

TRIPS: The Polarized Debate – Does the World Need Internationally Enforceable Intellectual Property Rights?

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Introduction

Intellectual property rights (IPRs) traditionally have been a local affair.¹ Based on national concerns, governments decided which IPRs best promoted the creation and dissemination of various types of intellectual property. Those national concerns could change. In the early to mid 19th Century, for example, the United States (U.S.) offered copyright protection only to citizens and residents.² It refused to protect the IPRs of foreign (particularly British) authors because it was seeking to promote its domestic publishing industry.³ However, today the U.S. demands strong international IP protection for all of its intellectual property, the very type of protection it refused to grant to foreign authors in the early 19th Century.

Many critics, particularly those in developing countries, view this as another example of U.S. imperialism and a double standard: demanding something that the U.S. would not grant when it was a new nation. This is flawed thinking, however, because the world is fundamentally different today. The economy was not global 200 years ago. The Internet, which provides inexpensive, instantaneous, worldwide distribution did not exist. As the Internet has blurred the boundaries of national 'borders,' purely domestic

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¹ See Peter Yu, *World Trade, Intellectual Property and the Global Elites: An Introduction*, <http://www.peteryu.com/globalelites.pdf> (2002).

² Steve Lohr, *The Intellectual Property Debate Takes a Page from 19th-Century America*, New York Times, 14 October 2002, at p. C4: 'The works of English authors were copied with abandon and sold cheap to an American public hungry for books. This so irritated Mr. (Charles) Dickens...that he toured the United States in 1842, urging the adoption of international copyright protection as being in the long term interest of American authors and publishers.'

³ Id., at p. C4.

protection has proven inadequate.⁴ The need to replace local protection with international protection paralleled the growth of world trade and the increase in what types of IPRs many developed countries protect.⁵

The value of IPRs increased exponentially when developed countries expanded copyright protection to encompass computer and genetic code, among others, and to protect biotechnology and pharmaceuticals businesses.⁶ As intellectual property exports became a new 'hot' commodity, developed countries, which held the most mature and hence valuable IPRs, realized that they needed to provide 'improved extra-territorial protection,'⁷ and to do so, they had to bring IPRs under the world trade umbrella. International intellectual property protection was no longer seen as a barrier to world trade,⁸ but rather as essential to its growth.⁹ As IPRs moved to the global trade table, the stage was set for the battle between those who argued for more IP protection and those who claimed that the public interest was best served by less protection – or as they saw it, free competition. That battle culminated in a groundbreaking international *trade* agreement for a set of minimum standards for IP protection.

⁴ *Integrating Intellectual Property Rights and Development Policy*, Report of the Commission on Intellectual Property Rights, 2002, at p. 2, [hereinafter IP Commission Report], <http://www.iprcommission.org> (the following items have been added as IPRs: living things and materials found in nature; biotechnology and information technology; software, business methods and new sui generis regimes for semiconductors and databases; a focus on the relationship between IP protection and traditional knowledge, folklore and genetic resources; and new exclusive rights, and extensions to copyright duration.) The British government in May 2001 established this reporting body that commissioned this report, the Commission on Intellectual Property Rights. Its members had a diversity of national origin, background and perspectives. The group commissioned 17 working papers, held 8 workshops, and a large conference in London on 21-22 February 2002.

⁵ A. David Demiray, *Intellectual Property and the External Power of the European Community: The New Extension*, 16 Mich. J. Int'l L. 187, at pp. 200 – 202: 'The growing interdependence of national economies in the increasing globalization and regionalization of markets has revealed insufficiencies in the present regulatory framework.'

⁶ Michael P. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, 1998, at pp. 2-3. U.S. exports as measured by royalties and licensing fees amounted to \$27 billion in 1995. A National Science Foundation study conducted in 1996 found that between 1990 and 1994 technology products accounted for 17 to 19 percent of all U.S. imports and exports with exports far exceeding imports; IP Commission Report, supra note 4, at p. 99. The value of copyright-based industries has increased 'at such a rapid rate in the last twenty to thirty years that together they currently contribute more than \$460 billion to US gross domestic product and sold almost \$80 billion in exports in 1999.'

⁷ Demiray, supra note 5, at p. 201.

⁸ Id., at p. 206. 'It is because of their exclusive character that intellectual property rights have traditionally been regarded as barriers to trade.'

⁹ Id., at p. 200. 'While strong intellectual property rights were once believed to create possible trade barriers, today the international exchange of goods is threatened by insufficient or nonexistent intellectual property rights.'

This international agreement – the Trade Related Aspects of International Property Rights (TRIPS) – exists under the aegis of the World Trade Organization. It is arguably the most ‘ambitious intellectual property convention ever attempted.’¹⁰ It is the first time that a majority of nations agreed on an international standard of intellectual property protection combined with strong enforcement measures, and more importantly, it put *all* countries on notice that whole scale piracy will not continue to be ignored.

It is also one of the most criticized international trade agreements. Although much of the TRIPS criticism encompasses both patent and copyright issues, this paper will focus only on that criticism directed at copyright. It will attempt to analyze whether the criticism is justified. It will balance the criticism against the real need for enforceable international copyright protection in this digital age, an age in which information is *the* commodity, an age in which copyright issues loom silently, and left unresolved, threaten to create a digital divide so huge that developing and least developed countries (LDCs) will be left even farther behind.

I. Intellectual Property Rights in the World Trade Organization

The U.S. spearheaded the movement to include intellectual property rights in the 1994 Uruguay Round trade negotiations.¹¹ With some prodding from the U.S., other developed countries with mature intellectual property systems used the Uruguay Round to introduce TRIPS as a World Trade Organization (WTO) agreement. Their goal was to force developing countries to agree to a worldwide consensus on a set of international *minimum* standards of IP protection. The TRIPS agreement, which took effect on 1 January 1995, covers copyrighted literary and artistic works, computer programs, sound recordings, patents, trademarks, geographical indications of origin, trade secrets, industrial design and integrated circuit design. It requires each WTO member to maintain adequate measures for securing and enforcing IPRs and it subjects TRIPS-related controversies to dispute settlement under the WTO Dispute Settlement Understanding.¹² Not surprisingly, developing countries, many of which are havens for efficient IP piracy, generally opposed bringing IPRs under the WTO, preferring to allow the World Intellectual Property Organization (WIPO) to remain the forum for these discussions.¹³ In part to allay these objections, the TRIPS agreement included a transition period of

¹⁰ J.J. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 Vand. J. Transnat'l L. 1996, pp. 363-390, at p. 366.

¹¹ See, Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, Routledge, 2nd ed. 1995, at p. 320.

¹² See Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement], Part V, Art. 64 (1).

¹³ Trebilcock and Howse, *supra* note 11 at 320. Developed countries wanted IPRs brought under the GATT because the WTO dispute resolution mechanisms (the WTO Disputes Settlement Body) were stronger and because under GATT they could engage in retaliatory trade actions if developing countries refused to honor the agreement to provide strong IPR protection. Developing countries preferred WIPO because it lacked a strong enforcement mechanism.

one year for developed countries, six years for developing countries and 11 years for least developed countries.

Bringing IPRs under the aegis of the WTO gave countries with mature IPR systems more power to enforce IP protection because the approximately 144 WTO members generate about 90 percent of the world's trade.¹⁴ With TRIPS in place, those members now are obligated to provide and *enforce* uniform minimum levels of protection for a wide range of IPRs. If a country does not honor its obligations, WTO enforcement strategies such as trade retaliation can be imposed.¹⁵ Having enforcement provisions was a key reason that the United States sought to bring IPRs into the WTO rather than leave them under WIPO control, long seen as having weak enforcement mechanisms.

Today, as a world trade commodity, IPRs generate about as much conflict and controversy as wealth – and they generate great wealth.¹⁶ Much of the wealth and most of the controversies stem from ways that digital technology has opened up market access (and threatens to prevent market access) and in so doing, profits (or losses) for the IPR holders.¹⁷

According to many supporters, TRIPS may be the most significant legal advance for the world trading system since the General Agreement on Tariffs and Trade (GATT) in 1947.¹⁸ It strikes a fine balance between ‘conflicting national perspectives and interests...’¹⁹ Supporters view TRIPS as a positive addition to the world trade scheme because it creates a ‘knowledge diplomacy’²⁰ that institutionalizes trade in

¹⁴ IP Commission Report *supra* note 4 at p. 3.

¹⁵ *Id.* Cases involving disputes over the interpretation of TRIPS and its implementation by national laws may be brought before the WTO Disputes Settlement Body. As of 2002, the dispute procedures were invoked in 24 cases, 23 of them brought by developed countries mainly against developed countries. One case was brought by Brazil; Frederick M. Abbott, *Trips in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 *Berkley J. Int'l L.* 165, 173 (2000). The most significant dispute is the ‘India-Mailbox decision’ where the court seems to read TRIPS literally and excludes non-violation considerations from its decision.

¹⁶ www.sice.oas.org/ftaa/belo/forum/workshops/paper (according to a working paper from the International Intellectual Property Association in 1994, core copyright industries accounted for 3.78% of the U.S. Gross Domestic Product, or \$254.6 billion, and between 1987 and 1994 these same industries grew twice as fast as the rest of the U.S. economy); See Lohr, *supra* note 2, at C4, stating that a World Bank study ‘estimates that American companies would pocket an additional \$19 billion a year in patent licenses and royalties’ if IPRs were honored worldwide; Alan Story, *Study Paper Five, Study on Intellectual Property Rights, The Internet and Copyright*, IP Commission Report *supra* note 4 at 11, ‘According to 1999 International Monetary Fund figures on global trade in royalties and licenses (primarily derived from intellectual property), the US received a total of US\$36.5 billion dollars on its global exports and had a net surplus of more than US\$23 billion.’

¹⁷ J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the Trips Agreement*, 29 *NYU J Int'l L. & Pol.* 11, 14 (Fall 1996 - Winter 1997).

¹⁸ Ryan, *supra* note 6, at p. 1.

¹⁹ Trebilcock and Howse, *supra* note 11, at p. 322.

²⁰ Ryan, *supra* note 6, at p. 1.

creative products, or products of knowledge and expression. An international trade-related copyright protection scheme offers *all* artists and innovators – those in developing as well as developed countries – the incentive to make and market their creative products for the global market. This global marketing is possible because the Internet makes the global market easily accessible. Supporters also contend that TRIPS, an international consensus on what had been regarded as a purely local concern, is an important first step towards other broad international agreements to harmonize other ‘local’ concerns, such as environmental, labor and consumer protection laws.²¹

While TRIPS has strong supporters, it also has generated more intense criticism and controversy than almost any other international trade agreement. Most of the criticism seems to be based either in an inherent distrust of the notion of globalizing something that has always been local,²² a fundamental distrust of the validity of IPRs in general, or commonplace U.S. bashing.²³

II. Intellectual Property: Right or Privilege

The criticism, much of it academic, almost always begins with a discussion of whether nations should ever protect intellectual property.²⁴ It questions whether IPRs are rights or ‘privileges.’²⁵ Some critics suggest that intellectual property creations ‘belong’ to a nation in a way that no other commodity does, and harmonizing protection is anathema to national interests.²⁶ The fundamental mistrust of protecting intellectual property as ‘rights’ is seen clearly in a report from the British Commission on Intellectual Property Rights, one of the most recent and most comprehensive reports on the TRIPS agreement:

‘In particular, there are no circumstances in which the most fundamental human rights should be subordinated to the requirements of IP

²¹ Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 Mich. J. Int'l L. 333, 2000, at p. 340; ‘Finally, strong indications exist that future efforts will be made to use the WTO machinery to address additional policy considerations, such as environmental, labor and consumer protection standards, which also stand in conflict with the unconditional pursuit of barrier free trade.’

²² *Id.*, at pp. 376-379. Globalizing IP is a departure from the traditional notion that IP primarily serves the interests of national cultures, values and politics.

²³ *Id.*, at p. 337. ‘[T]rips IPRs tip the distributional scale decidedly against the developing countries...TRIPS does not reflect universal normative accord, but rests instead on coerced “agreement;”’ Story, *supra* note 16, at p. 4. ‘The biases and interests of developed countries are monopolizing the international copyright agenda; the interests of LDCs have been ignored and, in any event, copyright, a Western concept is not a prerequisite for the production of work in LDCs.’

²⁴ IP Commission, *supra* note 4, at p. 6.

²⁵ *Id.*, at p. 6. ‘[W]e prefer to regard IPRs as instruments of public policy, which confer economic *privileges* on individuals or institutions solely for the purposes of contributing to the public good. The *privilege* is therefore a means to an end, not an end in itself.’

²⁶ *Id.*

protection. IP rights are granted by states for limited times whereas human rights are inalienable and universal...But describing them as “rights” should not be allowed to conceal the very real dilemmas raised by their application in developing countries, where the extra costs they impose may be at the expense of the essential prerequisites of life for poor people.’²⁷

This debate pits ‘fundamental’ human rights against intellectual property rights. It suggests that the right to be paid for one’s labor is not a ‘human right’ if the fruits of that labor are *intellectual* creations. It fails to explain exactly why the sweat of the brow is worth less than the sweat of the body. None of this criticism suggests that people should *work* for no pay, but it does propose that a person should *create* for limited or no pay if what is created imposes costs at the expense of ‘poor people.’ The report does not subject other types of product or the fruits of other types of labor to such a moral cost benefit analysis because doing so would be anathema to the established trade regime. Critics who rely on such an extreme equation (human rights vs. IPRs) stack the deck so far in favor of developing countries at the expense of IP creators that the debate cannot become anything other than exceedingly polarized. These critics pit developed countries as heartless pro-IPR regimes against least developed or developing countries as humane anti-IPR crusaders. And as with all polarized disputes, the truth usually lies ‘right between two angry ideas.’²⁸ In reality, IPRs are neither food for the rich nor are they poison for the poor.

Some of the criticism highlights the disagreements about IP protection even among and within developed countries. These disagreements are always theoretical. Are IPRs a true individually held property right or are they limited monopolies granted by the state? Should the Lockean view that people have a natural right to the fruits of their labor and the fruits of their minds prevail?²⁹ Are IPRs true property rights? If so, they should have the same legitimacy as ‘human rights’ because property rights *are* human rights.³⁰

Most of the TRIPS criticism holds that IPRs are neither fundamental rights, nor even property rights, which would give them legitimacy, rather they are ‘limited’ state granted ‘monopolies’³¹ which subordinates them to other ‘fundamental rights.’³² This rationale obscures the essential fact that all rights protect behavior and property, which society has decided at some point to place outside of the scope of a pure cost benefit analysis. All property rights are a ‘limited’ monopoly of sorts granted by the state. IPRs are no more of a monopoly granted by the state than is home ownership,³³ so why should they be treated as second class rights?

²⁷ Id.

Peter Udell and Gary Geld, *Meditation I Shenandoah*, 1975.

²⁸ Owen Lippert, *One Trip to the Dentist is Enough: Reasons to Strengthen Intellectual Property Rights Through the Free Trade Area of the Americas*, 9 Fordham Intell. Prop. Media & Ent. L. J. 241, 1998, at p. 243.

²⁹ Id., at p. 267.

³⁰ Id.

³¹ IP Commission Report, *supra* note 4, at p. 6.

³² Lippert, *supra* note 29, at p. 256.

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Further, even if copyrights are monopolies, they do not threaten fundamental human rights the same way that other state granted rights do. For example, people need food and oil, but the state grants monopolies to farmers and oil producers in the form of private land ownership. OPEC is not forced to give its oil to the least developed countries just because they cannot afford to buy it. The world *needs* food and fuel, yet we do not advocate nationalization of all food and oil production. The world does not *need* Mickey Mouse, yet in calling for limited IP protection, critics essentially advocate nationalizing IP ownership.

III. Are Intellectual Property Rights Really Non-tariff Barriers?

TRIPS critics also view including IPRs in the GATT as counterintuitive³⁴ because the GATT's focus is to eliminate non-tariff barriers (NTBs) to trade. Since a copyright holder can grant an exclusive license to distribute the copyright, critics contend that IPRs are in effect NTBs³⁵ because no one other than the licensee can sell that copyrighted piece and so 'free' trade is impeded. However, granting an exclusive license deal does not really hinder trade; it just limits the number of places where the product is available. There is no legal obligation on the part of a producer of any product to make it widely available to the buying public. In fact, limiting supply or distribution is an age-old marketing strategy to increase the value of the product. TRIPS critics do not suggest that all distribution deals or exclusive licenses are NTBs. Why only exclusive copyright licenses?

Other critics claim that TRIPS essentially uses the GATT to increase protection available under relevant international bodies such as WIPO. They see increased protection as contrary to free trade, but free trade does not mean that goods are free. Requiring customers to pay for the product they import and requiring governments to enact laws to prevent product theft – regardless of whether that product is a computer chip or a computer program – is not a true NTB; it is simply an axiom of trade. How those goods are distributed – via ship or via Internet download – should not change the analysis.

Technically, downloading unauthorized intellectual property is no different than stealing goods off a dock. Nothing in GATT would suggest that preventing 'stealing' should be considered an NTB. Strong IPR enforcement prevents theft of creative products. Further, nothing in the GATT suggests that a government should protect those who 'steal' imported products off the docks rather than paying for them just because they need or want them. Finally, viewing TRIPS as an NTB in disguise ignores one of the basic tenets of TRIPS, which is to 'ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to

³⁴ Lippert, *supra* note 29, at p.243; J.H. Reichman, *The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 *Fordham Intell. Prop. Media & Ent. L.J.* 1993, pp. 171-266, at p. 174.

³⁵ Chiappetta, *supra* note 21, at pp. 371-371. 'TRIPs...was not added to the WTO agenda to enhance trade, but specifically to limit it. IPR protections for IP creators, regardless of their justifications, run counter to basic free trade in related goods and services.'

legitimate trade.’³⁶ The key word here is ‘legitimate.’ Theft of goods, even IP goods, is not legitimate trade.

Perhaps a less reactionary reading of TRIPS would suggest that asking a country to implement strong IPR enforcement is simply asking that country to enact legislation preventing product theft. It is not an attempt to impose U.S. economic, social and cultural policy preferences on developing countries as many critics contend.³⁷ If we were to extend that analysis (asking a country to pay for the IP product it chooses to import imposes Western culture) to hard goods, asking all countries to pay for the hard goods they import is ‘imposing’ Western style capitalism. Basic trading policies generally have not been associated with attempts to overlay economic, social and cultural policy. Why is a trade agreement enforcing IPRs any different?

IV. Strong IPR Protection Enhances Economic Growth

It is clear why developing countries might favor free access to IPRs in the form of technology transfer as a vehicle for economic growth. It is less clear that free access to all intellectual property would actually deliver that growth. While it is true, as critics contend, that the copyright monopoly granted to the Microsoft Windows® operating system³⁸ could be seen to threaten the technology transfer to developing countries, even Windows® has competitors.³⁹ Linux, for example, is open source software⁴⁰ and is an even more stable OS than Windows®. The Apple® operating system is a viable competitor, and although it too has a monopoly, it is not as expensive as Windows® nor

³⁶ TRIPS Agreement, supra note 12, preface.

³⁷ See generally Peter Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 Am. Univ. L. Rev. 131, 2000, ‘[T]he U.S. drive for stronger protection of IP is more in the direction of devising a new legal regime that answers to its needs than to accommodate within the present conventions upcoming global trends in technology creation and use.’

³⁸ Story, supra note 16, at p. 22, pp. 26 -28. Windows® currently has approximately 96 percent of the global PC operating system market. In Mexico, a study suggests that it would cost \$885 million to install Microsoft Windows® 98, Microsoft Office and a server running Windows® NT in the labs of 140,000 schools, with \$124 million just for the software. Mexico opted for Linux instead.

³⁹ Stephen Shankland, *Investment Firm Confirms Microsoft Link to SCO*, nytimes.com, 11 March 2004, at www.nytimes.com/cnet/CNET 2100-7344 3-5172426.html?pagewanted=print&position=. Microsoft is financially supporting the copyright infringement case that SCO Group has brought against AutoZone, DaimlerChrysler, Novell and IBM. ‘SCO argues that the Linux operating system infringes on its Unix intellectual property, and the company says businesses should pay to use Linux, a claim that advocates of the open-source OS vehemently deny;’ Dinesh C. Sharma, *Windows: Trademark Case Could Get Expensive*, nytimes.com, 12 March 2004, at www.nytimes.com/cnet/CNET 2100-7343 3-5172859.html?pagewanted=print&position=; ‘Microsoft has argued in a number of courts around the world that Windows, which makes a version of the Linux operating system, has infringed on its Windows trademark.’

⁴⁰ Id.

does it impose as onerous a licensing agreement.⁴¹ Rather than using the very real need for a technology transfer from developed to developing countries to argue for less IPR enforcement, perhaps critics and governments of both developed and developing countries should allow the free trade they so cherish to work.⁴² They should be working to get everyone to switch to Linux, for example.⁴³ Perhaps by not using the Windows® operating system at all, that is, not using illegal copies, the competitive products would increase their market share, local software programmers would write new code, and Microsoft would either be forced to lower the price or to provide Windows® at low or no cost to developing and least developed countries. Rather than subjecting IPRs to a cost benefit analysis that pits IPR holders against those who desire the IP but do not want to pay for it,⁴⁴ if free market forces were allowed to function, the desired IP would likely become affordable. Free or reduced cost IPRs are a type of subsidy from developed to developing countries. If they continue for a long time, natural competitive free market forces cannot prevail and it is less likely that a strong domestic intellectual property market will develop.

Critics also contend that copyright holders should not enforce their ownership rights because developing countries need access to inexpensive technology and they will not develop without it.⁴⁵ However, technology alone does not necessarily hasten the transition from developing to developed country. Rather, some suggest, it is the structure of property rights that aids the transition.⁴⁶ According to Armen Alchian '[t]he existing system of property rights establishes a system of price determination for the

⁴¹ The newest version of Windows® requires a 'keycode' to be loaded onto each computer and the license does not allow a single user to load it onto more than one machine. This means that a single home user could not load the same version onto a desktop and a laptop. These restrictions don't apply to Apple systems.

⁴² Bruce Einhorn, Manjeet Kripalani and Jay Greene, *Asia Loves Linux – And Microsoft Scrambles*, Business Week, 12 January 2004, www.highbeam.com/library/doc0asp?DOCID=1P1:89197452&print=yes, 'Cost, adaptability and security concerns have more IT managers ditching Windows for open source software. [C]hen Yongguang ... is in charge of IT for the city of Xiaolan, in China's Guangdong province, and recently has become a convert to Linux, the free alternative to Microsoft's flagship Windows operating system.'

⁴³ Story, *supra* note 16, at p. 28. It costs \$50 to purchase one copy and a manual for Linux, which can be duplicated and reinstalled without limit. There is a growing list of organizations and governments across the 'developed, developing and least developed world which have decided...to switch to open source and free software.' Brazil; China; Mexico; France; Florence, Italy; Mexico and Argentina are among the countries and cities committed to switching.

⁴⁴ Lippert, *supra* note 29, at p. 262. '[F]oreign technology is sine qua non necessary for economic growth in the developing world. As a result, it is less important how technology is acquired than that it is.'

⁴⁵ See generally Lippert, *supra* note 29.

⁴⁶ Joseph Kahn, *China Moves to Protect Property, but the Fine Print has a Caveat*, *nytimes.com*, 25 December 2003, www.nytimes.com/2003/12/23/international/asia/23BEIJ.html?ex=1073388049&ei=1&en=44d3fd03ee02bcdc. 'China has moved to enact private property rights, as part of [C]hina's 25-year economic reform effort. It marks a victory for advocates of China's emerging class of entrepreneurs...'

exchange of or allocation of scarce resources ... In essence, economics is the study of property rights.⁴⁷ By extension then, a strong domestic IPR is ‘part of a legal and institutional framework, which by lowering transaction costs can create the conditions necessary for economic growth.’⁴⁸ Conversely without strong IPR enforcement, local technology will not develop and ‘domestic and international technology can never be exploited.’⁴⁹ Robust property rights underlie strong economies and generate wealth. Countries forced by TRIPS to adopt stronger IPRs may find that they benefit in the long run because strengthening *intellectual* property rights will lead to stronger traditional property rights as a whole.⁵⁰ The Chinese government has recently voted to amend its Constitution to protect private property rights, a first for the Communist party, in a response to pressure from entrepreneurs.⁵¹ This follows closely the growing domestic IP market in China.⁵²

Pro-TRIPS policymakers also link strong enforcement of IPRs to foreign direct investment (FDI) and to the type of trade that would foster technology transfers – a concern of many developing countries.⁵³ For example, W. Lesser, argues that TRIPS is not contrary to the GATT because it *promotes* trade by increasing FDI.⁵⁴ Lesser analyzes and reviews various studies and concludes ‘[E]mpirical studies generally support an expectation that stronger IPR protection does indeed enhance both FDI and imports.’⁵⁵ One can surmise that if a country protects IP, that is, if it has a developed system for protecting *property*, it is also more likely to attract the attention of multinational firms.⁵⁶ According to Lesser: ‘Results in general combined with survey results do support the view that investors are very aware of IPR systems in individual countries and act carefully within that context.’⁵⁷

⁴⁷ Lippert, *supra* note 29, at p. 264.

⁴⁸ *Id.*, at p. 264.

⁴⁹ *Id.*, at p. 264.

⁵⁰ Kahn, *supra* note 46; ‘China’s national legislature moved to amend the Constitution on Monday to protect private property rights, the first time the Communist Party has formally protected private wealth since taking power 55 years ago.’

⁵¹ *Id.*

⁵² See generally Joseph Kahn, *The Pinch of Piracy Wakes China Up on Copyright Issues*, New York Times, 1 November 2002, at p. C1.

⁵³ Ryan, *supra* note 6, at p. 17. See generally, W. Lesser, *The Effects of TRIPS-Mandated Intellectual Property Rights on Economic Activities in Developing Countries*, at www.wipo.org/about-ip/en/studies/pdf/ssa_lesser_trips.pdf, (2001); Lippert, *supra* note 23 at p. 247. ‘[S]trengthening IPR creates only transitional losses for developing countries while providing long-term gains.’

⁵⁴ *Id.* Lesser.

⁵⁵ *Id.*, at p. 16.

⁵⁶ *Id.*, at p. 21. In analyzing the role that IPRs play in attracting investors, *Chiappetta* notes, ‘Countries wishing to attract that group are advised to strengthen the IPR systems accordingly.’ Lippert, *supra* note 29, at p. 247; in discussing how strong IPRs provide long-term gains, ‘The economic and social benefits, however, lie as much in strengthening property rights in general as in any specific new investment and technology transfer.’

⁵⁷ Lesser, *supra* note 53, at p. 21.

The correlation is not so simple, however. Lesser's study also indicates that the level of industrialization in the developing country impacts the amount that FDI or imports might increase as a result of strong IPR regimes.⁵⁸ Overall, though, he says the data are compelling evidence that stronger IPRs do indeed provide some domestic benefits for developing countries⁵⁹ and that the relationship between strong IPRs and FDI and imports is 'both positive and significant.'⁶⁰ Yet in spite of this unequivocal statement, very little recent criticism written about TRIPS references this study. Most of the criticism quotes an older 1993 study by the U.N. Transnational Corporations and Management Division that concludes 'there is little empirical evidence of a correlation between high levels of IPRs protection and high levels of FDI,' subsequently concluding that the relationship between FDI and IPRs is ambiguous.⁶¹

TRIPS should not be viewed as contrary to the free trade axiom of the GATT. The main focus of TRIPS is 'to promote effective and adequate protection of intellectual property rights....'⁶² while recognizing that the least developed countries need 'maximum flexibility' to figure out how to implement laws and regulations that in the long run will actually improve their economies by giving them a 'sound and viable technological base.'⁶³ It allows members to adopt measures necessary to 'protect public health and nutrition' and to 'promote the public interest in sectors of vital importance to their socio-economic and technological development...'⁶⁴ It extends copyright only to expressions, not to 'ideas, procedures, methods of operation or mathematical concepts...'⁶⁵ Finally, it has as an objective that IPRs should contribute to the 'promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.' Stripped of the developed vs. developing country rhetoric it is difficult to see how these goals are bad nor why TRIPS should generate such intense criticism.

It is also important to take a hard look at why companies in developing countries are having a hard time acquiring the technology necessary for progress. In Brazil, for example, which succeeded in rewriting its intellectual property laws to bring them into compliance with international standards, companies still find it difficult to acquire technology because Brazil did not revamp its tax structure.⁶⁶ In Brazil, the cost of

⁵⁸ Id., at p. 19. '[L]ess industrialized countries can expect a more modest effect of IPR strength on FDI and imports.'

⁵⁹ Id. 'However, overall the results do indicate that strengthening IPRs is an effective tool for countries seeking to internationalize the economy or, conversely, increased internationalization is a benefit of TRIPS compliance.'

⁶⁰ Id.

⁶¹ Frederick Abbott, *Commentary: The International Intellectual Property Order Enters the 21st Century*, 29 Vand. J. Transnat'l L. 471, 1996, pp. 473-474.

⁶² TRIPS Agreement supra note 12.

⁶³ Id.

⁶⁴ Id., at Art 8.

⁶⁵ Id., at Art 9.

⁶⁶ Erica Aoki, *The Intellectual Property Trade Barrier in Brazil*, Jurisnotes, at www.jurisnotes.com/articles/IP%20Trade%20Barriers.htm.

licenses for 'patents, trademark and technology transfer has limited tax deductibility,'⁶⁷ and Brazilian companies that acquire foreign technology or that license patents or trademarks must 'pay a social contribution of 10 percent calculated over the payment amount.'⁶⁸ TRIPS is not the barrier to technology transfer in Brazil; archaic tax laws are. Finally, it is also important for developed countries to encourage developing countries and least developed countries to clean up the rampant governmental corruption that siphons off millions and billions in foreign aid,⁶⁹ rather than creating indefinite copy-right subsidies.

V. TRIPS Criticism as Simple Trade Complaint

This current debate about the role or implication of IPRs for developing countries is not new nor is it the first time that developed countries have been seen as pitted against developing countries in trade issues. Developed countries tend to control the trade process because they have more export power and developing countries almost always feel they have been taken advantage of because they import more products than they export. These same arguments have occurred since the GATT. Some countries have absolute advantage in certain areas, others absolute disadvantage. Some always import product X and always export product Y. Some will always import intellectual property although it is unlikely that any country will only export it. In reality, TRIPS is not different than any trade agreement. It strives to be fair but is not totally equitable. This is not to say that the developing countries were railroaded⁷⁰ into signing a bad agreement. All WTO members compromised. Developing countries accepted the TRIPS agreement because the overall package seemed beneficial.⁷¹ The bargain included commitments from developed countries to increase access for agricultural and textile exports, and to reduce tariffs.⁷² Essentially, developing countries got greater access to the markets of developed countries in exchange for agreeing to enforce IPRs. Today some of them think that developed countries are not living up to the bargain, but this is a garden-variety trade complaint.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Marc Lacey, *Primary Schools in Kenya, Fees Abolished, Are Filled to Overflowing*, New York Times, 7 January 2003, p. A8. The article describes how, in Kenya, the new president, Mwai Kibaki, has eliminated the fees for public schools because by 'simply running Kenya honestly the new government could find the estimated \$65 million needed for free primary education.'

⁷⁰ See Yu, *supra* note 37, at p. 26; see Chiapetta, *supra* note 21.

⁷¹ IP Commission Report, *supra* note 4, at p. 8.

⁷² Abbott, *supra* note 60, at pp. 471-472.

VI. Where Should IPRs Reside?

Because the criticism is so focused on either making the case that IPRs do not deserve protection or on developed country bashing, it seldom discusses the basic issue: where else but the WTO should copyrights reside? We live in the information age. The computer revolution – the transformation of economies from industrial to information based – fundamentally changed the importance of copyright both to a country's gross national product and to its level of development. Information – and how countries manage it – is the defining characteristic of contemporary civilization and it has become one of the primary commodities. As Douglas Robertson writes in his book, *The New Renaissance: Computers and the Next Level of Civilization*:

‘Civilization is information. Most of the factors that characterize a civilization – its ethics and laws, its technology, its philosophy and religion, its literature and art – are forms of information. And civilizations are generally limited more by lack of information than they are by lack of physical resources.’⁷³

Since IP is a prime commodity, how should it be regulated or protected in today's global economy? Certainly the first GATT agreement in 1947 dealt only with hard ‘goods’ because at that time countries only traded goods. This could be seen as a lack of foresight, but it is understandable because copyrighted material was a small part of most countries' GNP then. No one worried too much about illegal ‘copying’ of movies, books or songs when the copying technology was analog. Market friction was built-in – analog copies were not very good, so not many copies could be made from one original. No one worried about mass distribution of perfect copies because it was not possible.

Digital technology has changed that. Pirating copyrighted works is not new (remember Dickens' crusade) but the scale is. Digital technology renders perfect copies. With the Internet, any digital copy can be distributed worldwide simultaneously and at a miniscule cost. With the confluence of perfect copies and Internet distribution, infringing copyrights becomes exponentially more lucrative.⁷⁴ With so much money to be made, and lackluster international enforcement, large-scale piracy has attracted crime syndicates in China and Russia.⁷⁵ However, these crime syndicates are not just illicitly

⁷³ Douglas Robertson, *The New Renaissance: Computers and the Next Level of Civilization*, Oxford University Press 1998, at p. 9.

⁷⁴ John Schwartz, *Black Market For Software is Sidestepping Export Controls*, New York Times, 2 December 2002, p. C5. According to the Business Software Alliance Group more than 92% of the business software in China is pirated; Douglas Birch, *Moscow a Haven for Pirated Goods*, Arizona Republic, 28 December 2002, p. A30: in Russia the Gorbushka Market is like an open-air flea market for pirated CDs and DVDs. More than 30,000 people daily visit its 1,800 kiosks in search of pirated material. The Business Software Alliance Group also estimates that about 90% of the business software in Russia is pirated, costing Microsoft more than \$900 million a year.

⁷⁵ Sabrina Tavernise, *Russia Battles Video Piracy; But the Pirates Shoot Back*, New York Times, 2 December 2002, p. A6. In Russia, video pirates tried to murder Konstantin V. Zemchenkov, the chief of the task force fighting illegal video and DVD production. The Russian government estimates that between 60 and 80 percent of mass-produced films

trading music, office software and games; now they have moved into 'scientific and engineering software powerful enough to fall under United States export restrictions.'⁷⁶

With such wide scale and dangerous piracy, countries with mature IPR regimes *must* request that IPRs be discussed in the context of the WTO and that they must be enforced on a global level. The WTO is the only comprehensive world trade body that has enforcement 'teeth.'

VII. The Value to Domestic Markets in Preventing IP Piracy

It is not just international IPR holders that will benefit from a focus on preventing piracy. TRIPS ultimately can, if given the chance, promote the emergence of a domestic IP market. For example, when Chinese filmmaker Zhang Yimou opened his big budget martial arts film in Shenzhen, China in October, 2002, viewers were videotaped as they entered the theatre, they had to relinquish cellphones, watches, lighters, necklaces and they had to pass through a metal detector. Yimou was not worried about terrorism. He was worried about piracy of his *own* work in China.⁷⁷

'I plead with you to support our industry. Please do not make illegal copies of this film,' Jiang Wei, an executive at New Picture distributors, the Chinese distribution company, announced to viewers before the film started.⁷⁸

Yimou had reason to worry. Less than 10 percent of the music and software sold in China are legal copies.⁷⁹ The very efficient domestic illegal copying industry that grew as the Chinese government tacitly looked the other way because foreign work was

on video and DVD are produced illegally in Russia. Some of those illegal copies are being exported to the U.S. Zemchenkov says that his task force has 'found Russian-made DVDs in Brighton Beach. Now it's a problem not just for Russia but for Europe and the U.S.;' Lynette Holloway, *Arrests Illustrate a Growing Concern Over Bootlegged Recordings*, New York Times, 2 December 2002, p. C10. U.S. law enforcement officials busted a family with ties to organized crime operating out of a store in North Babylon, N.Y. who were making 10,000 bootlegged CDs a week, generating more than \$2.5 million in profit annually; Lydia Polgreen, *Pirating of CDs and DVDs Takes a Dangerous Turn*, New York Times, 21 December 2002, p. B3. 'Two recent shootings in Midtown Manhattan, one of which left a Guinean immigrant dead on Tuesday, may be part of a pattern of robberies aimed at people who make pirated compact discs and DVD's, the police said yesterday.'

⁷⁶ Schwartz, supra note 74, at p. C2. This new piracy includes software 'that allows you to model the fuel flow in a fighter jet.' With national security concerns, this software cannot legally be exported to countries such as Libya, North Korea or Iraq, but the company that makes it, Intelligent Light, has found Chinese entrepreneurs selling bootleg copies for \$200 on the Internet.

⁷⁷ Kahn, supra note 52, at p. C1. '[A]nyone in China who makes movies, writes books, develops software or sings songs for a living knows that popularity is barely half the challenge; such people must also fight intellectual piracy.'

⁷⁸ Id.

⁷⁹ Id.

being bootlegged, is now pirating domestic work.⁸⁰ The fledgling Chinese film and music industries must battle the most efficient illegal copiers in the world.⁸¹ 'After a release we often have only three days before the pirate copies hit the market,' said Jiang.⁸²

Seeking to emulate its success with *Crouching Tiger Hidden Dragon* by making other big-budget (by Chinese standards) films, the Chinese filmmaking industry finds itself on the same side as the foreign interests in pressuring China to meet international standards which also will benefit the holders of domestic intellectual property.⁸³ Without TRIPS, the Chinese government would feel less pressure.

Critics contend that requiring strong IP protection is imposing Western ideas of IP on the Chinese who 'regard imitation as the sincerest form of flattery or a necessary component of the creative process.'⁸⁴ But filmmaker Yimou does not seem to regard imitation in the form of illegal copies of his film as flattery, nor did the folk music group Yi Ren Zhi Zao as they watched their legal CD garner only a 1.2 percent market share because illegal copies of the CD were sold openly in department stores.⁸⁵

'Our hard work and money were stolen and sold cheap,' said Zhou Yaping, in charge of the group's Beijing-based production company.⁸⁶

This paper's support of TRIPS is not without recognition that TRIPS imposes significant burdens on developing countries and least developed countries. Although developing countries are finding it hard to meet these deadlines completely, they all have made some progress,⁸⁷ and will continue to make progress, particularly as domestic producers pressurize their respective governments to comply.

A recent analysis based on the IP laws of more than 70 developing and least developed countries shows that the majority have been amended to account for TRIPS.⁸⁸ Some countries took advantage of the flexibility in TRIPS to provide generous exceptions to copyrights, particularly for educational purposes.⁸⁹ The majority of countries

⁸⁰ Id., at p. C1, C5. 'Throughout the 1990s, intellectual property was mainly seen as a trade dispute pitting the wealthy West against the developing East. It's now also a domestic struggle, with local stars complaining that they get little fortune from their own fame.'

⁸¹ Id., at p. C5. 'Altogether the International Intellectual Property Alliance estimates that Chinese piracy costs foreign companies about \$2 billion a year, or roughly a quarter of the total global losses attributed to copyright violations.'

⁸² Id. In spite of tight security controls, a recent movie, *The Touch*, had a four-day run before pirated DVD copies were available on the black market. Ticket sales plummeted. A popular folk music group found that illegal CDs were available *before* the authentic version was in the store. The legal version only retains 1.2% of the market share.

⁸³ Id., at p. C5. 'The government has sought to demonstrate that it is finally taking the matter seriously. In August, the state-run China Daily tallied the exact number of pirated video and audio disks, 43.45 million, that had been destroyed in a crackdown so far this year.'

⁸⁴ Yu, *supra* note 37, at p. 64.

⁸⁵ Kahn, *supra* note 46, at p. C5.

⁸⁶ Id.

⁸⁷ See generally Phil Thorpe, *Study Paper Seven, Study on the Implementation of the TRIPS Agreement by Developing Countries*, IP Commission Report *supra* note 4.

⁸⁸ Id.

⁸⁹ Id.

allow only a limited exception to copyrights to allow incorporation of short extracts of work in teaching materials or to allow performance of a copyrighted work by way of education.⁹⁰ Nigeria allows any use by approved educational institutions, provided such copies are subsequently destroyed.⁹¹ Sri Lanka's proposed IP amendment provides that fair use for educational teaching, including multiple copies, is not infringement.⁹² All of these domestic laws are legitimate under the TRIPS agreement,⁹³ so its burden is not as onerous as critics warned

VIII. Weaknesses in the TRIPS Agreement

Perhaps the most valid criticism of TRIPS stems from its lack of comment on the subject of compulsory licensing which would facilitate technology transfer. There was no comment because the countries could not agree.⁹⁴ The need for compulsory licensing to facilitate technology transfer of software and knowledge software in the form of educational textbooks seems reasonable. While critics focus on the very real need for technology transfer and access to educational textbooks to call for the elimination of the strong IP protection required by TRIPS, it is not educational textbooks that are being pirated in mass. Educational textbooks are not being sold at the Gorbushka in Russia;⁹⁵ movies and music are. Rather than call for the elimination of TRIPS, critics should pressurize developed countries to work with domestic publishers to donate textbooks or to grant generous fair use exceptions for educational institutions. This strategy would accomplish the important goal of making educational textbooks available, for example, while still respecting the philosophy that the creator of an IP product is as worthy of protection as the creator of a widget.

Critics also focus on the fact that under TRIPS, 'folklore,' and traditional medicinal practices and native arts are not protected, and developed countries resist writing entirely new forms of intellectual property protection.⁹⁶ This is viewed as unfair to

⁹⁰ Id.

⁹¹ Id.

⁹² Id.

⁹³ TRIPS agreement supra note 12, preface. 'Recognizing also the special needs of the least developed Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;' Art 8(1) 'Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.'

⁹⁴ IP Commission report, supra note 4.

⁹⁵ Birch, supra note 73.

⁹⁶ J.H. Reichman, *The Trips Agreement Comes of Age: Conflict or Cooperation With the Developing Countries*, 18 Berkeley J. Int'l L. 165, 454 (2000); Abbott, supra note 15, at p. 170.

developing countries, which could generate income streams from this material.⁹⁷ However, the critics generally do not specify what type of 'folklore' or native arts should be protected and seem to ignore the fact that native 'folklore' has not been protected in developed countries either. For example, some of the best known rhythm and blues, gospel and Appalachian folk tunes are in the public domain because at the time they were written, the 'authors' did not claim authorship. The same problem exists for the folklore from developing countries. Who owns it? To whom should the royalty payments go? The current, often corrupt government? Further, even if this folklore had been protected originally, most of it would legitimately be in the public domain since no one is suggesting that IP protection in developing countries last forever. Even if past folklore authors lose under TRIPS because they never established ownership, establishing a strong domestic IPR system now will benefit future creators.

Critics also question whether computer programs should be included in TRIPS⁹⁸ and accuse the developed countries of rewriting IP for their needs. This criticism is perhaps the most reasonable, but it is not so much a problem with TRIPS, but a problem with how traditional copyright law in developed countries tried to adapt to new information technologies under intense pressure from the very powerful software industry. Perhaps computer programs should not have been treated as literary works either by U.S. courts or by the Berne convention, but the fact that they are should not be the reason to undermine TRIPS. Rather the focus should be on creating a different kind of protection that is far more limited, like a patent, or maybe a form of public interest compulsory licensing because in this technological age, access to computer technology is more akin to access to food or medicine.⁹⁹

This underscores a larger problem. Rather than dismantling TRIPS because it is not perfect, maybe we need to rethink what copyright should be in a digital era of perfect copies and instantaneous worldwide distribution. Rather than focusing on preventing copying, perhaps we should be focusing on controlling access. Or maybe rather than granting such complete control, authors should be guaranteed the right to remuneration only. Maybe we need to create an absolute, but limited right of non-profit 'fair use' for educational materials or essential technology for developing and least developed countries.¹⁰⁰

⁹⁷ Id. Abbott. 'Some developing Members have asked why their existing stock of valuable knowledge should not be worthy of some protection against uncompensated exploitation by nationals of other Members.'

⁹⁸ TRIPS Agreement supra note 12, Art 10(2) requires computer programs to be protected as literary works under the Berne Convention (1971).

⁹⁹ Story, supra note 16, at p. 22. Microsoft has a 96 percent market share of PC operating systems worldwide. This is not the kind of 'limited' monopoly for an individual author envisioned by the original U.S. copyright law, for example. It is more egregious considering that Microsoft charges the same licensing fee regardless of the development level of the country. '[M]icrosoft licensing officials in Vietnam and Ecuador have confirmed that the "per seat licensing fee" for universities in those two countries is essentially the same...as Microsoft charges Harvard or Oxford University; an elementary school in Soweto is treated the same way as is a school in a suburb of Boston.' These high costs encourage piracy because the pirates have no choice.

¹⁰⁰ Id.

Critics point to a final weakness in TRIPS: the lack of specificity to guide dispute settlement panels. Although the TRIPS agreement requires all WTO members to 'enforce' IPRs, it does not delineate what that means exactly. Can a country be accused of lack of enforcement based on one incident, or does the failure have to be systemic?¹⁰¹ This has not been adequately addressed since there have been few cases brought yet. The first major case in 1997, *United States v. India*,¹⁰² decided by the Dispute Appellate Body, applied a strict constructionist reading to the agreement, in keeping with its view of Article 31 of the Vienna Convention on the Law of Treaties.¹⁰³ In applying a constructionist reading, it deferred to local law, tilting the scale towards developing countries, if 'good faith efforts to implement the TRIPS Agreement were being made.'¹⁰⁴ Taken at face value, this suggests an inference that 'TRIPS law consists of negotiated rules and no more. Panels cannot fill gaps in international intellectual property law on a theory of commercial or competitive expectations.'¹⁰⁵ This gives developing countries 'wiggle' room to adapt TRIPS standards to their own economic situation as Art 8 (1) of the TRIPS agreement states,¹⁰⁶ a far less onerous burden than critics predicted.

Conclusion

In conclusion, the TRIPS agreement may be the most significant legal advance for the world trading system since the original GATT because it not only is an international agreement on what had been local concerns, but it foreshadows other international agreements on important human rights issues such as environmental protection, labor relations and working conditions. It is not a nefarious plot on the part of developed countries to force Western culture on developing countries. Even though the short term benefits will accrue almost exclusively to developed countries, in the long run, strong international enforcement of IPRs will benefit developed *and* developing countries. The agreement is not perfect and criticism is appropriate but that criticism should focus on the real flaws in the Agreement, not on the age-old criticism that the U.S. and other developed countries 'exploit' developing countries or the broader issue of whether intellectual property should be protected at all.

¹⁰¹ Abbott, *supra* note 61, at p. 476.

¹⁰² See *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body, WTO Doc. WT/DS50/AB/R (19 December 1997), available in 1997 WL 781259.

¹⁰³ Reichman, *supra* note 96, at p. 446.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, at p. 448.

¹⁰⁶ TRIPS agreement, Art. 8(1), *supra* note 12.