biggest beneficiary of this forum-proliferation/forum-shifting phenomenon. On the one hand, this development will allow weaker countries to better protect their interests by mobilising in favourable forums, developing the needed political and diplomatic groundwork, and establishing new “counter-regime norms” that help restore the balance of the international intellectual property system.¹⁶ The existence of multiple fora will also help promote “norm competition across different fora as well as . . . inter-agency competition and collaboration”.¹⁷ Without a doubt, WIPO has become a rather different organisation after the establishment of the WTO.

On the other hand, a proliferation of fora will benefit more powerful countries by raising the transaction costs for policy negotiation and co-ordination, thereby helping these countries to retain the status quo.¹⁸ The higher costs, along with the increased incoherence and complexities of the international intellectual property regime complex, are particularly damaging to less-developed countries, which often lack resources, expertise, leadership, negotiation sophistication and bargaining power. There are also justified fears that developed countries and their powerful supporting industries would launch what one commentator has described as a “multiple forum capture”¹⁹—a multi-forum strategy that seeks to shape the agenda, discussions, and norm development in areas that are implicated by intellectual property protection.²⁰

Secondly, with the arrival of the TRIPS Agreement and the growing use of TRIPS-plus bilateral, plurilateral, and regional trade agreements, the international intellectual property system is no longer as *international* as it was originally designed. Rather, the system has now become *global* and somewhat supranational.²¹ While Paul Geller alluded to the new “network model” of intellectual property lawmaking,²² Jane Ginsburg observed the emergent development of a “supranational code”.²³ In the

¹⁵ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000), pp.564–571; Laurence R. Helfer, “Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking” (2004) 29 *Yale J. Int’l L.* 1; Christopher May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (London: Routledge, 2007), p.66.

¹⁶ Helfer, “Regime Shifting” (2004) 29 *Yale J. Int’l L.* 1, 14; Donald J. Puchala and Raymond F. Hopkins, “International Regimes: Lessons from Inductive Analysis” in Stephen D. Krasner (ed.), *International Regimes* (Ithaca: Cornell University Press, 1983), p.66.

¹⁷ P. Bernt Hugenholtz and Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report* (New York: Open Society Institute, 2008), p.41.

¹⁸ Eyal Benvenisti and George W. Downs, “The Empire’s New Clothes: Political Economy and the Fragmentation of International Law” (2007) 60 *Stan. L.Rev.* 595; Peter K. Yu, “A Tale of Two Development Agendas” (2009) 35 *Ohio N.U.L. Rev.* 465, 556.

¹⁹ Viviana Muñoz Tellez, “The Changing Global Governance of Intellectual Property Enforcement: A New Challenge for Developing Countries” in Li Xuan & Carlos Correa (eds), *Intellectual Property Enforcement: International Perspectives* (Cheltenham: Edward Elgar Publishing, 2009), p.9.

²⁰ Peter K. Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40 *U.C. Davis L. Rev.* 1039, 1133–1141.

²¹ Yu, “The International Enclosure Movement” (2007) 82 *Indiana L.J.* 827, 901–906.

²² Paul Edward Geller, “From Patchwork to Network: Strategies for International Intellectual Property in Flux” (1998) 9 *Duke J. Comp. & Int’l L.* 69.

²³ Jane C. Ginsburg, “International Copyright: From a ‘Bundle’ of National Copyright Laws to a Supranational Code?” (2000) 47 *J. Copyright Soc’y U.S.A.* 265.

provocative words of noted English jurist Robin Jacob L.J., “as time goes on . . . the world will realize that at least for intellectual property the days of the nation-state are over”.²⁴

Finally, the growing activities in the various international regimes have made salient the spill-over effects and unintended consequences of intellectual property protection, as well as the high complex interdependence among policies in different issue areas. Today, intellectual property protection has impacted a wide variety of areas, including agriculture, health, the environment, education, culture, competition, free speech, privacy, democracy and the rule of law. The access-to-essential-medicines problem, for example, has raised difficult issues concerning public health, human rights, institutional infrastructure and government expenditures, in addition to the protection of pharmaceutical patents and clinical trial data. Likewise, the protection of traditional knowledge and cultural expressions implicates human rights, indigenous rights, cultural patrimony, biological diversity, agricultural productivity, food security, environmental sustainability, business ethics, global competition, scientific research, sustainable development and wealth distribution.²⁵

As the Committee on Economic, Social and Cultural Rights, a rare player in the intellectual property field, declared in its interpretative comment on a provision of the International Covenant on Economic, Social and Cultural Rights, “intellectual property is a social product . . . [with] a social function”.²⁶ “[T]he private interests of authors,” therefore, “should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration”.²⁷ This interpretive comment echoes the words of the WTO Appellate Body, which reminded us in its first trade dispute that the WTO Agreements, including the TRIPS Agreement, are “not to be read in clinical isolation from public international law”.²⁸

How the current international intellectual property order will evolve remains to be seen. Although some commentators have considered less-developed countries as rather ignorant of the complexity of and implications for the TRIPS Agreement—at least during the TRIPS negotiation process²⁹—developed countries were equally surprised by the evolution of the WTO and its many agreements.³⁰ Indeed, the

²⁴ Hon. Mr Justice Jacob, “International Intellectual Property Litigation in the Next Millennium” (2000) 32 Case W. Res. J. Int’l L. 507, 516.

²⁵ Peter K. Yu, “Teaching International Intellectual Property Law” (2008) 52 *St. Louis University Law Journal* 923.

²⁶ Committee on Economic, Social and Cultural Rights, *General Comment No.17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15, Paragraph 1 (c), of the Covenant)*, January 12, 2006, U.N. Doc. E/C.12/GC/17, para.35.

²⁷ Committee on Economic, Social and Cultural Rights, *General Comment No.171*, 2006, para.35.

²⁸ “United States—Standards for Reformulated and Conventional Gasoline”, Report of the Appellate Body, April 29, 1996, WT/DS2/AB/R, Pt III.B.

²⁹ Peter K. Yu, “TRIPS and Its Discontents” (2006) 10 *Marq. Intell. Prop. L. Rev.* 369, 375–376.

³⁰ Sylvia Ostry, “Asymmetry in the Uruguay Round and in the Doha Round” in Chantal Thomas and Joel P. Trachtman (eds) *Developing Countries in the WTO Legal System* (Oxford: Oxford University Press, 2009), p.105; Symposium, “U.S. Industries, Trade Associations, and Intellectual Property Lawmaking” (2002) 10 *Cardozo Journal of International and Comparative Law* 5, 10 (remarks of Jacques J. Gorlin, Director, Intellectual Property Committee).

international intellectual property system is now heading into an arguably uncharted territory where both sides will have to learn firsthand how to co-operate with each other to respond to new challenges while at the same time fighting hard against each other to protect their own interests.

A polarised policy debate

While the intellectual property system has become increasingly complex, the accompanying debate has become greatly polarised. The debate has also been impoverished by the increasing unquestioned use of binary terms.³¹ For example, part of the debate has focused on the dichotomy between corporate and consumer interests, between the interests of developed and less-developed countries, and between private and public goods. Even worse, inflammatory words, such as greed, theft, evil, parasite and piracy (including both piracy and biopiracy), have been used to attack, discredit or demonise one's opponents. Even when the same language is used, the terms often have different meanings or connotations or bring up different subtexts.³² In the end, the existing intellectual property debate has divided policy makers and commentators into two opposite camps, with the campers talking past, rather than to, each other.³³

The increased polarisation of this debate can be traced back to the growing strength and vocality of those who disagree with the positions taken by developed countries and their supporting intellectual property industries. Intellectual property rights holders have always been aggressive in pushing for stronger protection for their interests. However, it was only in recent years that their opponents have been able to mobilise to put up resistance or mount a counterattack. This growing resistance can be traced to four new developments.

First, with the rapid expansion of intellectual property rights, policy makers and commentators have become increasingly aware of the growing importance of intellectual property rights to the national economy as well as the potential for over-protection and abuse. While agriculture and textiles were the main concessions less-developed countries demanded during the negotiation of the TRIPS Agreement, intellectual property assets are likely to be the key economic driver for many countries in the 21st century.³⁴ As more countries migrate from the traditional agrarian and industrial economies to ones that are based on post-industrial, knowledge-based innovation, intellectual property assets will only become more important.

³¹ James Boyle, "Foreword: The Opposite of Property?" (2003) 66 (1-2) L. & Contemp. Probs. 1, 12; Peter Yu, "Intellectual Property and the Information Ecosystem" [2005] Mich. St. L. Rev. 1, 8-12.

³² Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (London: Zed Books, 2000), p.211; May, "Afterword" in Jeremy de Beer (ed.), *Implementing WIPO's Development Agenda*, (2009), p.170; Sisule Musungu, *A Conceptual Framework for Priority Identification and Delivery of IP Technical Assistance for LDCs during the Extended Transition Period under the TRIPS Agreement* (Quaker United Nations Office, 2007), p.5; Yu, "International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia" [2007] Mich. St. L. Rev. 1, 10.

³³ Yu, "Intellectual Property and the Information Ecosystem" [2005] Mich. St. L. Rev. 1, 10.

³⁴ Yu, "TRIPS and Its Discontents" (2006) 10 Marq. Intell. Prop. L. Rev. 369, p.380.

Secondly, the expansion of intellectual property rights, along with the changing lifestyles and consumer preferences, has led to a greater scrutiny of intellectual property laws and policies by the mainstream media.³⁵ While intellectual property issues were considered arcane, obscure, technical, and legalese in the past, the perception of these issues has changed dramatically in the past few years. Today, it is not uncommon to find the mainstream media reporting about the wide distribution of copyrighted materials through peer-to-peer file-sharing technologies, the trademarked products developed by McDonald's®³⁶, the need for greater access to patented pharmaceuticals in Africa and South America, and the use of geographical indications to protect champagne and cheese.

Thirdly, civil society groups and the academic community have become mobilised at both the domestic policy level and through cross-border networks.³⁶ They are increasingly active on the policy front, weighing in on the future development of the intellectual property system, especially when it relates to the information environment. For example, policy and academic experts have helped identify policy choices and negotiating strategies that help less-developed countries enhance their development prospects. They also have reframed the public debate to make it more favourable to the cause of these countries.³⁷ As John Braithwaite and Peter Drahos reminded us, "Had TRIPS been framed as a public health issue, the anxiety of mass publics in the US and other Western states might have become a factor in destabilising the consensus that US business elites had built around TRIPS"³⁸.

The most important development in this area, however, is the growing consciousness of intellectual property issues among the larger public—whether they be consumers, teachers, librarians, anti-globalisation protesters, artists, musicians, web designers, software programmers or virtual gamers. When the voices of these people are combined with those of political activists, academic experts and the mass media, the tone of the intellectual property debate has shifted dramatically. What was once considered unachievable, or even unimaginable, has now become somewhat possible. As Amy Kapczynski observed:

"Who would have thought, a decade or two ago, that college students would speak of the need to change copyright law with 'something like the reverence that earlier generations displayed in talking about social or racial equality'? Or that advocates of 'farmers' rights' could mobilize hundreds of thousands of people to protest seed patents and an IP treaty? Or that AIDS activists would engage in civil disobedience

³⁵ Yu, "A Tale of Two Development Agendas" (2009) 35 Ohio N.U. L. Rev. 465, pp.552–553.

³⁶ Yu, "A Tale of Two Development Agendas" (2009) 35 Ohio N.U. L. Rev. 465, pp.552–553.

³⁷ Braithwaite and Drahos, *Global Business Regulation*, 2000, p.576; Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford: Oxford University Press, 2009), p.173; Amy Kapczynski, "The Access to Knowledge Mobilization and the New Politics of Intellectual Property" (2008) 117 Yale L.J. 804, 809; John S. Odell and Susan K. Sell, "Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health, 2001" in John S. Odell (ed.), *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge: Cambridge University Press, 2006), p.87; Yu, "A Tale of Two Development Agendas" (2009) 35 Ohio N.U. L. Rev. 465, 552.

³⁸ Braithwaite and Drahos, *Global Business Regulation*, 2000, p.576

to challenge patents on medicines? Or that programmers would descend upon the European Parliament to protest software patents?’³⁹

Indeed, when Hong Kong—a place whose citizens are known for their political apathy—began to reform its digital copyright laws, I was pleasantly surprised, and indeed relieved, to find a large number of passionate young people who care about the direction of these reforms.

Thus far, there is a tendency to discuss intellectual property matters as if there is only black or white. The issues, however, are much more complex and nuanced—with many different shades of grey. Very few people today reject outright the protection and enforcement of intellectual property rights or embrace an absolute, despotic form of protection that excludes all limitations and exceptions. Indeed, it is rare to find people who argue that intellectual property rights are per se good or bad. Instead, it is more common to find discussions centring on how the intellectual property system should be set up and where the system should strike its balance.

At the international level, the larger debate concerns whether less-developed countries should follow the lead of developed countries and the path created out of past political compromises. Less-developed countries also question whether they are much better off setting up a somewhat different system. Such a system would allow them to experiment with new regulatory and economic policies while exploiting their comparative advantages. It would also enable them to take greater account of their local needs, national interests, technological capabilities, institutional capacities and public health conditions.⁴⁰

To be certain, a one-size-fits-all model—such as the one pushed by the TRIPS Agreement and the TRIPS-plus bilateral and regional trade agreements—is problematic. However, harmonisation is not entirely bad. Even if it would be highly impractical to have a multi-size model, there remains a serious and important question about what size the model should take. Should it be extra large, or should it be extra small?⁴¹ The fact that less-developed countries strongly oppose a super-size-fits-all model does not necessarily mean that these countries will always resist greater international harmonisation. After all, both the Paris and Berne Conventions began with a focus on setting up only “size S” minimum international standards which most of today’s less-developed countries are likely to find acceptable.

To help foster a constructive debate concerning international intellectual property standards, it is helpful to focus on four different areas. First, it is important to ground the debate on empirical data. Policy makers, especially those in the less-developed world, have a tendency to rely on data supplied by interested parties—whether they be trade groups and industry lobbies on the one hand or foreign-based civil society organisations on the other. Thus, instead of undertaking serious, impartial and sometimes difficult cost-benefit analyses that are based on substantive evidence, the policy makers’ misguided reliance on subjective data has reduced the debate to one that depends on a leap of faith.

³⁹ Amy Kapczynski, “The Access to Knowledge Mobilization and the New Politics of Intellectual Property” (2008) 117 Yale L.J. Pocket Part 262, 263.

⁴⁰ Yu, “The International Enclosure Movement” (2007) 82 Indiana L.J. 827.

⁴¹ Yu, “A Tale of Two Development Agendas” (2009) 35 Ohio N.U. L. Rev. 465, 512.

Secondly, it is important to understand, appreciate and carefully separate the different forms of intellectual property rights. That is, indeed, why some critics have discouraged the use of the term “intellectual property”, which they claim would encourage simplistic thinking that ignores the different characteristics of each form of protection.⁴² Intellectual property covers a large and ever-expanding variety of rights, such as copyrights, patents, trade marks, trade names, geographical indications, industrial designs, layout designs of integrated circuits, plant varieties, trade secrets and other undisclosed information, sui generis database rights, and the protection of traditional knowledge and cultural expressions. As new players and behaviours emerge and as new forms of intellectual property rights are being recognised, a careful debate that appreciates the different forms of intellectual property rights is likely to be very important.

Thirdly, it is important to incorporate into the discussion historical and comparative insights. These insights make us conscious of how the intellectual property system came to where it is today. The historical and comparative materials also provide the needed lessons to help us rethink the future of this system. Less-developed countries, for example, may not necessarily be reluctant to introduce stronger intellectual property protection. Nevertheless, they understandably would think twice after they notice that weaker protection may have contributed to the economic success of existing developed countries, such as the United States, Germany and Japan. It is therefore important not to overstate achievements or failures at a single point in time—such as the present. Rather, intellectual property developments should be studied as part of a more lengthy, complex, dynamic and evolutionary process.

Finally, it is important to take a holistic view and bring in interdisciplinary perspectives to illuminate the vast areas that are related to, but technically fall outside, the intellectual property field. While it remains important to understand the legal and economic implications for intellectual property protection, intellectual property rights have important cultural, social, educational and developmental aspects. The more interdisciplinary and holistic the discussion is, the more beneficial the debate will become.

The crossover point

When the international intellectual property system was set up, many less-developed countries had yet to obtain independence. It is telling that the Paris and Berne Conventions were set up at a time when European colonial powers—the Conventions’ founding members—were busy scrambling for concessions in Africa, Asia and other parts of the world.⁴³ Through colonial acts, the intellectual property standards in these Conventions were transplanted directly from the metropolitan states to the colonial

⁴² Richard M. Stallman, “Some Confusing or Loaded Words and Phrases That Are Worth Avoiding”, available at <http://www.fsf.org/licensing/essays/words-to-avoid.html> [Accessed September 15, 2009]; Yu, “Intellectual Property and the Information Ecosystem” [2005] Mich. St. L. Rev. 1, 1.

⁴³ Yu, “A Tale of Two Development Agendas” (2009) 35 Ohio N.U. L. Rev. 465, 565.

territories, even though these territories had not signed the international conventions.⁴⁴ As Ruth Okediji pointed out:

“Intellectual property law was not merely an incidental part of the colonial legal apparatus, but a central technique in the commercial superiority sought by European powers in their interactions *with each other* in regions beyond Europe . . . The [early period of European contact through trade with non-European peoples was] characterised by efforts to secure national economic interests against other European countries in colonial territories.”⁴⁵

In the 1960s, many of these territories became independent nations. With newfound sovereignty and autonomy, they expectedly demanded to adjust their intellectual property relations with other countries. From the establishment of the Stockholm Protocol to the revision of the Paris Convention to the unsuccessful creation of the International Code of Conduct on the Transfer of Technology, these newly independent nations requested special and differential treatment that took account of their colonial past, backward economic conditions and technological conditions, and desperate need for access to textbooks, scientific books and modern technologies.⁴⁶ Although many of these demands and initiatives failed, they provided the models for future pro-development efforts.

At the turn of this millennium, less-developed countries once again demanded the establishment of a development agenda, partly as a response to the serious shortcomings of the TRIPS Agreement and their concern over the harmonisation of substantive patent law. Their demands were made not just at WIPO and the WTO, but also in other fora, such as those governing public health, human rights, biological diversity, food and agriculture, and information and communications.⁴⁷ These demands and the resulting agenda successfully reintroduced a development dimension into the international intellectual property regime. Although enhancing the development prospects of latecomers remains a primary focus, the new agendas also bring with them new players, issues, fora, and rhetoric, a post-cold-war geo-political environment, and a more intellectual property-conscious public.⁴⁸

When one examines the development paths of many former less-developed countries, one could identify three distinct stages of development: (1) isolation; (2) emergence; and (3) crossover. The first stage began with the establishment of the international intellectual property regime. For most countries, this stage ended when countries declared independence and entered into relations with other countries on their own volition. The isolation stage lasted a little longer for those who relied on import substitution and similar strategies, such as those in the Communist bloc and

⁴⁴ Ruth L. Gana (Okediji), “The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development” (1996) 18 *Law & Pol’y* 315, 329.

⁴⁵ Ruth L. Okediji, “The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System” (2003) 7 *Sing. J. Int’l & Comp. L.* 315, 324–325.

⁴⁶ Yu, “A Tale of Two Development Agendas” (2009) 35 *Ohio N.U. L. Rev.* 465, 471–484, 493–511.

⁴⁷ Yu, “A Tale of Two Development Agendas” (2009) 35 *Ohio N.U. L. Rev.* 465, 511–540.

⁴⁸ Yu, “A Tale of Two Development Agendas” (2009) 35 *Ohio N.U. L. Rev.* 465, 540–573.

South America.⁴⁹ Unless there is a major setback to the international legal order, such as a movement to abandon existing international treaties, this stage is over for virtually all countries today.

The second stage occurred when less-developed countries pushed for the establishment of the old development agenda in the 1960s and early 1970s, such as the revision of the Paris and Berne Conventions, the transformation of WIPO into a specialised agency of the United Nations, and the establishment of the New International Economic Order. Except for WIPO's inclusion in the United Nations, most of these efforts ended with failure, due in no small part to the internal economic crises in these countries, the successful divide-and-conquer strategies deployed by the United States and other developed countries, and the successful launch of the GATT/WTO negotiations. The ongoing development agendas also fit within this stage and could be considered a continuation of past pro-development efforts. At this point, however, it is premature to evaluate the success of these recent efforts.

The last stage is where a less-developed country crosses over from a pirating nation to one that shows a strong respect for intellectual property rights. This stage is set to begin for some high-income developing countries, such as Brazil, China and India. It unfortunately will begin much later for low-income developing and least-developed countries. Indeed, for countries with very low imitative capacity or an insufficiently developed market, sufficient empirical evidence has suggested that stronger intellectual property protection may not be in the best interest of these countries.⁵⁰

Interestingly, these three stages of development strongly resemble the paths of evolution for many existing developed countries, including most notably the United States—which, according to some, has gone “from pirate to holdout to enforcer”.⁵¹ As far as protection of 18th and 19th century foreign authors are concerned, one need not be reminded that the United States was one of the biggest pirating nations in the world—creating frustration for both British and French authors. As Charles Dickens recounted, frustratedly, on his unsuccessful trip to America:

“I spoke, as you know, of international copyright, at Boston; and I spoke of it again at Hartford. My friends were paralysed with wonder at such audacious daring. The notion that I, a man alone by himself, in America, should venture to suggest to the Americans that there was one point on which they were neither just to their own countrymen nor to us, actually struck the boldest dumb! It is nothing that of all men living I am the greatest loser by it. It is nothing that I have to claim to speak and be heard. The wonder is that a breathing man can be found with temerity enough to suggest to the Americans the possibility of their having done wrong. I wish you could have seen the faces that I saw, down both sides of the table at Hartford, when I

⁴⁹ 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” (2002) 70 U. Cin. L. Rev. 569, 576.

⁵⁰ Keith E. Maskus, “The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer” (1998) 9 Duke J. Comp. & Int'l L. 109, 130–131; Carlos A. Primo Braga and Carsten Fink, “The Relationship Between Intellectual Property Rights and Foreign Direct Investment” (1998) 9 Duke J. Comp. & Int'l L. 163, 164.

⁵¹ Julie E. Cohen, Lydia P. Loren, Ruth G. Okediji and Maureen A. O'Rourke, *Copyright in a Global Information Economy*, 2nd edn (New York: Aspen Publishers, 2006), p.34.

began to talk about Scott. I wish you could have heard how I gave it out. My blood so boiled as I thought of the monstrous injustice that I felt as if I were twelve feet high when I thrust it down their throats."⁵²

Notwithstanding Dickens' frustration—and similar sentiments from Anthony Trollope, Gilbert and Sullivan, and many others—the attitudes toward protection of foreign authors in the United States soon improved with the arrival of a group of new stakeholders—budding American authors such as James Fenimore Cooper, Ralph Waldo Emerson, Nathaniel Hawthorne, Washington Irving, Henry Wadsworth Longfellow, Herman Melville, Edgar Allan Poe, Harriet Beecher Stowe, Henry David Thoreau, and Walt Whitman.⁵³ Today, the United States is an uncontested champion of intellectual property rights throughout the world.

If experiences from countries like the United States, Germany, Japan, Singapore and South Korea can be generalised, less-developed countries are likely to experience a similar crossover in the near future. Indeed, one can already find promising signs in high-income developing countries, such as Brazil, China, and India, which have been grouped together with Russia as the so-called "BRIC countries". It is only a matter of time before these countries reach a crossover point where stronger protection will be in their self-interests.⁵⁴

Although intellectual property protections in these countries will no doubt improve in the near future, there is no guarantee that these countries will be interested in retaining the existing intellectual property system once they cross over to the other side of the intellectual property divide. Instead, these "new champions" may want to develop something different—something that builds upon their historical traditions and cultural backgrounds and that takes account of their drastically different socio-economic conditions.

Although it is important and highly useful to forecast when a country will cross over from one side of the intellectual property divide to the other, making such a forecast, unfortunately, will be very difficult. There are several reasons. First, the uneven development within many high-income developing countries has led to significant socio-economic fragmentations at the domestic level—along geographical boundaries, across economic sectors, and based on different ideologies, philosophies and traditions.⁵⁵ While some constituents in these countries are likely to benefit from the growing protections and therefore will support active intellectual property reforms, those who lose out undoubtedly will strongly resist the ratcheting up of intellectual property standards. As a result, the policies of these countries may look "schizophrenic" to outsiders. Because of their complex economic situations, these countries

⁵² Letter from Charles Dickens to John Foster, February 24, 1842, reprinted in Hamish Sandison, "The Berne Convention and the Universal Copyright Convention: The American Experience" (1986) 11 *Columbia-VLA J.L. & Arts* 89.

⁵³ Yu, "The Copyright Divide" (2003) 25 *Cardozo L. Rev.* 331, 344.

⁵⁴ Yu, "Access to Medicines, BRICS Alliances, and Collective Action" (2008) 34 *Am. J.L. & Med.* 345, 391; Yu, "Intellectual Property, Economic Development, and the China Puzzle" in Daniel J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford: Oxford University Press, 2007), p.202.

⁵⁵ Yu, "International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia" [2007] *Mich. St. L. Rev.* 1, 21–33.

may also have more than one crossover point, depending on whether one focuses on a specific geographical region or the relevant economic sector.

Secondly, many of the existing bilateral, regional and multilateral intellectual property rules may make it difficult for these countries to cross over from one side of the intellectual property divide to the other. As we learn from those subscribing to the Realist tradition, countries are likely to push for rules and regimes that reflect their self-interests. Upon crossing over, these countries may become strong intellectual property powers that compete effectively against existing developed countries. At some point, the existing intellectual property powers, therefore, may express a preference for measures that prevent the emerging powers from reaching the crossover point, notwithstanding their concerns about the global piracy and counterfeiting problems. After all, if everything (including intellectual property standards) is the same, what would prevent multinational corporations from relocating their operations to countries that have drastically lower production, labour and distribution costs?

Thirdly, the finish line for this crossover process keeps on changing, thanks to the arrival of new forms of intellectual property rights, new issues in the intellectual property field, new players that demand stronger protection, and the negotiation of new bilateral, regional and multilateral treaties. While countries like Singapore and South Korea were undeniably on the promising side of the intellectual property divide a few years ago, the recent negotiations of bilateral free trade agreements with the United States, and therefore the establishment of a new finish line, may have threatened to push these countries back to the less promising side of the divide. Whether a country is considered to have provided adequate intellectual property protection will ultimately depend on what the minimum standards are.

Finally, intellectual property policies represent only one of the many components of a well-functioning innovation system. As complexity and dynamic systems theories have taught us, it is not easy to predict when the tipping point would be reached in a complex adaptive system. As Edward Lorenz observed in his widely-cited address to the Annual Meeting of the American Association for the Advancement of Science, the flap of a butterfly's wings in Brazil could set off a tornado in Texas.⁵⁶ There are indeed many variables in this crossover equation. Some variables, like the existence of a well-functioning innovation and competition system, are no doubt relevant to intellectual property protection. Others—such as the presence of a consciousness of legal rights, respect for the rule of law, an effective and independent judiciary, sufficiently developed basic infrastructure and a critical mass of local stakeholders—however, are irrelevant, or at best only marginally related, to intellectual property protection.⁵⁷

In sum, we may never be able to pinpoint when a country will cross over from one

⁵⁶ Edward Lorenz “describes a Brazilian butterfly that by beating its wings creates a movement of air that by joining with other currents transforms the weather in Texas”. Paul D. Carrington, “Butterfly Effects: The Possibilities of Law Teaching in a Democracy” (1992) 41 Duke L.J. 741, 743 (quoting Edward Lorenz, “Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?”, Address to the Annual Meeting of the American Association for the Advancement of Science, Washington, D.C., December 29, 1979).

⁵⁷ Yu, “Intellectual Property, Economic Development, and the China Puzzle” in Daniel J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era*, 2007, pp.213–216.

side of the intellectual property divide to the other, not to mention the fact that most forecasts have turned out to be inaccurate in hindsight. Nevertheless, if we have a better understanding of the conditions under which a country will cross over from one side to the other, we may be able to develop a better and more sophisticated understanding of the intellectual property system. We will also be in a better position to tackle the global piracy and counterfeiting problems. We may even be able to explore whether a careful and strategic recalibration of the existing intellectual property system could help accelerate the crossover process.

Conclusion

The international intellectual property system is expanding rapidly, yet it is at a point where its future remains undetermined. Although there has been wide disagreement over where the balance should be struck, the future standards are likely to fall somewhere in the middle—between what developed countries desire and what less-developed countries can afford. Although some commentators have argued that less-developed countries will eventually make a transition to become developed countries, it is premature to assume that less-developed countries, once developed, will always want the existing international intellectual property system. There is a good chance that they may want or *need* something rather different!

While policy makers and commentators continue to disagree over how to recalibrate the balance in the intellectual property system, such disagreement is not necessarily destructive. Countries, for example, disagreed widely and vehemently over a large number of issues in the early formation of both the Paris and Berne Conventions. Active and constructive disagreement, in fact, will only make the intellectual property debate more vibrant. It will also help others develop a greater appreciation of the tremendous efforts policy makers put into the development of the intellectual property system over the past few centuries. An “uninhibited, robust and wide-open” debate may even allow policy makers and commentators to rethink how an ideal intellectual property system should be set up, without focusing unduly on the choices made by treaty negotiators and policy makers in the past and the vested interests of incumbent industries.

Nobody can predict what the future intellectual property system will look like, but *everybody* can participate in the debate that helps us rethink its future. So, hear ye, hear ye, let the debate begin!