

The Evolution of a Regime: Institutional Challenges and Adaptations in the World Intellectual Property Organization

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More than fifteen years after the establishment of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights, how does the United Nations World Intellectual Property Organization maintain its relevance in a the global intellectual property regime?

Abstract: Twenty years ago, the study of intellectual property (IP)—a highly technical, nuanced issue—was reserved for only the most expert of international legal scholars. But with huge leaps in technology and scientific discovery, the issue of protecting knowledge from free public use has become decidedly political. Debates over topics such as biodiversity, protecting the rights of indigenous populations, and the role of the internet in the persistent violation of property rights dominate current scholarship on the protection of intellectual property rights (IPRs). But while there have been major changes in how the international community understands and controls IPRs, there has been little discussion regarding the institutional structure that governs the field. This paper will set out to explore IPRs as an international trade and economic development issue through a study of the global IP regime. The purpose is to understand how the United Nations World Intellectual Property Organization (WIPO) has developed and responded to technological advances and institutional challenges. It will examine the modern understanding of intellectual property and how this understanding has shaped the institutions that govern the IP regime. The paper will argue that structural obstacles in WIPO's framework caused the world's highly developed states to reposition IPRs as an international trade issue, thereby diluting WIPO's influence in the regime. But now, with intellectual property redefined as a trade issue, WIPO's institutional expertise and influence over the domestic governance of IPRs in developing states allow the organization to act both as a technical expert in IP law and as a socialization agent for the norms and values of the highly developed states. As a result, WIPO operates with more clearly defined responsibilities, actually cementing its role in the IP regime through a mutually reinforcing relationship with the international trade regime.

Introduction

It is not an exaggeration to claim that intellectual property (IP) laws, as banal as the subject may be to some, impact the basic function of modern society. From sitting down to breakfast in the morning enjoying a bowl of corn flakes to curling up late at night with the latest hit from the *New York Times* best-seller list, every product and practice of which we partake in our everyday lives has gone through a complex legal system that ensures its creators reap the benefits of their work. Encompassing everything from industrial processes to artistic works to biomedical innovations, intellectual property laws are a part of the foundation of today's global economic system. Recent decades have seen tremendous leaps in technology, and with the creation and proliferation of the internet and digital tools, the IP field has become increasing complex, and with it the debate surrounding the global governance of IP. Legal scholar Robert Merges, reflecting on the transformation of intellectual property issues in recent years, paints a vivid picture of IP, describing it as

like one of those sprawling, chaotic megacities of the developing world—Mexico City, maybe, or Shanghai. Construction cranes are everywhere. The old city center—the ancient core of the field—is today surrounded by new buildings, new neighborhoods, knots of urban growth, building in every direction, far off into the distance...The helter-skelter of new growth, proliferating at times with no regard for the classic lines and feel of the old city, brings a slight case of vertigo—a feeling of being lost among the familiar.¹

This analogy is reflective of the leaps that IP has taken in recent years, which of course has included transformations in the global governance of intellectual property rights (IPRs). The United Nations, specifically the World Intellectual Property Organization (WIPO), has been at the center of this global IP governance system for decades. But institutional competition and

¹ Merges, Robert P. *Justifying Intellectual Property* (Cambridge: Harvard University Press, 2011) 1.

developments in the international understanding of IPRs have brought about transformations of WIPO that have called into question its role and usefulness in the IP regime.

This paper will begin by exploring the modern understanding of intellectual property in both the developed and developing world, looking to the theoretical underpinning of each bloc's views on the importance of the individual in society and the concept of legal possession. In the next section, analysis will focus on the development of WIPO from its origins in the late nineteenth century through the recent adoption of the 2007 Development Agenda, with an emphasis on institutional politics in the intellectual property regime. The paper will weigh the strengths and weaknesses of WIPO in its governance of IPRs and discuss how alternative institutions—particularly the World Trade Organization (WTO)—have encroached on and surpassed WIPO in its formerly singular authority over the global IP governance system. Through this discussion, the paper will argue that structural drawbacks in WIPO's framework caused the world's highly developed states to shift the forum of IP governance toward the international trade system in the WTO, thereby diluting WIPO's influence in the regime. But now, with intellectual property redefined as a trade issue, WIPO's institutional expertise and influence over the domestic governance of IPRs in developing states allow the organization to act both as a technical expert in IP law and as a socialization agent for the norms and values of the highly developed states. As a result, WIPO operates with more clearly defined responsibilities, actually cementing its role in the IP regime through a mutually reinforcing relationship with the WTO.

The purpose of this work is to analyze intellectual property from the perspective of a somewhat overlooked institution. While IPRs have become an increasingly critical—and controversial—issue, there exists little scholarship on the relationships between the institutions

that are tasked with regulating intellectual property. Research generally focuses on issue-specific aspects of intellectual property law, such as biodiversity or access to life-saving medicines. In addition, the growth of the internet and digital technologies has made the discourse around intellectual property more influential on daily life and also more nuanced, as the existing IP industries are challenged by rapid technological developments, new business models, and open access arrangements that make regulation much more difficult.² WIPO especially is overlooked in favor institutions such as the WTO or World Bank, which have much higher profiles in the international community, which has resulted in a relative lack of analysis in the fields of global political economy and international governance. This paper attempts to rectify that deficiency, while at the same time providing a better understanding of global governance through an examination of how intergovernmental organizations interact, compete for resources, become political tools, and adapt in order to maintain influence.

Before beginning analysis, it is worth noting that this paper will reference at length the division between developed countries and developing countries, principally in their understanding and management of global IP issues. However, while states will be generalized into these groups for the purpose of simplifying analysis, it is important to remember that they are by no means monolithic blocs. Each state has individual interests and goals motivated by past precedent, political and economic conditions, social welfare, cultural priorities, and the aims of individual actors. It would be erroneous to claim that all states with similar levels of economic development will act toward the same ends in every occasion. However, for the sake of simplicity, this paper will by and large consider that the basic group interests of developing and

² Yu, Peter K. "The Global Intellectual Property Order and Its Undetermined Future." *The WIPO Journal* 1 (2009): 1.

developed countries in regards to the protection of IPRs are similar enough to justify categorizing and discussing states in this manner.

Understanding Intellectual Property

In order to explore the legal system through which IPRs are created and maintained, it is important first to discuss how intellectual property is understood. While the basic notion of intellectual property is generally agreed upon, there is significant disagreement regarding how that property should be treated.

At the most basic level, intellectual property involves the ownership of knowledge—protecting ideas and the expression of ideas. Knowledge, though, is a public good and therefore nonrivalrous, so that the consumption of one individual does not preclude another from consuming, and nonexcludable, so that it is difficult to prevent any individual from consuming.³ Consider, for example, a scientific theorem. Use of a scientific theorem by a physicist in Switzerland does not prevent a professor in China from using that theorem as well, and once it is widely known, it would be difficult for one to stop the other from use. The implication of knowledge as a public good is that there is little incentive for private interests to produce knowledge, because of high investment costs and low return benefits, which hurts the public welfare and therefore constitutes a failure of the market. IPRs exist to address this market failure, creating scarcity of use where none may naturally exist.⁴ Individuals, including individual firms, must put up a great deal of capital—both human and financial—in order to produce knowledge. But once that knowledge is created they need a means through which to gain profit, and thus they

³ Stiglitz, Joseph E. "Knowledge as a Global Public Good." *Global Public Goods: International Cooperation in the 21st Century*. By Inge Kaul, Isabelle Grunberg, and Marc A. Stern (New York: Oxford UP, 1999) 309.

⁴ May, Christopher. *The World Intellectual Property Organization: Resurgence and the Development Agenda* (London: Routledge, 2007) 8.

need to put a price on the knowledge they created. The global IP regulation system establishes and maintains this price through the creation of artificial scarcity.⁵ By preventing the public from consuming knowledge as a normal good, IPRs create monopolistic privileges, which checks free-riding on individual investments and therefore allows individuals to make welfare-maximizing choices.⁶ When IPRs are in place, individuals can license and transfer knowledge to extract a benefit. And when IPRs are infringed upon, individuals can demand compensation. These rights are the basis upon which most international trade occurs, as states demand protection for the rights of their innovators when their products cross national borders.

But while intellectual property rights can improve social welfare, the regulation of IPRs can also cause harm when the balance between private rewards and public interest conflict. Issues with overreach in the formation and enforcement of intellectual property laws can prevent people from capitalizing on the benefits of knowledge. In recent years a number of dilemmas have arisen that demonstrate the potential harm of too-strict intellectual property regulations—issues such as the control of genetically modified seeds that could flourish in resource-deprived regions, the cost of life-savings medicines for impoverished populations, and the rights of indigenous peoples to the products of their cultural heritage. Cases such as these call into question the moral legitimacy of denoting knowledge as property. But there is also a question of causing economic harm when the sharing of knowledge interferes with industrial or technological development. In some cases, the processes or initial inputs for innovations are regulated so strictly that technologies cannot progress. For example, when the proliferation of personal computers began to explode late in the last century, Microsoft attempted to leverage its

⁵ May 9.

⁶ Gana, Ruth L. "Has Creativity Died in the Third World - Some Implications of the Internationalization of Intellectual Property." *Denver Journal of International Law and Policy* 24 (1995-1996) 117-118.

intellectual property control of the dominant Windows personal computer operating system to achieve an even greater dominance in software, which many believe has slowed the pace of innovation in the computer industry.⁷ Clearly there is no one right way to regulate intellectual property rights—different individual interests bring about demands for different results.

Much of the global IP regime today is built around the western understanding of intellectual property that is implicit in the description of IPRs above. The majority of the most economically developed countries today are in what is commonly known as the 'west', centered in the advanced industrialized economies of western Europe and North America. Key to the regulation of IPRs in developed states, the western understanding of intellectual property is based in a worldview that springs from some of the most famous Enlightenment thinkers of the seventeenth and eighteenth centuries. The work of English philosopher John Locke in particular is central to the modern conception of intellectual property in developed states. His labor theory of appropriation holds that God gave to man the products of the earth for their use, so that property comes about by exerting labor upon these products, meaning the fruits of one's labor are one's own.⁸ Putting work into an endeavor gives an individual the right to property, and this is not limited to material objects. The western worldview is founded on the notion that investing capital—whether it be financial or human—entitles a the investor to the product of the work. There is no regard for the social consequences of the lack of limitations on what can be considered property. In addition, Immanuel Kant's philosophies on individual autonomy and freedom impact the modern western view of IPRs. Kant believed that legal ownership—and more broadly the concept of possession—is integral to human freedom, because it allows

⁷ Stiglitz 312.

⁸ Olivecrona, Karl. "Locke's Theory of Appropriation." *The Philosophical Quarterly* 24.96 (1974): 221-223.

humans to control that which is external to the self.⁹ His writings express a clear prioritization of personal autonomy over the collective interest, so that the benefit of the individual is considered more important than the benefit of society. The western worldview suggests that forms of exclusive privileges, such as IPRs, are a necessary part of a good society, because they reflect values such as liberty, property, and private enterprise—all values that support capitalism.¹⁰ The belief, as described by legal scholar Mark Lemley, is that "If some intellectual property is desirable because it encourages innovation... more is better," because creators will only have sufficient incentive to innovate if they are legally entitled to the full social value of their creations.¹¹

This worldview is not traditionally shared by most developing countries, which generally place less emphasis on notions of capitalism and more on non-universal cultural interests. Countries with large indigenous societies and a majority-rural population have much different interests than those whose populations are more homogenous and connected. As such, the forms of innovation that dominate in developing countries do not fit as well into the western understanding of intellectual property.¹² Unlike the individualistic basis of modern western societies, traditional societal interaction in many developing states is communal—the benefit of the individual is only important insofar as it benefits his community. However, modern understanding of IPRs is focused on the individual, with the privileges of rights holders held in higher regard than the privileges of the communities in which the innovation occurred. Advocates of developing states' interests hold that this focus on individualism "devalues and trivializes conceptions of communal property that are deeply embedded in the institutions and

⁹ Merges 17.

¹⁰ Gana 113.

¹¹ Lemley, Mark A. "Property, Intellectual Property, and Free Riding." *Texas Law Review* 83 (2004-2005): 1031.

¹² Gana 128.

norms of indigenous societies."¹³ For those familiar with the western system, the conception of property ownership in many developing countries is somewhat difficult to understand, because indigenous societies are not generally based around individuals, but around a clan, tribe, or other extended unit. When the western notions of individualism and rights to property are not present, the role of intellectual property rights in society becomes much different. Ruth Okediji, then Ghana, a leading authority on intellectual property law, underscores the fundamental differences between the goals of developed and developing states,

Whereas the stated underlying purpose of Anglo-American intellectual property law is to encourage creative endeavor, protection of creative endeavor in Third World societies is purposely used to achieve a myriad of social, political, and economic goals¹⁴

If IPRs are not established with the aim of individual economic prosperity, as in western nations, they are meant to achieve other aims that are integral to a community, such as preservation of cultural purity or public order. While not all developing countries focus their IP needs on indigenous populations or extended family units, the important point is that the western view of IPRs is not the only valid understanding of how property rights can bring about achievement.

Western and nonwestern understandings of intellectual property have quite distinctive origins—and vastly different political concerns—that would lead one to believe them to be irreconcilable. However, "both aim, ultimately, to enhance public welfare by protecting the fruits of creative effort."¹⁵ The world is able to have a global IP regime because there is a universal recognition of the power of knowledge in bringing about social progress.

¹³ Riley, Angela R. "Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities." *Cardozo Arts and Entertainment Law Journal* 18.1 (2000): 178.

¹⁴ Ghana 133.

¹⁵ Ghana 136.

Again, legal scholar Robert Merges sums up the dilemma that governments face in forming intellectual property legislation, observing,

Society offers above-market rewards to creators of certain works that would not be created, or not created as soon or as well, in the absence of reward. The gains from this scheme, in the form of new works created, are weighed against social losses, typically in the form of the consumer welfare lost when embodiments of these works are sold at prices above the marginal cost of their production. IP policy... is a matter weighting these things out, of striking the right balance.¹⁶

It is this balance that the subject of this paper, WIPO, pursues through its authority over the global intellectual property regime. Finding the proper balance between private rewards for innovation and the public interest presents the greatest opportunity and the greatest challenge to this institution.

The Origins of WIPO

Intellectual property rights were a global issue long before the United Nations came into existence. Beginning in the 19th century, nation-states developed a system of protecting their intellectual property even as it crossed over national borders. However, before the last quarter of the 19th century when the term 'intellectual property' first appeared, IPRs were entirely a national issue.¹⁷ It was at this point that growth in non-commodity international trade—especially between the great powers of the time—began to advance concern over the protection of the intellectual property of each state and its citizens. As the industrial revolution accelerated the production of intellectual goods, transportation and communication had also improved so that cross-border markets were quickly becoming a primary source of income.¹⁸ Two competing

¹⁶ Merges 2.

¹⁷ Yu 2009, 2-3.

¹⁸ Yu 2009, 7.

groups formed, those defending the protection of innovation and those defending free trade.¹⁹

Those advocating defense of innovation through the patent system included, unsurprisingly, those who stood to profit from strict patent law, such as inventors, engineers, heads of large companies, and patent lawyers. Interestingly, those with strong nationalistic tendencies were also fiercely protective of innovation through IP regulation because of growing concern over theft by foreigners. And in contrast to the argument that emerged in subsequent years, the free trade advocates of the 19th century held that intellectual property rights were inconsistent with free trade, because they led to monopoly power over innovation.²⁰ Today on the other hand, free trade advocates argue that intellectual property actually works to break down protectionist policies, allowing states to participate in open, transparent, and competitive international trade.²¹ By the end of the 19th century, growing pressure among the advanced industrialized countries to protect the intellectual property of their citizens resulted in a series of negotiated agreements that laid the foundation of today's WIPO.

The predecessor of WIPO was established with the negotiation of two conventions—the 1883 Paris Convention on the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works. These two agreements are still in play today, and remain the basis of all intellectual property governance. The Paris Convention was created with the intention of established a system through which countries would "recognize and protect the rights of foreign inventors and artists within states' own jurisdiction."²² It centered on the global protection of patents, trademarks, and industrial designs. Consequently, after years of

¹⁹ May 16-17.

²⁰ Machlup, Fritz, and Edith Penrose. "'The Patent Controversy in the Nineteenth Century.'" *The Journal of Economic History* 10.1 (1950): 4-6.

²¹ Weisman, Jonathan. "U.S. to Share Cautionary Tale of Trade Secret Theft With Chinese Official." *New York Times* [New York] 15 Feb. 2012: A10.

²² May 17.

competition, publishers in France, Belgium and Switzerland looked to the Paris Convention as a model and began to press their governments to negotiate an agreement to protect the works of their authors from theft abroad. In 1886, only three years after Paris, the Berne Convention was signed, establishing a doctrine of national treatment among member states so that the works of foreign authors would be subject to the same treatment as the works of foreign authors.²³

In 1893 these two agreements united to establish a joint secretariat, bringing the authority over international governance of patents, copyrights, and trademarks into one institution, known as the *Bureaux Internationaux réunis pour la protection de la propriété intellectuelle* (BIRPI). With this institutionalization of IP governance, the era of international recognition of intellectual property protection began.²⁴ This development is significant because it represents the transition of intellectual property from a strictly national issue to a global one—states recognized that the international protection of their rights-holders was vital to their national interest, which facilitated the advancement of a structure to govern intellectual property. The formation of BIRPI put into law the values that the founding members held in regards to individual ownership of knowledge. And even in an increasingly globalized world, "Law is the principle institution through which a society can assert its values."²⁵ Just the act of creating and enforcing law on IPRs is a signal of the norms and values that the budding IP regime held.

Global intellectual property governance stems from the conventions that made up BIRPI—conventions that were solely created to protect the economic interests of some of the most highly developed states of the 19th century. Accordingly, the very foundation of global

²³ May 17.

²⁴ Drahos, Peter. "States and Intellectual Property: The Past, Present and the Future." *From Berne to Geneva: Recent Developments in International Copyright and Neighbouring Rights*. By David Saunders and Brad Sherman. (Nathan, Qld: Australian Key Centre for Cultural and Media Policy, 1997) 47-70.

²⁵ Bickel, Alexander M. *The Morality of Consent* (New Haven: Yale UP, 1975) 5.

governance of intellectual property, even today, is based in western norms and values.

Fundamentally, the system is based on the western notion that creativity should be rewarded by granting monopolies over the use, possession, and disposition of intellectual property, and that these monopolies are required for creativity and innovation.²⁶ In practice, this meant that BIRPI advanced the notions of non-discrimination, national treatment, and the right of priority, which offered protection rights to the first individual or company to invent or create property, rather than the first to file or reproduce it.²⁷ The continued promotion of these norms fails to take into account any notion of cultural differences in the understanding of what constitutes property and what can be subject to private ownership.²⁸

As discussed earlier, many developing countries—those that were not present, and sometimes did not even exist at the negotiations for Paris and Berne—base their understanding of intellectual property in entirely different values. In the formation of these agreements, the founding states justifiably had their own economic interests in mind. In fact, the Paris and Berne Conventions, and the legislation of intellectual property law in general were meant by which European powers maintained the commercial superiority they shared amongst each other, using their shared values as a basis for agreement.²⁹ There was no consideration of nonwestern understandings of property, which laid the foundation for future divergence within the regime. This conflict, between the developed states that created the intellectual property regime and the developing states that see some policies of the regime as anti-development and counter to their

²⁶ Gana 116.

²⁷ May 18.

²⁸ Gana 115-116.

²⁹ Okediji, Ruth L. "The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System." *Singapore Journal of International and Comparative Law* 7 (2003): 324.

economic growth, is the basis of the current debate over the fundamental role of WIPO in the global IP regime.

There is one important implication of WIPO's founding agreements that has been the basis of the organization's limitations throughout the years. Both the Paris and Berne Conventions were based on the notion that "states were free to pass legislation of their own design, but were obligated to extend their legislative protection to foreigners of members states."³⁰ In essence, neither agreement was set up to infringe upon national sovereignty over IP legislation. States could still make their own rules, as strong or weak as they preferred, without the interference of the international community provided that those rules were applied to foreigners as they were applied to national citizens. From its start, BIRPI did not create substantive law, nor did it impose laws on members states, instead these agreements indicated a consensus among member states as to the means by which intellectual property should be protected, meant to legitimate domestic laws already in place.³¹ Without the ability to influence domestic legislation, BIRPI could not establish anything close to a comprehensive international IP agreement, nor an effective enforcement mechanism for the agreements that were made—issues that have plagued it in recent decades.

Over the next half century, BIRPI made little change to its initial agreements outside of simple revisions, but it did see significant change through a large influx of members in the post-WWII period. After the war, as the pursuit of empire slowly died from the global landscape, a number of newly independent and developing states began to come into their own and make attempts to ingratiate themselves into the expanding system of global democratic structures.

³⁰ May 18.

³¹ Gana 137.

Many less developed countries joined BIRPI in an attempt to use the international body for their emerging national interests, and these new members expected those interests to be recognized by the established members. As such, in the 1950s and 60s BIRPI began to include national delegations that were critical of the means by which the institution was using IPRs to further the goals and values of the highly developed states.³² A rift formed between these two factions, as developing states requested special and preferential treatment that "took account of their colonial past, backward economic and technological conditions, and desperate need for access to textbooks, scientific books, and modern technologies."³³ Developing states hoped that their needs in terms of economic development and closure of the technology gap could be addressed through the IP regime. Developed states, however, were unwilling to compromise the sanctity of property rights, which they believed would actually be helpful in any economy that hoped to develop and achieve economic growth. The stage was thus set for division in the global IP regime.

Formation of WIPO

The establishment of WIPO as it exists today began in 1967 when members of BIRPI signed the Convention Establishing the World Intellectual Property Organization, which went into force in 1970.³⁴ In the years leading up to this transition, a number of organizations had begun to encroach on BIRPI's authority in intellectual property governance. Institutions such as the International Labor Organization and the United Nations Economic and Social Council debated the possibility of taking up a formal role in IP governance, and as a result BIRPI began

³² May 22.

³³ Yu 2009, 10.

³⁴ May 23.

moves to consolidate its power. Before 1967, BIRPI was officially a part of the Swiss government, with its headquarters in Berne. But when faced with this institutional competition, in 1967 BIRPI divorced itself from the Swiss government, moved its headquarters to Geneva, and consequently gained independence and responsibility over its budget, programs, and activities. This move gave the organization the institutional structure it needed to become a specialized agency of the UN in 1974.³⁵

As a specialized agency, WIPO is formally an independent organization with its own membership. WIPO, in fact, has even greater independence than many specialized agencies because its funding is primarily non-voluntary. The organization is the administrator of the Patent-Cooperation Treaty (PCT), a unified system through which all members of the Paris Convention can file for patent applications. The fees collected from the PCT provide the majority of WIPO's funding, affording it opportunities as well as problems that are relatively unique in the UN.³⁶ In connecting itself to the UN, and thus the established global system of democratic institutions, WIPO was able to define itself as the premier body through which international intellectual property legislation would take place. It was at this point that WIPO was central to the global IP regime, as the primary forum for the debate of IP issues, and as an organization with a vast amount of institutional knowledge from which to draw.

The push to integrate BIRPI into the UN as a specialized agency was largely achieved through the efforts of one man, Arpad Bogsch. Bogsch was born in Budapest, escaping to the United States when Soviet troops pushed out Hungary's democratic government in 1948. He began working for BIRPI in 1963, where he became the Deputy Director and eventually Director

³⁵ Musungu, Sisule F., and Graham Dutfield. *Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organisation (WIPO)*. Geneva: Quaker United Nations Office, 2003. 4.

³⁶ May 25.

General.³⁷ Throughout his career Bogsch believed in the idea of the universalization of intellectual property law, making regulations completely uniform across the globe, and from his earliest years at BIRPI he worked toward this goal. He believed that universalization could best be achieved through UN specialized agency status, seeing the new WIPO as a universal organization backed by the authority of UN. With Bogsch's efforts, as he remained Director General of WIPO from 1973 to 1997, the organization worked from a strategy of universalization of intellectual property with the support of the highly developed states. The majority group of developing states, however, opposed this strategy. At that moment, the less developed states were in the midst of an attempt to establish a New International Economic Order (NIEO) within the UN. This NIEO aimed to revise the international economic system as a means of replacing the Bretton Woods system with a structure that favored their terms of trade.³⁸ The developing states advocating for this new system saw universalization as a continuation of flawed western policy that would not advance their goal of economic development. Thus, the idea of universalization was never formally adopted by WIPO, although Bogsch continued to advocate for it from his senior position. WIPO was formed from its very start by this idea of universalization, but the inability of the organization to resolve the differences between various state interests is a personification of the issues WIPO would face in the coming years.

Joining the UN began to change the goals of the organization, both because of its new responsibility in promoting economic development and because of its membership and funding structure. Although WIPO retained formal independence, the organization still had to work

³⁷ Mossinghoff, Gerald J., and Ralph Oman. "World Intellectual Property Organization: A United Nations Success Story." *World Affairs* 160.2 (1997): 108.

³⁸ UN General Assembly, 6th Special Session. "Resolution 3201 (1974) Declaration on the Establishment of a New International Economic Order " (A/RES/S-6/3201). 1 May 1974.

within the UN mission to promote economic development and international law. Along these lines, WIPO was compelled to work more with developing countries,

promoting their industrialization, their commerce and their cultural, scientific and technological development through the modernization of their industrial property and copyright systems and in meeting some of their needs in scientific documentation and the transfer of technology and technical know-how.³⁹

Through its inclusion in the UN, WIPO became the go-to institution for developing countries to receive technical assistance. At the same time, developing countries could use this relationship and the majority membership they held in WIPO to pressure the organization to take up development issues. In most bodies within the UN, developed states can push back against this pressure from the developing bloc by providing the largest voluntary funding sources, and therefore maintaining control of the budget. But as discussed earlier, most of WIPO's funding comes from fees from the private sector, so that the five largest state contributors account for only 3% of the organization's total funding.⁴⁰ Without the ability to project their influence over global intellectual property legislation, and with their economic interests at stake, developed countries began to look for a way to shift governance authority back in their favor.

The persistent discontent of the highly developed states, including most of western Europe and the United States, with WIPO's ability to address issues pertinent to their interests was based in a number of weaknesses in WIPO's governance structure. First, there was the issue of enforcement. While WIPO had established a number of long-standing multilateral treaties addressing the recognition and protection of IP issues, these agreements were generally considered toothless in the face of piracy and the recurrent contempt for intellectual property

³⁹ World Intellectual Property Organization. *Report of the World Intellectual Property Organization to the Economic and Social Council of the United Nations at its Fifty-Ninth Session* (Geneva: WIPO, 1975) 13.

⁴⁰ May 25.

protection outside the most developed states, and even sometimes among them.⁴¹ Intellectual property was still defined, legislated, and regulated through domestic law, and WIPO had no authority to interfere in this regard—a limitation that had plagued the organization since its founding almost a century earlier.

In addition to the problem with enforcement, WIPO had difficulty incentivizing global IP protection. The organization was the center of the IP regime, and with that authority had a great amount of power to wield, but did not make use of that power. WIPO needed to engage intellectual property closer to the hearts of its members through the use of issue linkage. Establishing a connection between IPRs and issues that were high-priority for most states would have brought negotiators to the table with something to lose, facilitating the crafting of truly effective results. The most obvious of these missed opportunities for issue linkage was WIPO's inability to link IP as a development issue with IP as a trade issue. In order to support WIPO's development goals, the U.S. and European Union needed to see IPRs integrated in a larger global economic context, but WIPO could not promote the view of intellectual property as a trade issue lest it lose governance authority to another institution, such as the then General Agreement on Tariffs and Trade (GATT).⁴² WIPO was in somewhat of an impasse situation—the organization could not be effective without establishing a link between IPRs and higher-priority issues, but not could promote these other issues in the IP regime for fear of diluting their regime leadership.

Perhaps worse than apathetic members, WIPO also had an issue with a measure of belligerence from its less developed members. In the 1970s and 80s, many members of the developing bloc, particularly countries from Latin America and India, fought for a dilution of

⁴¹ May 2-3.

⁴² Yu, Peter K. "Currents and Crosscurrents in the International Intellectual Property Regime." *Loyola of Los Angeles Law Review* 38.1 (2004): 356-62.

global IP law, arguing that WIPO provisions hindered their capability to design policies to their own national needs.⁴³ These states had begun to view IPRs as merely the legitimization of a preferential system for foreign rights holders, harming their own economic development by preserving import monopolies and hindering indigenous technologies.⁴⁴ These states became a constant obstacle for the developed countries, who were attempting to strengthen the international IP law system to better meet their economic needs. Again, the chasm between the goals of the developed and developing bloc were significant enough to seriously obstruct any substantive efforts in WIPO's negotiating framework.

But while WIPO, even in its early years, had the serious weaknesses described above, it also had one great advantage over any other institution that attempted to surpass it in the global IP regime, its vast institutional knowledge. Although only consolidated as a UN organization in 1970, WIPO can trace its direct origins to the very start of the IP regime—the Paris and Berne Conventions. The decades of work in international IP law gave WIPO a considerable knowledge base and institutional expertise. And so, while the highly developed states saw WIPO as insufficient in their quest for universal, comprehensive IP protection, they did see the enormous value of the organization as a custodian of knowledge and expertise. As will be discussed, the developed states believed that they could use this unique position of WIPO to shape the views of the developing states, who would require WIPO's institutional knowledge to inform their own domestic policies.

⁴³ Sell, Susan K. *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* (Albany: State University of New York, 1998) 107-110.

⁴⁴ Sell 1998, 110.

Forum Shift

Central to the interests of the highly developed states was the fundamental redefinition of intellectual property rights as an issue of international trade. The global trade regime at the time—the GATT—had a system in place to apply enforcement mechanisms when agreements were violated, whereas in WIPO not only had a number of countries refused to sign the Paris and Berne agreements, but there was also no authority to demand recompense when agreements were violated.⁴⁵ As a result, developed countries began a process of forum shifting during the Uruguay Round of trade negotiations, attempting to broaden the scope of intellectual property governance by moving past the technical and specialized legal nature of WIPO and redefining the issue in the terms of the global trade regime.⁴⁶

Rather than a removal of authority from WIPO, these efforts were aimed at a proliferation of the global IP regime. The developed states recognized WIPO's centrality in the regime as a foundational authority with an array of experiences, and thus were not pressing for the complete elimination of WIPO or the UN in general from IP governance. Rather, the regime shift was aimed at broadening the policy spaces through which relevant discussions could take place and new rules could be adopted. This would open up the regime establishment to a wider array of issues and interests to consider when defining its rules, norms, and decision-making procedures.⁴⁷ Developed states, and the private interests within them, could no longer accept the status quo of frequent violations and weak enforcement, and so they broadened the policy space through which IP governance would take place.

⁴⁵ May 33-34.

⁴⁶ Helfer, Laurence R. "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking." *Yale Journal of International Law* 29 (2004): 39.

⁴⁷ Helfer 2004, 39.

Out of this forum shift came the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as one of the founding documents of the newly established WTO. According to Chris May, a prominent IP scholar, TRIPS is the first agreement that sets a minimum standard that must be adopted by national legislatures for the protection of global intellectual property rights, so that "for the first time a multilateral trade treaty has required not merely changes in the manner in which imports and exports are regulated at national borders, but has also required significant undertakings as regards national legislation for non-internationally traded-products."⁴⁸ TRIPS regulations do not stop at national borders as WIPO agreements always had. And signing on to TRIPS became a cost of entry for the global trade regime, thereby establishing the WTO as the center of the intellectual property regime as well. In conjunction with the GATT and General Agreement on Trade in Services (GATS), TRIPS forms the core of the prolific WTO system.⁴⁹

TRIPS has allowed the developed states to take a huge leap toward the goal of universalization of intellectual property law. Based on the western belief that if some intellectual property is desirable then more is better, the developed bloc made a calculated effort to dramatically increase IP governance through TRIPS. Ruth Gana, a leading authority on international IP law, notes that

By *situating* intellectual property at the core of international trade regulation, by *making* intellectual property the subject of international trade rules, and by *premising* membership and participation in the multilateral trade system on the adoption of a global model of intellectual property protection, intellectual property law has, for the first time, been 'internationalized.' This is, intellectual property has adopted a universal mode which all countries must adopt in order to

⁴⁸ May 2.

⁴⁹ Gana 111.

benefit from the re-ordered basis of the international economy [emphasis included].⁵⁰

While contentious, TRIPS has been able to expand the IP governance regime through this universalization of principles and standards, accomplishing an achievement that WIPO had not attained in its quarter century of existence.

Negotiating TRIPS

TRIPS came about through a process of cooperation between private and public interests. By the late 1980s, the developed states—primarily the U.S. with Japan and the E.U.—had begun to press for IPRs to be addressed as a trade issue in reaction to demands from the private sector. With the help of industrial associations in Europe and Japan, a group of American corporations established the Intellectual Property Committee (IPC) in 1986 in order to seek international support for improving IPRs. At that point, corporate influence in intergovernmental negotiations had ascended to a previously unknown high as a result of both the openness of the U.S. system to private influence under President Reagan as well as the changing position of the U.S. in the world economy. Through the mobilization of a transnational coalition and shoring up of consensus among powerful private interests, the IPC was able to draft a framework for what they saw as acceptable standards for protection of their intellectual property.⁵¹ The IPC brought their power to bear against the U.S. government—with matching cooperation with Japan and the E.U.—to put forward their proposal in the Uruguay Round of trade negotiations, providing critical legal support for the negotiating team that heavily advantaged them against the

⁵⁰ Gana 120.

⁵¹ Sell, Susan K. *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge, U.K.: Cambridge University Press, 2003) 96-104.

opposition of the developing states. In essence, twelve American corporations made public law for the entire world.⁵²

Integrating WIPO or its established structure into these trade negotiations was never considered by either the corporate interests or governments of the developed states. The trade negotiators themselves already had an ingrained belief that the network of multilateral treaties WIPO had established had created too much rule diversity.⁵³ There was too great a scope of protection offered in sometimes contradictory manners, but still very little effectiveness. The developed states believed that the IP system needed a complete revolution, rather than another attempt at a quick-fix. The developed states had faced a number of frustrations in this regard. At each WIPO conference, the United States and its partners had proposed agreements that would expand and strengthen IP regulations, but the structure of the organization, with its majority of developing states and the its non-voluntary funding source, was not conducive to the types of agreements that they needed. Agreements they could achieve through the WTO. In this way, TRIPS was a direct political response to what the U.S. saw as an institutional failure of WIPO.

The United States and other developed states saw TRIPS as beneficial for several reasons. First, because TRIPS—and the WTO in general—has different structural mechanisms that advantage the aim of stronger IP governance. The WTO would allow developed countries to avoid the major objections that had hindered progress in WIPO, because it operated on a basis of consensus rather than unanimity. This would smooth the progress of negotiating agreements that aligned with U.S. economic interests, even if there were substantial objections. When the developing bloc did oppose proposals in the context of the trade regime, they could be shunted

⁵² Sell 2003, 96.

⁵³ May 29.

through a manipulation of the complex system of negotiations that advantaged developing states, who had scores of experts and private interests on their side.⁵⁴ In WIPO, developing states had used their significant majority and the fact that the developed states did not control the budget to block the strengthening of IPRs, but in the WTO they did not have those influences.

Another reason developed states preferred the WTO over WIPO was that in this new institution they had the ability to manipulate issue-linkage in a manner that had previously been impossible. Having already established significant leverage in trade negotiations because of their dominance over the global economy, the highly industrialized states were able to link markets and sectors together in all-encompassing omnibus agreements. IPRs were included in the same agreements as agriculture or textile agreements. This let them basically buy off objections by offering concessions on such things as tariffs or obstructions in particular markets that were of higher priority to developing countries than IPRs.⁵⁵ The developed states used the fact that developing states relied on trade negotiations for their basic livelihoods to manipulate the system through issue-linkage, which was more difficult in WIPO because of its singular focus on intellectual property.

Lastly, developed countries viewed the WTO framework as more advantageous than that of WIPO because of its strong enforcement mechanisms. While GATT already had a substantial system of enforcing trade agreements in place, when the Uruguay Round concluded and the WTO was established it emerged with a much more robust dispute settlement mechanism. Whereas under WIPO agreements violations occurred with little chance for recompense, the new Dispute Settlement Body (DSB) gave the developed states a weapon for enforcing the strict IP

⁵⁴ May 33.

⁵⁵ May 32-33.

regulations they had created.⁵⁶ The DSB was imparted with a means through which to conduct international monitoring activities as well as a system that was able to infringe on national sovereignty in order to defend against trade violations.⁵⁷ This system of enforcement was probably the single greatest advantage of using the global trade regime to regulate IPRs in the views of the developed states, because it signaled the importance of IPRs that had been previously lacking.

In contrast, for a number of reasons—some of them quite obvious—developing countries were by and large opposed to the TRIPS agreement. First, in a similar grain to WIPO, TRIPS is a representation of the western understanding of intellectual property, with its emphasis on individual gains. TRIPS requires that all WTO member states grant IPRs in fields that, on moral or cultural grounds, developing countries believe should not be treated as individual property, such as genetic resources, pharmaceuticals, and biodiversity.⁵⁸ TRIPS is a continuation of the western domination of the global IP regime, and it therefore does not take into account differences in cultural conceptions of intellectual property. This point is important because it suggests that no matter how strictly the WTO enforces the provisions entailed in TRIPS, noncompliance will always be a problem, because a large number of states do not recognize the claim to property that individuals in developed states make.

In addition, developing states were opposed to the TRIPS agreement because it takes away their ability to assert their values through domestic law. TRIPS infringes upon the freedom of a state to craft law based on local conditions, as it sets minimum standards of IP protection that legislatures must ensure, in many cases to the detriment of their own citizens.⁵⁹ Because

⁵⁶ Helfer 2004, 21-22.

⁵⁷ Gana 123.

⁵⁸ Helfer, Laurence R. "Regime Shifting in the International System." *Perspectives on Politics* 7.1 (2009): 40.

⁵⁹ Gana 112.

signing on to TRIPS is a cost of entry for the WTO, developing states must choose between their obligations to the international community and their obligations to their own people.

Now that it has been established that the TRIPS agreement in its current form goes against the social interests of developing states, the question becomes how it was passed as a founding document of the WTO. The answer is quite simple, actually—developing states were being overwhelmed by the influential pressure of developed state interests. To the developed country negotiators of TRIPS and other agreements from the 1980s, knowledge-based industries were an invaluable economic sector, and their intellectual properties were crucial for international competitiveness.⁶⁰ And so, negotiators for developed states used any means necessary—both the carrot and the stick—to entice developing states to sign on to the TRIPS framework.

In terms of the carrot, not only did the developed states promise to open agricultural and textile markets, but they also brought TRIPS to the table with the suggestion that it would create a new, unified agreement that could bring about greater clarity in the system, thereby making it easier for less developed states to comply and navigate the agreement.⁶¹ The negotiators for the developing states saw through this fairly easily, though, so the developed states began threatening bilateral trade sanctions. A number of countries, including vital trade partners such as India and Brazil that were leaders among the developing bloc faced this considerable threat.⁶² The U.S. was willing to jeopardize the trade relationship with these states because the economic gains from those trade partners were less significant than the gains that could be had from stronger protection of intellectual property. For those developing states, though, souring their

⁶⁰ May 31.

⁶¹ May 29.

⁶² Drahos, Peter. "Developing Countries and International Intellectual Property Standard-Setting." *The Journal of World Intellectual Property* 5.5 (2002): 774.

trade relationship with the United States and the other highly developed countries would have an unacceptably detrimental impact—they did not have the legal expertise nor the financial resources to resist this pressure. Once the U.S. made TRIPS a do-or-die issue, the developing bloc really had no choice but to acquiesce. And so, the developed states were ultimately successful in their aim to shift IPRs to the trade regime with the adoption of the TRIPS agreement, demoting WIPO from the position of sole arbiter of global IP governance.

TRIPS: Limitations and Opportunities

While there are clear advantages for developed, and to some extent developing states in the adoption of the TRIPS as the center of the global IP regime, there are also a number of weaknesses within the agreement. First, as the developing bloc claims, the agreement was written by corporations and industrial associations in the most highly developed states in the world, plainly biasing it toward the goals and values of these states. This is not only an issue of cultural insensitivity, but it also limits the ability of the agreement to affect change in the less developed countries. The western notion of intellectual property upheld by the TRIPS agreement is in no way a reflection of the customary practice in a majority of developing countries, many of whom have no precedence of IP protection at all.⁶³ Some developing states lack even the basic institutions and infrastructure necessary to come into compliance with TRIPS, decreasing their ability to consistently regulate commerce within their borders. Putting into place IP regulations that are meant to apply to developed states cannot be effective in states that have no knowledge base upon which to build IP legislation. Successful universalization of IPRs is not realistic when

⁶³ May 32.

states start off on such an unequal footing—but this is perhaps an area in which WIPO can assert itself.

While one of the primary arguments in favor of expanded IP regulations is the promotion of innovation, it can be argued that TRIPS takes this notion too far and limits future innovation both in developing and developed states. The TRIPS agreement represents a substantial expansion in the scope of IPRs in the realm of international trade, which, while advantageous for current rights holders, could limit the options available to future industrializers and inventors in terms of the processes they can use to innovate within their fields. TRIPS blocks the routes that innovators can take in the footsteps of their predecessors, as it extends the monopoly privileges of rights holders and requires states to take on a greater role in protecting them, raising the price of information and technology.⁶⁴ Without a more strict definition of what kinds of knowledge can be considered intellectual property, processes and advancements that could potentially be crucial to technological process will be restricted or made too expensive by the TRIPS framework. Again, though, there is an opportunity in this regard for WIPO to respond to this limitation of TRIPS.

Though the limitations of TRIPS are considerable, it is important to remember that its ascendancy to the center of the global IP regime is actually a kind of forum proliferation, which could work to the advantage of all its member states. The shift in IP governance authority from WIPO to TRIPS is not an indication that WIPO has been made superfluous, and could actually have the effect of integrating the institution more deeply in the regime's future by clarifying its position. It could be argued that the adoption of TRIPS by the WTO is just another step in direction of globalizing the increasingly complex IP regime. WIPO must strive to maintain its

⁶⁴ May 32.

position in the regime, but a diffusion of governance authority is not necessarily a blow to the institution, and actually has a number of advantages.⁶⁵ Primarily, increasing the policy spaces through which IP governance occurs will allow states to choose the institution that will best serve their needs and interests. Because intellectual property laws have an effect on so many different policy areas, there is a huge range of organizations and regimes that could address IP governance, and with the rise of so many new international fora, even weak states now have the ability to move from one forum to another in accordance with their national interest.⁶⁶ While this does make the regime more complicated, it is also representative of the vast opportunities that regime proliferation generates, as a wider array of policy spaces allows developed countries to choose more favorable forums to achieve their policy goals.

WIPO Post-TRIPS

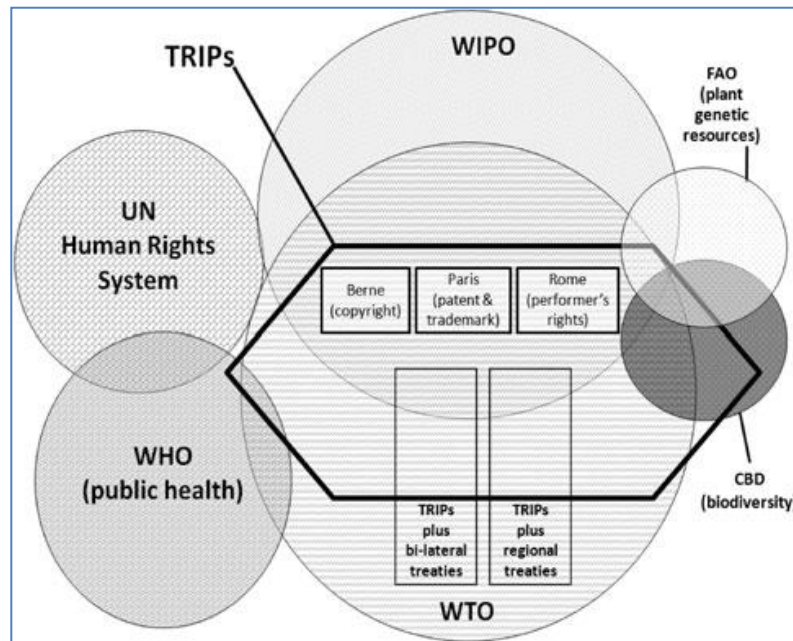
The rise of the WTO required WIPO to reassess its role in the ever expanding global IP regime, whose increasingly complex structure is illustrated in Figure 1 below. In light of all the limitations of TRIPS discussed earlier, WIPO saw a number of opportunities to restore its influence in the reshaped regime. In 1996 the two organizations crafted an agreement "to establish a mutually supportive relationship between them, and with a view to establishing appropriate arrangements for cooperation."⁶⁷ The Agreement between WIPO and the WTO established a formal division of labor between the two institutions, so that, as Figure 1 illustrates, they could act in conjunction as the main players in the global IP regime. The WTO was distinguished as the forum for political and economic negotiations, while WIPO was tasked to

⁶⁵ May 56.

⁶⁶ Yu 2009, 4.

⁶⁷ World Intellectual Property Organization. *Agreement Between the World Intellectual Property Organization and the World Trade Organization*. Geneva: WIPO, 1995.

Figure 1: The international intellectual property system (Helfer 2009, 40)



act as a technical agency, a source of knowledge, and a resource for developing countries who wished to join the regime and become TRIPS-compliant. In terms of treaties, the WTO is generally responsible for crafting the broad-spectrum treaties that establish international protection standards, while WIPO concentrates to a greater extent on the more specialized treaties that facilitate the regulation of specific intellectual properties and establish classification systems.⁶⁸ Despite the shift in regime authority after the adoption of TRIPS in 1995, it would be incorrect to assume that WIPO has been marginalized and now takes a backseat to the WTO. Instead, there has merely been a shift in the manner in which WIPO operates within the IP governance structure, becoming a much more focused agency by consigning enforcement responsibilities to the WTO and concentrating more on its newer functions.

Today, WIPO has two main functions in the global IP regime, working toward the purposes of technical assistance and socialization of developing states. Most observably, WIPO acts as a technical expert on intellectual property rights, having over a century of institutional

⁶⁸ May 48-51.

experience in the field. WIPO provides support and assistance primarily to developing countries in order to help them meet international treaty obligations in managing and protecting IPRs, thus facilitating their TRIPS compliance. In this role, WIPO engages in a number of activities, ranging from offering legislative guidance for developing states to conducting education and training programs.⁶⁹ In states that have little or no experience with IPRs or national legislation on which to build, this access to model and existing legal instruments is invaluable. As compliance with TRIPS has become a cost of entry for the WTO, the demand for WIPO assistance in drafting, introducing, and amending national legislation to fulfill compliance requirements has greatly increased. For this reason, WIPO has introduced a number of programs that assist developing countries in crafting modern legislation and regulation to promote economic development. This gives WIPO much better access to these developing states, an advantage that will be made clearer in the next section, and also increases the activity and overall worth of the institution in the regime. But still, any expertise WIPO can bring to bear according the 1996 agreement must be put to bringing developing countries toward TRIPS-compliant legislation, thus continuing to promote western IP norms.

Through this influence on the intellectual property laws of developing countries, WIPO actually acts as an agent of socialization for the western view of intellectual property. WIPO's access to developing countries and their policymakers has become key in the globalization and universalization of IPRs. Through training and technical assistance efforts, WIPO can influence local policy to bring developing states into alignment with the interests of the global IP regime. In some cases, in order to become members of the WTO countries must adopt laws toward

⁶⁹ World Intellectual Property Organization. *Introduction to Intellectual Property: Theory and Practice* (London: Kluwer Law International, 1997) 30-35.

which some elements of the population or the government itself may be hostile. But such laws cannot be effective, because the lack of popular or government support decreases enforcement efforts, and therefore negates the legislation entirely. Thus, it is necessary that national laws have some kind of socially imbedded precept so that TRIPS-compliance laws and the prior legal culture do not conflict. In this situation, WIPO's ability to socialize policymakers toward the norms and values of the global IP regime is critical—the training and education activities can turn domestic policymakers into advocates for the new IPR protection legislation, helping to overcome local objections.⁷⁰ In the post-TRIPS IP regime, WIPO acts as a bridge between the developing and developed states, promoting the globalized norms of the TRIPS agreement, but still working toward development goals in the least developed states. With WIPO acting as a technical assistant and socialization agent, there is a greater alignment between developing countries and private interests, which makes the organization much more effective than in its earlier years when it faced constant opposition from one or both of these groups.

While the establishment of TRIPS was seemingly a demotion of WIPO from the center of the IP regime to the periphery, this division of IP governance has actually been advantageous for WIPO. Rather than obligating states to come to agreements in annual conventions, states can now approach WIPO at their own pace when they feel it is in their national interest to receive assistance in joining the international system of IP regulation. This has allowed WIPO to be more effective in brokering negotiations that can lead to broader treaties. And so, while the WTO does the heavy lifting in forming consensus between all its members, WIPO can act as an agenda setter by initiating agreements among sub-groups that can expand over time.⁷¹ By dividing labor

⁷⁰ May 62-63.

⁷¹ Abbott, Frederick. "Distributed Governance at the WTO-WIPO: An Evolving Model for Open-architecture Integrated Governance." *Journal of International Economic Law* 3.1 (2000): 69.

between WIPO and the WTO through a clear delineation of responsibilities, each institution has cemented its place in the IP regime and created a symbiotic relationship between them. The current framework takes advantage of the strengths of each organization, enhancing the range of subject matter interests and the administrative capacity of the regime as a whole.⁷²

The Development Agenda and Its Effects

In recent years, members of WIPO that represent the developing bloc of states have begun to push back against the socialization role that the organization has adopted, continuing to express their opposition to the definition of intellectual property as a trade issue. In 2004, a number of developing countries, led by Brazil and Argentina, joined a group of international non-governmental organizations in creating and advocating for a policy agenda for WIPO that was more explicitly development-oriented.⁷³ The result of this pressure was the adoption of the 2007 Development Agenda, which established a set of forty-five recommendations for WIPO regarding the link between intellectual property and development, and in addition created a permanent Committee on Development and Intellectual Property to help reorient the organization back to the work of development-related issues.⁷⁴ With a greater focus on bottom-up approaches, the Development Agenda has encouraged WIPO to focus on the goals of economic development and closing the technology gap. The aim of this agenda is to attempt to strike a balance between the role of WIPO as a technical agency, promoting the policies and values of the WTO, and as a representative of its members in the developing world. The majority of WIPO activities still center on technical assistance and the maintenance of the current

⁷² Abbott 69.

⁷³ May 4.

⁷⁴ De Beer, Jeremy. "Defining WIPO's Development Agenda." *Implementing WIPO's Development Agenda*. By Jeremy De Beer (Ottawa: Wilfrid Laurier UP, 2009) 1.

intellectual property regime, but the Development Agenda represents a least an attempt at a paradigm shift for intellectual property policies in the organization.

But the Development Agenda can actually be considered to be a part of a broader response to the problems with the IP regime that have emerged since the adoption of TRIPS. In fact, IP lawmaking in the WTO and TRIPS framework has somewhat stalled in the past few years, for a number of political reasons.⁷⁵ The frustrations of developing states because of their inability to negotiate their interests in the WTO, along with an increase in tension between all states caused by the global financial crisis, have had serious impacts on the functionality of the TRIPS system.⁷⁶ The deadlock within the WTO has opened the door for WIPO to reemerge as a political influencer. The fact that a number of the more powerful developing states, such as Brazil, India, and China, which have historically led the developing bloc in WIPO, are reaching a point at which they have begun to support somewhat stronger IPRs is also significant.⁷⁷ With bloc leaders more willing to come to the table with favorable outlooks toward the interests of the developed states, achieving broad agreements within the WIPO framework is going to be much easier than in previous years, and perhaps easier even than in the stalled WTO. Clearly the post-TRIPS era represents a dynamic period in the development IPRs, and one in which the relationship between the WTO and WIPO will continue to evolve and shape the future of the global IP regime.

⁷⁵ Dinwoodie, Graeme B. and Rochelle Dreyfuss. "Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO and Beyond." Oxford Legal Studies Research Paper No. 50/2009 (2009), 1.

⁷⁶ Yu 2009, 1.

⁷⁷ Yu 2009, 11.

Conclusion

The intellectual property system in place today was created as a result of institutional challenges and political bargaining. It began merely as an effort to establish minimum standards by which states could protect the rights of their citizens outside their own national borders, resulting in the Paris and Berne Conventions of the late nineteenth century. In time, these standards went through revisions and expansions, gradually strengthening and adapting to the needs of an ever more technologically advanced world and an increasingly diverse body of membership. Within these initial frameworks, however, states still maintained independence over their national regulation of intellectual property, using the autonomy and policy space afforded by BIRPI to advance their own intellectual property laws and policies. Even after the escalation of BIRPI to the UN as WIPO, international coordination of intellectual property remained limited to basic standard-setting. The arrival of TRIPS and the WTO in 1995 fundamentally changed the global IP system, for the first time asking states to sacrifice sovereignty for economic growth by mandating the adoption of strong protection regulations and acceptance of a legally binding enforcement mechanism, and marrying intellectual property to the global trade regime. In the wake of this shift, WIPO had to rethink its role in the international system of IP governance. It was no longer the center of the regime, requiring the institution to adapt and rediscover its origins. Without the demands of high-level political negotiations, WIPO had been able to bolster its position and make itself an indispensable institution through its technical expertise and socialization capabilities.

The purpose of this paper was to approach the topic of intellectual property from a governance perspective, rather than the traditional legal analysis. But there are a number of governance-related aspects of IPRs touched on in this work that still merit study. Among these

are the social and economic implications of the 2007 Development Agenda, the role of non-state actors and the epistemic community in the international regulation of intellectual property rights, and the wide range of peripheral institutions that impact IP governance outside of WIPO and TRIPS. This paper was unable to perform an in-depth analysis on these subjects, and therefore further study is required to complete a full picture of the entire global system of intellectual property regulation.

Throughout its history, WIPO has been torn in two different directions. To the developed world, WIPO has the responsibility of monitoring and assisting in the protection of individual rights to intellectual property, ensuring that rights are upheld and innovation is supported. To the developing world, on the other hand, WIPO is the primary means through which to promote the agenda of economic development through intellectual property by closing the technology gap and increasing access to vital resources, such as life-saving medicines and biotechnologies. Even as new organizations and agreements come into play, WIPO still maintains its relevance in the intellectual property regime by striking a delicate balance between these two worldviews. As the intellectual property system heads into previously uncharted territory in technology and international governance, both developing and developed states will have to learn the hard way how to work together, cooperating and responding to the new challenges ahead.

Bibliography

- Abbott, Frederick. "Distributed Governance at the WTO-WIPO: An Evolving Model for Open-architecture Integrated Governance." *Journal of International Economic Law* 3.1 (2000): 63-81.
- Bickel, Alexander M. *The Morality of Consent*. New Haven: Yale University Press, 1975.
- De Beer, Jeremy. "Defining WIPO's Development Agenda." *Implementing WIPO's Development Agenda*. By Jeremy De Beer. Ottawa: Wilfrid Laurier University Press, 2009. 1-23.
- Dinwoodie, Graeme B. and Rochelle Dreyfuss. "Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO and Beyond." Oxford Legal Studies Research Paper No. 50/2009 (2009).
- Drahos, Peter. "Developing Countries and International Intellectual Property Standard-Setting." *The Journal of World Intellectual Property* 5.5 (2002): 765-89.
- Drahos, Peter. "States and Intellectual Property: The Past, Present and the Future." *From Berne to Geneva: Recent Developments in International Copyright and Neighbouring Rights*. By David Saunders and Brad Sherman. Nathan, Qld.: Australian Key Centre for Cultural and Media Policy, 1997. 47-70.
- Gana, Ruth L. "Has Creativity Died in the Third World - Some Implications of the Internationalization of Intellectual Property." *Denver Journal of International Law and Policy* 24 (1995-1996): 109-44.
- Helfer, Laurence R. "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking." *Yale Journal of International Law* 29 (2004): 2-55.
- Helfer, Laurence R. "Regime Shifting in the International System." *Perspectives on Politics* 7.1 (2009): 39-44.
- Lemley, Mark A. "Property, Intellectual Property, and Free Riding." *Texas Law Review* 83 (2004-2005): 1031-076.
- Machlup, Fritz, and Edith Penrose. "'The Patent Controversy in the Nineteenth Century.'" *The Journal of Economic History* 10.1 (1950): 1-29.
- May, Christopher. *The World Intellectual Property Organization: Resurgence and the Development Agenda*. London: Routledge, 2007.
- Merges, Robert P. *Justifying Intellectual Property*. Cambridge: Harvard University Press, 2011.

- Mossinghoff, Gerald J., and Ralph Oman. "World Intellectual Property Organization: A United Nations Success Story." *World Affairs* 160.2 (1997): 104-08.
- Musungu, Sisule F., and Graham Dutfield. *Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organisation (WIPO)*. Geneva: Quaker United Nations Office, 2003.
- Okediji, Ruth L. "The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System." *Singapore Journal of International and Comparative Law* 7 (2003): 315-85.
- Olivecrona, Karl. "Locke's Theory of Appropriation." *The Philosophical Quarterly* 24.96 (1974): 220-34.
- Riley, Angela R. "Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities." *Cardozo Arts and Entertainment Law Journal* 18.1 (2000): 175-226.
- Sell, Susan K. *Power and Ideas: North-South Politics of Intellectual Property and Antitrust*. Albany: State University of New York, 1998.
- Sell, Susan K. *Private Power, Public Law: The Globalization of Intellectual Property Rights*. Cambridge, U.K.: Cambridge University Press, 2003.
- Stiglitz, Joseph E. "Knowledge as a Global Public Good." *Global Public Goods: International Cooperation in the 21st Century*. By Inge Kaul, Isabelle Grunberg, and Marc A. Stern. New York: Oxford UP, 1999. 308-25.
- UN General Assembly, 6th Special Session. "Resolution 3201 (1974) Declaration on the Establishment of a New International Economic Order " (A/RES/S-6/3201). 1 May 1974.
- Weisman, Jonathan. "U.S. to Share Cautionary Tale of Trade Secret Theft With Chinese Official." *New York Times* [New York] 15 Feb. 2012: A10.
- World Intellectual Property Organization. *Report of the World Intellectual Property Organization to the Economic and Social Council of the United Nations at its Fifty-Ninth Session*. Geneva: WIPO, 1975.
- World Intellectual Property Organization. *Agreement Between the World Intellectual Property Organization and the World Trade Organization*. Geneva: WIPO, 1995.
- World Intellectual Property Organization. *Introduction to Intellectual Property: Theory and Practice*. London: Kluwer Law International, 1997.
- Yu, Peter K. "Currents and Crosscurrents in the International Intellectual Property Regime." *Loyola of Los Angeles Law Review* 38.1 (2004): 324-444.

Yu, Peter K. "The Global Intellectual Property Order and Its Undetermined Future." *The WIPO Journal* 1 (2009): 1-15.