



Perceptions of Intellectual Property: a review

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The views expressed in this paper are solely those of the author and may not necessarily coincide with those of the Haas School of Business UC Berkeley or the Intellectual Property Institute.

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Introduction

IP—The currency of the knowledge-based economy

Intellectual Property (IP) emerges as an essential organizational principle of the knowledge-based economy, since it determines the way in which knowledge relations are governed and structured.

Authors such as J. Mouritsen/S. Thrane or L. Moerman/S. Van der Laan go further and see in IP a property right in an abstract object.¹ In this sense, IP can be described as knowledge that is made actionable.

This review relies on the standard legal definition of IP as provided by the World Intellectual Property Organization (WIPO)

“Intellectual Property protects products of the human mind, such as inventions, literary and artistic works, symbols, names, images, and designs used in commerce. Intellectual property comprises the areas of patents, trademarks, industrial designs, geographic indications of source and copyright, which includes literary and artistic works. Rights related to copyright include those of performing artists in their performance, producers of phonograms in their recordings, and those broadcasters in their radio and television programs”.²

However, the review emphasizes the relationship between the words “intellectual” and “property”. It views IP rights as property rights over immaterial assets, which allows market participants to engage in entrepreneurial activities and to overcome market failures associated with publicly available knowledge.³ IP makes knowledge economically functional and managerially controllable. Eventually, IP facilitates hedging against risk and provides the inventor with the opportunity to turn a new idea or invention into an innovation and engage in some sort of commercial interaction. This falls within the paradigms for entrepreneurship and innovation developed by early key scholars such as F. Knight and J. Schumpeter.⁴

¹ J. Mouritsen/S. Thrane, “Accounting, network complementarities and the development of inter-organizational relations”, 31 *Accounting, Organizations and Society* 2006, pp 241—275.

L. Moerman/S. Van der Laan, “TRIPs and the pharmaceutical industry: Prescription for Profit?” 17 *Critical Perspectives on Accounting* 2006, pp 1089—1106.

² www.wipo.int

³ The European Patent Organization has adopted this approach in its document *Scenarios for the Future: How might IP regimes evolve by 2025? What global legitimacy might such regimes have?* EPO, Munich 2007.

⁴ J. Schumpeter, *Capitalism, Socialism and Democracy*. Harper and Brothers: New York 1942.

F.H. Knight, “Profit and Entrepreneurial Functions”, 2 *Journal of Economic History* 1942, pp 126-132.

IP can contribute to organizational effectiveness and resolve issues related to the appropriation of a firm's R&D activities and innovation. Furthermore, it can provide an incentive for the creation of invention, the making of investments so as to develop and commercialize innovation, the motivation of inventors to declare their inventions and to permit their orderly exploration. Managed under a public interest paradigm and in a proactive way, it can furthermore contribute to bridging divides, both within and between societies, allowing developing countries to leverage their own latent creativity. It can be argued that many of these strategic potential approaches remain unfulfilled if it is perceived that the concepts to which IP remains shackled do not permit thought or action along these positive lines.

The purpose of this review is therefore to help understand the current discourse on intellectual property, to grasp underlying themes, assumptions and connotations associated with the term "IP", so as to identify paths leading to a more comprehensive understanding of IP and the opportunities it provides to market participants, consumers, policy makers and citizens worldwide. It seeks to refer to the "said" as well as the "unsaid".

This paper was prepared under the supervision of the Intellectual Property Institute (IPI) in London. The views expressed in this study do not necessarily reflect those of the IPI, which emphasizes that it is neither "pro IP", nor "contra IP", but only "pro fact-based research" and against "unsubstantiated statements". The brief of the IPI for the preparation of this analysis was that this document should be written in easy and understandable language, without academic jargon. It should also be accessible to lay people. For this reason I was asked to keep as short as possible the theoretical aspects of this study which explain its methodology and scientific parameters. This report should also record recurring themes with which IP remains associated, reflecting mainstream critiques of the IP system.

The research on which this paper is based was undertaken during late 2007 and early 2008, with relatively little time to develop the themes recorded below or to monitor the continuing nature of the IP discourses in which the principal actors engage. This paper may nonetheless provide a useful springboard for further research, in which the roles of the protagonists and their respective positions may be explored in more detail.

IP and Globalization

Timeframe

“Uruguay Round, so unfair!”⁵

Contemporary discourse on IP and globalization is aggressive in its style and tends to express the many and varied concerns raised by the anti-globalization movement over the World Trade Organization (WTO) and its administration of the TRIPs agreement, rather than engaging in any detailed analysis of the legal architecture of the IP system.

In this sense, the Uruguay round of WTO discussions marked not only the birth of a new international treaty on IP, the TRIPs agreement, but also the inception of the critical IP discourse. From these discussions new international proponents emerged and a new orientation of IP-speak.⁶ Issues such as IP and globalization and public health emerge as completely new themes, yet they are discussed more in terms of protest than in terms of a solution-driven perspective.

The public outcry at the WTO ministerial conference in Seattle in 1999 made a major impact on the way IP was perceived. Until then, IP passed as a merely technical, legal concept. Subsequently concerns over the social implications of globalization were increasingly interwoven with the concept of intellectual property. Many actors, primarily worried that globalization would challenge their core beliefs and question fundamental human values, felt they had a say on (or rather against) IP. The discourse on IP was thus turned into a much wider discussion and expressed a general dislike for the WTO and the market liberalization approach for which it stands.⁷

In none of the articles I reviewed on how the anti-globalization movement perceived IP could I find any substantial critique of WIPO, its activities and the treaties it administers. The equation seems to be this:

IP = patents = pharmaceutical patents = WTO's approach to free trade and the perceived unhealthy side effects that come with it.

IP is many times used interchangeably and/or supplementary to notions such as downsizing jobs, outsourcing capacities to less wealthy nations, exploitation of the poor and their resources, pressure on developed countries' workforces, the erosion of the public health system and the social safety net, the prohibition of workers' unions in emerging markets and the erosion of unions in developed countries. In this sense the discourse on IP and globalization reflects many of the elements of the traditional discourse of left wing policy-making and represents policy concerns much bigger and comprehensive than the concept of IP in and by itself.

⁵ J. Stiglitz, “Making Globalization Work”, 139 *South Bulletin* 2007, pp 67-75.

⁶ P. Burke, “The meaning of historical terms and concepts: New studies on Begriffsgeschichte”, *German Historical Institute* Washington D.C. Occasional Paper 15, 1996, pp 70-96.

⁷ D. E. Evans, “Who Owns Ideas? The War over Global Intellectual Property” November/December 2002 *Foreign Affairs*, pp 28-35.

Who drives the discourse on IP and globalization?

In “The right to good ideas: patents and the poor”, *The Economist* depicts two driving forces in the contemporary discourse on IP and globalization. The one is interested in advancing the knowledge economy, an approach based on the belief that knowledge is the driving factor behind economic growth. The other resides on a belief that IP is a major means to advance the process of globalization.⁸ While the former is strongly motivated by new economic growth theory, as for example advanced by Stanford professor Paul Romer⁹, the latter is based on typical anti-globalization arguments, such as for example the position that the IP system helps multinational companies to build up monopolies to the detriment of the poor, drives small and medium-sized enterprises (SMEs) and local business in developing countries out of business and increases prices for consumer products, be they pharmaceuticals or software.¹⁰

As comes perhaps as no surprise, the defendants of the IP system turned out to be the traditional proponents of globalization: business, business associations and business-oriented academics. The materials reviewed for this research reflected a high degree of predictability and coherence in their content.

An excellent illustration of traditional left wing critique can be found in Michael Perlman’s review of “IPR and the commodity form”, published in the *Review of Radical Political Economics*: “IP is a strategy that defends capitalists, who with the words of Marx can no longer pretend that they are serving a social function”.¹¹ Perlman, an economist at UC San Francisco, argues that “IP converts scientific knowledge and therefore ... allows modern capitalism to revert to a winner take all arrangement”. He particularly criticizes the fact that innovative ideas and scientific breakthroughs are to a large extent funded by the public, yet subsequently capitalized by corporations and then resold to the public at a higher price. In his view “those who claim patent rights did nothing but extend the work already done in the public sphere”. He concludes that the patent system is “unfair” (a widely used notion in the context of IP and globalization) since it reserves the exclusive right to discovery while “offering absolutely nothing to the “others” who have contributed to its creation”.

⁸ S. McElhinney, “Exposing the interests: Decoding the Promise of the Global Knowledge Society”, 7 *New Media Society* 2005, pp 748-758.

⁹ P. Romer, “Endogenous Technological Change”, 98/5 *Journal of Political Economy* 1990, pp 71-102.

¹⁰ “The Right to Good Ideas. Patents and the Poor”. 359 *The Economist*, London 23 June 2001, pp 21-24.

¹¹ M. Perlman, “IPR and the Commodity Form: New Dimensions in the Legislated Transfer of Surplus Value”, 35 *Review of Radical Political Economics* 2003, pp 304-320.

From the moment the anti-globalization movement became interested in IP (usually patents, but with a few references to copyright),¹² critiques of the IP system arose from a variety of actors who at first sight did not seem to have a primary stake in IP, like the Chicago-based Christian Century and feminist associations situated all over the world.¹³ The critique of those actors does not so much raise technical question of intellectual property, but rather substantiates their views on IP by means of overarching ideological, philosophical and sociological critique. This makes the IP system just another illustration of gender discrimination along with the exploitation of the poor by multinational corporations, the disadvantageous situation of workers in the global economy or the violation of Christian beliefs, to name but a few. The Christian Century for example criticizes the IP system together with a range of other global issues, such as global warming, debt relief, trade policies and corporate governance.¹⁴

Gender studies again see in the IP system a reflection of “hypermasculinized” values. Thus IP fails to recognize that “the technological worlds of men and women differ fundamentally”.¹⁵ In this sense gender studies link the IP system to questions such as access to education, women inventors and the professional opportunities women have in a male-dominated work environment. Journals such as *Canadian Women Studies* also publish articles asking about the extent to which the developed world is not “feminized” in the TRIPs agreement since it puts developing countries in a passive, receiving position. The potential violent impact of the IP system is depicted in the example of female farmers who cannot access the seeds they need to nourish their children.¹⁶

Equally human rights activists have raised their concerns over the TRIPs agreement. Take for example the UN High Commission for Human Rights (UNHCR):

“TRIPs does not adequately reflect the fundamental nature and individuality of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self determination. There are apparent conflicts between the property rights regime embodied in the TRIPs agreement and international human rights law”.¹⁷

¹² J. Stiglitz, “How to Fix the IP Imbalance: Too Much IP Protection Bad for the Economy”. *Managing Intellectual Property* Oct 28 2004, pp 35-39.

S. Kell, “What role for Humanitarian IP? The Globalization of IPR” 6(1) *Journal of Law Science and Technology*, pp 20-33; N. Yeates, “Globalization and Social Policy: From Global Neoliberal Hegemony to Global Political Pluralism”, 2(1) *Global Social Policy* 2002, pp 69-91.

¹³ S. Barwa/S. Rai, “Knowledge and/as Power: A Feminist Critique of TRIPs”, 7(1) *Technology and Development* 2003, pp 91-100;

The Hindu, “Neo-Liberal Globalisation: a Threat to Women”, Jan. 6 2003. M. Stackhouse, “For Fairer Trade”, 124(16) *The Christian Century*, Chicago 2007, pp 28-35.

¹⁴ M. Stackhouse *ibid* and R.V. Adkinsson, “Globalization, Strategic Formation and the Use of Indigenous IP in the biotech Industry”, R.L. Ostergard/M. Tubin/J. Altman, 22/4 *Third World Quarterly* 2001, pp 643-660.

¹⁵ K. Joanna, “State of Our Globe—Globalization and Women’s Health: Women and Environments”, 50/61 *International Magazine*. Toronto 2003, pp 23-40.

¹⁶ S. Vandana, “Violence of Globalization”, 6 *Canadian Woman Studies* 2002, pp 180-200; M. McMahon, “Resisting globalization. Women Organic Farmers and local Food Systems”, 6 *Canadian Woman Studies* 2002, pp 203-230.

¹⁷ UNHCR Resolution Nr. 2000/7.

Common Themes

“Enslaved by Free Trade”¹⁸

Stiglitz, a major voice of the anti-globalization movement, suspects that the TRIPs agreement was consciously situated within the WTO and not the WIPO. In contrast to WIPO the WTO has “teeth” since Member States can ask for the respect of its international treaties through the Dispute Settlement Mechanism, which WIPO cannot. But Stiglitz offers another explanation: it was easier to advance a specific IP agenda through the trade channel than through the innovation/technology channel. Says Stiglitz, “IP had nothing to do with trade, yet the idea was to push the agenda on the trade ministers who do not understand IP”.¹⁹

Ruth Rikowski echoes this view in a paper contributed to *Business Information Review* in 2003: “TRIPs is not part of trade, but instead is primarily designed to help big business, as it engenders and encourages a protectionist environment through IP for the benefit of large corporations”.²⁰

Following Stiglitz’s line of argument a wide range of authors have criticized the way the Uruguay Round was negotiated, claiming that trade ministers from developing countries were underrepresented, ill-informed and in many instances lacking the technical and linguistic competencies needed for them adequately to represent their position in the lengthiest trade negotiation in world history.²¹

“TRIPs was negotiated by a handful of people, perhaps 45 ... Developing countries essentially signed away their rights in exchange for a couple of concessions in the agriculture and textiles industry, with very few actually understanding the implications on their markets, people and culture”.²²

¹⁸ G. Monbiot, “Enslaved by Free Trade”, 178(2397) *New Scientist* 2003,, pp 25-40.

¹⁹ J. Stiglitz, *ibid*.

J. Stiglitz, “My Say: Making Globalization Work”, *The Edge of Malaysia* Sept 18 2006.

J. Stiglitz, “Patents with Borders”, *New York Times* May 9 2007.

J. Stiglitz, “To Have and Have Not”, *New York Times* December 24 2006.

²⁰ R. Rikowski, “Tripping over Trips: An Assessment of the WTO’s Agreement on TRIPs, Focusing on Trade, Moral and Information Issues”, 20 *Business Information Review* 2003, pp 149-165.

²¹ M. C. Ingram, “Information Feudalism: Who owns the Knowledge Economy?” 32/5 *Contemporary Sociology* 2003 pp 638-650;

S. Wright, “Knowing scale: IPR, knowledge spaces and the production of the global”, 6(6). *Social and Cultural Geography*. 2005, pp 903-921 ; J. V. Beaverstock, “Globalization and Its Outcomes”, 82(4) *Economic Geography* 2006, pp 455-470; K. Coulter, “Earth First! Globalization: Corporations devour Biodiversity”, 19 *Tucson* 1999, pp 30-48; S. Vandana, “The Daily Violence of Globalization. Turning the Tide”, *Culver City* 2001 Nr. 14/2, pp 3-18.

²² J. Stiglitz, “Making Globalization work”, 139/67 *South Bulletin* Feb 15 2007.

Since IP gained recognition primarily through the international trade/trade liberalization perspective, rather than through an internal market, innovation, cultural policy or even business perspective, the perceived advantages and disadvantages of IP were primarily assessed through the trade lens. It comes therefore as no surprise that IP was being talked about in the context of “technology transfer to developing countries” or the “attraction of foreign direct investment.” Trade economists such as Keith Maskus extensively discuss whether “strong IP regimes” in developing countries can enhance these positively connotated mechanisms, which would allow the “cross sale” of the “bitter pill/unpleasant medicine” of “strong intellectual property regimes” in exchange for the much-desired foreign direct investment and technology transfer. Under this paradigm academics have primarily investigated multi-country trade and direct investment surveys or flows, finding either that weaker intellectual property protection policy systems discourage or that stronger intellectual property protection policy systems encourage trade and direct investment.²³ These findings suggest that developing countries will receive more trade and direct investment after intellectual property reform, and these are important research findings—but they say nothing about the domestic innovation effects of reform. Rather, these studies tend to put developing countries in a receiving position and ignore the pool of talent existing in developing countries.

“Globalization for us and for them”²⁴

The overarching discourse on IP and developing countries is contextualized into the categories of the “have” and “have not”, a common theme in the way globalization is discussed.²⁵ Discourse analysis is familiar with the notion of “the other” as that which deviates from the accepted norm, the dominant principle.²⁶

Globalization discourse constructs developing countries as the permanent “other”, deviating from the norms and standards set by developed countries. Nicolea Yeates, for example, views the current IP system as “global neoliberal hegemony” and asks how we

²³ B.S. Javorcik, “The Composition of Foreign Direct Investment and Protection of Intellectual Property Rights: Evidence from Transition Economies”, 48 *European Economic Journal* 2004, p.39-62.

J.Y. Lee/E. Mansfield, “Intellectual Property and US Foreign Direct Investment”, 78 *Review of Economics and Statistics* 1996, pp 181-186.

K.E. Maskus, “The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer”, 9 *Duke Journal of Comparative and International Law* 1998, pp 109-161.

K.E. Maskus/M. Penubarti, “How Trade-Related Are Intellectual Property Rights?”, 39 *The World Economy* 1995, pp 227-248;

C.A. Primo Braga/C. Fink, “The Relationship between Intellectual Property Rights and Foreign Direct Investment”, 9. *Duke Journal of Comparative and International Law* 1998, pp 163-188.

²⁴ M. Boldrin/D. K. Levine, “Intellectual Property in a Global Economy. Globalization: For us and for them”, PowerPoint Presentation, The Role of IP in the Global Economy http://www.dallasfed.org/news/research/2004/04global_boldrin_levine.pdf.

²⁵ “TRIPs: A Blessing or Curse for Developing Countries?” Discussions at the European Patent Forum. <http://www.epo.org/topics/patent-system/scenarios-for-the-future/forum.html>.

²⁶ R. Wodak, “Das Ausland and Anti-Semitic Discourse: The Discursive Construction of the Other” In *The Language and Politics of Exclusion*. Thousand Oaks, CA 1997.

can move to global political pluralism.²⁷ Equally, Matthews thinks there is a need to “develop cultural paradigms that are different from postcolonial and imperialistic paradigms”²⁸ and the *International Herald Tribune* sees IP as a major means to destroy the dream of “one world” since it benefits wealthy nations and therefore continues to increase the gap between rich and poor countries in the world as a whole.²⁹

The theme “us versus them” is repeated in various forms, usually with a negative connotation or through a search to underline current asymmetries. Evelyn Su, for example, speaks of “winners and losers” when she discusses the effects of the TRIPs agreement on developing countries. She reflects the widespread view that “TRIPs allowed large multinational corporations with far flung networks and global factories to dominate a new economic order”.³⁰ Surprisingly, even research papers issued by investment banks such as Credit Suisse First Boston reflect the discussion of developing countries’ role in the global IP regime under the paradigm of “winners and losers”.³¹

Carlos Correa, a Professor from the University of Buenos Aires and member of the WHO’s Committee on IP and Access to Health³², takes thoughts of authors like Evelyn Su further, devoting an entire chapter in “the TRIPs Agreement: A Guide for the South”, (prepared for the South Center) to the question: “how much freedom remains for developing countries in determining national policies on IPR?” His main line of argument is that the TRIPs agreement was the result of asymmetric negotiations and imposed a new global regime that does not primarily work for the benefit of developing countries.³³

Remarkably, this discourse is primarily driven by actors from the developed world. This gives rise to the question of the extent to which the image of the marginalized developed country, cut off from resources and modelled as passive receiver of IP developed elsewhere, serves as a kind of “lost paradise” for the developed world itself. Says Balzac: “while Paris the capital is everything, the

²⁷ N. Yeates “Globalization and Social Policy: From Global Neoliberal Hegemony to Global Political Pluralism”, 2/11. *Global Social Policy Bulletin* 2002, pp 69-91.

²⁸ D. Matthews, “NGOs, Intellectual Property Rights and Multilateral Institutions. Report of the IP-NGOs research project”. Queen Mary Intellectual Property Research Institute. London 2006.

²⁹ “To IBM sharing looks better than hoarding”, *International Herald Tribune* 12 April 2005, p 9.

³⁰ E. Su, “The Winners and Losers: The Agreement on TRIPs and its effects on developing countries”, 169. *Houston Journal of International Law* 2000, pp 195-210.

³¹ G. Keating (Credit Suisse Research Chief), “Global Winners and Losers A booming Population and widespread immigration is fuelling worldwide growth”, 1 *The Banker* 2006, pp 35-50.

³² World Health Organization: Public Health, Innovation and intellectual property rights. *Report of the Commission on Intellectual Property Rights, Innovation and Public Health*. Geneva: World Health Organization 2006, also: World Health Assembly Resolution 56.27. See eg C. Correa, “Integrating Public Health Concerns into Patent Legislation in developing countries”, <http://www.southcentre.org/publications/publichealth/toc.htm>.

³³ C. Correa, *ibid*.

province is nothing but itself”, perhaps not only a reflection of the centralized French state, but also of asymmetric power relations at the international level.³⁴

“IP = Violence”

Articles on the impact of the TRIPs regime (though not the IP regime in general) on developing countries can get quite passionate. Its proponents borrow from the domain of crime, injustice and human rights. “Patents kill” was according to *The Economist* a major theme of South African protestors in their “fight” (again another word related to crime and battles) for access to medicines.³⁵

The journal *Canadian Women Studies* takes a similar position and depicts the “violence of globalization” by describing the genocide caused by the IP regime: “The IP regime serves only the wealthy pharmaceutical companies... Patents are literally robbing AIDS victims of their lives”. For reasons like these IP becomes an instrument to exercise violence on a daily basis against developing countries.³⁶ It allows big corporations to “transform the fabric of life into private property... making the third world pay for cumulatively collected knowledge”.³⁷

The images created when speaking of the role of IP in a globalizing world suggest that IP is perceived as dangerous, an instrument of power, probably just another weapon in the fight for power, dominance and global leadership. The brutality of the IP regime is illustrated not only in the generally well-discussed issue of access to health, but increasingly in the context of climate change and environmental protection. Says Karen Coulter: “Earth First!... Other weapons in the globalization armory are agreements on IP. Incorporated in TRIPs, foreign corporations can easily appropriate biodiversity for their private economic development”.³⁸ The recent summit on climate protection held in Indonesia in the autumn of 2007 echoed this concern, discussing the role of IP in the context of climate change and developing countries under the generally established view of IP, that it prevents access and questions the chances of successful transfer of technology. Perhaps that is why the theme of the European Patent Office’s “European Inventor of the Year 2008” is “the role of IP in climate change”.³⁹

³⁴ H. de Balzac, *Scenes de la Vie de Province: Le lys dans la Vallee* (1871-1880) Paris 1946: La Nouvelle France.

³⁵ S. Shulman, “In Africa, Patents Kill. In AIDS-stricken Africa, the enforcement of Western drug patents is a needless death sentence for millions”: <http://www.technologyreview.com/Biotech/12348/>.

³⁶ S. Vandana, “Violence of Globalization”. 6 *Canadian Woman Studies* 2002, pp 180-200.

³⁷ R. L. Ostergard/M. Tubin/J. Altman, “Stealing from the Past: Globalization, strategic formation and the use of indigenous IP in the biotech industry”, 22/4. *Third World Quarterly* 2001, pp 643-660.

³⁸ K. Coulter “Earth First! Globalization: Corporations devour Biodiversity”, Tucson Daily Planet Publishing July 31 1999, p 30.

³⁹ www.epo.org.

“European cows are treated better than African peasants”⁴⁰

The “weapon” of IP is essentially being used to maintain an “unfair” world order, dominated by the US and other wealthy countries. This makes Christopher May in his article “Capacity building and (re)production of IP” argue that even development aid serves merely to replicate existing power structures and dominate poor countries, thus seriously questioning the politics behind this type of activity.⁴¹ The ethical concern for fairness is also depicted by the *Toronto Star* claiming that “fairness calls for fairer rules”, which the IP regime does not.⁴² Again, the discourse is created under the overarching themes—IP is unfair—TRIPs serves to exploit the poor—the international trading system is unfair.

Articles asking whether IP is an opportunity or threat are the most optimistic I could find on the issue.⁴³ Other questions such as the protection of traditional knowledge, genetic resources and folklore are also used to illustrate the argument. IP creates barriers that developing countries cannot overcome, particularly since the IP regime reflects the values, cultural system and social organization of developed countries. Critiques of the IP system assert that the notion of the individual inventor is deeply rooted in “western traditions” and irreconcilable with developing countries’ collective approaches to innovation, nature, property and communality.⁴⁴ Says John Frow in *Social Semiotics*: “The public space, which is left after all rights have been defined and distributed... is a protocol of an IP system that is built on the principles of Western law and deeply committed to the full commodification of culture”.⁴⁵

“Can Intellectual Property be theft?”⁴⁶

Critiques assert that an additional shortcoming of the IP regime is that it treats the intellectual capital of companies as property, while the knowledge and genetic material of indigenous communities is treated as a common.

The IP system has turned developing countries into alleged “thieves” since the borrowing of ideas elsewhere is now prohibited. To counteract the view of robbery, the “infant industry argument”, which calls for greater protection so to allow domestic producers to stand up against international competition, is repeatedly quoted. Graham Dutfield depicts the distinction between privately owned

⁴⁰ R. Picciotto, “Protests by development activists against injustice of the trading system are fully justified”, Letter to the editor, *Financial Times*, 30 June 2003.

⁴¹ C. May, “Capacity Building and the (Re) production of Intellectual Property Rights”, 25/5 *Third World Quarterly* 2004, pp 821-837.

⁴² “Fairness calls for fairer rules. IP represents significant barriers to development”, *The Toronto Star*, 17 January 2005 .

⁴³ “The Globalization Debate: An opportunity or threat to developing economies”, *Ghanaian Chronicle*, 19 Aug 2002.

⁴⁴ P. Marshall, “Guarding the Wealth of Nations. Intellectual property, copyright, and international trade”, 23 *Wilson Quarterly* 1997, pp 23-59.

⁴⁵ J. Frow, “Public Domain and the New World Order of Knowledge”, 10/2. *Social Semiotics* 2000, pp 173-185.

⁴⁶ A. Carmen/A. Saldamando/A. Gonzales/C. Kalafatic, “Plant plunder, genes and sneakers: Can intellectual property be theft?”, 35 *Vanderbilt Journal of Transnational Law* 2003, pp 25-40.

knowledge and knowledge in the public domain as one which does not work to the benefit of the developing world.⁴⁷ Ostergard, in “Stealing from the Past: globalization, strategic formation and the use of indigenous IP in the biotech industry” gives another illustrative example of the theme “IP = robbery and violence”.⁴⁸

According to authors such as Sarah Wright, “IP reflects knowledge spaces and knowledge as embedded in western traditions and has little to do with indigenous peoples/developing countries’ (the terms are being used interchangeably) perceptions of nature and property”. Thus indigenous people do not perceive nature as a passive container waiting for innovators to model it into forms that are subsequently protected through IP, since nature takes an active role as an innovator in and by itself. According to developed countries’ authors, indigenous communities have taken a different approach to the profit motive and do not want to see their knowledge being commercialised and/or, in the context of traditional healing methods, being separated from their religious beliefs.⁴⁹

Probably the public outcry against the perceived injustice of the IP regime made the German Chancellor Angela Merkel on the G8 summit of 2007 propose to “Give globalization a human face” and “seek for an appropriate role of IP in the globalized world”.⁵⁰

“Poor nations left swimming in a spaghetti bowl of rules”⁵¹

Of particular interest in this quote is the use of the passive tense, which puts developing countries again in the role of passive receivers of IP developed elsewhere. Their active participation in the IP system is implicitly denied, which leaves passivity as the only development option to get access to IP developed elsewhere, a rather paternalistic understanding of development.

The journal *Business Ethics, a European Review*, illustrates the point: “IP is an example of how the poor are being exploited by big corporations”.⁵² Articles carrying the title “playing catch up” or discussing the impact of the IP system on developing countries from the perspective of colonialism, may be well intentioned, yet they do not give developing countries the linguistic space to take active ownership of the IP system. This raises the question how developing countries perceive their role in the international IP system.⁵³

⁴⁷ G. Dufield, “The Public and the Private Domains. IPR in Traditional Knowledge”, 21/3 *Science Communication* 2000, pp 274-295.

⁴⁸ Ibid.

⁴⁹ S. Wright, “Knowing scale: IPR, knowledge spaces and the production of the global”, 6/6 *Social and Cultural Geography* 2005, pp 903-921.

⁵⁰ “German chancellor wants to give globalization human face”, BBC Monitoring Europe. May 24 2007.

⁵¹ A. Beattie/F. Williams, “Poor Nations left swimming spaghetti bowl of rule”, *Financial Times*, 26 July 2006.

⁵² X. Lu, “ Ethical Issues in the Globalization of the Knowledge Economy”, 10/2 *Business Ethics, A European review* 2001, pp 113-119.

⁵³ B. Hogge, “Playing Catch Up. Arts and Culture”, *New Statesman*, November 2007; A.B. Engelberg, “Property rights and danger of a new form of colonialism”, Asia edition of the *Financial Times*, 21 November 2005; *International Herald Tribune*, “To IBM sharing looks better than hoarding; releasing patents is seen as profitable”, 12. April 2005.

A rough analysis of Chinese, Indonesian, Korean and Malaysian newspaper articles and academic work suggests at least some discussion on the role of IP for national economies. This clearly needs more detailed analysis, but for the purpose of this review will be treated in brief.

The *China Daily* for example says that “China is waking up to IP” and correlates IP to Chinese economic growth rates:

“Against the backdrop of economic globalization... the strength of a company depends on its capability to innovate and the number of IPR it owns. Competition is at a higher level if it is based on IPR”.

China Daily also discusses how China can develop self-owned IP. Equally, the *South China Morning Post* makes the point that “home grown” IP opens the door to prosperity. The Chinese press seems to take an ambiguous approach to the issue of counterfeiting and piracy. On the one hand, piracy is considered a national “evil” that even does not prevent national celebrities from being copied; on the other, copying is seen as an expression of Chinese culture, which holds that counterfeiting is the highest form of appreciation of another person’s work.⁵⁴

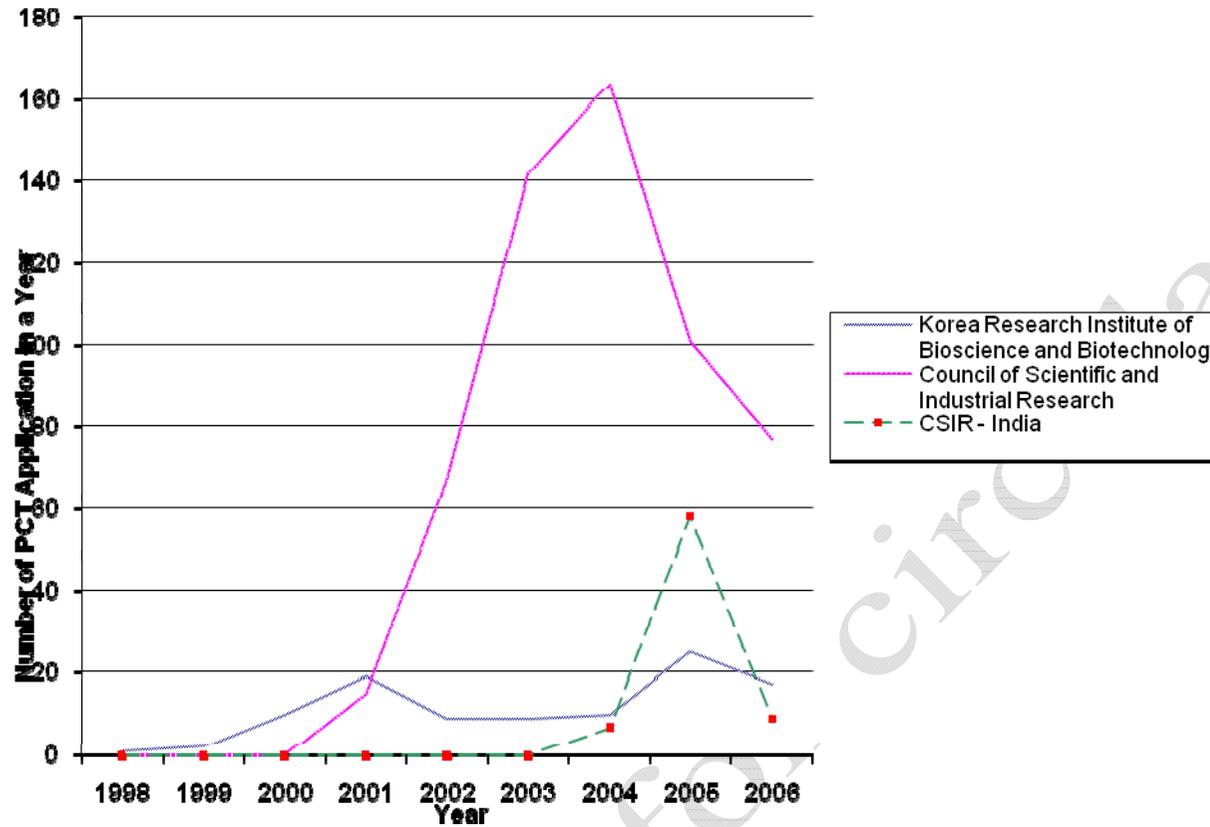
A proactive approach towards IP management in the era of globalization can also be found in the Thai newspaper *The Nation*, which considers that “managing globalization is not the sole jurisdiction of the U.S”.⁵⁵ Self-owned IP is considered an essential requirement for economic prosperity. In this context it is worth mentioning that the Thai SME bank was ahead of European banks in accepting IP as collateral and implemented a national IP strategy. Equally, Indonesia, has taken substantive steps in aligning IP to its overall strategy in leveraging Jamu, traditional Indonesian medicine. Data extracted from the PCT (Patent Cooperation Treaty) Statistics in 2006 also suggests that developing countries are increasingly leveraging the opportunities provided by international patent protection. The chart below shows the growing trend of patenting activities of public research institutions active in biotechnology, situated in selected developing countries.⁵⁶

⁵⁴ *South China Morning Post*, “Patents a deadly weapon in export war: Mainland companies must build IP to guard against lawsuits”, 22. March 2005; *South China Morning Post*, “International help needed to combat piracy”, 1 April 2006; C. Coonan, “Steel not Tofu. President Hu Jintao-Chinas commitment to the protection of IP”, *Variety*, 9 October 2006; *New Straits Times* (Malaysia), “Creating new innovation frontier”, 1 October 2006; *Jakarta Post*, “Reinventing Globalization”, 30 December 2002.

H. Priyono, “Globalization: In the long run, we are all dead”, *Jakarta Post*. Reproduced from *China Daily*. 19 August 2001.

⁵⁵ *The Nation* (Thailand), “Managing Globalisation is not the sole jurisdiction of the US”, 18 March 2004.

⁵⁶ A. Taubman/R. Ghafele, “Managing IP in the Public Interest: WIPO’s Perspective” in A. Krattiger, *Handbook of IP Management in Health and Agricultural Innovation*, MIHR/PIPRA 2007, Oxford.



Not every commentator would vest great significance in these initiatives. A huge part of the developing world still remains fairly silent on IP, a silence that one critical analyst, Pierre Bourdieu, would depict as the silence of the powerless: those who believe they have nothing to say do not dare to formulate a position, believing that it is up to the experts to determine what is right and healthy for them, a discourse that shows parallels to the patient/doctor interaction in medicine.⁵⁷

⁵⁷ Bourdieu, Pierre, *Les structures sociales de l'économie*. du Seuil, Paris 2000, Choses dites. Minuit: Paris 1987; Die Feinen Unterschiede. Kritik der gesellschaftlichen Urteilskraft. [Paris 1979] 3. korr. Aufl. Frankfurt am Main 1984. Ce que parler veut dire, l'économie des échanges linguistiques. Fayard: Paris 1982.

IP and Health

Timeline

The TRIPs agreement marks the beginning of a debate that has to a large extent resulted in the negative reputation of the intellectual property system. Patents are considered to “cause death, suffering and the prevention of access to much needed pharmaceuticals”, particularly in developing countries. The debate is polemic, passionate and everything other than calm and balanced. In this sense it is very similar to the debate on “IP and Globalization”. IP primarily gains widespread recognition through the lens of access to medicines and the impact of pharmaceutical patents on prices of medicines. It is seen as the tool that allows multinational companies to enrich themselves, no matter what, and the concept of IP becomes increasingly overloaded. NGOs, particularly, Medecins Sans Frontieres and OXFAM, drive the debate. Among academic journals, *The Lancet* strikes one as an ardent opponent of the IP system, repeatedly arguing that it harms public health:

“Patents prevent generic manufacturers from producing much needed medication at lower cost. This has fatal consequences. Patients, particularly in developing countries cannot afford the drugs they need to stay alive. Patents therefore become a matter of life and death, an issue of fundamental survival. The solution NGOs offer to “fight the devastating effects of the patent system” is to introduce compulsory licensing. Making market participants give up their rights is considered the way to fight global health inequities”.⁵⁸

“How much longer can we accept that commercial rights dominate over the right to live?” asked one public health activist in an UNCTAD conference held in Geneva in 2006.⁵⁹ Her question expresses well the concerns raised by health activists and NGOs. The underlying theme seems to be how to assure an equitable distribution of wealth and avoid the enrichment of a few at the expense of the masses. The pharmaceutical industry reacts to these attacks in a uniform manner, drawing on the standard pro-IP argument: without patent protection there is no innovation; pharma research is expensive, clinical trials cost and so does the process for approval by the Food and Drug Administration. There is also the risk of losing money associated with pharma research. Patents are the only hedge against those risks. Their point: without profits, the industry can’t give patients the medicines they need.

⁵⁸ A. M. Kimball, “The Health of Nations: Happy Birthday WTO”, 367 *The Lancet* 2006, pp 188-200; N. Ford, “The role of civil society in protecting public health over commercial interests: Lessons from Thailand”, 363 *The Lancet* 2004, pp 560-563.

⁵⁹ Ad hoc Expert Meeting, International arrangements on intellectual property and measures to improve developing country productive capabilities in the supply of essential medicines, (19/10/06-20/10/06).

Subsequently international organizations became involved in the issue. In 2001 the WTO and the WHO undertook a joint workshop on pricing and access to medicine. In the same year the WTO Doha Declaration recognized the concerns raised, probably a reaction to the fight of South African HIV/AIDS activists against pharmaceutical companies and the subsequent grant of a compulsory licence. In 2003 the adoption of paragraph 6 of the WTO Doha Declaration could clearly be read as recognition of public health concerns. It offered a pathway for compulsory licensing under TRIPs. The World Health Assembly, the governing body of the WHO, issued resolution WHA 51, giving it the mandate to assess the public health impact of the IP system. This led to the creation of a standing committee and various reports on the issue by the WHO.⁶⁰

Yet amendments to the TRIPs agreement did not resolve the debate and NGOs and public health activists complained that the so-called “TRIPs Plus” standards⁶¹, as reflected in various bilateral free trade agreements, further diminished policy options to protect public health since those agreements set higher standards for IP protection than did TRIPs.⁶²

Other issues related to IP and public health, such as the role of trade marks in the marketing of tobacco products and obesity-inducing food, were completely ignored in these arguments.

The discourse on IP and public health is strongly driven by NGOs

The study on IP and NGOS conducted by the Centre for Applied Studies in International Negotiations—CASIN—and the Study on IP, NGOs and Multilateral Institutions by the University of London both provide an excellent overview of NGOs and their attitudes towards IP.⁶³ The field of IP and health covers NGOs’ main concerns.⁶⁴ It is an issue of global concern, in contrast with issues such as genetic resources, traditional knowledge and folklore. OXFAM launched its “Cut the Cost” campaign in 2001, following the

⁶⁰ For further discussion see GAO Report, *Intellectual Property: US Trade Policy Guidance on WTO Declaration on Access to Medicines May Need Clarification*. Washington DC: GAO Report-07-1198A Report to Congressional Requestors 2007.

⁶¹ R. Pastor, “The Impact of Free Trade Agreements on IP Standards in a Post TRIPs World” 2006, http://www.bilaterals.org/article.php?id_article=4311.

⁶² GRAIN (in cooperation with SANFEC). TRIPs-plus through the back door, *How bilateral treaties impose much stronger rules for IPRs on life than the WTO*, Online Briefing 2001. <http://www.grain.org/briefings/index.cfm?id=6&print=yes>.

⁶³ A. Lafortune, *Non Governmental Organizations and Intellectual Property Rights*. Issue Profile: Casin, Geneva 2006; D. Matthews: “NGOs, Intellectual Property Rights and Multilateral Institutions”, Report of the IP-NGOs research project. Queen Mary Intellectual Property Research Institute. London 2006; M.F. Schultz & D.B. Walker, “Intellectual Property. How Intellectual Property became controversial: NGOs and the New International IP Agenda”, 6/2. *Engage*, pp 84-95; G. Mutume, “Health and intellectual property. Poor nations and drugs firms tussle over WTO patent provisions”, 15/1-2 *Africa Recovery*, pp 14-20.

⁶⁴ A. Lafortune, *ibid*.

Seattle Ministerial meeting of the World Trade Organization. Academics in line with OXFAM's approach are Carlos Corra, Frederick Abbott and Jerome Reichman.⁶⁵

NGOs are not a homogenous group and a distinction must be made between northern and southern NGOs. The NGOs with the highest profile on IP are from the North.

Common Themes

“Rights of patients over patents”⁶⁶

The theme “patents versus patients” is widespread and expressed in various forms such as “patients before patents” or “patents versus patients”. Newspapers like the *Los Angeles Times* and the *Herald Tribune*, and writers situated in the developing world, consider the profit aspirations of pharmaceutical companies as incompatible with patients' rights. In an article issued in 2006 the *Financial Times* for example argued that “Washington uses trade deals to protect drugs, which puts hundreds of thousands of Thai citizens under threat”. A year later, the *International Herald Tribune* celebrates the “victory of patients over patents”, when an Indian

⁶⁵ F.M. Abbott, “Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT”, 30 *Vanderbilt Journal of Transnational Law* 1989, pp 120-150; C. Corra, “Traditional Knowledge and Intellectual Property”, Quaker United Nations Office (QUNO), Geneva, with financial assistance from the Rockefeller Foundation, <http://www.quno.org/geneva/pdf/economic/Discussion/Traditional-Knowledge-IP-English.pdf>; C. Corra, “Health and IPR”, 79/5 *Bulletin of the World Health Organization*, 2001, http://www.scielosp.org/scielo.php?script=sci_arttext&pid=S0042-96862001000500002.

K. Maskus Keith/J. Reichman, “The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods”, 7/3 *Journal of International Economic Law* 2004, pp 279-320; J.Reichman, “The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market”, 171 *Fordham Intellectual Property Media & Entertainment Law Journal* 1993, pp 254-266.

⁶⁶ *International Herald Tribune*, “India ruling clears path for generic drug firms; Aid agencies declare victory for rights of patients over patents”, August 7 2007.

court ruling cleared the path for generic drug firms.⁶⁷ Equally, the *Los Angeles Times* opined that patents on Aids drugs should be ignored, making the point that Third World nations have the right to produce generic versions.⁶⁸

In articles such as “the Health of Nations: Happy Birthday WTO” and “The role of civil society in protecting public health over commercial interests: Lessons from Thailand”, *The Lancet* takes a clear position: IP prevents health and the only solution is compulsory licensing.⁶⁹

“Global War for Public Health”

Like the debate on IP and globalization, the debate over public health uses vocabulary derived from the domain of war, crime, battlefields and conflict. The “war” against “corporate greed” is linked to other major issues of public concern, such as the war against terrorism. Authors like Badawi take the role of advocate on behalf of the poor, depicting IP as a global problem, just like “commercial exploitation, the monopoly of health commodities, new food hazards and the marketing of tobacco”.⁷⁰ The IP system is considered an “unnatural act”, showing that market ideals have gained supremacy in all spheres of life, leaving no scope for the greater social interest.

⁶⁷ “Patients before Profits: TRIPs and Trade Rules on Intellectual Property”, http://www.oxfamamerica.org/whatwedo/issues_we_work_on/trade/news_publications/trips/art4190.html; “Trading Away Health: Intellectual Property and Access to Medicines in the Free Trade Area of the Americas (FTAA) Agreement”, http://www.doctorswithoutborders.org/publications/reports/2003/FTAA_Advocacy.pdf; <http://www.who.int/intellectualproperty/topics/innovation/innovation/en>; J. Love, “The Politics of Intellectual Property Rights an Access to Medicines”, *The Huffington Post*, May 29 2007, http://www.huffingtonpost.com/james-love/the-politics-of-intellect_b_49782.html; “Innovation, Essential Health Research and IPRs”, The WHO Working Group, 2006, <http://www.southcentre.org/info/scielipquarterly/ipdev2006q3.pdf>; “Patent Rights vs. drugs for poor at issue in India”, *International Herald Tribune*, January 30 2007; “Clash in India: Patents vs. patients, Novartis files suit to stop production of generic drugs”, *International Herald Tribune*, January 30 2007; “How drug patenting fails the world’s poor. WHO report backs reformulating system”, *International Herald Tribune*, May 22 2006; L. Santoro, “Forget the patents on Aids drugs; 3rd World Nations have the right, and the duty, to produce generic versions”, *Los Angeles Times*, October 9 2007.

⁶⁸ For an academic discussion see eg H. Grabowski, “Patents, Innovation and Access to New Pharmaceuticals”, 5/4 *Journal of International Economic Law* 2002, pp 846-860; J. McNeely/M. Rojas/C.Martinet, “The Convention on Biological Diversity: Promise and Frustration”, 4 *Journal of Environment Development* 1995, p.33-50; M. Lanoszka, “The Global Politics of Intellectual Property Rights”, 24/2. *International Political Science Review*, pp 180-200.

⁶⁹ A. M. Kimball: The Health of Nations: Happy Birthday WTO. 367 *The Lancet* 2006, pp 188-200; N. Ford, “The role of civil society in protecting public health over commercial interests: Lessons from Thailand”, 363 *The Lancet* 2004, pp 560-563.

⁷⁰ A. A. Badawi, “The Social Dimension of Globalization and Health”, 3/1 *Perspectives on Global Development and Technology* 2004, pp 38-45.

It is striking that the issue of IP and public health is discussed in the realms of “fear” and “threat”, “condemning millions of the poor to premature, preventable death and a near to complete lack of “corporate social responsibility”.⁷¹ For example, *Global Information Network* rejoiced that the “Local drug Industry gets shot in the arm” when a Pakistani court rejected the patent claims of a multinational pharmaceutical company. Equally, the *International Herald Tribune* observes that “AIDS drugs provoke a battle in India, which, if won by Pharma, could cost lives”.⁷² The way NGOs and also newspapers like the *International Herald Tribune* report on the lawsuit of Novartis in India to stop the production of generic drugs is reminiscent of a fight between the good (the poor, the public health activists) and the bad (the pharmaceutical industry). When India finally ruled against Novartis in litigation regarding the production of generic medicines, it was considered a clear “victory” (again a vocabulary deriving from the domain of war) of the poor against big corporations.

“Dying for Drugs”

In “The Profits that Kill” Osei Boateng sees in the debate a campaign by the British newspaper *The Guardian* and the NGO OXFAM. In this campaign the pharmaceutical industry was portrayed as an industry devoid of morality using “the patent system to squeeze low cost copies of branded medicines off the market”. According to Boateng *The Guardian* systematically made news with headlines such as “Millions of lives at risk—drug companies must temper their power”.⁷³ The ethical dimension of pharmaceutical business is also questioned by activists such as Jamie Love and Julian Borger; Merrill Goozner also asks whether it is acceptable to “view medicine as luxury”.⁷⁴

“Public health over commercial interests: lessons from Thailand”⁷⁵

While it is not the purpose of this review to document in depth the chronological evolution of the Thai initiative for a compulsory licence of an HIV/AIDS drug, it is worth underlining that the Thai initiative was highly politicized within the paradigms sketched out above and remains for that reason controversial. In contrast the grant of a compulsory licence for a cancer drug by Italy did not receive any attention.

⁷¹ “IPS (Latin America): Novartis gets in new campaign against cheap medicines; Health: Novartis in New campaign against Cheap Medicines”, March 2007.

⁷² M. Rizvi, “Health Pakistan: Local Drug Industry Gets Shot in the Arm”, *Global Information Network*, February 12 2002; “Patent Rights versus drugs for poor at issue in India”, *International Herald Tribune*, January 30 2007; “How drug patenting fails the world’s poor. WHO report backs reformulating system”, *International Herald Tribune*, May 22 2006; “AIDS drug provokes patent battle In India; Approval could cost lives, critics say”, *International Herald Tribune*, May 11 2006.

⁷³ O. Boateng, “The profits that kill”, *New African* April 2001, pp 22-27.

⁷⁴ M. Goozner, “Medicine as luxury: The West Treats vital pharmaceuticals as just another commodity. If poor countries can’t afford file, why should they get cheap drugs?”, *The American Prospect* 2002. Princeton, pp 3-7.

⁷⁵ N. Ford, “The role of civil society in protecting public health over commercial interests: Lessons from Thailand” 363 *The Lancet* 2004, pp 560-563.

Scholars have addressed the question of how to balance public health concerns with the IP system primarily through the lens of compulsory licensing and other policy choices questioning substantive patent law, such as criteria for patentability and the expansion of further exceptions and limitations under the patent system.⁷⁶ The WHO's Commission on Intellectual Property Rights, Innovation and Public Health appears to be largely in line with scholarly thinking under this paradigm.⁷⁷

Within this context the question is also raised as to which extent IP promotes innovation in health R&D. Building upon the work of Heller and Eisenberg⁷⁸ the UK Commission on IPR for example argues that IP plays hardly any role in stimulating R&D, particularly in R&D on diseases prevalent in developing countries.

The pharmaceutical industry's reaction

With a certain degree of humour Neil Turner states in the *Pharmaceutical Executive* that the pharmaceutical industry is "as popular as an arms dealer". Headlines such as "The profits that kill" or "at the mercy of drug giants" have strongly challenged the reputation of the industry. Thus he suggests a comprehensive communication strategy for pharmaceutical companies: they should spread positive messages, avoid litigation whenever possible, avoid communication gaps and silence, partner with the public sector and present a more eloquent, compassionate and inclusive public face.⁷⁹

Repeatedly the point has also been made that less than 5% of medicines of the WHO's essential drugs list are subject to patent protection, yet, drugs are still not available in many countries. WIPO has recently commissioned a study analyzing the patent landscape for HIV/AIDS drugs. This study is based on the argument that many countries considering the IP system to be an impediment to health may not necessarily be aware of the fact that the medicine in question has not been under patent protection in their country. *The Manufacturing Chemist* offers the following statistics: "Patent protection for HIV/AIDS drugs exists in just over 20% of 53 African countries and in 13 countries, no patents at all were found".⁸⁰

⁷⁶ M. Reichenberger, "The Role of Compulsory Licensing in Unilateral Refusals to Deal: Have the United States and European Approaches Grown Further Apart After IMS?", 31/2 *Journal of Corporation Law* 2006, pp 549-565; D.M. Gitter, "International Conflicts over Patenting Human DNA Sequences in the United States and the European Union: an Argument for Compulsory Licensing and a Fair-Use Exemption", 76/6. *New York University Law Review* 2001, pp 1623-1691.

⁷⁷ V. Guimaraes/C. Sternberg, "Brazil's AIDS controversy: antiretroviral drugs, breaking patents, and compulsory licensing", 60/3. *Food and Drug Law Journal* 2005, pp 471-477.

⁷⁸ WHO's Commission on Intellectual Property Rights, Innovation and Public Health: *Public Health, Innovation and Intellectual Property Rights*. WHO Geneva 2006.

⁷⁹ M. Heller/R.S. Eisenberg, "Can Patents Deter Innovation? The anticommens in Biomedical Research". 280 *Science* 1998, pp 698-701.

⁷⁹ N. Turner, "The pharmaceutical industry has been a powerless spectator to the carnage of HIV/AIDS in Africa. Pharma needs to keep a cool head in the face of global criticism", 21/8. *Pharmaceutical Executive* 2001, pp 44-60.

⁸⁰ S. Houlton, "Paying the price for protection", 73/12. *Manufacturing Chemist* 2002, pp 22-25.

IFPMA, the international pharmaceutical association, stresses that the pharmaceutical industry has contributed US\$ 2 billion in healthcare efforts in developing countries through direct access initiatives, providing HIV/AIDS drugs at lower cost, below cost or even free of charge in certain countries and has repeatedly used differential pricing and parallel imports as a means to provide medication to the poor.⁸¹

A Third Way?

Can IP be managed in the public interest? Does the IP system provide scope to assure health for all?

A minority school of thought has taken a more pragmatic approach and asks what type of policy choices may work towards obtaining social inclusion and equitable distribution of research and development findings within the existing intellectual property framework.⁸² Not seeking substantive reform of the intellectual property system, NGOs such as MIHR, the Centre for Management of Intellectual Property in Health Research and Development, PIIPA, the Public Interest Intellectual Property Advisory Group, PIPRA, Public Interest Intellectual Property Resources for Agriculture or SIPPI, Science & Intellectual Property in the Public Interest have sought to raise awareness and identify intellectual property strategies that promote equitable access through humanitarian licensing, non-exclusive licensing or other public sector intellectual property policies.⁸³ These approaches have been less reflected within academia and the WHO.⁸⁴

The discipline considers itself as “public interest IP management” and seeks to offer policy choices on how to reconcile the apparent contradiction between the exercise of exclusive rights and the universal right to equitable access to health. Representatives of this line of thinking argue that managing the IP system does not equal administering the IP system. It demands strategic thinking on the role of IP so to counteract existing asymmetries and gaps. Public interest IP management argues that the IP system cannot be viewed in isolation, but is part of a wider matrix of policy choices regulating property. It is the successful interplay of a variety of various policies, such as antitrust, free speech, privacy, telecommunications law, tax law, international trade law and intellectual property law that makes or breaks the success of public policy aiming at assuring equity and equality.

⁸¹ E. Noehrenberg, “Improving Equity Access to Medicines. IFPMA reacts to Oxfam report on TRIPs”, *Pharmaceutical Market Letter* Nov 20 2006, pp 23-27.

⁸² C. Garner, *Dealmaking and Intellectual Property Management for Public Interest*, Oxford 2004; MIHR; R. Mahoney/A. Pablos-Mendez/S. Ramachandran, “The Introduction of New Vaccines into Developing Countries. The Role of Intellectual Property”, 22/5 *Vaccine* 2004, pp 786-79.

⁸³ <http://www.mihr.org>; <http://www.pipra.org>; <http://www.sippi.aaas.org>.

⁸⁴ A. Krattiger, *Golden Rice: A Case Study of Humanitarian Licensing*, MIHR Oxford 2004; M. Qaim/A. Krattiger/J. von Braun/R. Evenson, “Agricultural Biotechnology in Developing Countries: Toward Optimizing the Benefits for the Poor.”, 40/2 *Quarterly Journal of International Agriculture*. 2001, pp 187; H. Egelyng, “Evolution of Capacity for Institutionalized Management of Intellectual Property at International Agricultural Research Centers”, 8/1. *Journal of Agrobiotechnology Management & Economics* 2005, pp 7-17.

IP and Counterfeiting/Piracy

Timeline and main actors

While the TRIPs agreement marked the beginning of the discourse on IP, globalization and health, it did not have the same impact on the debate on IP and counterfeiting/piracy. Rather, the TRIPs agreement allowed rights holders to rely on minimum levels of IP protection in all WTO members, thus guaranteeing the enforcement of rights and the opportunity (at least in theory) to sue infringers. In this sense, advocates of the IP system considered the TRIPs agreement a major breakthrough since it enabled the internationalization of the knowledge-based economy. Trading creative expressions, products and services of the human mind is thus facilitated through an international treaty allowing clear distinctions to be made between what lies within the realm of law and what does not.

Proponents of the discourse on counterfeiting and piracy are primarily governments, industry associations (e.g. the Business Software Alliance and the International Chamber of Commerce), customs (World Customs Organization), trade agencies, as well as the police (Interpol).⁸⁵ NGOs have surprisingly remained silent on the issue and no anti-globalization activists or public health proponents have raised their voice in this debate, definitely not making the point for stronger IP protection, but neither fighting against it. The most recent historical event worthwhile mentioning may be the 2007 US/EU agreement to combine in their fight against counterfeiting and piracy.⁸⁶ Also, the OECD was granted funding to revise its 1998 study on the economic impact of counterfeiting and piracy and the calculation of their cost to the global economy.⁸⁷ WIPO held, jointly with external partners, one of the biggest meetings in the history of the organization in January 2007 on counterfeiting and piracy.⁸⁸

What's in the mind of the consumer?

Possibly because the discourse on counterfeiting and piracy is maintained by a different set of actors than those engaged in the discourse on IP, globalization and health, there is data on how consumers think about the issue. Based on 65,000 interviews in 51

⁸⁵ *Intellectual Property: US Efforts have contributed to Strengthened Laws overseas, but challenges remain.* GAO Report 04-912-2004: Washington D.C.; "CBP Supports EU-US action strategy for enforcement of IP", Fed News June 23 2006; "IPR -Capitol Hill hearing testimony", CQ Congressional testimony, November 7 2007; "US names IP enforcement chief in Asia", *States News Service*, January 5 2006; "Counterfeiting and Theft of Tangible IP", Capitol Hill Hearing Testimony. Federal Document Clearing House Congressional Testimony. March 23 2004; "IP and Beyond: Why Protecting it is Everyone's Business", Cisco White Paper C11 41 8387-00 7/07, San Francisco 2007; "Microsoft announces new initiative to combat counterfeit software and piracy", *PR Newswire US*, March 9 2006.

⁸⁶ "Intellectual Property Rights, Counterfeiting & Piracy" <http://useu.usmission.gov/Dossiers/IPR/default.asp>.

⁸⁷ OECD Project on Counterfeiting and Piracy, http://www.oecd.org/document/50/0,3343,en_2649_34173_39542514_1_1_1_1,00.html

⁸⁸ Third Global Congress on Combating Counterfeiting and Piracy. Geneva 2007; http://www.ccapcongress.net/archives/Geneva/Files/ldris_final.pdf.

countries conducted over a period of 18 months, Gallup found that one fourth of consumers purchase counterfeit goods. These goods may be branded apparel, bags, footwear, music or movies. In another survey, conducted in the US among 1,300 adults in 2005, Gallup found that 13% of Americans bought or sold counterfeit products, but only 7% did so knowingly. In the same survey Gallup found that 60% are not familiar with the term 'IPR'.⁸⁹

Olswang found in a 2007 study among British consumers that people are much less willing to pay for audiovisual content, with free content being three times more often consumed than paid content. The computer is becoming increasingly an instrument of home entertainment and 63% of online users in the UK use YouTube. The illegal downloading of film and music is common and only "content junkies" are willing to pay for audiovisual content. Also, consumers are confused about the legality downloading and are scarcely concerned about getting caught. Only 34% of interviewees of this study believe it is wrong.⁹⁰

Equally Mori Group, another UK market research company, found that considerations of the effect of counterfeiting and piracy on the UK economy did not particularly bother consumers. Consumers do not generally feel guilty when buying a counterfeit good at lower price, and copying a CD for a friend is seen as perfectly justifiable. According to the study, participants would also not feel comfortable about having infringers punished.⁹¹

The findings of Mori Group stand in contrast to the Microsoft Counterfeit survey prepared by YouGov in 2006. The survey, which is based on interviews with 2000 UK adults, found that more than 52% of respondents considered the purchase of counterfeit goods as theft. People buy counterfeit goods primarily to save money. The most popular counterfeit items were movies, music, fashion, handbags and software. The survey also found that buyers would stop if they knew what other crimes were funded by the proceeds.⁹²

⁸⁹ Chris Stewart: GALLUP Presentation given at the WIPO/OECD Expert Meeting on Measurement and Statistical Issues related to Counterfeiting and Piracy. Geneva October 17/18 2005; Gallup Organization, *Global Consumer Awareness, Attitudes, and Opinions on Counterfeiting and Piracy*, Third Global Congress Combating Counterfeiting and Piracy. Geneva, January 31 2007.

⁹⁰ <http://www.olswangnews.com>.

⁹¹ MORI Social Research Institute: IP Public Attitudes, <http://www.ipsos-mori.com/understandingsociety/pdf/srinewsletter1.pdf> and: <http://www.programs.ssrc.org/ccit/publications/kretschmer-piracyagenda.rtf>.

⁹² YouGov, Microsoft Counterfeit software survey, 21 December 2006, <http://www.itnews.com.au/News/52929,dvds-most-popular-pirated-goods.aspx>; <http://forums.lugradio.org/viewtopic.php?f=2&t=397>.

While in 2007 Price Waterhouse Coopers found that “demand for counterfeit luxury goods in the UK may be set to rise as consumers face a spending squeeze, but retain their appetite for luxury brands”,⁹³ researchers such as Tscheber and Boigner argue that buyers of counterfeit goods may have a distorted personality or are not concerned with intellectual property protection.⁹⁴

Common Themes

“Breeding a culture of respect for IP”

The discourse on counterfeiting and piracy relies strongly on legal premises; it stresses that IP can be “protected” and that intellectual property is a legal right rather than a business asset. IP enables worldwide markets to the extent that it operates to let players “defend one’s rights and protect oneself against infringers”. So far, it has not recognised that piracy and counterfeiting may have both positive and negative effects. While the conditions are not yet well researched, it appears that its impact on markets depends on the purchasing power parity of consumers in the relevant market.⁹⁵

“The war against piracy”⁹⁶

The discourse on counterfeiting and piracy shows many of the emotional elements of the discourse on IP, globalization and health.⁹⁷ Its proponents argue that there is a need to wage a “war” against piracy, to protect the “health” of the economy and to consider it a serious “threat” to prosperity.⁹⁸ “Patents are a *deadly weapon* in export war”, states the *South China Morning Post*, when discussing best practices to promote Chinese exports.⁹⁹ Counterfeiting is considered a “real threat” resulting in loss of jobs as well as revenue. The “health of the economy” depends on the outcome of the “economic war”, which can be won by fostering a

⁹³ PriceWaterhouseCoopers, “Managing the Risks of Counterfeit Products: The Effects of Celebrity Culture on the Luxury Goods Industry”, PWC London 2007 (based on YouGov market research using ONS population statistics). Total sample size was 2,238 adults in the UK in 2007. Figures are weighted and are representative of all UK adults.

⁹⁴ pp Tscheber/A.Boigner, “Determinants of the purchase intention regarding counterfeit luxury products and software—an empirical study applying the theory of reasoned action”, WU Wien Discussion Paper. Vienna 2004.

⁹⁵ This issue is discussed further at p.23.

⁹⁶ “Winning the War against Piracy”, www.majormud.com/piracy.html; “Malaysia: War against Piracy targets Landlords”, <http://www.managingip.com/Article/1254383/War-against-piracy-targets-landlords.html>; “The MPAA Surrenders in War Against Piracy”, <http://www.pcmag.com/article2/0,1759,2019308,00.asp>; “Stealth war against CD piracy”, <http://news.bbc.co.uk/2/hi/entertainment/1524662.stm>; “China wages war against piracy”, http://www.chinadaily.com.cn/china/2007-03/17/content_830307.htm.

⁹⁷ L. Chalker, “Declaring War on Counterfeiters and Pirates”, 355: *African Business* 2007, pp 46-48.

⁹⁸ CISCO White Paper, “Intellectual Property and Beyond: Why Protecting it is Everyone’s Business”, Cisco 11-418387-00 7/07. San Jose 2007.

⁹⁹ “Patents a deadly weapon in export war: Mainland companies must build IP to guard against lawsuits”, *South China Morning Post*, March 22 2005; D. C. Stimson: “Counterfeiting in cyberspace”, <http://www.questia.com/googleScholar.qst;jsessionid=HSvW60qLGtbnhjmfcD7WTFx5DwK0fk87y8pH5THGyJJ2ctg0pBZ5l-264188374?docId=5001330306>.

culture of compliance—ideally at international level. To do so, TRIPs has provided a “robust” legal infrastructure and promoted a “strong” IP regime.¹⁰⁰ To build public support for “tougher” enforcement worldwide, countries like the US have even nominated an enforcement chief for Asia, as well as several additional public relations initiatives. Counterfeiting and piracy are linked to terrorism.¹⁰¹

¹⁰⁰ “Counterfeit Goods Pose Real Threat; Counterfeit goods result in loss of jobs as well as revenue. But of even greater concern is the way this global black market is funding terrorist and criminal organizations”, The World, Industry Overview, http://goliath.ecnext.com/coms2/gi_0199-3283954/Counterfeit-Goods-Pose-Real-Threat.html; IPR -Capitol Hill hearing testimony. CQ Congressional testimony. November 7 2007; “Counterfeiting and Theft of Tangible IP”, Capitol Hill Hearing Testimony. Federal Document Clearing House Congressional Testimony, March 23 2004; P. Choate, *Hot Property. The Stealing of Ideas in An Age of Globalization*, Random House. New York 2005.

¹⁰¹ “US names IP enforcement chief in Asia”, States News Service, January 5 2006.

“Counterfeiting: the crime of the 21st century”¹⁰²

The discourse on counterfeiting and piracy borrows much vocabulary from the domain of crime. IP is to be policed, enforcement to be assured and potential infringers taken to court and, if found guilty, convicted of their crime, punished and imprisoned for a substantive period of time.¹⁰³ Buying fake goods is dangerous for consumers and may be linked to other serious organized crime.¹⁰⁴ To counter the risks, new initiatives such as software to detect counterfeits are needed in order to respond to the risks posed by counterfeits.¹⁰⁵

“Counting the costs”

The issue of quantifying the costs emerges as an important argument in the context of counterfeiting and piracy. In 2007 the OECD estimated that counterfeit goods and services cost worldwide US\$ 176 billion annually, which is about 2.4 per cent of world trade in manufacturing.¹⁰⁶ The OECD figure stands in strong contrast to a previous estimate given by the organization, where it was argued that counterfeiting accounted for 5 to 7% of international trade, as well as figures provided by industry and its representatives.

The Business Software Alliance estimates that, in the US, software piracy costs industry US\$ 11 billion in lost revenues and estimates that 35% of all software used worldwide is counterfeit.¹⁰⁷ The International Anti-Counterfeiting Coalition states that counterfeiting costs the US economy US\$ 200 million in lost revenues and US\$ 4 million in efforts to combat counterfeit goods. The IDC (International Data Corporation) Economic Impact Study found in 2007 that, if global software piracy was only lowered by 10% over the next four years, this change could contribute to 2.4 million new jobs and US\$ 400 billion in economic growth to the global economy.¹⁰⁸

¹⁰² The Anti Counterfeiting Group: Campaigning against the Trade in Fakes, The Crime of the 21st of Century. <http://www.a-cg.com/main.html>.

¹⁰³ Capitol Hill Hearing Testimony: “Counterfeiting and Theft of Tangible IP”, Federal Document Clearing House Congressional Testimony. March 23 2004.

¹⁰⁴ “Counterfeit Goods Pose Real Threat”, *ibid*.

¹⁰⁵ “Microsoft announces new initiative to combat counterfeit software and piracy”, *PR Newswire US*, March 9 2006.

¹⁰⁶ J. Dryden, “Counting the Cost: The Economic Impacts of Counterfeiting and Piracy”, Presentation given at the Third Global Congress on Combating Counterfeiting and Piracy, January 30/31 2007, <http://www.ccapcongress.net/archives/Geneva/Files/Dryden.pdf>.

¹⁰⁷ Speech by Deputy Attorney General Eric H. Holder, Jr. at the High Tech Crime Summit: The Business Software Alliance estimates that software piracy cost their industry more than \$11 billion in lost revenue in 1998. [http://www.US\\$oj.gov/criminal/cybercrime/dag0112.htm](http://www.US$oj.gov/criminal/cybercrime/dag0112.htm).

¹⁰⁸ Business Software Alliance: The Economic Benefits of Lowering PC Software Piracy, http://www.bsa.org/sitecore/shell/Controls/Rich%20Text%20Editor/~/_media/Files/idc_studies/bsa_idc_australia_final%20pdf.ashx.

US Fed News stated in 2006 that “the number of counterfeit items seized at EU borders increased by 1,000% from 10 million in 1998 to over 103 million in 2004”.¹⁰⁹ The *Los Angeles Times*, quoting experts, even finds that counterfeit goods cost US companies about US\$ 200 billion annually, four times the equivalent figure for a decade ago. 70% of these illegal products are from Asia and most of them are from China.¹¹⁰

Academic interest in counterfeiting and piracy has strongly focused on the notion of counting the costs. Researchers looked at the costs caused to entrepreneurial firms owning IP (Globerman, Wagstaff), particularly in the area of direct sales losses (Givon et al., Lowry et al.), the costs of brand erosion (Keller; McDonald and Roberts) and the costs of enforcement (Rice).¹¹¹

“Headaches over online market places”

There is quite a vivid discussion on the role of IP enforcement on the internet. To what extent is eBay infringing IP? How can YouTube be controlled and how can cybersquatting and other domain name disputes be regulated?

While the fact is stressed that the online environment is regulated by the same rules and laws as the offline world, the digital age has still presented new challenges to law-makers.¹¹² Napster’s peer-to-peer facility was ultimately shut down, viewed as having piracy as its very business model.¹¹³

YouTube may face similar challenges in the form of litigation by the record, film and TV industries. In addition to services provided by the internet, software piracy is another issue industry seeks to fight since it expects “enormous benefits from cutting it down”.

¹⁰⁹ US Fed News, “CBP Supports EU-US action strategy for enforcement of IP”, June 23 2006.

¹¹⁰ D. Costello, “Getting patents in other nations and doing your homework can help”, *Los Angeles Times*, May 22 2007.

¹¹¹ S. Globerman, “Addressing international product piracy”, 32 *Journal of International Business Studies* 2001, pp 497-504; J. Wagstaff, “Hungry pirates will pay”, 165/20 *Far Eastern Economic Review* 2002, pp 38—50; M. Givon/V. Mahajan/E. Muller, “Software Piracy: Estimation of lost Sales and the Impact on Software Diffusion”, *Journal of Marketing* 1995, pp 29-37; T. Lowry/C. Yang/C. Edwards, “Hollywood heist: Will tinseltown let techis steal the show?”, *Business Weekly*, July 14 2003, pp 74-82; K. L. Keller, “Conceptualizing, measuring, and managing customer-based brand equity”, 57 *Journal of Marketing* 1993, pp 1-22; G. McDonald/C. Roberts, “Product Piracy”, 3/4 *Journal of Brand Management* 1994, pp 55-65; D.A. Rice, “Copyright as talisman: Expanding property in digital work”, 16/2 *International Review of Law Computers & Technology* 2002, pp 113-133.

¹¹² W. Adams, “Intellectual Property Infringement in Global Networks: The Implications of Protection Ahead of the Curve”, 10/1 *International Journal of Law and Information Technology* 2002, pp 71-131.

¹¹³ T. McCourt/P. Burkar, “When Creators, Corporations and Consumers Collide: Napster and the development of On-line Music Distribution”, 25/3 *Media Culture Society* 2003, pp 333-345.