

## NEW DIRECTIONS IN INTERNATIONAL INTELLECTUAL PROPERTY

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[Edited remarks]

Thank you to Mark McKenna and the section committee for inviting me here. It is a real honor to address this section.

My role here is to set the stage a little bit. Perhaps convince you that there is something important and interesting to follow in international intellectual property.

The theme of my remarks is that the field of international intellectual property is being shaped today at the intersection of two rival and conflicting agendas. The high protectionist (maximalist) agenda being pushed by the US and other wealthy countries. And the opposing “development agenda” being led by Brazil, India and other developing countries. A lot of what may be interesting and consequential in the field in the future will likely follow from the intersections and conflicts between these two agendas.

### A. Some early antecedents

- To some extent, the maximalist agenda has been the dominant narrative in international IP for the last century. The Paris and Berne conventions were amended 6 times between the 1880s and 1970s, mostly to increase protection and harmonization of rights. Daniel Gervais describes the trend as justified by an “addition narrative” – the idea that more is better. Better for the wealthy countries. But also better for global development and innovation.
- But there was a countercurrent that one can trace back at least to the 1960s and 70s, fueled by decolonizing members in Africa, Asia and Latin America renegotiating their place in the global governance systems. Peter Yu describes this period as revealing the first of two development agendas. The agenda is led by developing countries – then as now with India and Brazil in the lead. A primary concern is access. Access to educational works, to translations, to medicines, to technology transfer.

## B. Modern period: Maximalist morphing

- 301. I normally describe the modern period as beginning in 1988 with the creation of the Special 301 program in the US. This was to some extent a response to the success of the first development agenda. It was attached to a larger narrative about the failure of the GATT because of its lack of enforcement. 301 authorized unilateral trade sanctions for failure to adopt domestic IP laws demanded by the US. The first targets were Brazil and Korea for software and pharmaceutical patents – neither addressed in the multilateral instruments. The agenda is unilateral determination and enforcement of foreign IP standards. It regulates domestic regulation from afar.
- While many thought that 301 would end with the WTO, in fact its use increased. 301 is the place where the US articulates soft law norms backed up by threats of sanctions. It regularly lists countries on its watch lists that are fully in compliance with all international agreements. Israel is listed for emulating US fair use. Canada is listed for its “notice and notice” system for internet take downs. Dozens of countries are listed for lacking data exclusivity, patent registration linkage and lack of patent term extensions for drugs – none of which are required by any multinational norm.
- BILATERALS. Norms flow from 301 into free trade agreements. The unilateral becomes bilateral. But note the targets. The strategy starts with the weak and easy and builds out. A goal may be to split south-south alliances.
- It is worth noting that not all interests in the US and other wealthy countries are in favor of the kind of high protectionist norms the US advocates. And that is a key part of the story. As Rochelle Dreyfuss and others have been showing, international IP law is an area that is ripe for the application of global administrative law analysis. Outcomes are shaped by processes, and there is no clearer example than in this field.
- ADVISORS. Unlike in the multilateral system, bilateral agreements are negotiated under antiquated procedures created for horse trading of tariff schedules. The negotiations themselves take place behind closed doors (unlike in the WTO or WIPO). A closed group of industry lobbyists (USTR calls them “citizens”) have access to ongoing proposals but no one else does. The advisors are highly unrepresentative. One ISP. No public health group. No library. No free speech advocate or consumer group. Not all of US industry benefits from a maximalist intellectual property agenda. And not all of American industry, much less citizens at large, are represented in the advising structure that produces and reviews international IP policy positions.
- ADVOCACY FUNDING. Of course the disparity of resources is also mirrored at the

national level. Peter Drahos and Susan Sell have provided us with rich histories of the translation of this investment into TRIPS.

- FOUNDATION EXODUS. Less analyzed is the recent exodus of major funders who once supported a relatively rich infrastructure of public interest advocates in the field. Ford, Macarthur and Rockefeller all once had substantial projects in the IP policy space, but now spend nothing on this area. So this is the political context in which US international IP policy is formed. The context that has led us to ACTA and TPP in recent years.
- ACTA is a game changer on participation, as David Levine, Jeremy Malcolm, myself and others have written about. It represents a shift of the bilateral horse-trading model to a new non-geographical “plurilateral” model. Daniel Gervais calls it the “country club” model – a group of (mostly wealthy) countries form the rules for a new “global standard” that others can only join, not change. Norms are negotiated through classified texts. Rounds for ACTA were announced 48 hours before they occurred. It was a lock down.
- We also have a radical change in domestic treaty adoption procedures. The administration states that it will enter ACTA as an internationally binding sole executive agreement. But the if you look at Oona Hathaway’s amazing work on the history of the rise and expansion of sole executive agreements in international law making, it is pretty clear that they were never thought to be, and have not before been used as, a legal vehicle for binding the US to a minimum legislative standards agreement on an Article I Section 8 issue. Even John Yoo’s writings agree that you cannot bind the country to an international IP agreement without congressional input. Senator Wyden has begun challenging the administration on this point. We could be headed for a new conflict over executive power. But that would require a much more assertive Congress on these issues than we have seen thus far.
- Lots of concerns have been raised about the substance of ACTA as an appropriate new global norm.
  - Border measures requirements that require ex officio seizures of where a border agent “suspects” a label of being “confusingly similar” to a brand. That standard was used in some of the EU drug seizure cases.
  - Mandatory third-party and intermediary liability.
  - Statutory damages provisions based on the “market price” or “suggested retail price” of a branded product, even in a developing country with excessive pricing.

- TPP is next. Again, the narrative is the pursuit of new global standards. It follows the ACTA standard for secrecy. Indeed, it is worse in some respects. The classification order says that all negotiating documents and proposals will remain secret until 4 years AFTER the conclusion of the agreement. TPP is broader in the reach of countries it includes. The majority of its members are developing countries, perhaps enhancing its ability to claim a new global standard. But who is missing? China, India. Brazil. Yet these continue to be the real targets of the norms the US is pushing.
- TPP v. India 3d. Take the patentability proposal. India's new post-TRIPS patent act defines the inventive step test as not being met by new forms of existing substances that do not increase the effectiveness of the known product. Many would see this as reasonable. TRIPS does not, on its face, ban such a domestic implementation choice. But the US placed India on the 301 priority watch list for this local decision. And in TPP, the US proposed a new international norm banning exactly this practice, although India is not part of that negotiation.

### C. Development Agenda

This brings us to the other agenda -- the Development Agenda -- of which India section 3d is a part. I mean the term to be broader than the similarly named working group in WIPO. That is a part. But the agenda is in other institutions, national and international.

- The current development agenda is sometimes described as born at the time of the major debates around access to medicines in the late 90s. In its current state, it is fair to say that the agenda's primary concern revolves around access.
- In economic terms, the development agenda is another expression of the long tail economic problem. The problem is that IP owners, whether supplying CDs or medicines, tend to target their marketing strategies toward the head. But developing countries live in the tail. Media markets like medicine markets in developing countries are tiny. Prices are exclusionary.
- For long tail problems, we need long tail solutions. Like promoting more digital distribution models that decrease prices and broaden distribution. And we need more, not less, generic competition for the supply of poor country markets.
- So you have a mix of policy proposals coming out of the development agenda that are often in direct conflict with the maximalist agenda. Where the maximalist agenda wants more one-size-fits all protection and enforcement standards, the development agenda wants to halt harmonization and safeguard local flexibility. Gervais calls this step as motivated by a "subtraction narrative" – the idea that lower IP standards may be better for development.

- There is also a positive agenda for new international norms in the agenda – it is not all subtraction. Thus, India and Brazil are driving the current international negotiation for the Treaty for the Visually Impaired. It is not against harmonization per se. It is for a different mix of international vs. domestic responsibilities.
- There are major differences in process. India and Brazil do not see themselves as benefitting from closed and non-transparent processes. Work by Amy Kapczynski, Duncan Mathews, Susan Sell, Margot Chon and others have mapped the close links between civil society input and positive policy proposals from India, Brazil and others. The development agenda's primary forum is WIPO. Open to civil society. All countries can formally participate.
- The differences carry down into views of enforcement. The maximalist agenda wants to make enforcement cheaper, easier and more deterrent in penalties. The development agenda wants user pay systems that are more protective of due process and local economic concerns.

#### D. Possible points of intersection?

We are mired in conflicting visions. Now what? Thus far, the two agendas are mostly progressing on their own. It is a bit like a play date for one year olds – lots of parallel play interspersed with short moments of violent conflagration, followed by more parallel play. But the interesting academic work is charting how the two systems may come into more direct conflict and how it might be mediated.

- Lawrence Helfer just published his book on the intersections of IP and human rights, and some of my work has been with students to help organizations file complaints in these forums. It is an example progressive regime shifting. In this case it is an attempt at vertical regime shifting – can there arise a human rights trump that can check some of the maximalist excesses?
- Rochelle Dreyfuss, Maggie Chon and others are looking toward global administrative law and the new governance literature for ideas on how to improve some of the processes of law making and administration. I have also worked with some students to file submissions in the 301 processes that I think fit into this field.
- Others are looking at how these issues are or might come into WTO litigation. Henning Grosse Ruse-Kahn, Alvaro Santos, and others are working in this way.
- Or whether TRIPS should be amended. Annette Kur, MSF.
- Another line of work that we at AU are engaged in, with others like IVIR and Max Plank, is in the nature of soft law norm setting and best practices. A lot of the thick descriptions of opportunities for flexibility of the kind done by Cynthia Ho and

Rochelle fit here. PIJIP has been working on several projects in this regard, including:

- The Global Congress on IP and the Public Interest – the second to take place in Rio in December 2012.
- The Washington Declaration on IP and the Public Interest, signed by 1000 or so IP experts from around the world and seeking to chart a more balanced set of substantive norms to guide the future.
- The Global Network on Copyright Limitations and Exceptions – a new group we formed last year to explore a positive strategy of promoting open and flexible limitations and exceptions in national and international IP law.
- And finally, there is the work of sharing information and building some potential for collective action.
  - Infojustice.org blog
  - IP-enforcement list-serv

Please email me if you would like to join any of this. This is a scholarship agenda. But it is also a political movement.

Thank you.

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