



SEATTLE  
UNIVERSITY  

---

SCHOOL OF LAW

A Rough Guide to  
Global Intellectual Property Pluralism

MARGARET CHON

*Donald and Lynda Horowitz Professor for the Pursuit of Justice*

.....  
Seattle University School of Law Legal Studies Paper 09:01  
Forthcoming in "Working Within the Boundaries of Intellectual Property"  
(Rochelle Dreyfuss, Harry First, Diane Zimmerman, eds.) (Oxford University Press 2010)  
.....

**This paper can be downloaded without charge from  
the Social Science Research Network Electronic Paper Collection**

Standing for **excellence**. Reaching for **justice**.

# *A Rough Guide to Global Intellectual Property Pluralism*

*Margaret Chon*<sup>\*</sup>

## **I. Introduction: If Not Now, When?<sup>1</sup>**

The enduring question of the missing “on-ramp” to technological development is vexing for legal engineers, such as intellectual property and trade scholars. From within the traditional boundaries of intellectual property, where are some promising signposts? From the newer boundaries created by the linkages of intellectual property to other domains such as environmental law or human rights or public health, are clearer directions evident? Indeed, what role can and should intellectual property play in global development, where almost half the world is “technologically marginalized” – to use Jeffrey Sachs’s term?<sup>2</sup> For example, there is growing evidence that inequality is a barrier to development, and specifically that “technological differentials . . . play an important role in explaining the distributive impact of globalization.”<sup>3</sup> Will major global institutions such the World Intellectual Property Organization (WIPO) or the World Trade Organization (WTO) be nimble enough to draw from various possible sources of norms to facilitate development through intellectual property?

This chapter provides a rough guide to the shifting boundaries of intellectual property through the global positioning system of “legal pluralism.”<sup>4</sup> Several specific aspects of normative pluralism are explored here: (1) *actors* (or the de-centering of the state); (2) *directions* (or the de-centering of a top-down regulatory process and of international law’s focus on public or so-called formal “hard” law); and (3) *domains* (or the de-centering of intellectual property’s recent master narratives, particularly of innovation-fueled economic development towards the more capacious approach of human

---

<sup>\*</sup> Many thanks to the conveners and participants of *Working Within the Boundaries of Intellectual Property*, a New York University School of Law Conference of the Engelberg Center on Law and Innovation Policy (June 2007), for their support, and to Diane Zimmerman in particular for her diplomatic editorial touch. I am also indebted to the various scholars affiliated with the Law & Society Association who have influenced my thinking greatly, as well as to Pedro Roffe, Senior Fellow of the International Centre for Trade and Sustainable Development, for his invaluable comments on an earlier draft and for his support of my WIPO visits. Thanks also to research assistants Bryan Lee, Anne-Marie Marra, Van Ngo, Baskut Tuncat and Nancy Yamashiro, as well as to associate librarians Kerry Fitz-Gerald and Bob Menanteaux, for their timely assistance. All errors are mine.

<sup>1</sup> “If I am not for myself, then who will be for me? And if I am only for myself, then what am I? And if not now, when?” (PIRKEI AVOT 1:14) (attributed to Rabbi Hillel).

<sup>2</sup> Jeffrey Sachs, *The Innovation Divide*, in 3 INNOVATION POLICY AND THE ECONOMY, 133 (Adam B. Jaffe et al. eds., 2003).

<sup>3</sup> Elena Meschi & Marco Vivarelli, *Trade and Income Inequality in Developing Countries*, 37 WORLD DEV. 287, 293 (2009); see also William Easterly, *Inequality Does Cause Underdevelopment: Insights from a New Instrument*, 84 J. DEVELOPMENTAL ECON. 755 (2007).

<sup>4</sup> See, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L LAW 301 (2007) [hereinafter Berman, *A Pluralist Approach*].

development). Global intellectual property boundaries necessarily expand in this dynamic policy-making environment.

An arguably classical type of global intellectual property pluralism is triggered by the competition and sometimes conflict between national and international norms, or among various international norms.<sup>5</sup> In a multilateral framework, each national government must further measure the expression of its own intellectual property laws against the obligation to comply with international minimum standards and national treatment principles. For example, various national exceptions or limitations such as the fair use exception in U.S. copyright law are measured for compliance against the three step tests of Article 9 of the Berne Convention or of Article 13 of the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>6</sup> Or, as Jane Ginsburg's careful analysis in this volume illustrates, the question of mandatory substantive maxima such as the quotation right of Berne Article 10(1) raises the question of potential conflict with other treaty provisions, such the subsequent mandate of Article 11 of the WIPO Copyright Treaty (WCT) to provide for anti-circumvention measures.<sup>7</sup> Despite the heightened incommensurability created by these plural norms, comforting narratives still pervade both domestic and international intellectual property: The rules of intellectual property are ultimately convened by the state or through consensus by states, and the overarching value of intellectual property is to encourage creativity and innovation.

For purposes of this chapter, the most significant locus for global intellectual property pluralism is found in the fusion of global intellectual property with trade. TRIPs accomplished the linkage of beyond-the-border-standards—intellectual property minima—to such border measures as tariff reductions on goods or services. Put another way, the deep integration of intellectual property standards among WTO Member States now jostles up against traditional trade norms. The pre-TRIPs classic intellectual property mandate has taken on the character of an invasive species in the post-TRIPs world, to maximize not just innovation but also to drive economic growth and consolidate

---

<sup>5</sup> See, e.g., Jerome Reichman & Rochelle Cooper Dreyfuss, *Harmonization without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 DUKE L.J. 85 (2007), reprinted in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA (Daniel J. Gervais, ed. 2007).

<sup>6</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 9, 828 U.N.T.S. 221 [hereinafter Berne Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS--RESULTS OF THE URUGUAY ROUND, arts. 9 and 13, 1869 U.N.T.S. 299, 33 I.L.M. 1125 [hereinafter TRIPS]; see also Open Letter from the Max Planck Institute from Intellectual Property, *Declaration: A Balanced Interpretation of the "Three-Step Test" in Copyright Law*, (July 9, 2008), available at [http://www.ip.mpg.de/ww/en/pub/news/declaration\\_on\\_the\\_three\\_step\\_cfm](http://www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_cfm); William Patry, *Fair Use, The Three Step Test, and the Counter-Reformation*, Apr. 2, 2008, available at <http://williampatry.blogspot.com/2008/04/fair-use-three-step-test-and-european.html>; Posting of William Patry, to Sisule Musungu, to The Patry Copyright Blog, <http://williampatry.blogspot.com/2008/04/fair-use-three-step-test-and-european.html> (April 2, 2008, 2:44 PM); MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW (2004).

<sup>7</sup> Jane Ginsburg, *Contracts, Orphan Works, and Copyright Norms: What Role for Berne and TRIPS?*, elsewhere in this volume.

wealth on the part of intellectual-property-exporting nations.<sup>8</sup> This has opened a proverbial Pandora's box of issues related to intellectual property as a consequence of its being "trade-related" (or "trade and" as the jargon of international trade law puts it). Once linked to trade, subsequent linkages of intellectual property to other legal regimes such as environmental law with its attendant jurisprudence of sustainable development, human rights, public health, and so on, have followed.

Thus working backwards from Rabbi Hillel's aphorism from its last to its middle phrase—"and if I am only for myself, then what am I?"—this trade linkage move has contributed to the most radical de-centering of intellectual property's innovation mandate. Almost everyone can agree that the original connection to trade was for purely economically instrumental purposes,<sup>9</sup> and yet few would have predicted its other consequences, particularly the reshaped relationship of intellectual property and its classic innovation mandate to other development goals. A pluralism lens may sharpen our focus of how and when private means facilitated by intellectual property meet appropriate publicly-defined global governance ends such as development. It can expose the multiplicity of forces—actors, directions and domains—within global intellectual property in ways that still lodge ultimate accountability in the public policy decisions of individual states and intergovernmental organizations. Just as significantly, global intellectual property pluralism can contribute to a more accurate descriptive understanding of what is occurring on the international plane where regulation of knowledge goods increasingly takes place.

## **II. Friendly Enemies? Towards a Theory of Global Intellectual Property Pluralism**

### **A. Models of Global Intellectual Property Pluralism**

One of the intellectual pioneers and longtime observers of legal pluralism, Sally Engle Merry, recently observed that

[w]hen communities are fragmented, fluid, and changing, linked through networks rather than territories and subject to movement of people and ideas, the law that they produce and that governs them becomes more plural. Imagining a stable system of law connected to a nation-state is no longer adequate. This fluidity and plurality of law is particularly characteristic of international law, with its competing forms of ordering and grounding in a highly mobile and fragmented set of social relationships.<sup>10</sup>

Paul Schiff Berman further exhorts:

A pluralist approach to managing hybridity should not attempt to erase the reality of that hybridity. . . . [A] pluralist framework recognizes that normative conflict is unavoidable and so, instead of trying to erase conflict, seeks to manage it through procedural mechanism, institutions, and practices that might at least draw the participants to the conflict into a shared social space . . . . [Or] as political theorist Chantal Mouffe has put

---

<sup>8</sup> Peter Gerhart, *The Tragedy of TRIPS*, 2007 MICH. ST. L. REV. 143 (2007).

<sup>9</sup> Peter Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 Loy. L.A. L. REV. 245 (2004); Graeme B. Dinwoodie, *The Global Politics of Intellectual Property* 3 (June 2006) (unpublished manuscript, on file with author).

<sup>10</sup> Sally Engle Merry, *International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism*, 41 STUD. L. POL. & SOC'Y 149, 151-52 (2008) at 151-52.

it, we need to transform ‘enemies’—who have no common symbolic space—into ‘adversaries.’ Adversaries, according to Mouffe are “friendly enemies”: friends because they ‘share a common symbolic space but also enemies because they want to organize this common symbolic space in a different way.’<sup>11</sup>

What symbols are being effectively re-organized within the overlapping boundaries of global intellectual property and development? Importantly, Berman’s accounts gloss over Merry’s insight that classic legal pluralism “began in the study of colonial societies in which an imperialist nation, equipped with a centralized and codified legal system, imposed this system on societies with far different legal systems . . . [and thus] is embedded in relations of unequal power.”<sup>12</sup> This is a significant oversight because in the areas of trade and development, the question of whether and how much equality exists among formally equal trading partners is a constant theme.<sup>13</sup> But at the same time, astonishingly, substantive as well as procedural norms are being modified in the overlapping domains of intellectual property and development. Countries like Antigua, with relatively less power than the United States, for example, are analyzing seriously how to leverage trade for development and how to use (or not use) intellectual property for that purpose.<sup>14</sup>

The legal pluralism literature typically has very thin analyses of intellectual property – even though arguably global intellectual property provides a potential case study that is rich with detail. Although complex pluralism exists in many other fields of international law, intellectual property is different for several reasons. International intellectual property public law-making started quite early, with the conclusion of the first multilateral treaty, the Paris Convention in 1883, and of the second, the Berne Convention in 1886.<sup>15</sup> More significantly, although intellectual property was once considered an isolated field for so-called specialists, that view has completely changed in

---

<sup>11</sup> Berman, *Global Legal Pluralism*, *supra* note 4, at 1192.

<sup>12</sup> Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC. R., 869, 874 (1988); *See also* Ruth Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 SING. J. INT’L & COMP. L. 315, 357 and 359 (2003) (“The fact is that the criteria for patentability or copyrightability are themselves culturally contingent. Arguing that cultural differences make traditional knowledge unsuitable for protection under the intellectual property system ascribes a scientific validity to European-based intellectual property criteria that is simply not sustainable. . . . [T]he alternative to intellectual property proposed by the cultural narratives is to protect traditional knowledge under the ‘customary law’ of developing countries. This narrative has ignored critical anthropological literature that demonstrates that customary law . . . reflects indigenous interaction with colonial power, as institutionalized through the apparatus of colonial institutions. . . . Intellectual property law, which has played only an incidental role (if any at all) in the literature on the relationship between international law, colonialism and developing countries, is paradigmatic of the motives, strategies and justifications of the colonial experience in Africa and Asia, particularly as they reflected race consciousness.”).

<sup>13</sup> Ruth Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125 (2003-04); William Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in a Post-European Cold War World*, 29 NYU J. INT’L L. & POL. 135 (1997).

<sup>14</sup> Shammad Basheer. 2009. *Turning TRIPS on Its Head: An “IP Cross Retaliation” Model*, ExpressO, available at: [http://works.bepress.com/shammad\\_basheer/1](http://works.bepress.com/shammad_basheer/1); Henning Grosse Ruse-Khan, *A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations*, 11 J. INT’L ECON. L 313 (2008).

<sup>15</sup> Paris Convention for the Protection of Industrial Property, 828 U.N.T.S.305 (Mar. 20, 1883); Berne Convention for the Protection of Literary and Artistic Works, 828 U.N.T.S. 221 (Sept. 9, 1886). I am indebted to Pedro Roffe for the observations in this section.

the face of a new global consensus over the critical importance of being part of the so-called knowledge society. Developing countries have historically attempted to leverage intellectual property for development through multilateral intellectual property treaties since at least the mid-20<sup>th</sup> century through the leadership of specific countries, such as India or Brazil, or institutions, such as the United Nations Conference on Trade and Development (UNCTAD). Currently, intellectual property is viewed not only as technical but as hugely political, with very high stakes.<sup>16</sup>

Conversely, intellectual property scholarship rarely engages with pluralism perhaps with the exception of ‘regime-shifting,’ a term imported from international relations theory to describe “an attempt to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another.”<sup>17</sup> This subset of legal pluralism is still state-centric but does attempt to de-center the innovation rationale of intellectual property and implicitly underscores the heterarchical nature of international norm-shaping.

While pluralism can be a powerful descriptive lens, it is less clear whether it will lead to more meaningful normative dialogue about the domain of intellectual property in relation to other domains of development. The term “domain” implies a territory of control—a field, realm or region bounded by shared norms of those within that bounded space. But do these additional actors, directions and domains open up meaningful new spaces for global development or are we celebrating hybridity for its own sake?<sup>18</sup> This chapter ends with a brief and necessarily incomplete assessment of the integration of intellectual property with the goals of global development, from a pluralist frame.

## **B. New Normative Actors: Transnational Norm Entrepreneurs**

Various regulatory entrepreneurs<sup>19</sup> have attempted to cross-fertilize the domain of intellectual property with norms from domains such as human rights and public health. At the risk of stating the obvious, a norm entrepreneur can consist of the central figure in the classic Westphalian model of international law: a state with power of enforcement. Legal pluralism supplements but does not supplant the typical state-centric model of

---

<sup>16</sup> See generally Peter Yu, *A Tale of Two Development Agendas*, 35 OHIO N. U. L. REV. 465 (2009).

<sup>17</sup> Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and the New Dynamic of International Intellectual Property Law-Making*, 29 YALE J. INT’L L. 1, 42 n.186 (2004); Yu, *id.*, at 408-17 (describing multilateral to bilateral regime shifting as well as shifting between the WTO and WIPO); cf. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 571 (2000) (defining forum-shifting and suggesting that it is a game that only the powerful states can play).

<sup>18</sup> Orly Lobel, *The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 938, 984-85 (2007) (in the context of domestic labor and civil rights, Lobel has been critical of the privileging of “[p]rivate ordering and the idea of self-regulation [that] are clearly central to the study of legal pluralism. . . . [because] . . . they do not translate into specific visions of social justice reform. . . .”).

<sup>19</sup> Steve Charnovitz, *Accountability of NGOs in Global Governance* 38, Geo. Wash. U. Legal Studies Res. Paper No. 145 (May 4, 2005), available at <http://ssrn.com/abstract=716381> (“Just as private corporations are being subjected to claims of triple bottom line and corporate social responsibility, similar transfigurational ideas are being applied to international organizations and their treaties. In my view, it is the NGOs, acting as “transnational norm entrepreneurs,” who, along with the publicists, are leading the way in these developments

international law by focusing on those who, other than state actors, are practitioners of statecraft.<sup>20</sup> In the global intellectual property arena, for example, hybrid state-non-state (or public-private) partnerships, in the form of governments with industry or public interest nongovernmental organizations (NGOs), have put forth substantive proposals and procedures within WIPO. Indeed, in this area, more than in the environmental or human rights areas where they may be viewed as critics or adversaries,<sup>21</sup> NGOs have worked effectively with developing countries and industry associations to advance specific norms and proposals.<sup>22</sup>

What may be worth noting as well is the relative power of developing countries on the international negotiating terrain. A recent obvious example of developing-country norm entrepreneurship within WIPO is the Development Agenda proposal.<sup>23</sup> In 2004, fourteen developing-country member states (Friends of Development) put forth a proposal called the “Establishment of a Development Agenda for WIPO” (Development Agenda).<sup>24</sup> After several years of sometimes contentious discussion, often divided along developed-versus-developing-country perspectives, WIPO adopted forty-five recommendations to be mainstreamed into all its activities, and established a Committee on Intellectual Property (CDIP) with a mandate to develop a work program to implement these recommendations.<sup>25</sup>

---

<sup>20</sup> Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, 26 STAN. ENVTL. L.J. 181, 184 & 43 STAN. J. INT’L L. 181, 184 (2007).

<sup>21</sup> Duncan Matthews, *The Role of International NGOs in the Intellectual Property Policy-Making and Norm-Setting Activities of Multilateral Institutions*, 82 CHI.-KENT L. REV. 1369, 1379 (2007).

<sup>22</sup> Peter Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345, 346 (2008); European Patent Office, SCENARIOS FOR THE FUTURE (2007), available at <http://www.epo.org/topics/patent-system/scenarios-for-the-future/detailed.html> (interview with Vera Franz).

<sup>23</sup> Pedro Roffe and Gina Veá, *The WIPO Development Agenda in a Historical and Political Context*, THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 79 (Neil Netanel, ed., 2009); see also Marcelo Dias Varella, *WTO, Intellectual Property and AIDS: Case Studies from Brazil and South Africa*, 7 J. WORLD INTELL. PROP. 523 (2004).

<sup>24</sup> WIPO, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO in Document WO/GA/31/11* (Aug. 27, 2004); see also WIPO, *Report on the Thirty-First (15th Extraordinary) Session in Document WO/GA/31/15*, 33-7 (Oct. 5, 2004) (This proposal was joined by twelve other member states: Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela. Among other things, it called for WIPO to implement its functions in the context of various other initiatives of the United Nations.).

<sup>25</sup> WIPO, Summary by the Chair, Committee on Development and Intellectual Property (CDIP), Second Session, Geneva, July 7 to 11, 2008, available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_2/cdip\\_2\\_summary.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_2/cdip_2_summary.pdf). (These include the following so-called “Cluster B” recommendations:

“20. To promote norm-setting activities related to IP that support a robust public domain in WIPO’s Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions. . . .

22. WIPO’s norm-setting activities should be supportive of the development goals agreed within the UN system, including those contained in the Millennium Declaration.

23. The WIPO Secretariat, without prejudice to the outcome of Member States considerations, should address in its working documents for norm-setting activities, as appropriate and as directed by Member States, issues such as: (a) safeguarding national implementation of intellectual property rules (b) links between IP and competition (c) IP-related transfer of technology (d) potential flexibilities,

In the area of global copyright specifically, Chile has been the leading *demandeur* at WIPO for global educational exceptions and limitations (or users' rights) to copyright through the Standing Committee on Copyright and Related Rights<sup>26</sup> and through the WIPO CDIP. Recommendations 15, 17 and 19 of the CDIP Working Document refer to current WIPO activities that include the consideration of limitations and exceptions to copyright and related rights.<sup>27</sup> These are powerful examples of norm generation by developing countries outside of the well-publicized access to medicines campaign. They are intended to move the global system toward greater flexibility for certain public, pro-development purposes, including the reduction of trade barriers for information service providers.<sup>28</sup> Legal pluralism illustrates the multidirectional impact of norms – in this case, originating from less powerful Member States within WIPO and their NGO supporters.

With respect to global development, all state actors – whether developed or developing—may need to re-think development strategically.<sup>29</sup> Many have observed, for example, that the intellectual property interests of developing countries are not monolithic; Brazil and India are two developing states with substantial pharmaceutical manufacturing capacity, and they are moving from imitative to innovative capacities.<sup>30</sup> Alliances may be made between and among middle income countries with potential intellectual exporting interests.<sup>31</sup> In the most utopian sense, all states must cooperate in order to achieve the basic levels of development: that form the global ethics premise underlying the Millennium Development Goals (MDG) aimed at eliminating poverty.<sup>32</sup> To the extent that the case for copyright or other intellectual property in certain

---

exceptions and limitations for Member States and (e) the possibility of additional special provisions for developing countries and LDCs.”; see also WIPO, Report of the Provisional Committee On Proposals Related to a WIPO Development Agenda, at Annex 2-3, PCDA A/43/13 Rev. (Sept. 17, 2007) [hereinafter PCDA REPORT].

<sup>26</sup> WIPO Standing Committee on Copyright and Related Rights [SCCR], *Proposal by Brazil, Chile, Nicaragua and Uruguay for Work Related to Exceptions and Limitations*, SCCR/16/1 (March 2008), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_16/sccr\\_16\\_2.doc](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_16/sccr_16_2.doc).

<sup>27</sup> WIPO Committee on Development and Intellectual Property (CDIP), Initial Working Document for the Committee on Development and Intellectual Property, CDIP/1/3 (March 3, 2008) [hereinafter “CDIP Working Document”] at Annex III, p. 24, 26-28.

<sup>28</sup> P. Bernt Hugenholtz and Ruth L. Okediji, *Considerations for an International Instrument on Limitations and Exceptions to Copyright*, BRIDGES, 21 (May 2008), available at [http://www.tradeteam.bb/cms/default.asp?V\\_DOC\\_ID=2189](http://www.tradeteam.bb/cms/default.asp?V_DOC_ID=2189).

<sup>29</sup> See Symposium, *Intellectual Property, Trade and Development: Accommodating and Reconciling Different National Levels of Protection*, 82 CHI.-KENT L.R. 1109 (2007); see generally INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA (Daniel J. Gervais, ed. 2007).

<sup>30</sup> Carlos Morel, *The Road to Recovery*, 449 NATURE 180 (September 13, 2007); Janice Mueller, *Taking TRIPS to India—Novartis, Patent Law, and Access to Medicines*, 356 NEW ENG. J. MED. 541 (2007); Janice Mueller, *The Tiger Awakens: The Tumultuous Transformation of India's Patent System and the Rise of Indian Pharmaceutical Innovation*, 68 PITT. L. REV. 491 (2007).

<sup>31</sup> Yu, *supra* note 22.

<sup>32</sup> U.N. Millennium Development Goals, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000), available at <http://www.un.org/millennium/declaration/ares552e.pdf>; see also U.N. Dev. Programme, Summary, *Human Development Report 2003: Millennium Development Goals: A compact among nations to end human poverty* (2003).



knowledge goods has always been uneasy<sup>33</sup> at certain times and in certain places, the interests of developed and developing countries will shift and change and occasionally converge with each other.<sup>34</sup> One of the scenarios forecast recently by the European Patent Office, for example, put the United States of the future in the same boat as China today—that is, in the shoes of an intellectual property-importing state.<sup>35</sup> In that sense, there is a certain epistemological privilege<sup>36</sup> that developing countries and/or their non-elite populations may currently possess “from below.”<sup>37</sup>

In addition, the perspectives of non-state actors such as intellectual property spokespersons and personalities have always powerfully shaped norms: Victor Hugo, Jack Valenti and even DJ Danger Mouse are paradigmatic examples. Private sector industry associations, too, have been powerful norm entrepreneurs (for example, in advocating for the formation of TRIPs)<sup>38</sup> and they have long had a formal role within the WIPO organization.<sup>39</sup> The role of social movements and public interest NGOs has become increasingly significant.<sup>40</sup> Academics continue to play a role in shaping norms, directly and indirectly. These include well-known treatise writers<sup>41</sup> and formal WIPO consultants as well as those whose work is supported by either private or public interest NGOs. Private ordering, whether through open source, copyleft or Creative Commons models, or through industry click-wrap agreements, continues to proliferate in the digital networked era through which we grope.<sup>42</sup> And private law has an equally important role to play in the shaping of international intellectual property law as does traditionally privileged public international law.<sup>43</sup>

---

<sup>33</sup> Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970-1971).

<sup>34</sup> Jeremy F. DeBeer & Michael A. Geist, *Developing Canada's Intellectual Property Agenda*, in CANADA AMONG NATIONS, (Jean Daudelin and Daniel Schwanen, eds., 2007).

<sup>35</sup> European Patent Office, *supra* note 22.

<sup>36</sup> Uma Narayan, *Working Together Across Difference: Some Considerations on Emotions and Political Practice*, 3 HYPATIA 31 (1988).

<sup>37</sup> Margaret Chon, *Intellectual Property From Below: Copyright and Capability for Education*, 40 U.C. DAVIS L.R. 803 (2007).

<sup>38</sup> SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 174 (2003).

<sup>39</sup> Geoffrey Yu, *The Structure and Process of Negotiations at the World Intellectual Property Organization*, 82 CHI.-KENT L. REV. 1445, 1453 (2007).

<sup>40</sup> James McGann and Mary Johnstone, *The Power Shift and the NGO Credibility Crisis*, 8 INT'L J. NOT-FOR-PROFIT L. 65, 67 (Jan. 2006) available at [http://www.icnl.org/KNOWLEDGE/ijnl/vol8iss2/ijnl\\_vol8iss2.pdf](http://www.icnl.org/KNOWLEDGE/ijnl/vol8iss2/ijnl_vol8iss2.pdf) (“The Economist estimates that the number of international non-governmental organizations rose from 6,000 in 1990 to 26,000 in 1996. According to the 2002 UNDP Human Development Report, nearly one-fifth of the world’s thirty-seven thousand INGOs (international non-governmental organizations) were formed in the 1990s.”); see also Matthews, *supra* note 21.

<sup>41</sup> INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND, (Sam Ricketson & Jane C. Ginsburg eds., 2d ed. 2006).

<sup>42</sup> Severine Dusollier, *Sharing Access to IP Through Private Ordering*, 82 CHI.-KENT L. REV. 1391 (2007).

<sup>43</sup> Graeme Dinwoodie, *The International IP System: Treaties, Norms, National Courts and Private Ordering*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA (Daniel J. Gervais, ed. 2007).

Indeed, Jessica Litman punctured any notion of disinterested state actors making neutral law in the public interest long ago, at least in the domestic realm.<sup>44</sup> Daniel Gervais has also naturalized the view that copyright norms are more the product of the play of commercial interests than of creative authors.<sup>45</sup> But along with greater accuracy, the lens of global legal pluralism liberates us to come up with more creative, out-of-the-box solutions for a complex set of problems, by acknowledging the greater set of interests at stake. Transnational norm entrepreneurship allows us to acknowledge that no one actor has a monopoly on being a purveyor of norms, assuming that a certain minimum threshold of relevance and thoughtfulness is met. Norm entrepreneurs are simply stakeholders who have points of view. Presumably, in an increasingly complex and dense policy environment where multiple sources of information are needed as checks and balances for evidence-based policy-making, audiences who have more divided attention spans might need to be introduced to critical ideas (or a combination of them) outside of the usual disciplinary silos.<sup>46</sup> In the development realm, these audiences include not just the WTO Dispute Settlement Body, but foundations, public-private partnerships, and even charismatic individuals.<sup>47</sup>

Recent prominent examples of entrepreneurial norm-generation include the Intellectual Property Rights in Transition Project (IPT), led by a group of European intellectual property scholars.<sup>48</sup> IPT has resulted in specific proposals for amendments to TRIPS, so that exceptions for public interest purposes are more detailed and specific.<sup>49</sup> Another major effort is the report by Ruth Okediji and Bernt Hugenholtz on a possible global treaty on exceptions and limitations to copyright.<sup>50</sup> The latter effort was a collaboration with other non-state actors, including at least one supporting foundation and several other prominent scholars. These norm-entrepreneurial efforts tie into global regulatory models proposed by Peter Drahos, John Braithwaite and Scott Burris. In these alternative network models,

nodal governance . . . generat[es] . . . rules and standards of best practice. An insight of the theory of nodal governance is that the tying together of different networks produces nodal concentrations in power and

---

<sup>44</sup> Jessica Litman, *Copyright, Compromise and Legislative History*, OR.L. REV. (1987).

<sup>45</sup> Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1 (2005).

<sup>46</sup> McGann & Johnstone, *supra* note 40, at 70.

<sup>47</sup> Jyh-An Lee, Greenpeace of the Cultural Environmentalism (unpublished paper on file with author).

<sup>48</sup> Annette Kur and Henning Grosse Ruse-Khan, *Enough is Enough - The Notion of Binding Ceilings in International Intellectual Property Protection*, Max Planck Inst. for Intell. Prop. Competition & Tax L. Res. Series, (December 8, 2008) at 64-68, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1326429](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1326429).

<sup>49</sup> AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: Synopsis of Original Version and Proposals for Amendment, available at <http://www.atrip.org/upload/files/activities/Parma2006/Kur%20synopsis.pdf>; see also TRIPS AMENDMENTS (work in progress) – background and explanations, available at: <http://www.atrip.org/upload/files/activities/Parma2006/Kur%20AMENDMENT.pdf>; These were presented at the International Association for the Advancement of Teaching and Research in Intellectual Property, Parma meeting 2006.

<sup>50</sup> P. Bernt Hugenholtz & Ruth L. Okediji, CONCEIVING AN INTERNATIONAL INSTRUMENT ON EXCEPTIONS AND LIMITATIONS TO COPYRIGHT: FINAL REPORT (2008).

knowledge. This is a form of governance that weak as well as strong players can utilize in the world system.<sup>51</sup>

In this regard, Steve Charnovitz has reiterated an important insight about accountability in a pluralistic environment with respect to global goals such as development: Adequate global accountability may be lacking among *all* of the institutions engaged in global governance and accountability itself should be looked at as a comparative phenomenon. Thus, one should expect the attributes of accountability for non-state actors to be different than for states or others.<sup>52</sup> Perhaps norm entrepreneurs in the shape of non-state actors are responsible only for making sure their input is both thoughtful and relevant—and need not take on responsibility for the overall social welfare calculus. Of course, there are possible downsides to over-relying on this approach, some of which I will trace at the end of this chapter.

### C. New Normative Directions: Bottom-Up Regulation and Less Formal Forms of Law

Many have criticized the WTO, the WIPO and other public law-making institutions for their trickle-down approach to global intellectual property.<sup>53</sup> Various commentators have proposed a bottom up rather than a top down method to lawmaking, for example, in the form of a moratorium on international intellectual property harmonization until the current norms shake out on the national level.<sup>54</sup> Hybrid spaces where the influence of law and power combine to shape development in a positive way need to address the phenomenon of “glocality”<sup>55</sup> or spatiality<sup>56</sup> where law’s power plays out with material consequences to life and death.

However, the local site is not always innocent and the supranational one is not always the one with blood on its hands. In examining the efficacy of a TRIPs Article 31*bis* solution to the access to medicines question compared to Article 30, it may be generally true that an Article 30 solution could provide more flexibility on the local level, which may in turn be good for local control, policy space and development generally.

---

<sup>51</sup> Peter Drahos, *An Alternative Framework for the Global Regulation of Intellectual Property Rights* 21, AUSTRIAN J. OF DEV. STUDIES, No. 1, (2005), available at <http://ssrn.com/abstract=850751>.

<sup>52</sup> Steve Charnovitz, *supra* note 19, at 5-6 (citing to Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, available at <http://www.docstoc.com/docs/4649/Grant-Keohane-AccountabilityinWorldPolitics-Tables>).

<sup>53</sup> Graeme B. Dinwoodie, *The International Intellectual Property System: Treaties, Norms National Courts & Private Ordering*, in INTELLECTUAL PROPERTY, TRADE & DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 61, 89 (Daniel Gervais ed., 2007) (citing Rochelle C. Dreyfuss, *Creative Law Making: A Comment on Lionel Bentley, Trade Development & Multiple Layers of Lawmaking: Copyright, Translations and Relations Between Britain & India in the Nineteenth and Early Twentieth Centuries*, 82 CHI.-KENT L. REV. 1243 (2007)).

<sup>54</sup> See, e.g., Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 3 (Keith E. Maskus & Jerome Reichman eds., 2005).

<sup>55</sup> Merry, *supra* note 10, at 159-65; Lauren Carasik, *'Think Glocal, Act Glocal': The Praxis of Social Justice Lawyering in the Global Era*, 15 CLINICAL L. REV. 55 (2008).

<sup>56</sup> Merry, *id.*

But as Frederick Abbott and Jerome Reichman point out, member states may be vulnerable to pressure from their own elites, from multinational corporations, or from stronger member states who have pharmaceutical industry interests. Thus, under an Article 30 regime, some states may enact no national legislation at all rather than exploit even the relatively small degree of flexibility offered by proposed TRIPs Article 31 *bis*.<sup>57</sup> Annette Kur and Henning Grosse Ruse-Kahn have offered the same speculation regarding copyright substantive maxima: Under treaty pressure, weaker states may elect to enact the barest minimum of the proposed maxima (especially if mandatory ceilings are set low) rather than explore the full range of policy options.<sup>58</sup>

With these admonitions in mind, the global turn towards informal or contract law within the boundaries of copyright may have unintended consequences for development. Private law solutions to public policy impasses, especially in the face of new technologies, may at first seem appealing. Private ordering is being used to facilitate access, flexibility and standardization of copyright-protected works through contracts, such as Creative Commons licenses in order to further public policy goals like access to education. Related social practices revolve around copyright-protected, contract-protected, or technology-protected, as well as public domain material. These range from banal uses in digitally dense sectors<sup>59</sup> to very tailored efforts to promote education for development.<sup>60</sup> The other side of the coin of these non-public law-based efforts is digital rights management (DRM). This also might be viewed as a form of “soft law” or regulation through computer code,<sup>61</sup> mandated for signatory states by the WCT.

As Graeme Dinwoodie has observed:

[O]ne of the most intriguing aspects of the internationalization of copyright norms that has occurred of late is that international norms arguably are being generated and embodied in a variety of instruments, some of which are neither public nor (formally) sources of law.<sup>62</sup>

---

<sup>57</sup> FREDERICK M. ABBOTT AND JEROME REICHMAN, ACCESS TO ESSENTIAL MEDICINES: LESSONS LEARNED SINCE THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH AND POLICY OPTIONS FOR THE EUROPEAN UNION (study for the European Parliament, June 2007).

<sup>58</sup> Kur and Ruse-Kahn, *supra* note 48, at 30.

<sup>59</sup> John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537.

<sup>60</sup> Graciela Rabajoli and Mónica Báez, *Uso tecnologías y producción contenidos educativos digitales en el Plan CEIBAL* (Uruguayan educators’ report on using XO computers, from the First Regional Dialogue of Educators on the Implications of Copyright, March 2-3, 2009) (Powerpoint presentation on file with author).

<sup>61</sup> Compare Mary E. Footer, *The Role of “Soft” Law Norms in Reconciling the Antinomies of WTO Law*, Soc’y of Int’l Econ. L. (SIEL) Inaugural Conference 2008 Paper, 2-3, (July 14, 2008) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1159929](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159929) (“The term ‘soft law’ in international law and international relations is often used to characterize a variety of extra-legal or non-legal norms, which are ‘in the twilight between law and politics’ and which, while deliberately of a non-binding character, have legal relevance.”); with Anthony D’Amato, *International Soft Law, Hard Law, and Coherence*, NW. PUB. L. Res. Paper No. 08-01 (March 1, 2008), available at <http://ssrn.com/abstract=1103915>; LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE, VERSION 2.0 (2006); TIM WU, *When Code Isn’t Law*, 89 VA. L. REV. 679 (2003).

<sup>62</sup> Graeme Dinwoodie, *Conflicts and International Copyright Litigation: The Role of International Norms*, in INTELLECTUAL PROPERTY IN THE CONFLICT OF LAWS 195, 196 n.1 (Metzger et al. eds., 2005).

Non-state actors have engaged in private ordering as a type of end run around the public bargain struck in domestic statutes as well as international treaties. This has arguably occurred both in favor of and against public interest values in intellectual property.<sup>63</sup> For example, Creative Commons standardized licenses or BiOS models<sup>64</sup> strike a balance in favor of promoting access to knowledge-protected goods. Conversely, licensing agreements and digital rights management can circumscribe the public domain and the space allowed to follow-on innovators and users.<sup>65</sup> How broadly private ordering based upon voluntary licensing can be leveraged for development is still an open question. Regardless, as David Kennedy points out, “[i]n the field of trade, humanitarian voices have led us seriously astray . . . by focus[ing] on *public* ordering . . . and ignor[ing] the world of background norms such as private law, corporate standards, transnational administrative arrangements, and rules of corporate governance and liability.”<sup>66</sup> Thus, pluralism analysis exposes the realms of informal or non-public lawmaking, including private ordering, standard-setting, soft law and/or normative practices not sanctioned by law. These are significant directions, impulses and sources of regulatory norms, culminating in what has been called multi-stakeholder governance,<sup>67</sup> supplementing top-down models of global regulation.

#### **D. New Normative Domains: Intellectual Property and Human Development**

Demands are being placed upon intellectual property to go beyond the initial economic instrumentalism that drove its “trade related” linkage to the WTO, and address social values and distributional claims within a still incipient global governance framework. For example, developing countries have shifted regimes from trade to the human rights, food and agriculture, public health and biodiversity regimes, in order to negotiate more favorable terms of development within intellectual property.<sup>68</sup> Thus, within its own traditional boundaries, intellectual property is now encountering other domains of development, including sustainable development, human development and

---

<sup>63</sup> Dusollier, *supra* note 42; Niva Elkin-Koren, *User-Generated Platforms*, elsewhere in this volume.

<sup>64</sup> Creative Commons, available at <http://creativecommons.org/>; Richard Jefferson, *Science as Social Enterprise: the CAMBIA BiOS Initiative*, 1 INNOVATIONS 13 (2006), available at <http://www.mitpressjournals.org/doi/pdf/10.1162/itgg.2006.1.4.13>; see also Carol Mimura, *Technology Licensing for the Benefit of the Developing World: UC Berkeley’s Socially Responsible Licensing Program*, 18 J. ASS’N U. TECH. MANAGERS 15 (2006); Carol Mimura, *Nuanced Management of IP Rights: Shaping Industry-University Relationships to Promote Social Impact*, elsewhere in this volume; Anil K. Gupta, *From Sink to Source: Honeybee Network Documents Indigenous Knowledge and Innovation in India*, 1 INNOVATIONS 49 (2006).

<sup>65</sup> K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Or Lady Sings the Blues*, 16 AM. U.J. GENDER SOC. POL’Y & L. 365 (2008).

<sup>66</sup> David Kennedy, *International Humanitarianism: The Dark Sides*, in HUMAN RIGHTS & DEVELOPMENT IN LAW POLICY & GOVERNANCE 13, 16 (C. Raj Kumar and D.K. Srivastava eds., 2006).

<sup>67</sup> Errol Meidinger, *Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems*, LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS 121 (Christian Brüttsch and Dirk Lehmkuhl, eds (2007), Buffalo Legal Stud. Res.Paper No. 2006-019 (July 2006) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=917952](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917952).

<sup>68</sup> Laurence R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, 36 CASE W. RES. J. INT’L L. 123, 127 (2004).

other modes of accomplishing human progress besides its single-minded focus on fostering creativity and innovation.

In a recent survey of the relationship of law to development, Kevin Davis and Michael Trebilcock's only firm conclusion was that while *institutions* matter, we do not have enough information at this point to know whether and how *law* matters in development; we simply need to study this relationship more.<sup>69</sup> However, what seems clear is that local culture and appropriate policy space give rise to optimal institutions for development. One size definitely does not fit all, even if one discounts colonial history.<sup>70</sup> As Peter Drahos and Olunfunmilayo Arewa have already noted with respect to intellectual property law and development, local knowledge and local freedom of design matter greatly to the success of intellectual property institutions.<sup>71</sup>

Added to these conclusions is the protest by a growing chorus of development economists over the shotgun marriage of intellectual property to trade and/or over the observed negative effects of intellectual property law upon economic development in developing countries; with points of view ranging from heterodox<sup>72</sup> to free trade or liberal orthodoxy,<sup>73</sup> it is tempting to advise the WIPO and the WTO that the promotion of technological innovation may very well be served in many cases by minimal intellectual property enforcement. Tolerance of technology diffusion may be the key to development in the least developed countries, at least until those countries have had a chance to establish the technological foundations and stable conditions for intellectual property industries in which they could plausibly have a comparative advantage.<sup>74</sup>

---

<sup>69</sup> Kevin Davis & Michael Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895, 945-46 (2008) ("Optimal institutions generally, including legal institutions in particular, will often be importantly shaped by factors specific to given societies, including history, culture, and long-established political and institutional traditions. This in turn implies some degree of modesty on the part of the external community in promoting rule of law or other legal reforms in developing countries and correspondingly a larger role for 'insiders' with detailed local knowledge. In turn, reference points for legal reforms in many developing countries may not be legal regimes, substantive or institutional, that prevail in particular developed countries but more appropriately legal arrangements that prevail in other developing countries that share important aspects of the history, culture and institutional traditions with countries embarking upon such reforms.").

<sup>70</sup> Marjorie Florestal, Abstract, *On the Origin of Fear in the World Trade System: Excavating the Roots of the Berlin Conference of 1884-1885*, 101 AM.SOC'Y INT'L L. PROC. 143 (2007), available at :available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1082124](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1082124).

<sup>71</sup> Drahos, *supra* note 51, at 44; Olunfunmilayo Arewa, *Culture as Property: Intellectual Property, Local Norms and Global Rights*, NW. PUB. L. Res. Paper No. 07-13, (April 24, 2007), available at <http://ssrn.com/abstract=981423>.

<sup>72</sup> Dani Rodrik, *How to Save Globalization From Its Cheerleaders*, KSG Working Paper No. RWP07-038, (October 15, 2007), available at <http://ssrn.com/abstract=1019015>; Ha-Joon Chang, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* (2008).

<sup>73</sup> JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 182 (2004); *see also* José E. Alvarez & Jagdish Bhagwati, *Afterword: A Question of Linkage*, 96 AM. J. INT'L L. 126, 127 (2002); JOSEPH E. STIGLITZ & ANDREW CHARLTON, *FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT* 11-46 (2005).

<sup>74</sup> Yong-Shik Lee, *Development and the World Trade Organization: Proposal for the Agreement on Development Facilitation and the Council for Trade and Development in the WTO*, 6 ASPER REV. INT'L BUS. & TRADE L. 177, 200 (2007).

Thus the transitional periods and greater flexibilities that serve as special and differential treatment (S&DT)<sup>75</sup> in the WTO framework might be transplanted as norms into WIPO treaties. Contested flexibilities within intellectual property are related to the question of their contribution to development values. Both types of flexibilities—whether S&DT or the policy levers specific to intellectual property—underscore the importance of maintaining policy space for states to formulate and implement intellectual property laws that are appropriate to their circumstances. But these flexibilities, including limitations and exceptions to exclusive rights (sometimes referred to under the rubric of “access to knowledge” or “A2K”), are not a complete policy solution either: “any promised benefit from implementing limitations cannot replace the fundamental need of developing countries to determine *how best to stimulate domestic innovation*.”<sup>76</sup> Building technological capacity and speeding up the process of technology transfer, including the right kind of technology for sustainable development, is critical for all countries. As Jeremy DeBeer and Michael Geist put it, “[t]he intellectual property-trade dilemma . . . is that low protection for foreign cultural products may cause the population to consume more of them at the expense of domestic industries while high protection may cause a large outflow of royalty payments.”<sup>77</sup>

While the WIPO CDIP recommendations have not focused on the relationship of intellectual property to education, health and food security *per se*, they do reference the Millennium Declaration.<sup>78</sup>

22. WIPO’s norm-setting activities should be supportive of the development goals agreed within the UN system, including those contained in the Millennium Declaration.<sup>79</sup>

This recommendation is an indirect reference to the work of the late Mahbub ul Haq, as well as Amartya Sen and his occasional collaborator Martha Nussbaum. Together they have articulated a widely-accepted alternative to the concept of development often spoken of purely in terms of economic growth. Sen has called this other framework “development as freedom” and it underlies the MDG,<sup>80</sup> as well as the capabilities approach to development (also known as the human development approach). While the MDG are not necessarily a primary baseline for the work of the WIPO CDIP, they are the primary development framework within which the entire UN global governance system is arguably situated.

Without necessarily referencing the MDG, numerous intellectual property and international trade scholars recently have relied upon this human development framework directly or implicitly. For example, I have argued that a “development as freedom” paradigm that accounts for education and health, as well as economic growth; is a more appropriate IP model for many developing countries. Development as freedom

---

<sup>75</sup> Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUM. J. TRANSNAT’L. L. 221 (2007).

<sup>76</sup> Okediji, *supra* note 12.

<sup>77</sup> DeBeer & Geist, *supra* note 34, at 167.

<sup>78</sup> Article 22, United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

<sup>79</sup> PCDA REPORT, *supra* note 25, at Annex 3.

<sup>80</sup> United Nations Millennium Development Goals, *supra* note 32.

not only stimulates innovation but also protects knowledge goods that enhance human capabilities, which in turn build national capacity for innovation. For all countries, the dynamic benefits of intellectual property include the promise of increasing innovation capacity over the long term. But for developed countries the path to innovation may diverge quite sharply from that for developing countries, and each may require different kinds of policy and flexibility.<sup>81</sup>

Similarly, Yochai Benkler relies on capabilities to argue in favor of access to knowledge to facilitate economic growth, “centrally driven by innovation . . . most rapidly by adopting best practices and advanced technology developed elsewhere, and then adapting to local conditions and adding their own from the new technological platform achieved in this way.”<sup>82</sup> Several copyright scholars including Arewa, Julie Cohen and Madhavi Sunder have recently emphasized the human development or capabilities approach in arguing for a culturally-based approach to copyright, in which freedom to express and/or create takes precedence over economic instrumentalism.<sup>83</sup>

Human development includes economic development as one measure, but also aims for minimum education and health distributions across and within countries. Many agree that intellectual property theory and practice seem fixated on an economic justification to the exclusion of any other; yet it seems clear that intellectual property has much to contribute directly to the other prongs of human development. In the absence of clear empirical evidence showing the significant positive relation of intellectual property to economic development indicia such as licensing, foreign direct investment, and/or technology transfer, nonetheless intellectual property can impact access to food, health technologies, knowledge goods necessary for education, and other aspects of human development. The correct policy balance in these latter development domains may need to be different than the balance in domains of pure economic growth or entertainment.

Given this widespread academic and institutional agreement on the significance of a human development model of global intellectual property, this approach deserves serious consideration. In this regard, WIPO has proposed several activities as part of its work program for recommendation 22 in the CDIP.<sup>84</sup> Intellectual property implications of the development-as-freedom approach abound with respect to such diverse development goals as democracy, education, free speech, food security, health status as well as the

---

<sup>81</sup>Margaret Chon, *A Substantive Equality Principle in International Intellectual Property Norm-Setting*, in TRADE, DEVELOPMENT AND INTELLECTUAL PROPERTY: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 475, 476-77 (Daniel Gervais ed., 2007).

<sup>82</sup> YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 310 (2006).

<sup>83</sup> Olufunmilayo Arewa, *Freedom to Copy: Copyright, Creation and Context*, 41 U.C. DAVIS L. REV. 477 (2007); Julie Cohen, *Creativity & Culture in Copyright Theory*, 40 UC DAVIS L. REV. 1151 (2007), Madhavi Sunder, *IP*<sup>3</sup>, 59 STAN. L. REV. 257 (2006); see also Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 265, 312-20 (2007).

<sup>84</sup> See CDIP Working Document, *supra* n. 27, Annex V at 12; see also Posting of Sisule Musungu, to Ideas in Development, <http://www.iqsensato.org/blog/2009/04/24/the-wipo-development-agenda-and-the-mdgs/> (April 24, 2009, 20:20) (among other things, proposing greater member-driven norm-setting processes such as a rule that working documents for norm-setting are only prepared at the request of the Member States constituted either as the General Assembly or other formal body and that such documents are prepared in accordance with any specific guidelines provided by Member States; and that WIPO prepare a report (to be presented to the fifth session of the CDIP, which would presumably be held in the first half of 2010) on WIPO's past and future activities that contribute to the achievement of MDGs.).



classic intellectual property mandate of innovation. For example, access to knowledge surely implicates free speech, which in turn affects other democratic values. Recently, Thom Brooks reiterates what many have gleaned from Sen, which is the latter's observation that "the best measure of a people's development is their ability to pursue basic capabilities: development is freedom, not merely resources. Sen's well-known and powerful example is that no democracy has ever suffered a famine."<sup>85</sup> As many have observed, the fundamental human right of free speech undergirds the copyright regime.<sup>86</sup> However, free expression norms are not being exported at the same rate as the economic norms of rights-holders.<sup>87</sup> Similarly, discouraging market concentration in the media through appropriate competition law<sup>88</sup> has profound development implications, and should be part of WIPO's robust development mandate. Nonetheless, the significance of recommendation 22 may be overlooked by WIPO and other possibly partnering UN agencies.<sup>89</sup>

### III. Global Intellectual Property Pluralism: A Report Card from the Edges

In this section, I tentatively assess the boundaries of global intellectual property pluralism, with respect to the development value that "policies be specifically tailored to benefit the least advantaged."<sup>90</sup> Development is still hazy enough as a key term of art in legal discourse that it is impossible to assess every one of its dimensions.<sup>91</sup> For the sake

---

<sup>85</sup> THOM BROOKS, *THE GLOBAL JUSTICE READER* (2008) (citing Amartya Sen, *RESOURCES, VALUES & DEVELOPMENT* (1984); AMARTYA SEN & JEAN DRÈZE, *HUNGER & PUBLIC ACTION* (1989); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999)); *see also* Thomas W. Pogge, *Justice Across Borders: Brief for a Global Resources Dividend*, in *SOCIAL JUSTICE* 264 (M. Clayton & Andrew Williams eds., 2004); Lawrence O. Gostin, *Meeting Basic Survival Needs of the World's Least Healthy People: Toward a Framework Convention on Global Health*, 96 *GEO. L.J.* 331, 367 (2008) (relying upon the capabilities approach to argue for reframing the priorities for international developmental assistance to basic survival needs, including "immunization, essential medicines, food, potable water, sanitation, disease prevention and treatment, primary health care, and health education."). On the other hand, a law and economics scholar, Eric Posner, has recently referenced Sen's work in the context of arguing for the pragmatic effectiveness of a human welfare approach to measuring global social justice over a human rights approach. Eric A. Posner, *Human Welfare, Not Human Rights*, 108 *COLUM. L. REV.* 1758 (2008).

<sup>86</sup> Deven R. Desai, *Property, Persona, and Preservation*, 81 *TEMP. L. REV.* 67 (2008), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1101648#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101648#).

<sup>87</sup> Michael D. Birnhack, *Global Copyright, Local Speech*, 24 *CARDOZO ARTS & ENT. L.J.*, 491 (2006); Michael D. Birnhack, *Trading Copyright: Global Pressure on Local Culture*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 363 (Neil W. Netanel ed., 2009).

<sup>88</sup> Eleanor M. Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, 13 *SW. J. L. & TRADE AM.* 211 (2007); Harry First, *Controlling the Intellectual Property Grab: Protect Innovation, Not Innovators*, 38 *RUTGERS L.J.* 365 (2007).

<sup>89</sup> Sisule Musungu, *supra* note 84 (noting that the MDG portal does not link to WIPO).

<sup>90</sup> Frank J. Garcia, *Justice, The Bretton Woods Institutions and the Problem of Inequality*, in *TRANSCENDING THE OSTENSIBLE: DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* 49 (Chantal Thomas, Joel P. Trachtman eds. 2008).

<sup>91</sup> Garcia, *id.* at 27 (referencing Copenhagen Declaration); *see also* Hans Christian Bugge, *1987-2007: "Our Common Future" Revisited*, in *SUSTAINABLE DEVELOPMENT IN INTERNATIONAL AND NATIONAL LAW: WHAT DID THE BRUNDTLAND REPORT DO TO LEGAL THINKING AND LEGAL DEVELOPMENT, AND WHERE CAN WE GO FROM HERE?* 3, 7 (Hans Christian Bugge and Christina Voige, eds. 2008) (*quoting*

of brevity, I have reduced the possible sites of legal pluralism into three angles discussed above: (1) new normative actors (or the de-centering of the state); (2) new normative directions (the de-centering of a one-way regulatory process and of international law's focus on public law); and (3) new normative domains (or the de-centering of intellectual property's master narratives of innovation).

### A. New Normative Actors—or Decentering the State

Berman refers to these pluralism sites as non-state international lawmaking or, alternatively, as the disaggregation of the state. His examples include “non-state arbitral panels [or] nongovernmental standard-setting bodies, from . . . the Motion Picture Association of America (which rates the content of films) to the Internet Corporation for Assigned Names and Numbers (ICANN) (which administers the Internet domain name system).”<sup>92</sup> Trade associations always had a role in intellectual property lawmaking both at some domestic (at least in the U.S.) and international levels, and intellectual property commentators have already noted the increasing role of non-national ordering through the role of organizations such as ICANN.

In global intellectual property pluralism, the role of the developing countries such as the Friends of Development, and their partnership with public interest NGOs, heralds a type of relationship that goes beyond the traditional domination of WIPO by developed countries and private NGOs such as industry associations. Non-state actors at WIPO have traditionally been led by trade groups—as stated earlier, these were the original “NGOs” whose interests were represented at WIPO. The role of public interest NGOs is not absolutely new but has recently been broadened.<sup>93</sup>

Yet it is not clear whether the “public interest” driving these non-state actors is robust enough to sustain the kinds of values that these and other norm entrepreneurs advocate. When discussing the public interest in intellectual property, sometimes the term is conflated with access, balanced policy-making, evidence-based policy-making or a greater recognition of the public domain. In the realm of copyright, for example, the public interest is often synonymous with arguments in favor of fair dealing, fair use, exceptions and limitations for library and educational use, and manifestations of the public domain on the domestic and international levels.<sup>94</sup> In the area of patents, the same public interest values may be represented by local working requirements or compulsory licensing, as permitted by Article 5A of the Paris Convention.<sup>95</sup> While sympathetic to the goals of the reform effort taking place through the WIPO CDIP, others identify much

---

from Report of the World Commission on Environment and Development, *Our Common Future*, Chapter 2, Annex to U.N. Doc. A/42/427 (1987)).

<sup>92</sup> Berman, *A Pluralist Approach*, *supra* note 4, at 313.

<sup>93</sup> European Patent Office, *supra* note 22.

<sup>94</sup> PAMELA SAMUELSON, *Challenges in Mapping the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 7* (Lucie Guibault & P. Bernt Hugenholtz eds., 2006); GIUSEPPINA D'AGOSTINO, *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use* 53 MCGILL L.J. 309 (2008)

<sup>95</sup> Paris Convention for the Protection of Industrial Property, art. 5A, 828 U.N.T.S.305 (Mar. 20, 1883); Roffe & Veá, *supra* note 23.

more of an ambiguity in the terms “public domain” (or its occasional alter ego, the “commons”) and see space for arguments that could be constructed in a way that is possibly the opposite to the public domain.<sup>96</sup>

An additional analytical problem is whether the public interest or public domain or the public good—however defined—can encompass all of the norms and tools of development. All the policy levers of intellectual property must be deployed sensitively, including the exclusive rights, to stimulate domestic innovation appropriate to a particular environment. And while I suggested, optimistically, in the immediately preceding section that intellectual property is robust enough to consider the relationship of copyright not just to education, but also to other development domains such as public health and food security in the context of the MDG, others may not be so sanguine.

### **B. New Normative Directions—or Decentering Top-Down Global Regulation and Hegemony of Hard Law**

Berman describes this as the multidirectional interaction of local, national and international norms and/or dialectical legal interaction. In other words, even without direct “hierarchically-based commands backed by coercive power,”<sup>97</sup> many possible interactions among norm entrepreneurs, norm-setters and norm-interpreters can exist.

Swinging from public to private ordering has wrought some victories for unrepresented or vulnerable populations,<sup>98</sup> but private decentralized approaches may be too scattershot to address systematic global inequities. As Ginsburg’s<sup>99</sup> and Elkin-Koren’s<sup>100</sup> chapters to this volume suggest, for example, contract rules favoring the rights of some content owners have been embedded into treaty law frameworks, without correspondingly clear access rules for follow-on innovators and users. Indeed, it is banal to observe that the public law aspects of copyright are an increasingly smaller piece of the regulatory puzzle with respect to copyright-protected knowledge goods. Yet it is an open question whether states can or will step decisively into an increasingly privatized regulatory environment to effectuate through public law a social welfare balance between the content owners, technology innovators, consumers/users and other stakeholders.<sup>101</sup>

---

<sup>96</sup> Mary W.S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775 (2009); Julie E. Cohen, *Copyright, Commodification and Culture: Locating the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN 121-66 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006); Keith Aoki, *Space Invaders: Critical Geography, The “Third World” in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000).

<sup>97</sup> Berman, *Global Legal Pluralism*, *supra* note 4, at 1198.

<sup>98</sup> Amy Kapczynski, Samantha Chaifetz, Zachary Katz & Yochai Benkler, *Addressing Global Health Inequities: An Open Licensing Approach for University Innovations*, 20 BERKELEY TECH. L.J. 1031 (2005); Mimura, *supra* note 64.

<sup>99</sup> See Jane C. Ginsburg, *Contracts, Orphan Works, and Copyright Norms: What Role for Berne and TRIPS*, elsewhere in this volume.

<sup>100</sup> See Niva Elkin-Koren, *User-Generated Platforms*, elsewhere in this volume.

<sup>101</sup> Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577 (2008); Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to*

While it is important to account for plural regulatory directions, conventional public law frameworks are still important points of accountability in global governance.

Having said that, let me add still another cautionary note: Even if they are willing to act, states are not always the best guardians of the social welfare. For example, because of the confusion over and failure to understand the impact of the decision overlay of the so-called three step test (whether under Article 9 of the Berne Convention, TRIPs Article 13 or TRIPs Article 30) onto national and regional laws, the domestic policy space for exceptions and limitations may also decrease in some countries.<sup>102</sup> Legal pluralism thus may operate, for example, to “harmonize” a ‘limitation’ that, ironically, may inhibit other limitations to copyright that would increase the state’s ability to pursue beneficial public objectives relating to social and cultural development. This is not only due to parsimonious readings of these Articles by the WTO Dispute Settlement Body, but also because states have chosen somewhat curiously to circumscribe their local policy space by legislating three step tests directly into their local laws.<sup>103</sup> This particular expression of international law within domestic law is a topsy-turvy type of bottom-up lawmaking.

### **C. New Normative Domains—or Decentering the Master Narrative of Innovation**

As a potent example of global pluralism, Berman refers to Graeme Dinwoodie’s aspiration regarding international intellectual property, that “national courts should decide international copyright cases not by choosing an applicable law, but by devising an applicable solution, reflecting the values of all interested systems, national and international, that may have a prescriptive claim on the outcome.”<sup>104</sup> I have observed that “trade and” has become necessary to any full understanding of intellectual property, yet hybridity is achieved slowly when it comes to any actual substantive norms. The original trade linkage to intellectual property may have had realpolitik origins, driven by software and pharmaceutical sectors within the so-called Quad (the United States, the European Union, Japan and Canada). Interestingly, too, intellectual property was the first example of an arguably non-trade-related linkage, opening the way to arguments that labor and environment standards also have a claim to becoming a legitimate part of the WTO.<sup>105</sup> Since then, as noted above, the WTO itself has evolved towards a greater willingness to respond to both economic and non-economic norms.<sup>106</sup> Correspondingly, within global

---

*Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981 (2007); Dusollier, *supra* note 42.

<sup>102</sup> Berne Convention art. 9, *supra* note 6; TRIPs arts. 13 and 30, *supra* note 6; Senftleben, *supra* note 6.

<sup>103</sup> Daniel Gervais, Address at the Cardozo School of Law Conference on Harmonizing Exceptions & Limitations to Copyright Law: The Varied National Implementations of the Three Step Test (March 30 & 31, 2008); Declaration, *supra* note 6.

<sup>104</sup> Berman, *Global Legal Pluralism*, *supra* note 4, at 1217.

<sup>105</sup> Braithwaite & Drahos, *supra* note 17, at 221.

<sup>106</sup> Peter Sutherland et. al., *The Future of the WTO: Addressing Institutional Challenges in the New Millennium: Report by the Consultative Board to the Director-General Supachai Panitchpakdi*, (2004), available at [http://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.htm](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm); Ernst-Ulrich Petersmann, *Justice in International Economic Law? From the ‘International Law Among States’ to ‘International*

intellectual property, social justice norms have slowly but surely de-centered the innovation mandate and infiltrated the economic discourse of intellectual property with non-economic values and goals such as human development and human rights.

Indeed, norm entrepreneurship within the intellectual property and trade framework triggers critical questions of the relationship of legal pluralism generally to development goals. Some highly critical of the WTO on the question of access to medicines have nonetheless posited that intellectual property linkages to trade are themselves positive for development because they highlight the question of intellectual property's purpose in relation to social welfare goals generally.<sup>107</sup> Through "trade and" linkages, human rights and public health possibly have come closest to the realization of hybridizing with intellectual property. However, in the area of human rights, Okediji has argued that human rights critiques simply reinforce the notion of "balance" and thus problematically may "undermin[e] the essence of the right to self-determination and development."<sup>108</sup> According to her, a truly realized right to self-determination would include the right to adopt something other than a western-determined intellectual property. An equally vigorous critique from Rochelle Cooper Dreyfuss argues that if we should view intellectual property through the lens of anything but utilitarianism, we will find ourselves to be in a minefield.<sup>109</sup>

Purely procedural mechanisms for managing hybrid legal spaces may be neither completely satisfying nor effective in the short term either. One thinks, for example, of observer status of IGOs at each other's meetings, or the phenomena of accrediting NGOs. Might more than the mere presence of additional norm entrepreneurs be needed to coordinate an effective development response?

Yet this very indeterminacy also provides space for optimism. For example, the debates around "trade and" development norms now taking place at the WIPO CDIP have legitimized the argument that intellectual property is not necessarily always the best tool for innovation in all contexts (or perhaps that intellectual property is too often automatically used as a regulatory hammer and everything that could be called a knowledge good treated like a nail). Other IGOs are not merely decorative; they are influencing WIPO's development trajectory through soft law initiatives and policy position papers. For example, the World Health Organization has a "Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property."<sup>110</sup> Another

---

*Integration Law' and 'Constitutional Law,'* 4-7 Eur. U. Inst. Working Paper LAW No. 2006/46, , 4-7 (December 2006), available at <http://ssrn.com/abstract=964165>.

<sup>107</sup> Sisule Musungu, *Rethinking Innovation, Development and Intellectual Property in the UN: WIPO and Beyond* (Quaker U.N. Office TRIPS Issues Papers No. 5, 2005), available at <http://www.qiap.ca/pages/documents/TRIPS53.pdf>.

<sup>108</sup> Okediji, *supra* note 12.

<sup>109</sup> Rochelle C. Dreyfuss, *Patents and Human Rights: Where is the Paradox?*, Molengrafica Series (Forthcoming), N.Y.U. L. Sch. Pub. L. Res. Paper No. 06-29, (2006), 14, available at <http://ssrn.com/abstract=929498>; accord Merry, *supra* note 10 (economic and human rights "orders are quite separate in terms of ideology and institutional grounding.").

<sup>110</sup> U.N. WHO, 61st Sess., 8th Plen. Mtg., U.N. Doc. A/61/VR.8, (May 24, 2008), available at [http://www.who.int/gb/ebwha/pdf\\_files/A61/A61\\_R21-en.pdf](http://www.who.int/gb/ebwha/pdf_files/A61/A61_R21-en.pdf).

illustration—the future studies exercise by the European Patent Office, forecasting different scenarios driving the patent system—shows that perspectives from other domains of knowledge are critical to the system’s legitimacy, not to mention its ability to respond to an increasingly dynamic environment, including the challenges of climate change.<sup>111</sup>

#### **IV. Conclusion: Global Intellectual Property Pluralism—Cultural Environmentalisms for the New Millennium?**

For a long time, intellectual property discourse seemed stuck at the first phrase of Rabbi Hillel’s developmental challenge: “If I am not for myself, then who will be for me?” With respect to nontraditional norms, intellectual property still mostly adheres to pluralism light: The stories we tell ourselves about intellectual property are the usual morality tales.<sup>112</sup> The most durable narratives of intellectual property center around creativity, dignity and innovation. That these are ‘feel-good’ stories as well as ‘just-so’ stories perhaps have contributed to their longevity and persuasiveness. However, legal pluralism is clearly evident in global intellectual property—distilled in a recent observation that a globalized discourse of intellectual property creates “global publics” despite the technical nature of the subject matter.<sup>113</sup> Correlation, however, is not causation: the greater visibility of plural norms and norm entrepreneurs will not inevitably promote development and social justice, as measured by policies tailored to benefit the most vulnerable global populations.

Because new regulatory entrepreneurs, directions and domains are increasingly dominant, intellectual property must account for them as it adapts to and makes itself relevant to the challenges of the new millennium. Some scholars have invoked environmental metaphors to describe the growing systems complexity associated with the multiple roles of intellectual property within an incipient global governance framework.<sup>114</sup> References to NGOs and other civil society actors, however, still tend to be cursory, if they exist at all. The predominant policy focus continues to be on formalistic public law analysis and “hard law” reforms. Despite its clear mandate in the UN arena, human development and/or sustainable development approaches in addition to the dominant economic development paradigm seem underappreciated as intellectual property’s mandates. Yet the field of intellectual property is, from its very inception, one in which the continuing boundary between the public and the private has always been

---

<sup>111</sup> European Patent Office, *supra* note 22; see also, EPO, *UNEP and ICTSD to Work on Green Patent Study*, 27 April 2009, available at <http://www.epo.org/topics/news/2009/20090427.html>.

<sup>112</sup> Jessica M. Silbey, *The Mythical Beginnings of Intellectual Property* 15 GEO. MASON L. REV. 319 (2008).

<sup>113</sup> Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

<sup>114</sup> Peter Yu, *Intellectual Property and the Information Ecosystem*, 2005 Mich. St. L. Rev. 1 (2005); James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net*, 47 DUKE L.J. 87, 108 (1997); Brett Frischmann, *Cultural Environmentalism and the Wealth of Networks*, 74 U. CHI. L. REV. 1083 (2007) (reviewing YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006)).

redefined and contested.<sup>115</sup> Intellectual property has always been a hybrid type of regulation—one in which “[t]he public good fully coincides . . . with the claims of individuals”<sup>116</sup>—or at least, so we must continue to hope.<sup>117</sup> It is within the changing context of the global with the local, the economic with the cultural and social, as well as the private with the public, that we must re-interpret and re-evaluate the expanding and shifting boundaries of intellectual property leavened by new norms from elsewhere.

---

<sup>115</sup> Compare Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1003 (2006) with Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921 (2007).

<sup>116</sup> THE FEDERALIST NO. 43, at 271-72 (James Madison) (Clinton Rossiter ed., 1961).

<sup>117</sup> TRIPs pmb., *supra* note 6 (“Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives”); World Intellectual Property Organization Copyright Treaty pmb., Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (“Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”).