ACCESS TO KNOWLEDGE
IN THE AGE OF INTELLECTUAL PROPERTY

edited by
Gaëlle Krikorian and Amy Kapczynski

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We live in a world where the rules of intellectual property (IP) and the intellectual property generated using those rules are globally pervasive phenomena. For example, in the nineteenth century, two important multilateral agreements on intellectual property were negotiated by some states: the Berne Convention for the Protection of Literary and Artistic Works (1886) and the Paris Convention for the Protection of Industrial Property (1883). Today, the World Intellectual Property Organization (WIPO) administers some twenty-three treaties on intellectual property.

The global quantity of intellectual property being generated under the rules of intellectual property cannot really be accurately quantified, but it is vast. By way of illustration, in 2004, there were about 5.5 million patents in force around the world.¹ There were at least another 5 to 6 million unexamined patent applications. In 2006, the U.S. Patent and Trademark Office reported that there were 1,332,355 active certificates of trademark registration in the United States. There are many other forms of intellectual property that one would have to add to a global stocktaking of intellectual property, including the number of works protected by copyright, the number of plant variety registrations, the number of registered designs, the number of protected circuit layouts, and so on.

One important issue is whether globalizing the rules of intellectual property and encouraging the production of more and more intellectual property under those rules will lead to a continuous increase in social welfare. In a moment, we will see that as a matter of theory, more intellectual property does not necessarily mean more social gains. This leads to the question that is the focus of this paper: If there are dangers and risks in continuing to expand both the rules of intellectual property and the production of intellectual property, why is this expansion occurring? The answer can entail explanations of the structural kind or of the agent-centered kind or something in between. This paper focuses on agents in the form of companies.
and individuals, but especially on transnational corporations—TNCs. A focus on agents raises the possibility for social action. If the intellectual property world that we have today reflects certain choices and actions taken by one group of actors, can other actors with different views about the desirability of intellectual property change the direction of its growth? Our answer is a qualified yes.

**TWO MUCH INTELLECTUAL PROPERTY?**

Economic theory suggests that a society that had no intellectual property protection at all would almost certainly not be allocating resources to invention and creation at an optimal level. But equally, a society that went to extremes of protection would almost certainly incur costs that would exceed the benefits. Intellectual property rights permit owners to exclude people from the use of socially valuable information. At some point, allowing intellectual property owners to exploit this power of exclusion becomes too costly in terms of social welfare. The rules of arithmetic, for instance, can be used and reused endlessly. The costs of excluding people from the use of these rules would be very high in economic terms and in terms of basic human freedoms. The diagram below illustrates the proposition that one can have too much intellectual property protection. It also suggests that there is an optimal level of intellectual property protection.

Like most abstractions, Diagram 1 does not capture the real-world dynamic complexity of the way in which intellectual property rights and the growth of knowledge actually interact. For example, it implies nothing about the mix of intellectual property systems that a society should employ. A patent system, for example, might not be part of an optimal mix. In the nineteenth century, both Holland and Switzerland were able to industrialize without a patent system. A patent system might be on the scope of the efficiency of a particular product.

When we consider the costs, it is not one level that imitative property operating in developed countries that harm from this PC gains is profound. Imitative property (IP) engineering). The century designates the creation of knowledge. Imitative practice in developing a factor of production in ways that made of production counties if the rights that contribute follows from countries must to how it will fit the production to be organic whole. Being of the world countries must reveals the economics must struggle.

The idea that protection for different benefits for a nation may differ from that of an H's optimal pol...
system might be part of an optimal mix, but whether it is or not depends in part on the scope of patentability. For example, as other chapters in this book illustrate, the efficiency of extending patents to software, business methods, and pharmaceutical products is highly debatable.

When we come to think about optimal levels of intellectual property protection in the context of a world of interdependent nation-states, it is clear that there is not one level of protection that is universally optimal for all states. It is clear that imitative production and learning are important to developing countries. TNCs operating in developing countries typically do so with higher levels of knowledge assets than domestic firms, for example. There is scope for domestic firms to benefit from this positive externality. But, whether domestic firms make productivity gains is profoundly affected by the property rules that govern imitative production. Imitative production and learning require an appropriately designed set of intellectual property rights (for example, rules that permit some degree of reverse engineering). We know, for example, that Japan for a large part of the twentieth century designed and used a patent system that placed the emphasis on the diffusion of knowledge, rather than on the right to appropriate knowledge.

Imitative production typically requires less capital, a factor that is important in developing countries. If, with Ronald H. Coase, we think of property rights as a factor of production, it follows that those property rights should be designed in ways that match the comparative advantage that a country has in other factors of production. This suggests that there will be real long-run costs for developing countries if they continue to participate in a global regime of intellectual property rights that continues to ratchet up standards of protection. Much the same conclusion follows from the theory of comparative capitalism. This theory suggests that countries must choose their system for regulating intellectual property with an eye to how it will fit other crucial legal and industry policy institutions, from competition policy to labor-market policy. Property and these other institutions form an organic whole. Whether or not particular property rights contribute to the well-being of the whole is a matter of careful diagnosis. Crucially, just like a physician, countries must have the freedom to design the right treatment once the diagnosis has revealed the source of the problem. As Jeffrey Sachs says, development economics must strive to be more like clinical medicine in its approach to problems.

The idea that there are different optimal points of intellectual property protection for different countries is captured in Diagram 2 below. Even if there are benefits for New Guinea in having a patent system (and this is an open question), an optimally designed patent system for New Guinea is likely to be very different from that of an optimal system for that of the United States. In Diagram 2, Country B's optimal point of intellectual property protection is well and truly passed by
the standards of protection required in order for Country A's optimal point to be reached. If Country B is required to harmonize with Country A's standards of protection it is likely to be made even worse off.

Like Diagram 1, Diagram 2 abstracts from a much more complex empirical reality. At a given point in time in a country's development history, the wrong set of institutional choices when it comes to intellectual property rights may drive it into negative territory when it comes to the welfare impacts of intellectual property rights. For example, a country such as New Guinea, which has a weak manufacturing base and a minerals-based economy, has virtually nothing to gain from adopting a patent system. Yet in order to meet its World Trade Organization (WTO) obligations, it has adopted a patent law based on a WIPO model law. It also has a growing HIV/AIDS crisis. Depending on what happens in the next decade, New Guinea may find that as a result of its membership in the Patent Cooperation Treaty, it ends up being designated for pharmaceutical patent applications. Such patents may well complicate the New Guinea government's capacity to access the cheapest medicines. There are other kinds of complex interdependencies at work. New patent laws in countries such as India and China, which have been a source of low-cost pharmaceuticals, when combined with the patent law in New Guinea, may also complicate access. The curve for New Guinea for patents might take on the shape in Diagram 3 below.8

This brief analysis of the economics of intellectual property in the context of economic development suggests that it would be prudent for states to retain design sovereignty over intellectual property rights. Moreover, given the differences in development among nations, one might expect to find a real diversity of standards of intellectual property protection. When we look at the intellectual property world, however, instead of finding diversity, we find an increasing convergence on intellectual property rights under the TRIPS Agreement. This has resulted in a bureaucratization of intellectual property rights, creating a new kind of administration, as states have increasingly relied on intellectual property rights to foster innovation.

Diagram 2: Different optimal points for different countries.

Diagram 3: Losses at
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creasing convergence on standards of intellectual property protection. For example, all the members of the WTO have to comply with the standards of protection that are set down in the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS). Since TRIPS came into operation, states have signed hundreds of bilateral agreements, many of which include provisions that deal with intellectual property and that set standards of protection that are higher than required under the minimum standards of TRIPS.

Accompanying this global spread of intellectual property standards has been a vast growth in the bureaucracies that administer intellectual property rights. Patents, trademarks, and designs are registration systems and therefore require a bureaucracy that examines applications for the rights, decides on eligibility, and maintains a register of the rights. Patent offices are costly operations. The U.S. Patent and Trademark Office has a staff of some sixty-five hundred, the Japanese Patent Office some twenty-five hundred, and the European Patent Office approximately five thousand.

The costs of creating intellectual property rights do not end with administration. Property rights that cannot be enforced are worth little. Enforcement requires the participation of civil courts and specialist tribunals. Increasingly, criminal-law enforcement agencies have begun to play a much greater role in enforcement as states have moved down the path of criminalizing the infringement of intellectual property.

Administering and enforcing intellectual property is particularly costly for developing countries. Should they direct their scarce scientific resources into patent examination? In order to save on the costs of patent administration, they may be tempted to rely on the work of offices such as the European Patent Office or the U.S. Patent and Trademark Office, but will the work of these offices meet the

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**Diagram 3** Losses and no gains.
needs of developing countries? Similarly, there is a real issue as to whether developing countries should devote scarce criminal-justice resources to enforcing what in the end are private monopoly privileges and what historically have been the subject of civil proceedings.

**THE ORIGINS OF THE IP WORLD: FROM THE MEDIEVAL PERIOD TO THE 1980s**

Historically speaking, two types of actors have been key in the processes that have led to the globalization of intellectual property rules and the production of intellectual property: states and companies. The sovereigns of newly emerging states in medieval Europe well understood the importance of capturing resources for the benefit of the states, resources that included knowledge. There was widespread warfare between the powers of Europe, of which the Hundred Years' War between England and France was but one example. Natural disasters such as the Black Death and crop failures were other sources of instability. Sovereigns found themselves having to compete for skilled artisans who could bring commercially and militarily important goods and techniques to their territories. To some extent, the comparative advantage of nations and city states was locked up by them in the guilds that formed around all important technologies, such as mining, the making of sailcloth, machines for milling or weaving, and so on. Local guilds could not, however, provide all the innovation that the emerging states of the time demanded. Using the privilege system to entice foreign skilled workers to defect from their guilds and relocate to another territory was a natural step for sovereigns to take. It was a way of building comparative advantage and robbing others of theirs. For this reason, many monopoly privileges of the Middle Ages went to foreigners.

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By the 1880s, terms of industr 63 percent of th was making gia matched that or ing for some on the principal un supremacy depe iron, and steel, and electricity. (Europe and the tions in the for cooperated in t ments to deal v United States b rapidly organiz firms in the coa and the exchan production was one of two agn in 1918.12

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Out of the medieval system of privileges that existed across Europe there evolved statutory forms of intellectual property, copyright and patents being the earliest examples. At the same time, the laws relating to the formation of corporate personality were also evolving and being used for the purposes of business and trade. The links between intellectual property and the economic interests of companies existed early on in the history of intellectual property (for example, the Stationers Company and printing privileges in sixteenth-century England). The large-scale use by companies of systems of intellectual property evolved more slowly. States did not really invest in the creation of the administrative infrastructure needed to run systems of intellectual property rights till the nineteenth century. So, for example, patent offices were modernized and patent fees were reduced. Companies in Europe and the United States began to see that patents could confer business opportunities not just in their domestic markets, but in markets abroad. The United States and the lead industrial states in Europe saw in intellectual property, especially patents, a means by which to increase control over resources that mattered in the final instance to state power.

By the 1880s, the United Kingdom, Germany, France, and Belgium led Europe in terms of industrialization, and Europe led the world. For example, it accounted for 63 percent of the world’s steel production. Across the Atlantic, the United States was making giant strides in industrialization. By 1913, its manufacturing output matched that of the United Kingdom, France, and Germany combined, accounting for some one-third of world production. Nation-states, which had become the principal unit of political and economic organization, saw that their economic supremacy depended on their capacity to compete in the heavy industries of coal, iron, and steel, as well as in the new industrial technologies based on chemicals and electricity. One of the important features of this period of industrial growth in Europe and the United States was the increase in monopolistic business combinations in the form of cartels, trusts, or syndicates. Put simply, firms colluded and cooperated in the marketplace. There were, of course, some attempts by governments to deal with this, the passage of the Sherman Antitrust Act in 1890 in the United States being the single most notable example. In Europe, some industries rapidly organized themselves into national cartels. In Germany, for example, the firms in the coal-steam industry formed special agreements to regulate production and the exchange of patented knowledge. By 1913, 88 percent of world chemical dye production was controlled by German industry, with the companies being part of one of two agreements that regulated the industry and that were merged into one in 1916.12

The institutions of intellectual property were regularly the subject of attack by skeptics. In the nineteenth century, the patent system narrowly survived an attack
by a coalition of free traders, economists, and some politicians. The arguments against the patent system were much the same as today. These included the view that prizes and other payments are a superior way to create incentives for inventors, that the monopoly costs of the patent system outweigh its incentive effects, that there are doubts about its incentive effects in any case, that patents inhibit trade across borders, and that patents are not natural rights. Fritz Machlup and Edith Penrose suggest that one of the main ways in which defenders of the patent system prevailed was by the use of sophisticated techniques of propaganda. It is a point that remains relevant today. Critics of intellectual property rights often find themselves embroiled in propaganda wars in which criticism of the design of intellectual property is framed as an attack on private property rights and the rights of investors. Corporate intellectual property owners use this rhetorical framing technique to shroud the fact that they are pushing states into expanding and enforcing private monopoly rights.

In any case, because the lead industrial states at the beginning of the twentieth century realized that their military and economic power depended on the key industries of coal, iron, steel and chemical production, they concluded that if the lead industrialists in these sectors supported the patent system, so would they. Not for the last time, states bought into the belief that strong intellectual property rights would make for a strong state.

For the first half of the twentieth century, states concentrated on developing the two nineteenth-century pillars of the international framework for intellectual property—the Berne Convention and the Paris Convention. In general, the companies that participated in domestic and international processes of intellectual property lawmaking tended to view those processes from the perspective of national businesses protecting national or regional interests. American publishers, for example, were not a strong force for encouraging the United States to join the Berne Convention (the U.S. did not join until 1988). The publishing cartels that were formed in the first half of the twentieth century between U.S. and UK publishers (known as the British Publishers Traditional Markets Agreement) were more defensive in nature, dividing up the world into territories where one would agree not to trespass on the business interests of the other.

In some industries, the chemical and pharmaceutical industries being an example, some companies did have an aggressive international focus. The German chemical industry employed thousands of chemists, and their output was measured by thousands of patents. Companies such as Bayer and Badische Anilin Fabrik held hundreds of patents in America. German industry held in total approximately forty-five hundred U.S. patents, creating a “colossal obstacle to the development of the American dyestuff industry.” But there was also sufficient flexibility in the

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arguments of the view that inventive efforts, not inhibition, result in the patenting and enforcement of intellectual property. The twenty-first century is the place where the key to the future is the effective use of intellectual property to protect and advance technological innovation. The international system for states to be able to defend their national interests along with companies that saw themselves as nationally, rather than globally based. A good example of the scope of this flexibility was the change that the United Kingdom made to its patent law in 1919 by preventing the patentability of chemical compounds. Chemical processes remained patentable. Fearing the might of IG Farben, British industry pursued a strategy of free riding by concentrating on inventing better processes that duplicated German dyestuffs.

For the most part, companies and industries took an interest in those areas of intellectual property that directly affected their particular business model and did not operate in lobbying terms across all of intellectual property. The publishers were active in copyright, pharmaceutical companies were active in patents, and a variety of industries were active in trademarks. A cross-cutting, unified approach to intellectual property by companies did not take place until the 1980s, when they united on a common agenda for an international intellectual property framework in the context of the General Agreement on Tariffs and Trade Uruguay Round of Multilateral Trade Negotiations.

TNCS AND TRIPS

The antecedents of this unified approach to intellectual property lie in the rise of transnational corporations after the Second World War. TNCS are characterized by the fact that their investment strategy takes the form of foreign direct investment in production, sales, and distribution. The vehicles of this foreign direct investment are foreign affiliates that allow the TNC to manage a centrally coordinated foreign direct investment strategy across a large number of countries. TNCS are companies that have a genuinely global investment philosophy. At base, TNCS evaluate the regulatory systems of nation-states in terms of the impact of those systems on their ability to make, control, and manage their investments in those states. It was this investment philosophy that ended up unifying different TNCS during the course of the Uruguay Round on the crucial issues of trade in services and intellectual property.

The U.S. pharmaceutical industry, and Pfizer, in particular, turned out to be leaders in the Uruguay Round because pharmaceutical companies were among the first companies to change into genuine TNCS. Pfizer, facing strong domestic competition in the production of penicillin after the end of World War II, moved to a program of expansion into developing country markets. Pfizer's move into overseas markets was the idea of John "Jack" Powers, Jr., assistant to the president, then president hisfelf of the company, who in effect globalized Pfizer as a firm. Out of his initiative was born Pfizer International. Manufacturing plants and distribution networks were established "in countries ranging from Argentina to
Australia and Belgium to Brazil.15 By 1957, Pfizer International had achieved more than its target of $60 million overseas sales.

Pfizer's investment in developing countries sensitized it to the threat to international markets that generic manufacturers in countries such as India posed for the pharmaceutical research-and-development industry. It also saw that developing countries were increasingly using their superior numbers in WIPO to put forward initiatives that favored their own position as net importers of foreign technology. During the early 1980s, a small group of Washington-based policy entrepreneurs had conceived the idea of linking the intellectual property regime to the trade regime. Pfizer executives, including the CEO Edmund Pratt, were among the leading proponents of this idea. Essentially, their policy idea was to get an agreement on intellectual property into the General Agreement on Tariffs and Trade (GATT). Among other things, such an agreement would be enforceable under GATT dispute-resolution procedures. Existing intellectual property treaties such as the Berne Convention lacked meaningful enforcement mechanisms. Moreover, the wide membership of GATT meant that the enforcement mechanism would be potentially available for use against more states.

Pfizer executives used their established business networks to disseminate the idea of a trade-based approach to intellectual property. Pratt began delivering speeches at business forums such as the National Foreign Trade Council and the Business Round Table, outlining the links between trade, intellectual property, and investment. As a CEO of a major U.S. company, he could work the trade-association scene at the highest levels. Other Pfizer senior executives also began to push the intellectual property issue within national and international trade associations. Gerald Laubach, president of Pfizer Inc., was on the board of the Pharmaceutical Manufacturers Association and on the Council on Competitiveness set up by President Ronald Reagan; Lou Clemente, Pfizer's general counsel, headed up the Intellectual Property Committee of the U.S. Council for International Business; Bob Neimeth, Pfizer International's president, was the chair of the U.S. side of the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development. The message about intellectual property went out along the business networks to chambers of commerce, business councils, business committees, trade associations, and peak business bodies. Thus, Pfizer executives who occupied key positions in strategic business organizations were able to recruit the support of more and more organizations for a trade-based approach to intellectual property. With every such enrollment, the business power behind the case for such an approach became harder and harder for governments to resist.

Pfizer also managed to gain representation on a key committee, the Advisory Committee on Trade Negotiations, created in 1974 by the U.S. Congress under U.S. trade law with the the...
trade law as an organization of numerous private-sector advisory committees with the Advisory Committee on Trade Negotiations at its apex. The purpose of this committee was to ensure a concordance between official U.S. trade objectives and the U.S. commercial sector. Pratt, with the assistance of other senior executives within Pfizer, began to put himself forward within business circles as someone who could develop U.S. business thinking about trade and economic policy. In 1979, Pratt became a member of the committee and in 1981 its chairman. During the 1980s, representatives from the most senior levels of big business within the United States were appointed by the president to serve on the committee. Out of this business crucible came the crucial strategic thinking on the trade-based approach to intellectual property.

With Pratt at the helm and the CEOs of IBM and Du Pont Corporation serving on the committee, it began to develop a sweeping trade and investment agenda. John Opel, the then chairman of IBM, headed this task force. During Pratt's six years of chairmanship, the Advisory Committee on Trade Negotiations worked closely with William E. Brock III, the U.S. trade representative from 1981 to 1985, and with Clayton K. Yeutter, the U.S. trade representative from 1985 to 1989, helping to shape the services, investment, and intellectual property trade agenda of the United States.

The committee's basic message to the U.S. government was that it should pull every lever at its disposal in order to obtain the correct result for the United States on intellectual property issues. U.S. executive directors of the International Monetary Fund and World Bank could ask about intellectual property when casting their votes on loans and access to bank facilities; U.S. aid and development agencies could use their funds to help spread the intellectual property gospel. Over time, the message was heard and acted upon. Provisions protecting intellectual property as an investment activity were automatically included in the Bilateral Investment Treaty program that the United States was engaged in with developing countries in the 1980s. Means of influence of a personal and powerful kind also began to operate. George Shultz, the secretary of state, discussed the intellectual property issue with Prime Minister Lee Kuan Yew of Singapore, according to Jacques Gorlin in his 1985 analysis of the trade-based approach to intellectual property. President Reagan in his message to Congress of February 6, 1986 entitled "America's Agenda for the Future" proposed that a key item in that agenda should be greater protection for U.S. intellectual property abroad. This was consistent with the recommendation of the Advisory Committee on Trade Negotiations that the development of a U.S. strategy for intellectual property be endorsed by the president and the cabinet. The ground was being prepared for intellectual property to become the stuff of big-picture political dealing, and not just technical trade negotiation. The ground was being prepared for the TRIPS Agreement.
The detailed story of how TRIPS came to be part of the Final Act of the Uruguay Round has been told elsewhere. Key to the achievement of TRIPS was the formation of the Intellectual Property Committee. The Intellectual Property Committee was an ad hoc coalition of thirteen major U.S. corporations; Bristol-Myers, DuPont, FMC Corporation, General Electric, General Motors, Hewlett-Packard, IBM, Johnson and Johnson, Merck, Monsanto, Pfizer, Rockwell International, and Warner Communications. It described itself as “dedicated to the negotiation of a comprehensive agreement on intellectual property in the current GATT round of multilateral trade negotiations.”

Europe was the key target for the committee. Once Europe was on board, Japan was likely to follow, or at least would not raise significant opposition. The support of European and Japanese corporations was crucial. What followed was a consensus-building exercise carried out at the highest levels of senior corporate management. CEOs of U.S. companies belonging to the Intellectual Property Committee would contact their counterparts in Europe and Japan and urge them to put pressure on their governments to support the inclusion of intellectual property in the Uruguay Round. Ultimately, the linkages that were created between U.S., European, and Japanese companies led to the joint release in 1988 of a suggested draft text of an agreement on intellectual property.

TRIPS was a stunning negotiating victory that was made possible because a small group of individuals in the 1980s saw the possibilities of networked governance, especially when those networks could capture and deploy a “big stick” in the form of U.S. trade threats. Within these intersecting TNC networks, there were pools of technical expertise upon which to draw for the purposes of producing a draft agreement, while other networks steered the draft through a multilateral trade negotiation involving more than one hundred states that lasted from 1986 to 1993. Important to this achievement were a small number of business actors who created ever-widening circles of influence that enrolled more actors in networks that had TRIPS as their mission.

**POST-TRIPS**

The post-TRIPS era has seen a shift to bilateral trade agreements as the principal means for spreading intellectual property norms by means of the trade regime. These agreements contain standards that are either the same as or higher than those to be found in TRIPS. In the United States, TNCs continue to monitor these agreements through a U.S. trade representative advisory committee called IFAC-3 (the Industry Functional Advisory Committee-3). IFAC-3 is made up of twenty members drawn from Industry Sector Advisory Committees and another twenty members drawn from a pool of experts from the U.S. International Int Offi. The Trade Council, I. Biotechnology C Counterfeiting C Intellectual Property. IFAC-3 works at the bilateral, regional, and global levels to negotiate trade agreements that U.S. experts are available for example, it...
ni Act of the Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was the subject of a GATT round of negotiations, Japan's position. The subsequent discussions followed was a key component of the negotiations, urging them to put intellectual property rights on the table. This was a suggested solution because a networked government is a "big stick" in negotiations, and there were cases of producing goods with a multilateral trade regime.

members drawn from private-sector areas who provide the committee with a large pool of expertise in intellectual property. The private-sector members are: the International Intellectual Property Alliance; The Gorin Group; Pfizer, Inc.; the Law Offices of Hope H. Camp, representing Eli Lilly and Company; the Pharmaceutical Research and Manufacturers of America; Cowan, Lebowitz and Latman, P.C.; the Anheuser-Busch Companies, Inc.; Merck and Company, Inc.; the National Foreign Trade Council, Inc.; Powell, Goldstein, Frazer and Murphy, LLP; representing the Biotechnology Industry Organization; Time Warner Inc.; the International Anti-Counterfeiting Coalition; the Recording Industry Association of America; the Intellectual Property Owners Association; and Levi Strauss and Company.

IFAC-3 works across all U.S. trade initiatives on intellectual property, whether bilateral, regional, or multilateral. It is thus able to coordinate at a technical level the work it does across these different forums, thereby ensuring that U.S. trade-negotiating initiatives push intellectual property standards in the direction that U.S. industry would like. IFAC-3's technical expertise, as well as the expertise available to it from its members' corporate legal divisions, means that, for example, it can evaluate a country's intellectual property standards in detail.
when that country seeks accession to the WTO, and it can provide detailed assessments of the standards that U.S. trade representative negotiators must bring home in a negotiation.

The other striking feature of the post-TRIPS era has been the increasing involvement of civil-society NGOs in intellectual property policy. Today, there are thousands of NGOs working on issues such as access to medicines, access to knowledge, biopiracy, indigenous intellectual property rights, licensing, Internet governance, copyright-user rights, software freedom, and so on. The presence of NGOs working on a range of intellectual property issues provides scope for an alliance between developing states and NGOs. United minority factions can, under certain conditions, secure global regulatory change, the Declaration on the TRIPS Agreement and Public Health of 2001 being an example. Western NGOs are at their most effective when they can capture Western media interest and publicity. Often this requires a crisis of some kind. It has taken literally millions of deaths in Africa in order for the Western media to become interested in the links between patents, price, and AIDS drugs, despite the fact that cartelism in the pharmaceutical industry has been a problem for the health-care system of developing countries for decades.18

THE FUTURE

The possibility of securing change that benefits citizens in the context of intellectual property rights should not be overestimated. For the most part, intellectual property policy ends up mired in complex debates over rules and systems that only a few insiders really understand. Ignorant or corrupt politicians will nine times out of ten listen to the TNC representative who promises that bad things will happen to investment if policy X, which favors stronger intellectual property rights, is not followed. Of course, disagreements over the rules of intellectual property do break out among TNCs. A good example is the recent conflict over the rules that regulate the use of continuations in the U.S. patent system. Continuations are applications for inventions that have already been claimed in earlier applications. They are a way of keeping the application process going. Continuations are used most heavily in the biotechnology and chemical fields. The lack of restrictions on their use means that examiners have to devote time to reworking applications already examined, time that could be used to deal with new applications.19

As part of its attempt to reduce its volume of applications, the U.S. Patent and Trademark Office issued rules placing limits on the use of continuations.20 This rule change was supported by a number of large companies, including Intel. Intel has a patent strategy based on filing for many patents and obtaining them as quickly as possible.

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as possible. Rules that allow an applicant to play for delay hold no advantage for it and in fact hurt its patent strategy, because continuations divert scarce examination resources to applications with earlier priority dates. (Applications forming part of a continuation chain get the benefit of earlier priority dates.) Intel thus supported the patent office rule change. Members of the biotechnology industry, on the other hand, are in the unfortunate position of not ever being sure what they have invented. The complexity of the biochemical world means that they are often left guessing, but they nevertheless file patents early and then use the continuation process to refine their original application. The biotech industry came out against the patent office's rule changes. GlaxoSmithKline was part of a group of plaintiffs that were successful in temporarily stopping the patent office from implementing the rules on November 1, 2007.

The above example shows how a reform desired by one TNC player may be seen as damaging by another. Compromises and incremental rule changes are the usual results of this kind of conflict. But the divisive politics that are generated by specific rules of intellectual property should not be confused with the global politics that surrounds the institution of intellectual property. Here, TNCs remain united, because despite their different business models and strategic uses of intellectual property, they understand that the globalization of intellectual property is consistent with their long-term investment strategies. The source of their unity does not lie in any of the abstract philosophies of intellectual property, such as natural property rights, utilitarian-based cost-benefit approaches, or personality theories, because all of these would set limits on the corporate ownership of intellectual property. Rather, TNCs are unified by the belief they will all do better in a world where states and citizens have embraced an ideology that favors hyperstrong intellectual property rights because that ideology enables those TNCs to invest in turning knowledge from a public good into a private good and to set the terms of access to it.

The claim being made here about the unity of TNCs should not be read as a claim about specific rules of intellectual property. TNCs will often be opponents in the context of a given set of international business rules because of the way those rules limit or increase their individual strategic opportunities. Other essays in this book have drawn attention to the divisions among TNCs in the context of software patents and the Broadcasting Treaty. The unity of TNCs does not operate at the level of rules, but rather at the level of deep ideology, because it is deep ideology that defines the evolutionary space in which some institutions flourish and others do not. Even if, for example, an Intel and a GlaxoSmithKline disagree about the reform of continuations in the context of the U.S. patent system, they remain unified on the need for a strong patent system to be spread to as many countries
as possible and for that system to be made cheap and easy to use so that they can pursue their respective global patenting strategies. The inevitable disagreements among TNCs over the specifics of intellectual property rules should not blind us to their deeper-level ideological unity over the constraints to be placed on the evolutionary space of intellectual property institutions.

A good example of the unified TNC ideology that surrounds the institution of intellectual property is the proposal by Japan, the European Community, the United States, and Switzerland for a new plurilateral Anti-Counterfeiting Trade Agreement. The idea behind the proposal is to forge new standards for the enforcement of intellectual property rights to combat global counterfeiting and piracy. All TNCs have been calling for some time for more to be done on the enforcement of intellectual property, calls that have been broadcast through state mouthpieces such as G8 gatherings. The same states and TNCs that pushed for TRIPS are now pushing a global enforcement agenda that will deeply affect the rights and privacy of citizens in developed and developing countries alike. The enforcement push is real, and it will profoundly affect policing resources in developing countries over the coming decades. The e-mail message below that circulated recently in South Africa might also be seen as a future leitmotif in which states have been persuaded to rearrange their criminal enforcement priorities:

Please take note as this is scheduled for the weekend. . . .

Please note that SAPS [the South African Police Service] are having roadblocks where they will check all CD Recordables in your car. If they find any, you get arrested and taken down to the police station so that all of them can be checked for pirated copies.

The minimum fine is R3,000 and you have to pay it immediately or they will detain you until you come up with the money. So if you have any pirated CDs please discard them and if you have empty recordable CDs or CDs that have information other than music and movies then keep them out of your car.

Don’t say you were not warned. 23

The philosophy that unites TNCs in the institutional politics of intellectual property is a form of absolutism that elevates the rights of investors above all else. A world in which investor absolutism drives the making of intellectual property law is a world in which the welfare of all citizens will be diminished in vital areas such as education, health, and privacy.

Developing countries and civil society can fight these TNC agendas, but in order to do so effectively, they have to form much closer political bonds than they have to date. While a few developing countries can resist developed-country intellectual property agendas, they are doing so in a nuanced way, picking and choosing their issues and in-
issues and interests. India, for example, in the Uruguay Round of trade negotiations, concentrated its resistance on the patents part of TRIPS and not on copyright, even though the latter has just as many implications for access to knowledge. Vietnam, when it signed a bilateral trade treaty with the United States in July 2000, accepted a chapter on intellectual property, but was successful in keeping out a provision that would have limited its capacity for the parallel importation and resale of goods without the consent of the patent holder. Small to medium-sized parties involved in a negotiation with the United States or the European Union on intellectual property issues tend to adopt a harm-minimization strategy, agreeing to intellectual property standards that they believe will not hurt them too much.

There is, however, a collective cost for developing countries in adopting this harm-minimization approach. As they become integrated into the global architecture of intellectual property by means of free-trade agreements, they create for themselves an institutional box beyond which it becomes more difficult to experiment with real alternatives to the existing system. Having entered a web of international obligations (TRIPS, the Patent Cooperation Treaty, the International Union for the Protection of New Varieties of Plants, and so on), a web dotted with enforcement spiders (for example, the WTO's dispute-resolution mechanism), they become more cautious. When confronted with a radical model of access to knowledge, the first reaction of developing-country officials will be to ask, "Is this consistent with our international obligations?"—the answer to which will keep many lawyers joyfully occupied for a long time.

The need for a cooperative multilateral leadership on intellectual property by developing countries has become increasingly urgent. The monopoly control of the production of oseltamivir (Tamiflu) by Roche and the lack of global coordination by countries in dealing with the problem of inadequate stockpiles of oseltamivir, especially in high-risk developing countries, shows that the patent system has become a factor in the management of pandemic risk. The World Health Organization (WHO) had recommended that countries stockpile oseltamivir. Yet because of the patent price, many countries could not afford to build a stockpile. As a study showed, this produced, in risk-management terms, the absurd situation of poor countries (e.g., Vietnam, Cambodia) that were also high risk in terms of the flu pandemic breaking out having the smallest stockpiles, while the lowest-risk countries (the United States and the European Union countries), which were also the richest, having the largest stockpiles. Furthermore, the possibility of generic production was severely hampered by the fact that Roche did not disclose the patent position of oseltamivir, leaving public-health officials uncertain about what they could do in terms of importing or manufacturing it. Similarly, the diffusion of climate-change technologies will be crucially affected by intellectual property rights over those technologies.
Clearly, developing countries should be collectively thinking about ways in which to manage intellectual property in the context of global risks such as pandemics and climate change. Their current philosophy of mild cooperation in multilateral forums while deflecting to short-term gains in bilateral contexts is inconsistent in the management of risk. More generally, if developing countries really wish to change the evolutionary space of intellectual property institutions so that real alternatives can flourish, they will have to design much better and stronger coalitions than they have to date. It is not good enough, for example, for developing countries to unite in the WTO on a disclosure obligation with respect to the patenting of genetic resources and then for some of those developing countries to agree to free-trade agreements that do not support that WTO position. Obviously this kind of coalition breakdown simply creates incentives for the United States to continue to operate outside of multilateral forums.

For civil-society groups working on intellectual property issues, the good news is that there are more groups engaged across a broader spectrum of issues than ever before. Among other things, this increases the possibilities of coalition building and, as the negotiations on the Doha Declaration on TRIPS and Public Health showed, a coalition of state and civil-society actors can be forged and wielded successfully. But just as civil-society actors can build coalitions and networks, so can the TNCs, with very different power outcomes. For civil-society actors, the prescription is to continue to invest in the creation of alternative models of knowledge creation and to float these in various national and international policy forums. Many of these will be ignored or will fail to gain wide support. But some will take hold, especially in times of crisis, such as a pandemic or the environmental crises that are predicted to accompany climate change, when state actors are desperately looking for solutions. For civil-society actors, floating new models for the growth and diffusion of knowledge, creating coalitions around those models, and acting in times of crisis are the basic elements of a strategy to change the evolutionary space of intellectual property.

NOTES


4 Janusz A. Ordo,
Perspectives 5, 1

5 Ronald H. Coas
pp. 1–23.

6 Peter A. Hall and
David Soskice (2001)

7 Jeffrey D. Sachs
My thanks go to

8 J. M. Roberts, I

9 Ibid.

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11 Gary Herring,
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18 See G. Genefi,
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19 See the U.S. Pa
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20 U.S. Patent at
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8. My thanks go to Amy Kapczynski for suggesting a diagram of this kind.
10. Ibid.
22. The comments of the Biotechnology Industry Organization in favor of continuations can be found at http://www.uspto.gov/web/offices/pac/dapp/opa/comments/fpp_continuation/continuation_comments.html (last accessed April 11, 2009).
23. Forwarded to the author by a criminalologist based in South Africa on November 9, 2007.
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Yochai Benkler

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