
Access to Knowledge in a Network Society

A Cultural Sciences Perspective on the Discussion on a Development
Agenda for the World Intellectual Property Organisation

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Karsten Gerloff

Matrikelnr. 2134028

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Thesis Advisors:

Dr. Martin Warnke, Universität Lüneburg

Dr. Volker Grassmuck, Humboldt-Universität Berlin

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The author can be reached at gerloff@fsfe.org

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The ground thus prepared, a series of talks organised by Meike Richter and Alexander Finkenberger, among others, brought me onto the topic of Free Software. These two people have both accompanied me during various stages of the trip. So has Sebastian Helgenberger, in ways that only a best friend can.

What started out with an internship with the Free Software Foundation Europe (FSFE) has turned into a permanent fascination. The group's core team was, and still is, as demanding and stimulating an environment as one could wish for. Working closely with Georg Greve first gave me a ring-side seat for the debate about the regulation of knowledge. Then it let me enter the ring myself.

There, I met a number of people who gave me valuable guidance, and patiently put up with my incessant questions. The WIPO discussions were baffling to a newcomer. Teresa Hackett, Sisule Musungu and Jamie Love helped me make sense of them. Together with Barbara Stratton, Robin Gross and Gwen Hinze, they encouraged me to work my way through the intricacies of international copyright and patent regulations. Much inspiration came from Judit Rius and Pedro Paranaguá Moniz. All of them are also great company. Special thanks are due to Ahmed Abdel Latif for sharing his knowledge of the development agenda debate with me.

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List of Abbreviations

A2K	Access to Knowledge
art.	Article
BIRPI	Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle
ECOSOC	United Nations Economic and Social Council
EU	European Union
FOD	(Group of) Friends of Development; the group of countries behind the WIPO development agenda proposal
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade; the precursor to the WTO, pre-1995
GDP	Gross Domestic Product
GNU GPL	GNU General Public License; the most widely used Free Software license
IAC	Industry Advisory Commission; a body advising WIPO's Director General
ICTSD	International Centre for Trade and Sustainable Development; a non-governmental organisation
IIM	Intersessional Intergovernmental Meeting (for the discussion on a Development Agenda for WIPO)
IMPs	Intellectual Monopoly Powers
IP	Intellectual Property
LDCs	Least Developed Countries
MDGs	Millennium Development Goals, adopted by the United Nations in 2000
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
para.	paragraph

PCDA	Provisional Committee on Proposals Related to a WIPO Development Agenda; a WIPO body
PCIPD	Permanent Committee on Cooperation for Development related to Intellectual Property; a WIPO body dealing with matters of technical assistance, meeting once every two years
QUNO	Quaker United Nations Office; a non-governmental organisation
R&D	Research and Development
SCCR	Standing Committee on Copyright and Related Rights; a WIPO body
SCP	Standing Committee on Patents; a WIPO body
SMEs	Small and Medium Enterprises
SPLT	Substantive Patent Law Treaty; a WIPO treaty presently under negotiation.
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
US	United States of America
USTR	US Trade Representative
WCT	WIPO Copyright Treaty (1996); one of two so-called “WIPO Internet Treaties”
WERO	WIPO Evaluation and Research Office; a WIPO body proposed by the Friends of Development
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty (1996); one of two so-called “WIPO Internet Treaties”
WTO	World Trade Organisation

*This publication is written from a definite perspective—
that IP is good.*

Kamil Idris, Director General of WIPO (2003):
Intellectual Property—A Power Tool for Economic
Growth

Honi soit qui mal y pense.

King Edward III.



Introduction

For society, knowledge is an essential resource. Cultural and technological progress both rest on knowing how to do something best: How to cure an illness, how to grip an audience with a plot, how to move a rock, or how to build a microchip. Knowledge is so important that we take the pains to devise elaborate systems such as schools and universities to ensure that it is further developed and passed on. The informal exchange of knowledge in everyday communication is just as important, not least since it acts as social glue.

More recently, knowledge has also taken centre stage in the world economy. Though most products exchanged on the routes of international trade still are physical goods, the amount of money changing hands for the permission to use the ideas that someone else has had is rapidly growing as a part of the total.

The spread of digital communication networks has brought another spin to the ways in which we handle knowledge. In the digital environment, information is separated from its physical carrier. It can be rapidly communicated and endlessly replicated. This harbours great opportunities for some, but brings trouble for others who are accustomed to selling knowledge as a product in a final, prepackaged form.

As a consequence of these changes, the regulations drawn up for a 20th century where knowledge was produced and distributed in an industrial manner clash with

the realities of a 21st century where the industrial way is only one way among many, and not always the most effective.

These rules do not only establish who has control over knowledge. More importantly, they determine who has *access to knowledge*. Such access is a precondition for a person, a business or a country to participate in the global knowledge economy. It can also be a question of mere survival. Access to knowledge has many facets. The availability of essential medicines, and of textbooks for students, are among the basic conditions for developing countries to make the most minimal progress. Science and culture cannot function without one person building upon the ideas of another. The discussion about the rules to govern the exchange of knowledge on the Internet is in full swing.

This thesis will examine how access to knowledge is regulated, and which conflicts are caused by this regulation. One debate that reflects many of these conflicts is the discussion on a “development agenda” for the World Intellectual Property Organisation (WIPO). WIPO is the main international organisation for administering treaties on intellectual monopoly powers. In the view of some member states, the organisation’s activities put developing countries at a disadvantage. This is why Brazil and Argentina in 2004 took the initiative to call for a wide-ranging reform of that body. The ensuing debate is the subject of this thesis.

Here, many of the conflicts surrounding the international regulation of knowledge can be observed. Many different stakeholders in the system are voicing their demands. Both developed and developing countries state their positions, as do groups representing the interests of industry or of civil society. An analysis of this debate provides us with an overview of the conflicts surrounding the global governance of knowledge and information.

This thesis asks if WIPO’s present approach to regulating access to knowledge is viable in a network society. Can the tensions that are apparent in the development agenda debate be resolved by making adjustments to the system, or is deep-seated reform needed?

To answer this question, I will first provide a broad look at the structure of society and the governance of knowledge. I will also describe the global rules that are regulating knowledge today. Against this background, I will analyse the current debate on a development agenda for WIPO. Which conflicts surface with regard not only to WIPO, but to the global regulation of knowledge in general? Looking at these conflicts provides us with clues to where the main deficits of the

present system may be located. A final chapter provides a possible perspective for the future.

Cultural sciences At the origin of writing this thesis was the desire to learn more about how knowledge is governed today, and how it could be governed tomorrow. The literature on the topic of regulation of knowledge is vast; providing a comprehensive overview would merit a Master's thesis in itself. Most contributions come from law and economics. In both cases, authors often have to transcend the limits of their discipline in order to make a relevant argument. Economists have to take into account the effects of legal regulations, while law scholars trying to gauge the repercussions of the latter often have to resort to economics.

This work was written at a faculty of cultural sciences. One thing that binds together the various disciplines which may be subsumed under this label is that they are looking at society's cultural activity. This cultural activity is obviously based on knowledge which is shared and expanded. The regulation of access to knowledge should consequently be a central concern for cultural scientists. Some of them, such as one of the advisors of this thesis, have already done valuable research on the topic. It is to be hoped that more will follow. The interdisciplinary approach that sets cultural sciences apart seems particularly well suited for this fast-moving and diverse field.

Scope and limitations This thesis is quite broad in scope. Drawing upon the detailed analysis done by many others, it attempts to paint a panoramic picture of the situation that the regulation of knowledge is currently in. The first year of the development agenda debate at WIPO, which this author had the privilege of observing in person, is certainly a vantage point from which to begin such an undertaking.

Yet a number of caveats apply for this thesis. In the choice of literature, authors that are sceptical of using intellectual monopoly powers (often called "intellectual property") as the only way to regulate knowledge are somewhat overrepresented. This is because the creative ideas in the discourse often come from such sceptics. Conservative thinkers usually limit themselves to calling for stricter and more far-reaching monopoly powers. They are often at a loss to explain phenomena arising from the liberal sharing of knowledge, or simply ignore them. This self-limitation is regrettable, as it deprives the debate of a whole set of constructive ideas. The de-

scriptive part of this thesis could therefore be read as an introduction to the wealth of reform-oriented ideas on the subject.

The analysis of the WIPO debate remains descriptive. It wants to clearly highlight the conflicts that surround the international framework for the regulation of knowledge. It does not aim to extract the motives of the actors from their statements. It is also limited in that it does not take into account the larger strategic situation in other multilateral organisations such as the World Trade Organisation (WTO), which may have repercussions on a nation's stance in WIPO.

It must also be noted that the governance of knowledge is most hotly debated in North America, and especially the United States of America. This can probably be attributed to that country's extraordinary economic weight in the international trade with intellectual monopoly powers, as well as to the great importance that knowledge has to the national economy of one of the earth's most technologically advanced nations. It is in this country where the trend towards ever more restrictive monopolies on ideas is most pronounced. But it is also in this country where the criticism of this trend is the most vocal, leading to an intense discussion. Other nations and regions, both developing and developed, have yet to exhibit a similar dynamic. The extension and tightening of monopoly powers is by no means absent there.¹ But the issue is not a matter of public debate to quite the same degree. As a consequence, much of the literature that this thesis is based on comes from, and is centred on, the US. Efforts have been made to maintain a global perspective. The reader should keep in mind that especially the problems of developing countries are quite different from those of developed nations, as are their circumstances.

1.1 Terminology

Before launching into the thesis proper, it is necessary to explain some of the terms used. Some, such as *intellectual monopoly powers* or *users*, clearly have some bearing on the arguments made in this thesis. Other elaborations, such as those on *knowledge*, *information*, *developing countries* and *civil society*, are of a more technical nature.

Intellectual monopoly powers A large part of the regulation of knowledge uses a set of tools that is commonly referred to as “intellectual property” (IP). It would

¹Indeed, in certain cases those powers are even more extensive than in the US. Examples are Mexico's copyright term of author's life + 100 years, or the EU's *sui generis* monopoly power for databases.

have been an obvious solution to adopt the term in this thesis as well. But there are two problems to it.

One is that it is imprecise. Under the term “intellectual property”, quite different areas of law are subsumed: Copyright, author’s rights, patents, trademarks, geographical indications and a host of others. All these behave differently. For a productive and detailed debate on one of these areas, assumptions drawn from others are worse than useless. Yet such an unfortunate transfer of assumptions is encouraged by using a common term for all areas alike.

On the other hand, it would have been impractical to write this thesis without the use of a summary term. There are many sections that discuss the common features of all those areas of law, and naming each one of them every time would have enlarged this thesis considerably without adding much value.

The second problem with the the expression “intellectual property” is more profound. Can immaterial ideas really be handled in the same way as physical objects? Grassmuck argues that such limited monopolies as copyright or patents fulfil all requirements of property rights: they are freely tradeable, can be inherited, can be enforced in court and are protected against state intervention.² This is correct when referring to the monopoly powers. But in the view of Richard Stallman, calling ideas “property” implies that the most natural way to think about them is as physical objects, which they clearly are not:

“[T]his analogy overlooks the crucial difference between material objects and information: information can be copied and shared almost effortlessly, while material objects can’t be. Basing your thinking on this analogy is tantamount to ignoring that difference.”³

The use of the term “rights” too often prompts people to ignore the costs that these legal instruments carry.⁴ It has even led some to argue that a sort of sanctity of monopolies on ideas can be inferred from the Universal Declaration of Human Rights.⁵

To address this concern, in this thesis I use the term *intellectual monopoly powers* (IMPs). It skirts the thorny question of “property” by stating what copyrights, patents, trademarks and others really confer: A limited monopoly on the use of an idea. In a debate as heated as the one this thesis is dedicated to, both this term and its more conventional alternative are eminently political. Calling this a “power”

²Grassmuck (2002), 50.

³Stallman (2002), 189 f.

⁴UK IPR Commission Report - Executive Summary, 10.

⁵See e.g. Cass and IIM/3/3, para 131.

instead of a “right”, I hope to help the reader to keep in mind the malleability of the concept of awarding someone exclusivity in the use of an idea.

Consumers or users? When knowledge takes the form of a physical product, we call the person who buys that product a consumer. But this term is problematic when looking at the way knowledge is used in the network society, especially in the digital environment.

Here, it is often not delivered on a physical carrier, but rather in its digital representation. It is also not “consumed”: An online music shop cannot run out of copies in quite the same way our local bookstore can. For the receiving person, it is much easier to change the set of bits and bytes she has just acquired. Sticking with the case of music for simplicity’s sake, she can cut a song into bits, sample it, mix it with other songs and produce versions that are radically different from the original. With an LP record, most of this is possible in principle; but it is only digital technology that makes it viable in practice.

Calling such a person a “consumer” is clearly an understatement. In this thesis, I will rather call her a *user*. This is meant to constantly remind us not only that knowledge is not consumed as it is passed on, but also that each person has the potential to put it to creative use.

It should be noted that the term is used differently within WIPO. To that organisation, a “user” is someone holding a monopoly on an idea who uses its global system for the protection of monopoly powers.

Knowledge and information Though this is a difficult distinction to make, these terms are not quite as contentious as the preceding ones. For the purposes of this particular thesis, it is also not so much essential as rather what Castells has called “*an intellectually satisfying gesture*”.⁶ In keeping with the definitions used by that researcher, I will understand knowledge to consist of organised statements of facts or ideas, while information is made up of organised data.⁷ Viewed this way, it could be said that knowledge possesses a higher degree of organisation or abstraction than information. Knowledge is not limited to black letters on white paper. An organised statement of facts or ideas can be a song, a traditional healing method passed on as oral tradition, a software algorithm and many other things.

⁶Castells (2000b), 17, note 25.

⁷Ibid.

Developing countries The term “developing countries” is inherently vague. It has been viewed as problematic, since some understand it to imply that there is only one path of development that a nation may follow; or that all states subsumed under it experience similar economic circumstances. Often, the term also is used in a way that includes countries which show no sign of achieving any sort of progress; the gerund “-ing” is therefore to be taken with caution.

In this thesis, the use of the term has been developed inductively. In WIPO, which is at the centre of attention here, there are apparently no criteria to determine if a country belongs to this group or not: “*Contributions by Member States are made on the basis of a system of contribution classes, and each Member State freely chooses which class to belong to.*”⁸ Similarly, at the WTO each member state decides if it wants to be classified as a developing country; other members may challenge the decision.⁹

In accordance with World Bank conventions,¹⁰ I will use the term *developing countries* for low- and middle income economies as classified by that institution. High-income economies will be referred to as *developed countries*.

Civil society Clearly distinguishing between categories of actors in the debate about the regulation of knowledge can be difficult. Developing and developed countries are discerned easily enough. But finding a way to accurately tell apart those groups that work to advance the interests of those that hold intellectual monopoly powers—the *rightsholders*¹¹—from those that push the interests of society at large is not easy.

In keeping with the language of the Development Agenda Proposal,¹² I will use the term *civil society* to collectively refer to groups that promote the interests of the users of knowledge and the public at large. Their distinguishing characteristic is that they concentrate interests that are otherwise diffuse, whereas rightsholders’ interests are concentrated from the outset.

⁸Musungu/Dutfield (2003), 8.

⁹See http://www.wto.int/english/tratop_e/devel_e/d1who_e.htm, visited on 2006/08/02.

¹⁰See <http://www.worldbank.org/data/countryclass/classgroups.htm>, visited on 2006/08/02.

¹¹Although it does not quite fit into the pattern of terminology used in this thesis, I have decided to stick with the term “rightsholder” to refer to the person or institution who holds the monopoly power over an idea or expression. Both “power-holder” and “monopoly-holder” seemed too unwieldy and too unfamiliar to guarantee understandability. Suggestions are welcome.

¹²WO/GA/31/11, para. VIII.

1.2 Overview

Chapter 2 will provide an introduction to the concept of the *network society*. With the sociologist Manuel Castells,¹³ I will argue that since the 1970s, there has been a tremendous shift in the role that knowledge has for our society, as well as in the way that our society is organised. The network has become its dominant pattern of organisation. The science of networks, represented here by the work of the physicist Albert-László Barabási,¹⁴ provides information about some basic features and behaviours of the networks that surround us.

Chapter 3 starts on p. 23 by explaining the nature of knowledge as a *public good* in the economic sense of the term. It then proceeds to outline two basic modes of the regulation of knowledge: intellectual monopoly powers and commons-based approaches. The former mode is based on exclusion, the latter on access. The description of the knowledge commons draws heavily on the concepts of the law scholars Yochai Benkler,¹⁵ Peter Drahos¹⁶ and James Boyle,¹⁷ all of which have contributed to a better understanding of immaterial commons and the way knowledge is produced in such an environment. A third section lays out some aspects of the relation between intellectual monopolies and economic development.

Chapter 4 (from p. 37) is dedicated to the way in which the rules are made that currently govern knowledge on a global scale. Drawing upon the work of Peter Drahos and John Braithwaite,¹⁸ and highlighting the link between copyright, patents and trade, I will outline the most important forces shaping the regulation of knowledge: US trade policy, the TRIPS Agreement¹⁹ and bilateral agreements between states. A large section of that chapter describes the World Intellectual Property Organisation (WIPO), which is an associated organisation of the United Nations (UN) dealing with intellectual monopolies. Sisule Musungu and Graham Dutfield have delivered a thorough analysis of this institution and its problems,²⁰ which has proven a valuable starting point.

¹³Castells (2000b).

¹⁴Barabási/Albert (1999); and Barabási (2003).

¹⁵Benkler (2002) Yale Law Journal; and Benkler (2006).

¹⁶Drahos (2004) Journal of International Economic Law; and Drahos (2006) Consumer Policy Review.

¹⁷Boyle (2003b) Law and Contemporary Problems.

¹⁸Drahos/Braithwaite (2002).

¹⁹Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995. Hereinafter: TRIPS.

²⁰Musungu/Dutfield (2003).

Empirical part Forming the core of this thesis, the next two chapters analyse the discussion about a development agenda for WIPO. To remedy a number of perceived fundamental shortcomings of that organisation, Brazil and Argentina in 2004 proposed a number of measures to thoroughly reform it. They want WIPO to better take into account the interests of developing countries and the public. The proposal calls for a more critical and balanced approach to IMPs, taking into account not only the benefits, but also the costs of monopoly protection. This *Development Agenda Proposal* started a heated debate, which is currently still in progress.

From p. 53, Chapter 5 describes the context in which the proposal is placed. Beside the regulatory structure outlined in chapter 4, there are a number of international agreements and declarations, as well as some contributions from academia and civil society to the debate. This is the background that the proposal must be viewed against.

After this introduction, chapter 6 (p. 65) provides an overview over the first year of the development agenda debate at WIPO. I am looking to describe the different views that the organisation's member states hold of the international IMP system, and of WIPO as an organisation. To this end, I will first summarise the proposals submitted by member states, as well as the criticisms lodged against them. Then, I will analyse the statements that were made during the debate, grouping them by the particular conflicts they refer to. This makes it possible to identify the main areas where tensions exist. It also allows us to locate the lines of conflict. On the foundations laid out in chapters 2 to 4, we can attempt to infer some of the problems the global regulation of knowledge is presently suffering from.

Casting a look beyond the horizon, chapter 7 (p. 97) ponders a possible remedy to some of these problems. A "Treaty on Access to Knowledge" is not only mentioned in the Development Agenda Proposal. It is also a rallying point for a considerable number of civil society organisations. This chapter will analyse some of the structural difficulties posed by this project. It will also present a first sketch of how such a treaty may work.

What scholarly and popular writing alike denominate as a thing (“the Internet”) is actually the name of a social condition: the fact that everyone in the network society is connected directly, without intermediation, to everyone else.

Eben Moglen (1999): Anarchism Triumphant. Free Software and the Death of Copyright.

2

Theory of the network society

The following chapter will provide the theoretical tools with which this thesis operates. With the sociologist Manuel Castells, I will argue that we live in a *network society*, meaning that networks have become the dominant structural characteristic of the present age; and that knowledge has become the primary resource of productivity. The work of the physicist Albert-László Barabási will then provide us with some information about the basic properties of the networks that shape our world.

Although it is hard to find a precise definition of the term “information society”, there is little doubt that information and knowledge have indeed taken a central role in society. Even though there are problems of quantification, this holds true from various perspectives. Our technological capacity to store, communicate and process information has greatly increased since the 1970s. In the economic realm, an ever growing share of productivity depends on information and knowledge. There is a noticeable shift in the workforce away from manufacturing towards information occupations. Information networks dramatically affect the way our society organises across space and time.²¹

It is generally agreed upon among social theorists that society has undergone profound changes during the final third of the twentieth century, and that these

²¹see Webster (1995), 6-29.

changes are related to information technology.²² Yet there is a debate on how to explain them. Is it merely that technological progress has taken place, or have we entered a different era altogether? Are the changes we detect causes or effects of the technological advance?

Faced with these questions, most liberal and conservative social theory has so far not achieved much beyond an updating of Bell's endism.²³ The Marxist branch of theory, on the other hand, is struggling to grasp the vastly increased complexity of society in its terms of class and power.

Manuel Castells' work has its root in the Marxist tradition, but has gone on to incorporate a wide array of social theories, such as those of Daniel Bell and Alain Touraine. While he has given up clinging strictly to the Marxist conceptions of class and power, he still insists on seeing society as an organic whole. For him, though, power is not located with a certain class, but—with a nod to Foucault—in the flows of finance and information. He argues that with the spread of computers and digital networks, a radical change of society's structure has taken place. He sees the "*information technology revolution*" as

"[...] at least as major an historical event as was the eighteenth-century industrial revolution, including a pattern of discontinuity in the material basis of economy, society and culture."²⁴

Technological determinism? Castells' earlier work has been criticised for portraying technology as being, to a degree, independent of society: no matter how much capitalism changes, there is a certain technical realm that remains untouched.²⁵ But while he admits that in his thinking, technology has a central place, he professes a more differentiated view in the later work that is used here:

"Indeed, the ability or inability of societies to master technology [...] largely shapes their destinies, to the point where we could say that while technology *per se* does not determine historical evolution and social change, technology (or the lack of it) embodies the capacity of societies to transform themselves, as well as the uses to which societies, always in a conflictive process, decide to put their potential."²⁶

Technology, in his view, could be considered an expression of the character of a society. But to what use a society puts its technological capabilities still depends on

²²Webster (1995), 161 f.

²³Daniel Bell in 1973 published *The Coming of Post-Industrial Society: A Venture in Social Forecasting*, which was very influential in establishing the concept often referred to as "endism": the idea that history and ideology are reduced to insignificance as capitalism and democracy triumph.

²⁴Castells (2000b), 30.

²⁵e.g. Webster (1995), 195.

²⁶Castells (2000b), 7.

the decisions of those who hold the power; they may promote or stifle technological innovation.²⁷ While this and other criticisms²⁸ must be taken into account when working with Castells' theory, they by no means render it obsolete.

2.1 The network society

Castells argues that since the 1970s, the way in which our society develops is changing. We are moving from an industrial mode of development, where cheap energy was the prime resource of productivity, to an informational mode of development, where productivity relies on inputs of information and knowledge. In this new age, the subject of power and the economy changes. Whereas it used to be the individual (be it a person or a company), it is now the network. While knowledge now assumes a central role as the most important ingredient of the production process, it is distributed quite unevenly.

Few would argue with Castells' view that at during the final third of the twentieth century, there occurred a rapid "*transformation of our 'material culture' [i.e. technology in the broadest sense of the word, KG] by the works of a new technological paradigm organized around information technologies.*"²⁹

As a consequence of the spread of information and communication technologies, the network has become the defining structural characteristic of society. This holds true for all its realms, be it economy, the enterprise, labour, or culture:

"For the first time in history, the basic unit of economic organisation is not a subject, be it individual [...] or collective [...] *the unit is the network*, made up of a variety of subjects and organizations, relentlessly modified as networks adapt to supportive environments and market structures."³⁰

The network economy The distinctive features of the new economy are that it is informational, global and networked.³¹ What sets the global economy apart from a long-existent "world economy" is that it is able to function as a unit in real time³². This capability only emerged in the final years of the twentieth century.³³

²⁷see Castells (2000b), 5–13.

²⁸Some, such as Webster (1995), 161, have criticised Castells' earlier work for overstating the profoundness of technological and social change.

²⁹Castells (2000b), 28.

³⁰Ibid., 214.

³¹Ibid., 77.

³²Ibid., 101.

³³Ibid., 135.

While, for the first time in history, the entire planet is capitalist or dependent on its connection to global capitalist networks, the expansion of the new economy is at once rapid and highly uneven. The new economy affects everybody, but is not inclusive towards everybody.³⁴

The global economy does not embrace all economic processes on the planet, and neither does it include all territories or people in its workings; but it affects, directly or indirectly, the lives of everybody. There is a fundamental asymmetry between countries, as well as regions and social groups, as to their level of integration into the global economic network. This leads to the concentration of resources, dynamism and wealth in a few territories, and ultimately to “*global trends of increasing inequality and social exclusion.*”³⁵ Yet the status of a country, a region or a segment of the population with regard to the network constantly is subject to change:

“[O]n the one hand, valuable segments of territories and people are linked in the global networks of value making and wealth appropriation. On the other hand, everything, and everyone, which does not have value, according to what is valued in the networks, or ceases to have value, is switched off the networks, and ultimately discarded. Positions in the networks can be transformed over time, by revaluation or devaluation.”³⁶

As an example of such structurally induced instability, Castells points to the Asian financial crisis at the end of the 1990s.

Culture and communication: “real virtuality” Castells argues with those—now ever scarcer—critics who purport that the symbolic environment of the Internet does not represent “reality”. Referring to Barthes and Baudrillard, he affirms that all human communication is based on, and encoded in, symbols. As a message between humans is never quite received the way it was sent, one could say that all reality is virtually perceived. This applies independently of the medium that transmits the symbols.³⁷ Therefore, the effects produced by “virtual” communication over electronic networks are no less “real” than the effects of communication by other means.

But the fact that communication happens over horizontal, decentralised electronic networks like the Internet does not mean that there is a homogenisation of cultural expressions, or that there are a few dominant senders. Because the new

³⁴Castells (2000b), 160 f.

³⁵Ibid., 132 ff.

³⁶Ibid., 134.

³⁷Ibid., 403 f.

communications system is diverse, multimodal and versatile, it is able to accommodate diverse interests, values and imaginations. The only condition—and the price to pay—is that those using the system must adapt “*to its logic, to its language, to its points of entry, to its encoding and decoding.*”³⁸

2.1.1 The informational mode of development

Castells distinguishes ages by their dominant *mode of development*. “*Each mode of development is defined by the element that is fundamental in fostering productivity in the production process.*” In the agrarian mode of development, rising productivity depended on quantitative increases in land and labour. In the industrial mode of development, this fundamental element was the introduction of new sources of energy. Today, in the informational mode of development, it is information processing: “*informationalism is oriented towards technological development, that is toward the accumulation of knowledge and higher levels of complexity in information processing.*”³⁹ A special characteristic of the informational mode of development is the action of knowledge upon knowledge itself as the main source of productivity.⁴⁰

The informational society As one of Castells’ central concerns is with the role of information in society, he makes it clear that his term “informational society” should not be confused with the common phrase “information society”. The term “information society” merely emphasises the role of information in society;

“in contrast, the term ‘informational’ indicates the attribute of a specific form of social organization in which information generation, processing, and transmission become the fundamental sources of productivity and power [...]”⁴¹

To illustrate this distinction, Castells draws a parallel to the “industrial society”. As he explains, “*an industrial society is not just a society where there is industry, but a society where the social and technological forms of industrial organizations permeate all spheres of activity [...]*”. The fact that its basic structures follow a networking logic is one of the informational society’s key features.⁴²

³⁸Castells (2000b), 405. A more common way to approach the Internet’s versatility would be to ascribe it to the network’s neutral design, the end-to-end principle of smart terminals and dumb transmission lines.

³⁹Ibid., 17.

⁴⁰Ibid., 16 f.

⁴¹Ibid., note. 31.

⁴²Ibid., fn 31.

2.1.2 Knowledge in the network society

It is clear that in informational production, productivity and competitiveness are based on knowledge. It is the raw material of the informational economy. The ability to generate and process knowledge largely determines the economic fate of organisations and countries.

Therefore, the geography of science and technology — i.e. the concentration of economically valuable knowledge — has a great impact on the sites and networks of the global economy. Science and technology are highly concentrated in OECD countries:

“In 1993, ten countries accounted for 84 percent of global R&D, and controlled 95 percent of the US patents of the past two decades. By the late 1990s, the fifth of the world’s people living in the high-income countries had at their disposal 74 percent of telephone lines, and accounted for over 93 percent of Internet users.”⁴³

Basic research is for the greatest part located in research universities and the public research system around the world. Yet Castells is wrong when he argues that basic research is therefore open and accessible.⁴⁴ The trend to allow universities to patent publicly funded research, epitomised by the Bayh-Dole Act in the US, endangers the accessibility in which Castells puts such high hopes.

Permanent communication between scientists around the world is indispensable for the functioning of the academic research system. While this communication has greatly intensified thanks to electronic media, there is a heavy bias in favour of the US and European science institutions in terms of access to publications, research funds, and appointments. But in spite of this bias, the communication exists and generates advances. This concentration leads to a fundamental asymmetry in the issues taken up by research. Those problems that are interesting to scientists in developed countries are pursued with great energy, while those important to developing countries receive much less attention.⁴⁵ Castells summarises:

“Therefore, science is global, but it also reproduces in its internal dynamics the process of exclusion of a significant proportion of people, by not treating their specific problems, or by not treating them in terms which could yield results leading to improvement in their living conditions.”⁴⁶

⁴³Castells (2000b), 124.

⁴⁴Ibid.

⁴⁵Ibid., 125 f.

⁴⁶Ibid., 126.

2.2 The properties of networks

According to Castells, the network has become the basic structural characteristic of our society. Not only is our communication organised in networks; so are economy, culture and politics. He points out some recurring features of these networks. First, the nodes that are included in the network are very unevenly distributed in their environment: using a geographical example, bankers in big cities in the US are more likely to be included in the worldwide economic network than farmers in Burundi. Second, some nodes are bigger, or “more central” than others: e.g. a giant car manufacturer wields more power in the automotive business network than the small company that produces specialised electronic components for the brake system. Yet, third, no single node has absolute control of the network. The car manufacturer has massive influence on, but cannot control other manufacturers of similar size.

These patterns surface in virtually all of the networks which Castells examines. It is therefore worth asking if they might in fact be a property of the network structure itself, rather than of the different kinds of nodes (which may be people, enterprises, computers, or anything else). This is exactly what a number of physicists and mathematicians are currently working on. One of them, Albert-László Barabási, has described some basic characteristics of a certain widespread type of these structures: The *scale-free* network. I will briefly present the fundamentals of his research on the laws and topologies of networks, as they complement Castells’ thoughts. Most importantly, Barabási is able to explain why so many networks exhibit a highly uneven distribution of size between their nodes. If networks are indeed what shapes our society, then their properties certainly deserve attention.

Scale-free networks Each network is a collection of *nodes* which are connected to each other through *links*. In mathematics it was long assumed that the number of links that each node receives was random. Though some nodes would have more links than others, the differences would not be great: a classical Poisson distribution.⁴⁷ It follows that each random network can be meaningfully described by giving the mean number of links per node—the *scale* of the network.

In recent years, the Internet has provided researchers with a real-life network that is not only rapidly growing, but can also be conveniently examined owing to its digital nature. It became obvious that the traditional random model completely

⁴⁷Barabási (2003), 22.

failed to predict many of the characteristics that could be seen not only there, but also in many other networks that scientists explored; e.g. the network of citations in scientific papers, or that of sexual relationships between people. Most importantly, the random model does not allow for what Barabási calls *hubs*: nodes with an extraordinarily high number of incoming links.⁴⁸ (Examples of such hubs on the Internet today would be those sites that are extremely popular: yahoo.com, google.com etc.)

For these real-world networks, the average number of links per node does not make a very good description. What good is it to know that the average web site is linked to by, say, 40 other sites, when in fact some sites receive only one or two links, while others boast millions? For this type of network, Barabási and his team have coined the term *scale-free*. Here, the distribution of links per node is described not by a Poisson distribution, but by a power law.⁴⁹ There is a low (but still significant) probability that any node in the network will have a very large number of links to many others; and there is a high probability that a very large number of nodes will be connected only very loosely.⁵⁰ Compared to random networks, in scale-free networks governed by a power law distribution, there is a large chance for hubs to occur.⁵¹

Rich get richer Barabási holds that “*most complex networks of practical importance are scale-free.*”⁵² Networks of almost any kind, as they grow large and complex, organise themselves into a scale-free state.⁵³ Two basic conditions must be met for this to happen. The first one is that the network must be growing. This can be observed in most real networks: every day, more computers connect to the Internet, more scientists publish papers with citations, and population growth perpetuates itself by the addition people to the network of sexual relations. The sec-

⁴⁸Barabási (2003), 62 illustrates:

“If the Web were a random network, the probability of there being a page with five hundred incoming links would be 10^{-99} —that is, practically zero, indicating that hubs are forbidden in a randomly linked web. Yet the latest web survey found four hundred such pages and one document with over two million incoming links. The chance of finding such a node in a random network is smaller than the chance of locating a particular atom in the universe.”

⁴⁹Ibid., 70 f.

⁵⁰Benkler (2006), 243. For a discussion of the consequences of network structures for political discourse, see generally *ibid.*, 241–261

⁵¹Barabási/Albert (1999), 510.

⁵²Barabási (2003), 91.

⁵³Barabási/Albert (1999), 510.

ond is what Barabási calls *preferential attachment*: nodes are more likely to link to those existing nodes that already have a large number of links. This behaviour can also be widely observed in real-world networks: a new website is more likely to link to a popular website than to an unpopular one. A scientist writing a new publication is more likely to rely on prominent sources than obscure ones.

If these two conditions are fulfilled, they lead to a *rich get richer*-phenomenon: Nodes that already have a large number of links are likely to receive more, leading to the emergence of a small number of highly connected nodes: the hubs.

These hubs in turn make another characteristic of networks even more pronounced: the *small world* phenomenon. In most types of networks, any node can be reached from any other through a number of links that is often surprisingly small. (A common expression of the social network's small world properties is that strangers surprisingly discover mutual acquaintances.) But in a scale-free network, hubs contribute to making the distance even shorter. As it is very likely for any site to be connected to a certain hub, there is a good probability that any two sites connect to the same hub, putting them at the distance of a mere two links. The phenomenon scales up: For example, on the World Wide Web with its billions of websites, any site may be reached from any other via no more than 19 links.⁵⁴

After this approach was first published in 1999, other researchers have improved upon it in a number of ways, expanding and refining it. One result is that small clusters of nodes—numbering in the hundreds or low thousands—no longer follow a pure power law distribution. While these clusters still exhibit the “long tail” of sparsely linked nodes, a substantial proportion of nodes is moderately linked, instead of having either a very small or a very large number of connections.⁵⁵ This attribute of small clusters may offer a way of understanding networks like that of non-governmental organisations (NGOs) pushing for greater access to knowledge described in 7.2.

Resistance to failure and attack Scale-free networks are relatively resistant to the failure of individual nodes. A significant fraction of nodes can be removed at random without the network breaking apart; e.g. on the Internet, traffic is simply re-routed around a malfunctioning router. This robustness lies in the fact that most nodes on the network are small. Randomly occurring failures are therefore more

⁵⁴Barabási (2003), 34.

⁵⁵see Benkler (2006), 251.

likely to affect small nodes than hubs. Even more impressively, most real-world scale-free networks have mathematical properties that lead them to fall to pieces “*only after all nodes have been removed—or, for all practical purposes, never*”.⁵⁶ Yet although scale-free networks are highly resistant to failure, they prove much more fragile in the face of attacks. If an attacker intends to break the network, she will target not just any node, but the most central hubs. If only a small number of these hubs is removed, the network falls apart.

2.3 Summary: Knowledge in the network society

Since the 1970s, the way in which our society develops has changed. We have gone from an industrial to an informational mode of development. Instead of mainly relying on the input of energy, productivity now depends on the input of knowledge. The action of knowledge upon knowledge is the main source of productivity. Our society is an *informational* one, because the social and technological forms of an informational, networked organisation permeate all spheres of activity. The network has become the central structural characteristic of our society. Technology has an important role in society; it embodies the capacity of society to transform itself. While all people and economies are affected by the global informational economy, not all are included in it to an equal degree. Information production and processing are highly concentrated in OECD countries. Though global communication between scientists has intensified, those located in developed countries have far greater means at their disposal than those in developing nations. In the network society, substantial inequalities persist.

The networks that shape our world have certain mathematical properties that are characteristic to nearly all of them. They are often *scale-free*, allowing for the existence of very large hubs, i.e. nodes that are much more connected than others. In these networks, nodes that have a lot of connections tend to attract even more of them. Thanks to the hubs, the number of steps required to get from any node in the network to any other is usually quite small. But in networks, there are also small clusters of nodes. Within these clusters, the number of connections is much more evenly distributed. While scale-free networks are very resistant to failure, they are quite sensitive to attacks targeting the largest hubs.

The two researchers at the centre of this chapter are complementary in that they have different perspectives on networks. Castells, drawing on a wealth of empir-

⁵⁶Barabási (2003), 113 ff.

ical material, concentrates on the inclusion or exclusion of people and territories in the economic networks spanning the globe; but he does not provide a conclusive explanation for the routes that the flows *inside* each network take. This is done by Barabási, who, on the other hand, does not consider what happens to the nodes which are not connected. Nevertheless, he and the many other researchers in his discipline provide us with important tools to better understand the connections between the wide array of facts that Castells presents about the network society.

Though the network architecture may pose certain difficulties, it offers some great opportunities as well. Due to the decentralised structure and the ease of communication, it becomes more efficient to produce knowledge in other ways than through the distributor-centred systems of the industrial age. In its overview of the way we govern our knowledge, the next chapter will explain how in a networked world, commons-based peer production of information is often showing itself to be more efficient than systems based on exclusion.

Based on the nature of knowledge as a public good, the next chapter will discuss how it is regulated in our society. Two main approaches are considered: intellectual monopoly powers (IMPs) rely on exclusion, while commons-based models make a point of being inclusive. As IMPs currently dominate the regulation of knowledge, their implications for development are also discussed.

He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.

Thomas Jefferson (1813): Letter to Isaac McPershon

3

Governing knowledge

In the network society, knowledge has more than ever become the lifeblood of the economy. In the informational mode of development, the main source of productivity is the “*action of knowledge upon knowledge*”.⁵⁷ If knowledge is central to the economy—and therefore society—, so is its regulation. How should society govern its most precious resource? How can knowledge be managed in a way that enables the society as a whole to draw the maximum benefit from the creative activity of its people? This problem is currently hotly debated. The society in question, thanks to that diffuse process known as globalisation, is the entire population of the planet.

Based on the nature of knowledge as a public good, this chapter will discuss two different ways of governing knowledge. The first one is by intellectual monopolies such as copyright and patents, which give the rightsholder property-like rights to a certain expression or idea, while excluding all others from its use. The second describes managing knowledge as a commons: giving everybody access under conditions that prevent the appropriation of knowledge products by any single person or group. We will further cast a look at some basic aspects of the relation between intellectual monopolies and development.

⁵⁷Castells (2000b), 17.

Knowledge as a public good Knowledge is what economists call *nonrival*: Its use by one person does not prevent its simultaneous use by another. It is also *non-excludable*: one unit of an information good can satisfy any number of users; and as the entertainment industry is currently experiencing to its chagrin, it is hard or impossible to stop it from doing so.⁵⁸ These two properties—nonrivalry and non-excludability—are what makes knowledge a *public good* in the economic sense of the term.

Yet in practice, it is often turned into something that resembles private property (though with limitations in time and scope) through intellectual monopoly powers. While an idea retains the inherent characteristics of a public good, its distribution and use is restricted by legal means. There are several lines of argument to justify IMPs.⁵⁹ The “natural rights” argumentation holds that people have a “property right” to their ideas, no matter if this benefits or harms society. Society should recognise this right and punish as theft any unauthorised use of the idea. This concept is in evidence in the continental European tradition of author’s rights.⁶⁰ A second way of justifying monopolies on ideas is that that a person who creates something should be rewarded or reimbursed for her effort. A third rationale, often brought forth in connection with patents, is that the monopoly gives the inventor an incentive to publish the invention.

But the most common justification for granting copyright and patents to individuals is that they represent a trade-off: Today, there may be less knowledge available at any given price than there would be if access were granted to all. But the restrictions that IMPs impose are indispensable to give knowledge its market value. They provide a monetary incentives to creators, leading to more ideas being produced.⁶¹ This way, over time, more people will participate in information production, and more information will eventually be available to society. This is the rationale found in the US Constitution, which states that

“The Congress shall have power [...] To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”⁶²

⁵⁸Boyle (2003b) *Law and Contemporary Problems*, 42.

⁵⁹see Bödeker/Moldenhauer/Rubbel (2005), 64 ff.

⁶⁰see Grassmuck (2002), 48 f.

⁶¹Benkler (2006), 36 f; Pugatch (2006), 98 ff.

⁶²Constitution of the United States, Art. I sect. 8 clause 8.

3.1 Intellectual monopoly powers

When the regulation of knowledge is under discussion, IMPs are frequently regarded as the only tools in existence.⁶³ Most, if not all countries grant intellectual monopoly powers for creative works and inventions. Two of the most salient forms of these monopolies are copyright and patents.

Copyright Copyright awards the rightsholder a limited monopoly on the use of an expression, such as a text, a picture, or a piece of software. The monopoly is limited both in time and in scope. The TRIPS Agreement, presently the most important global IMP treaty (see 4.2), establishes a minimum duration of 50 years before the copyrighted work enters the public domain. Many countries grant even longer terms, such as 70 or 95 years. It is also common to limit the monopoly power of the rightsholder for certain uses that are considered to be in the public interest. Under these limitations and exceptions, the work may be used e.g. for noncommercial educational purposes, or citations may be allowed.

What is referred to here as “copyright” is really two different concepts: Copyright and author’s rights. For the purposes of this thesis, it is sufficient to remark that the two concepts differ mainly with respect to one question: Does the author herself hold certain rights in her work which are inherently hers and cannot be sold? In the author’s rights tradition, she has “moral rights” which allow her to insist on being named as the author, and to prevent distortions of her work. She can only transfer the right to *use* the work. In the copyright tradition, the author may (and usually does) transfer all of her rights to the publisher or distributor.⁶⁴

Patents A patent is a limited monopoly granted to an inventor for an invention in exchange for the disclosure of how the invention works. Under the TRIPS agreement, this monopoly lasts for a minimum of twenty years. Different from copyright, patents are granted for ideas, not expressions. This means that after a person

⁶³See as one among many examples a speech by the German minister of justice at a symposium on “Innovation and Intellectual Property”, in Munich on 2004/07/06 (http://www.bmj.bund.de/enid/Juli/Muenchen__6_07_2004_-_Innovation_und_Geistiges_Eigentum_ny.html). See also a “Joint Statement between the United States of America and the Republic of Chile” on the conclusion of a bilateral free trade agreement between those countries, 2006/06/08 (<http://www.whitehouse.gov/news/releases/2006/06/20060609-6.html>). Both visited on 2006/08/01.

⁶⁴see e.g. Grassmuck (2002), 51–60.

has obtained a patent on a certain idea, no one else is allowed to use a similar idea *even if it was independently invented*.⁶⁵

It is important to note that in reality, these monopoly powers are often not held by the author or inventor herself. In the case of copyright, most rights are sold to the publisher who produces and markets books, or the record company who markets the music. Patents have long served as business assets which are not only bought and sold by companies, but also serve to keep competitors at bay and form cartels.⁶⁶

3.1.1 Criticism

Intellectual monopoly powers as a form of regulation of knowledge have been criticised in various ways, as have their justifications. From an economic perspective, monopolies on knowledge lead to systematic inefficiencies. Economists assume that in a market, goods are produced efficiently when they are priced at their marginal cost (the cost of producing an additional unit). As information is costly to produce, but cheap or even cost-free to reproduce, the marginal cost of information is zero or near zero. If we have to pay a price greater than zero for information, that means that it will not be utilised to the extent that it could be: “[P]recisely to the extent that [property] is effective, there is underutilization of information.”⁶⁷

A common criticism of the “natural rights” justification is directed at its inherent assumption that creativity occurs independently of previously existing material. Knowledge is both the input and the output of its own production process. Producing information requires information. Scientists build on their peer’s work; writers read existing texts to learn their trade; programmers have to look at source code produced by others before they can create their own. This is called the “on the shoulders of giants”-effect.⁶⁸ It follows that if the input is more expensive, then fewer people can take advantage of existing information, and less knowledge is produced. This effect amplifies the under-utilisation of information caused by monopolies on knowledge such as copyright and patents:

⁶⁵To provide a somewhat simplistic example: If the idea of a romantic comedy were patentable—which it is not yet, though the patenting of a movie plot has been attempted—and patented, then no other film-maker could produce a romantic comedy, even if he independently came up with the idea. Films are protected by copyright, which is much narrower in that it covers only the expression, not the idea.

⁶⁶see Drahos/Braithwaite (2002), 39–60.

⁶⁷Arrow, Kenneth: “Economic Welfare and the Allocation of Resources for Invention,” in *Rate and Direction of Inventive Activity: Economic and Social Factors*, ed. Richard R. Nelson (Princeton, NJ: Princeton University Press, 1962), 616-617; quoted by Benkler (2006), 36

⁶⁸After a quote attributed to Isaac Newton: “*If I have seen farther it is because I stand on the shoulders of giants.*” Scotchmer (1991), as cited by Benkler (2006), 37.

“If we pass a law that regulates information production too strictly, allowing its beneficiaries to impose prices that are too high on today’s innovators, then we will have not only too little consumption of information today, but also too little production of new information for tomorrow.”⁶⁹

The demand that authors and creators should be remunerated for their efforts is not necessarily wrong. But this does not mean that monopoly powers are the only possible way of doing this. Authors and inventors can be remunerated without giving them exclusive control over their works; collecting societies could be considered an example.⁷⁰

Regarding the third justification, the exclusivity granted by a patent can indeed work as an incentive to publish the invention in question. But not only is the worth of patents as a means for publishing information disputed in some areas, such as life forms, business methods or software; in practice, measures are sometimes taken to preserve this exclusivity even after the patent term has expired. Some patents are drafted in ways that discourage use of the published invention (see note 103).⁷¹

The most economically relevant justification, however, is the last one: that intellectual monopoly powers provide people with a monetary incentive to become creative, leading to a greater production of ideas in total and thus promoting the progress of all.⁷² As Benkler points out, this defence has its limits:

⁶⁹Benkler (2006), 38.

⁷⁰Bödeker/Moldenhauer/Rubbel (2005), 64 ff.

⁷¹Ibid.

⁷²A scathing critique of incentives as a metaphor for what drives people to be creative is delivered by Moglen (1999):

“According to the econodwarf’s vision, each human being is an individual possessing ‘incentives,’ which can be retrospectively unearthed by imagining the state of the bank account at various times. So in this instance the econodwarf feels compelled to object that without the rules I am lampooning, there would be no incentive to create the things the rules treat as property: without the ability to exclude others from music there would be no music, because no one could be sure of getting paid for creating it. [...]

The dwarf’s basic problem is that ‘incentives’ is merely a metaphor, and as a metaphor to describe human creative activity it’s pretty crummy. I have said this before, but the better metaphor arose on the day Michael Faraday first noticed what happened when he wrapped a coil of wire around a magnet and spun the magnet. Current flows in such a wire, but we don’t ask what the incentive is for the electrons to leave home. We say that the current results from an emergent property of the system, which we call induction. The question we ask is ‘what’s the resistance of the wire?’ So Moglen’s Metaphorical Corollary to Faraday’s Law says that if you wrap the Internet around every person on the planet and spin the planet, software flows in the network. It’s an emergent property of connected human minds that they create things for one another’s pleasure and to conquer their uneasy sense of being too alone. The only question to ask is, what’s the resistance of the network? Moglen’s Metaphorical Corollary to Ohm’s Law states that the resistance of the network is

“If some information producers do not need to capture the economic benefits of their particular information outputs, or if some businesses can capture the economic value of their information production by means other than exclusive control over their products, then the justification for regulating access by granting copyrights or patents is weakened.”⁷³

He then proceeds to demonstrate that both of these conditions are in fact the case for large areas of business activity. As an example, newspapers receive only a small part of their revenue from copyright-based activity such as syndication. Most of it instead comes from advertising and sales.⁷⁴ Contrary to popular belief, the share of information production that relies on excluding others from the product through copyright and patents is comparatively small. There are many strategies that allow the producer of information to appropriate the benefits of production without excluding others from the product itself.⁷⁵ Benkler concludes:

“[...] the reality of both theory and empirics in the economics of intellectual property is that both in theory and as far as empirical evidence shows, there is remarkably little support in economics for regulating information, knowledge, and cultural production through the tools of intellectual property law.”⁷⁶

Innovation, he insists, does not mainly come from market actors whose business models are based on copyright and patents. Rather, much of it is produced by a mixture of non-market sources (such as universities) and market actors who do not rely on monopoly powers for their revenue. This means that in information production, there is a substantial role for government funding; that non-profit research can be more efficient than for-profit research; and that the production of information in non-proprietary systems can play an important role.⁷⁷

Infrastructure An additional point may be made with regard to the infrastructure for the production and distribution of knowledge. In the past, distributing

directly proportional to the field strength of the ‘intellectual property’ system. So the right answer to the econodwarf is, resist the resistance.”

⁷³Benkler (2006), 37.

⁷⁴Ibid., 39 ff.

⁷⁵One example among many is the business strategy of IBM. Though certainly not averse to monopolies on knowledge—the company is the world’s largest patent holder—, IBM invests heavily in the development of the GNU/Linux operating system. This way, IBM obtains a better operating system for its server business and remains independent of proprietary providers. In 2003, the company’s revenue from GNU/Linux-related services was more than double that from the sale or licensing of its patents. See *ibid.*, 46 f.

⁷⁶Ibid., 39.

⁷⁷Ibid., 41.

information on a large scale required substantial investments of capital. A printing press or a broadcasting station are out of the financial reach of ordinary people. Information production and distribution were therefore largely structured around a centralised, capital-intensive model.

The advent of affordable desktop computers, digital cameras and broadband connections thoroughly changed the capital structure of cultural production. Producing and distributing knowledge now carries little cost, and the necessary devices are available to a larger part of humanity than ever before. As a consequence, “*the primary remaining scarce resource is human creativity*”.⁷⁸ Centralised, market-based systems are no longer the only option. Creators can choose the system that is most efficient with regard to their particular needs.

3.2 Knowledge commons

Instead of relying on exclusion, the regulation of knowledge may also be based on access. This is the case when knowledge is treated as a commons.

Four types of commons A typology of the commons has been provided by Peter Drahos.⁷⁹ He makes two distinctions for commons. The first is between the negative and the positive commons. In the negative commons, resources are owned by no one, but may be appropriated by anyone. In the positive commons, resources are jointly owned by the commoners, and anyone who wants to make use of those resources first has to obtain their consent. The second distinction is between the inclusive and the exclusive commons. An inclusive commons gives all individuals the right to use the resource, regardless of geography, race or culture. An exclusive commons confines the use of the resource to a particular group. These two distinctions result in a simple matrix of four types of commons: Negative inclusive, positive inclusive, negative exclusive and positive exclusive.

As perhaps the most important of the four with regard to knowledge, Drahos identifies the positive inclusive intellectual commons. This is a commons that lets everyone use the resource, but resists appropriation. Much of the cultural heritage of humanity is part of a positive inclusive commons—e.g. the works of Shakespeare. There are many works of art and science that have an important cultural

⁷⁸Benkler (2002) Yale Law Journal, 377.

⁷⁹Drahos (2006) Consumer Policy Review.

role, but are kept out of the positive inclusive commons by restrictive intellectual monopolies.

Free Software⁸⁰ is an example of such a positive inclusive commons: Anyone can use it, but licences like the GNU GPL⁸¹ protect it from appropriation. Drahos sees such commons as our most vital resource, which is endangered by the overreach of intellectual monopolies. He calls for society to weigh the costs of monopolies against their benefits before granting one:

“The intellectual commons is our most vital resource. It represents the publicly available means at our disposal for solving problems, it underpins our cultural and scientific creativity and, perhaps most importantly, it helps us to arrive at our chosen ends. It follows that creating even temporary monopoly rights over the intellectual commons carries risk and should only be done if we have great confidence that the benefits outweigh the risks. Unfortunately around the world today all governments have failed their citizens when it has come to embracing a cost-benefit-approach to intellectual property.”⁸²

It is a matter of much debate where in this concept the human genome should be placed. Though many would say that this information should be managed as a positive inclusive commons, a number of biotechnology companies have already appropriated parts of it through patents: “*The politics of the negative intellectual common was simply imposed on these resources.*”⁸³

What about the tragedy? A much-touted phrase is that of the “tragedy of the commons”. Derived from the title of a 1968 essay by Garrett Hardin,⁸⁴ it refers to the danger that a commonly owned resource will be overused, because every individual commoner has an interest in appropriating maximum benefits, but no incentive to invest in the maintenance of the resource. However Drahos, in line with a number of other scholars,⁸⁵ rejects the application of this concept to information and knowledge. He points out that information grows through use as opposed to being reduced: “*Repletion though use rather than depletion is what characterizes the intellectual commons.*”⁸⁶

⁸⁰Free Software is software that offers its users four basic freedoms: To run the program; to study and adapt it; to redistribute it; and to modify it, and redistribute modified versions. See <http://www.gnu.org/philosophy/free-sw.html>, visited on 2006/07/30.

⁸¹GNU General Public License; the most widely used Free Software license. “GNU” is a recursive acronym for “GNU’s not UNIX”.

⁸²Drahos (2006) Consumer Policy Review, 3 f.

⁸³Ibid., 3.

⁸⁴Hardin, Garrett: The Tragedy of the Commons, *Science*, 162 (1968): 1243–1248.

⁸⁵such as Boyle (2003b) *Law and Contemporary Problems* or Benkler (2002) *Yale Law Journal*

⁸⁶Drahos (2006) Consumer Policy Review, 3.

3.2.1 Commons-based peer production

Commons-based peer production is a mode of producing knowledge that relies on access instead of exclusion. Information is managed as an inclusive commons, and production happens in a networked way rather than through central distributors. The term was popularised by Yochai Benkler,⁸⁷ some of whose ideas will be briefly discussed in this section.

Commons-based peer production as a mode of generating knowledge has existed for a long time. One important example is academia: scientists produce information that is vital for our progress as a society. They usually do not expect to exclude from the results of their work anyone who does not pay for them. But while scientists are professional information producers, non-professional production of knowledge is perhaps even more important. At the most basic, this simply means people informally communicating with each other, creating entertainment, commentary and a host of other information—in effect, culture.⁸⁸ The online encyclopedia Wikipedia, to which anyone may contribute, is an outstanding example of peer production.

In addition to markets and firms, peer production is a third way of organising production, especially with regard to knowledge.⁸⁹ Though it currently does not receive nearly the same attention as intellectual monopoly powers, commons-based peer production has long thrived in our societies. Benkler argues that today, both models of regulation exist side by side, and that each serves better for certain tasks than for others:

“[I]t is easy, though unjustifiable, to forget that information production is one area where we have always had a mixed system of commercial/proprietary and nonproprietary peer production—not as a second best or a contingent remainder from the Middle Ages, but because at some things the nonproprietary peer production system of the academic world is simply better.”⁹⁰

The economic implications of commons-based peer production can be seen “*occurring throughout the value chain of information production on the Internet, from content production, through relevance and accreditation, to distribution.*” Benkler argues that commons-based peer production is particularly suited to the digital environment. Thanks to the speed and low cost of communication, peers

⁸⁷Benkler (2002) Yale Law Journal; Benkler (2006).

⁸⁸Benkler (2002) Yale Law Journal, 382 f.

⁸⁹For a discussion and comparison of these three models of production from the perspective of transaction costs see generally *ibid.*

⁹⁰*Ibid.*, 382.

can now exchange information much more quickly. He therefore sees peer production as having a “*systematic advantage over markets and firms in matching the best available human capital to the best available information inputs in order to create information products.*”⁹¹

This systematic advantage may require companies whose business model is based on intellectual monopoly powers to adapt and switch to business models which do not rely on appropriating the end product of information production. Firms such as RedHat or IBM have successfully done this; others will be overtaken by competitors who use these more efficient methods.⁹² This should, however, not be understood to mean that the peer production of information is always superior to production organised through a market or a firm. The latter two models may be more or less efficient than peer production, depending on the circumstances. The advantage of peer production consists in the improved identification and allocation of human creativity.⁹³

Restrictive copyright and patent rules “*harm peer production by raising the cost of access to existing resources as input.*”⁹⁴ This limits the creative application of existing information, and prevents contributors from applying their full potential to the task at hand. Thereby, restrictive rules act as a tax on non-proprietary models in favour of proprietary models.⁹⁵

“[W]e have known for decades that intellectual property entails systematic inefficiencies as a solution to the problem of private provisioning of the public good called information. The emergence of commons-based peer production adds a new source of inefficiency.”⁹⁶

As a consequence, Benkler recommends that regulators should focus more on enabling collaboration than on devising ever more restrictive monopoly schemes to enable the private appropriation of the public good that knowledge is.⁹⁷

Critical remarks This section should not be understood to portray commons-based peer production as a cure-all for the networked knowledge economy. It is another way of producing knowledge, which is complementary to the monopolis-

⁹¹Benkler (2002) Yale Law Journal, 444.

⁹²Ibid.

⁹³Ibid., 380 f.

⁹⁴Ibid., 445.

⁹⁵Benkler (2006), 461.

⁹⁶Benkler (2002) Yale Law Journal, 446.

⁹⁷Ibid.

tic approach to regulation.⁹⁸ It does not replace IMPs; but by presenting a viable and attractive alternative, commons-based peer production makes it necessary to ponder the most efficient way for producing knowledge in each case. The production of knowledge will be most efficient when creators can choose from a wide range of options for regulation. But no way of regulation should constrain the possibilities of the others.

3.3 Intellectual monopolies and development

Throughout the course of history, countries have used copyright and patents as tools to foster their economic development. Especially the recognition of monopolies granted by other countries was subject to interests of trade. Countries that were net importers of information products had little incentive to restrict the use of ideas coming from other nations. Countries that were net exporters of knowledge, on the other hand, clamoured for monopoly protection for the works of their citizens.⁹⁹

Until the beginning of the 20th century, US courts did not recognise the copyright and patents of other countries' citizens.¹⁰⁰ Books by foreign authors, especially British ones, were widely printed and sold without royalty payments of any kind throughout the 19th century.¹⁰¹ Around 1900, the German chemical industry was at the top of its game, and other countries used their patenting policies as tools to protect their domestic manufacturers. For example, Switzerland required patents to be represented by a model. Since this could not be done for processes, Swiss chemical manufacturers could copy those developed by the Germans. The English, on the other hand, did not allow chemical compounds to be patented.¹⁰² In World War I, the US seized the patents of German chemical companies in the US. They were then sold on to domestic chemical companies. Though these often had trouble getting the processes described in the patent to work,¹⁰³ they proved

⁹⁸In fact, most projects in peer production protect their products from appropriation through licenses which are based on copyright, such as the GNU GPL or those drawn up by Creative Commons.

⁹⁹As accounts of the expansion of intellectual monopoly powers go, this humble thesis cannot hope to improve upon the conciseness of James Boyle's *The Second Enclosure Movement and the Construction of the Public Domain* (Boyle (2003b) Law and Contemporary Problems) or on the breadth and detail of Peter Drahos' *Information Feudalism* (Drahos/Braithwaite (2002)), both of which provide entry points to the large body of literature on this topic.

¹⁰⁰Grassmuck (2002), 63.

¹⁰¹Drahos/Braithwaite (2002), 32 f.

¹⁰²Ibid., 35.

¹⁰³When a patent is filed, the invention must be publicly disclosed. But then as now, this disclosure was often less than perfect:

quite valuable: The established companies holding the patents could keep up-and-coming competitors from performing research in the patented fields. Even if the patent did not exactly cover the topic in question, the smaller competitor could usually not afford the drawn-out lawsuits to prove it.¹⁰⁴

Today, we are faced with the rapid expansion of intellectual monopoly powers. This is evidenced by the TRIPS agreement, which sets out minimum standards for all WTO member states (see chapter 4). With TRIPS as a “floor”, even stricter rules of exclusion are propagated through bilateral trade agreements that the US and the European Union strike with developing countries. It is ironic that as a consequence, as formal restrictions on trade such as quotas or tariffs are dismantled, the markets for knowledge and innovation are re-regulated.¹⁰⁵

If developing nations are to take advantage of the opportunities offered by an increasingly networked world, they need to absorb new technologies or develop them by themselves. If they cannot succeed in doing this, they risk becoming increasingly separated from the technology-driven world economy. This problem has been examined by Jerome Reichman and Keith Maskus, whose findings are reflected in the following paragraphs.¹⁰⁶

Developing countries can be viewed as nations where a relatively large part of the economy consists of small and medium enterprises. The IMP regulation that these companies need is quite different from that preferred by multinational corporations, which are usually based in developed countries.¹⁰⁷ They are typically in the position of follow-on inventors, building on technologies that were invented in the north. For them, TRIPS-plus IMP standards make the inputs for their activities more expensive, raising the barriers to entry into the global economy.¹⁰⁸ The process of technological absorption and development may hit a roadblock when confronted with increasingly strict IMP rules. Reichman and Maskus outline the

“[I]t must be understood that many of these patents are bogus, that is to say, contain deliberate misstatements for the purpose of misleading inquiring minds as to the manner in which important products are manufactured by the firm. In fact, some German patents are drawn for the purpose of discouraging investigation by more practical methods: thus, any one who attempted to repeat the method for manufacturing a dye stuff protected by Salzmann and Kruger in the German patent No. 12096 would be pretty certain to kill himself during the operation.”

A.C. Seward: *Science and the Nation*, 1917, quoted by Abraham S. Greenberg: *The Lesson of the German-owned US Chemical Patents*, *Journal of the Patent Office Society*, 1926–27, vol. 9, pp.19,20, cited in Drahos/Braithwaite (2002), 56

¹⁰⁴Ibid., 57.

¹⁰⁵Reichman/Maskus (2004), 282 f.

¹⁰⁶Ibid.. Both authors are based in the US. Keith Maskus is an economist at the University of Boulder, Colorado; Jerome Reichman is a law professor at Duke University, North Carolina.

¹⁰⁷Ibid., 310 f.

¹⁰⁸Ibid., 309.

problems that small and medium enterprises (SMEs) in developing countries are facing especially with regard to patents:

“Objective difficulties of accessing technical information generated abroad and of adapting it to local conditions still hamper the catch-up activities of firms in developing countries. International IP standards augment these difficulties by elevating the cost of inputs and by making the task of reverse engineering by honest means more costly and sometimes impossible. Additional obstacles arise when high prices charged for foreign technologies make locally produced goods uncompetitive, when foreign suppliers refuse to license needed technology at all, or when they impose unreasonable terms and conditions that restrict exports and otherwise create barriers to entry.”¹⁰⁹

The two authors are highly sceptical of the view that more restrictive intellectual monopoly rules will be of unequivocal benefit to all. They warn that such rules may instead jeopardise the provision of public goods such as health, environmental protection, education and scientific advance:

“In our view, the greater likelihood is that the privatization of public-interest technologies could in many cases erect competitive barriers, raise transactions costs and produce significant anti-commons effects, which tend to reduce the supply of public goods related to innovation as such, and also to limit the capacity of single states to perform essential police and welfare functions not otherwise available from a decentralized international system of governance.”¹¹⁰

Reichman and Maskus conclude that to maintain the supply of public goods, developing countries must take the lead in innovative IMP regulation, as well as in the adjacent areas of competition policy and the promotion of innovation. By doing so, these countries might even provide a much-needed stimulus to global competition:¹¹¹

“[T]he turmoil generated by the TRIPS Agreement and its aftermath [...] suggests that we stand at the threshold of an era in which unanswered questions about the role of IPRs in a networked information economy demand a lengthy period of ‘trial and error’ experimentation, like that which ensued after the adoption of the Paris and Berne Conventions in the 1890s.”¹¹²

¹⁰⁹Reichman/Maskus (2004), 309.

¹¹⁰Ibid., 283. A thorough treatment of the regulation of public goods is provided by Drahos (2004) *Journal of International Economic Law*.

¹¹¹Reichman/Maskus (2004), 283 f.

¹¹²Ibid., 312.

3.4 Summary: Focusing on efficiency

Knowledge is a *public good* in the economic sense of the term, as it is nonrival and non-excludable. Societies regulate knowledge with the goal of maximising both the amount of creative ideas and the amount of knowledge available. The best-known method for such regulation are intellectual monopoly powers (IMPs). They turn information into something closely resembling private property.

But this privatisation of information can be inefficient as a method of regulation. It reduces the amount of knowledge available that follow-on authors and inventors can use as input for their own work. The claim that the informational economy depends on strong monopolies on ideas appears to be greatly exaggerated when looking at the empirical evidence. Out of a great variety of business models in this area, only a few depend on such monopolies. The spread of digital communication networks adds another source of inefficiency to this proprietary model.

If communication is cheap, easy and quick, commons-based models of knowledge production may quickly become more efficient than monopoly-based ones. Here, knowledge is managed as a positive inclusive commons: Anyone may use the resources available, but no one may appropriate them exclusively. Science has long functioned as such a knowledge commons. In the digital environment, a host of other examples shows the potential of this model. This way of producing knowledge also gives rise to new business models which produce competition for monopoly-based ones.

As the dominant model in the global regulation of knowledge, intellectual monopoly powers have long played an important role in the economic development of countries. Historically, each nation adapted its IMP regime to the advantage of its economy. It was only when developed countries reached a critical mass that the construction of a global framework for IMPs began in earnest. But developing countries might benefit more from being able to mold their IMP regimes to suit their needs.

The next chapter will describe the most important forces and institutions in the global IMP framework. The link between IMPs and trade is an important consideration. Unilateral, bilateral and multilateral agreements shape the global knowledge landscape. As the specialised UN agency for matters of intellectual monopoly powers, the World Intellectual Property Organisation (WIPO) will be described in some detail.

Bilateralism is like cooking an elephant and rabbit stew: however you mix the ingredients, it ends up tasting like elephant.

Peter Drahos and John Braithwaite (2002): Information Feudalism

4

The international IMP framework

The following sections treat the four most important institutions for the global regulation of IMPs. First, we consider US trade policy, which has been a significant driver for the spread of stricter IMP standards to other countries since the 1980s. The TRIPS agreement of 1995, presently the single most important substantial multilateral treaty on intellectual monopolies, is discussed in the second section. The third section explains the basics of bilateral free trade agreements (FTAs). Although they had existed before TRIPS, these agreements between developed and developing countries today are the main means for spreading IMP regimes that are much stricter than required by TRIPS (so-called TRIPS-plus standards).

The fourth section deals with the World Intellectual Property Organisation (WIPO). This is a specialised agency of the UN which deals with matters concerning intellectual monopolies. Except for TRIPS, most international agreements on the subject are negotiated and administered here. Besides giving an introduction to the organisation and its mandate, I will discuss some of the problems of governance ailing this particular body.

The link between IMPs and trade Three of the four sections in this chapter concern matters of international trade. The importance especially of copyright and

patents in this area becomes clear when one considers the amount of money at stake. In 2002, the US alone received US\$ 24.984 billion from other countries in royalties and license fees, out of a world total of US\$ 29.110 billion.¹¹³ Only 18 (out of 200) territories were net exporters of license fees and royalties.¹¹⁴ From the early 1990s, the value of the export of US copyright products exceeded the total for cloths, chemicals, cars and computers and airplanes combined. Developing countries accounted for 87% of all cultural goods imports in 1980 and for 78% in 1998.¹¹⁵ Intellectual monopolies are an important trade asset. As by far the greatest exporter of IMP goods, “[t]he USA has followed a consistent and unremitting policy of elevating IPRs standards. It has done so through unilateral, bilateral, regional and multilateral action.”¹¹⁶

4.1 US trade policy: 301 and Special 301

The so-called 301 system, based on section 301 of the US Trade Act, is a key tool for enforcing international trade rules set by the US government. It gives the US Trade Representative (USTR) the authority to investigate the policies of foreign governments, and to take action if there are any “unfair trade practices” (e.g. issues concerning market access for US goods or investment in foreign countries). At first, such 301 action usually consists of investigations and consultations with

the government in question; if these consultations do not bear fruit, then the US government may use retaliatory measures.¹¹⁷

These can include the withdrawal of trade benefits or imposing tariffs on goods. The USTR can either initiate a 301 action by itself or as a response to a petition by any interested person. In 1984, the scope of Section 301 of the 1974 trade act was amended so as to include “failure to protect intellectual property” in the list of unfair trade practices against which the US can act.¹¹⁸

¹¹³UNCTAD Handbook of Statistics On-line, 2005, Table 5.2: Trade in services by sector and country. Available at <http://www.unctad.org/Templates/Page.asp?intItemID=1890>, visited on 2006/07/29.

¹¹⁴see <http://www.sasi.group.shef.ac.uk/worldmapper/display.php?selected=99>, visited on 2006/07/29. The total US GDP for 2001 was US\$ 10.082 trillion calculated at purchasing power parity. (Source: CIA World Factbook 2002, <http://www.umsl.edu/services/govdocs/wofact2002/geos/us.html>, visited on 2006/07/29.)

¹¹⁵Abdel Latif (2006).

¹¹⁶Roffe (2004), 4.

¹¹⁷Drahos/Braithwaite (2002), 88 ff, Pugatch (2006), 124 f. See also the USTR web page on the topic: http://www.ustr.gov/Trade_Sectors/Intellectual_Property/The_Work_of_USTR_-_Intellectual_Property.html, visited on 2006/07/29.

¹¹⁸Drahos/Braithwaite (2002), 89.

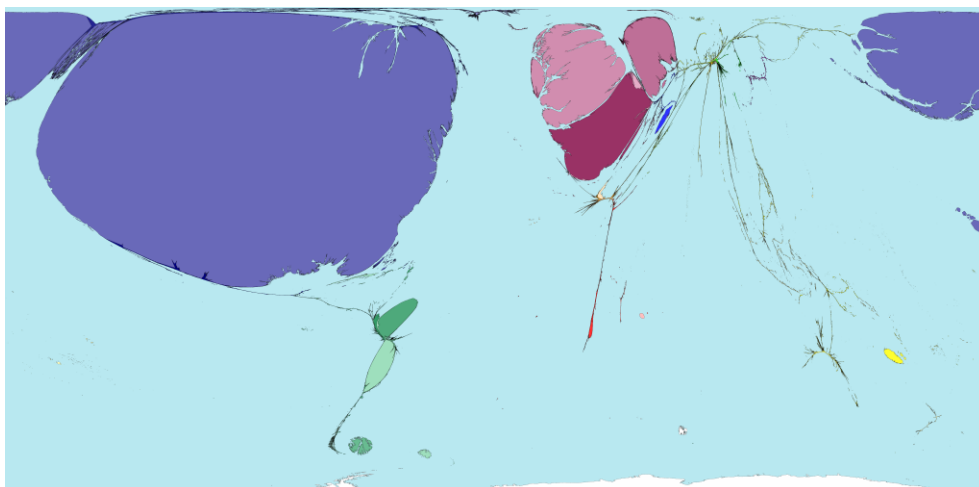


Figure 4.1: Territory size adjusted for the proportion of royalties and license fees imported from other countries (i.e. IMP goods exported).

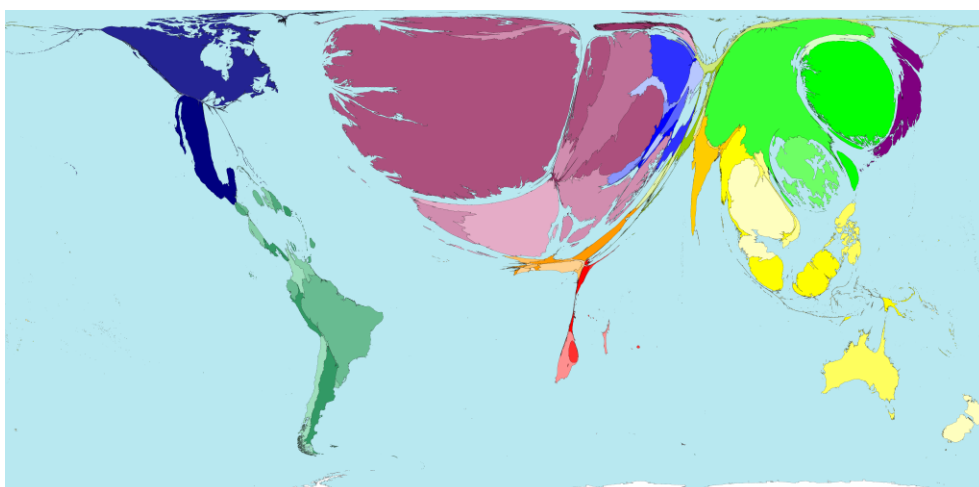


Figure 4.2: Territory size adjusted for the proportion of royalties and license fees exported to other countries (i.e. IMP goods imported).

Source for both maps: <http://www.worldmapper.org>. Based on data from the United Nations Conference on Trade and Development's (UNCTAD) Handbook of Statistics On-line, 2005, Table 5.2. © Copyright 2006 SASI Group (University of Sheffield) and Mark Newman (University of Michigan). Used by permission.

Special 301 (added in 1988) plugs intellectual monopoly powers into the enforcement mechanisms of section 301. It requires the US government to identify countries that do not give “adequate” protection to monopoly powers held by US citizens or corporations. It turns the monitoring of IMPs into a routine task of the USTR, instead of an activity that the office may occasionally take up. The USTR has to produce an annual Special 301 report, which is mainly based on information obtained from industry and lobbying groups. They do not only supply numbers (which may be more or less well-founded) for “piracy” losses in each country. Lobbyists also provide “*prepackaged analysis*” of other countries’ IMP laws.¹¹⁹

In the USTR’s report, countries are divided into three main categories: Priority Foreign Country (with the possibility of trade retaliation by the US: withdrawal of trade benefits or imposition of tariffs on goods),¹²⁰ Priority Watch List and Watch List. These lists are revised yearly. One criterion for a country’s position in the watch list system is its “*constructive participation in multilateral intellectual property negotiations*”. Amounting to a threat enacted as law, this gives the US government the possibility to bilaterally punish countries for their positions in multilateral negotiation.¹²¹ The system is by no means aimed only at developing countries. The 2005 Watch List included Canada and the European Union.¹²²

But in spite of the pressure exerted by lobbies, 301 action rarely ends in trade retaliation. The real aim is to prod developing countries into participating in the global knowledge economy on the terms of the US. It is more efficient to give countries the feeling that their behaviour is under constant surveillance than to rip apart the delicate web of international dialogue by imposing sanctions.¹²³

In the run-up to the TRIPS negotiations (see next section), the US used its bilateral coercive powers under 301/Special 301 to neutralise opposition to the multilateral TRIPS agreement.¹²⁴ Countries that might have resisted TRIPS saw their legislation slowly adapted towards standards that would later appear in the agreement: “*Each bilateral brought that country much closer to [the] TRIPS agreement, so accepting TRIPS was no big deal.*”¹²⁵ Contrary to the hopes of developing coun-

¹¹⁹Drahos/Braithwaite (2002), 89, 93–96.

¹²⁰Ibid., 89 f.

¹²¹Ibid., 134 ff.

¹²²See USTR 2006 Special 301 report. The Priority Watch List included those countries that are the most vocal advocates of a development agenda for WIPO: Argentina, Brazil, India and Venezuela. Report available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/Section_Index.html, visited on 2006/07/31.

¹²³Ibid., 100.

¹²⁴Ibid., 191.

¹²⁵Former US trade negotiator, quoted by *ibid.*, 105

tries that the aggressive unilateralism displayed by the US in the use of the 301 process might subside after the multilateral TRIPS agreement, it “*acquired a more machine-like efficiency in the post-TRIPS period.*”¹²⁶

4.2 TRIPS

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) entered into force in 1995 and is administered by the World Trade Organisation (WTO). It was negotiated during the GATT’s¹²⁷ Uruguay round of trade negotiations (1986–1994). The WTO is the international organisation which sets and administers rules covering international trade.¹²⁸ It currently has 150 member states (as of July 2006).

The goal of TRIPS is “*to reduce distortions and impediments to international trade [...] and to ensure that measures and procedures relating to IP rights do not themselves become barriers to legitimate trade*”.¹²⁹ The agreement establishes binding international minimum standards in the field of intellectual monopolies. Its provisions act as a “floor” for these monopolies: No WTO member state may introduce a more permissive IMP regime, but stricter rules of exclusion are allowed.¹³⁰ TRIPS was a big step towards the global “harmonisation” of IMP standards.¹³¹

Provisions TRIPS covers most classes of intellectual monopoly powers, including copyright, patents, trademarks, geographical indications, industrial designs, integrated circuits and trade secrets. Importantly, it includes provisions designed to ensure that these monopolies can be effectively enforced. As a WTO agreement, it is also linked to that organisation’s dispute settlement mechanism.¹³²

As for copyright, TRIPS includes the substantive provisions of the Berne Convention, additionally requiring the protection of original databases and computer software. It establishes a minimum copyright term of 50 years. Limitations and exceptions to copyright are tightly confined. Regarding patents, TRIPS establishes that they have to be granted in all “*fields of technology*”, but members may ex-

¹²⁶Drahos/Braithwaite (2002), 107.

¹²⁷General Agreement on Tariffs and Trade; precursor to the WTO before 1995

¹²⁸http://www.wto.int/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm

¹²⁹TRIPS, Preamble.

¹³⁰Ibid., art. 1.1.

¹³¹For a concise summary of the basics of the TRIPS Agreement, see UK IPR Commission Report, 3.

¹³²Tansey (2006), 1; TRIPS, art. 64.

clude certain areas from patentability, such as therapeutical methods or plants and animals.¹³³ Limitations and exceptions to patents are limited almost as strictly as in copyright. TRIPS applies equally to all member states of the WTO, regardless of their development status. Developing countries were allowed to delay implementation until 2000 for most rules, and were expected to be in full compliance by 2006.¹³⁴ Least developed countries (LDCs) were given until 2013 to achieve full compliance.

Though the agreement mainly benefits rightsholders and developed nations,¹³⁵ developing countries were able to obtain some favourable provisions as well. TRIPS Article 7 states that IMPs are not an end in themselves, and makes it clear that stricter IMP rules by themselves do not automatically lead to innovation, technology transfer and development. It also spells out that both producers and users of intellectual goods should benefit from the monopoly protection offered, under a balance of rights and obligations. Article 8 provides some room for member states to adopt measures to protect public interest, as well as for steps to control the abuse of IMPs for anticompetitive practices.¹³⁶ These articles expound that IMPs are subject to public policy objectives; that flexibilities should be emphasised; that IMPs should contribute to technology transfer; and that intellectual monopolies should not interfere with access to essential medicines. In 2001, they were given added emphasis by the Doha Declarations (see 5.3).

Criticism Criticism of the TRIPS agreement concentrates mainly on two issues: the perception that the agreement is skewed towards rightsholders' interests; and the costs of TRIPS to developing countries, chiefly caused by the loss of flexibilities.

TRIPS negotiations were largely based on a blueprint produced by big corporations from the US, the EU and Japan.¹³⁷ It is therefore no surprise that it gives extensive powers to rightsholders, while imposing considerable costs on developing countries in several areas. It made their imports of IMP goods dramatically more expensive, especially in health and education:

“TRIPS [...] was clearly an economic disaster for nations that were net importers of intellectual property rights, and particularly for those that would

¹³³TRIPS, art 27.

¹³⁴Ibid., Art 65.

¹³⁵UK IPR Commission Report, 159 f.

¹³⁶UNCTAD-ICTSD (2005), 125 ff.

¹³⁷Drahos/Braithwaite (2002), 125, 137.

be unable to afford the drugs that might save millions of lives from epidemics like AIDS”.¹³⁸

Though TRIPS required all member states to change their laws to some extent, developing countries had to make far greater modifications than developed ones: “*In fact, for the key players [. . .], TRIPS offered the opportunity to globalize their own domestic models of regulation.*”¹³⁹ Developing country negotiators, in the meantime, could only try to minimise their losses.¹⁴⁰

There is substantial evidence that in trade, TRIPS has almost exclusively benefited developed countries, most importantly the US. Developing countries, on the other hand, had to deal with net losses in their IMP trade balances. While the US surplus for royalties and license fees increased from US\$ 14 billion in 1991 to US\$ 22 billion in 2001, developing nations saw a deficit in this category of US\$ 7.5 billion in 1999.¹⁴¹ Additionally, TRIPS is forcing developing countries to invest massively into building an administration and enforcement infrastructure for intellectual monopoly powers, largely to the benefit of corporations based in developed countries. At the same time, their legal systems sometimes do not afford their own citizens even the most basic protection against violence.¹⁴²

Even more detrimental is the loss of flexibilities that countries used to enjoy in designing rules for intellectual monopolies. IMPs are not ends in themselves, but rather tools that can be used to foster economic, cultural and technological development. Although they may produce benefits by providing financial incentives for creativity, they also have costs, as they raise the price for the knowledge that is the input of creativity.¹⁴³ In its IMP regime, each country has to find the balance between access and exclusion that best suits its needs.¹⁴⁴ The TRIPS agreement, by establishing global minimum standards, greatly reduces the manoeuvring space for countries to use particularly the copyright and patent rules as tools at the service of their own development.¹⁴⁵

Why did developing countries sign TRIPS? If the agreement does so much harm and so little good to developing countries, why did they sign it? One reason

¹³⁸Drahos/Braithwaite (2002), 192.

¹³⁹Ibid., 143.

¹⁴⁰Ibid., 145.

¹⁴¹UK IPR Commission Report, 21.

¹⁴²Drahos/Braithwaite (2002), 147.

¹⁴³see e.g. UK IPR Commission Report, 21–24.

¹⁴⁴Ibid., 6 f.

¹⁴⁵UNCTAD-ICTSD (2005), 119.

is that developed countries applied a considerable degree of bilateral pressure. For those countries that resisted TRIPS, the threat of US 301 action loomed in the background; in signing TRIPS, many hoped for a reprieve from the US' aggressive unilateralism. Additionally, the GATT talks were set up in a way that put developed countries in almost exclusive control of the negotiations.¹⁴⁶ A second reason is that many IMP importer nations did not have a clear understanding of their own interests in the field. Also, there was virtually no activity from civil society and user groups to counter the massive lobby work of the rightsholding industries.¹⁴⁷

One must also keep in mind that TRIPS was not a stand-alone agreement. It was part and parcel of the Uruguay round of GATT negotiations; accepting the outcome of the trade round also meant accepting TRIPS. In return for tolerating TRIPS, developing countries could obtain concessions in other areas of the negotiations, such as agriculture. They were also able to obtain some provisions that reflected their interests and concerns. Perhaps the most significant of these are parts of the preamble that recognise that IMPs are tools in favour of public policy objectives, and articles 7 and 8.¹⁴⁸

4.3 Bilateral agreements

In 1986, the US concluded its first significant bilateral agreement on IMPs with South Korea, after initiating a 301 action against the country a year earlier.¹⁴⁹ Treaties with other states soon followed. These agreements were important in preparing countries for TRIPS, as they tightened IMP standards in the direction that developed countries would later push for in the GATT negotiations of the Uruguay round. But bilateral deals on IMPs, often made in the course of Free Trade Agreements (FTAs), only acquired their current significance after the conclusion of the TRIPS agreement. From the European side, the EU Partnership Agreements (EPAs) and free trade agreements with EFTA (European Free Trade Association) are pushing in a similar direction, though not quite as consistently.¹⁵⁰

Standard TRIPS-plus provisions in US-negotiated FTAs Some developed countries (in particular the US and the EU) pursue TRIPS-plus policies because

¹⁴⁶Drahos/Braithwaite (2002), 192–197.

¹⁴⁷Ibid.. See this work generally for a detailed account of the GATT negotiations on TRIPS.

¹⁴⁸Abdel Latif (2006).

¹⁴⁹Drahos/Braithwaite (2002), 102 ff.

¹⁵⁰Roffe (2004), 4–8, Pugatch (2006), 122.

they do not feel that the TRIPS agreement provides sufficiently high standards of monopoly protection.¹⁵¹ Since 1994, the US “*has followed a clear and explicit bilateral trade policy going beyond the TRIPS Agreement by including TRIPS-plus provisions in its free trade agreements*”.¹⁵² Bilateral FTA negotiations conducted by the United States strive for the agreement to “[...] *reflect a standard of protection similar to that found in United States law*”.¹⁵³ This means *inter alia*:¹⁵⁴

- the extension of copyright, trademark, and patent protection beyond the terms found in TRIPS
- joining the WIPO Internet Treaties of 1996 (WCT/WPPT).
- patent protection for life forms
- limitations in granting compulsory licences on patents
- specific implementation of TRIPS provisions in areas such as undisclosed information

These provisions further shift the—already skewed—balance of rights and obligations found in TRIPS in favour of developed countries. The nearly uniform application of these demands in bilateral negotiations is the mark of a “one size fits all”-approach to the regulation of intellectual monopolies.

The “most favoured nation” principle Though bilateral agreements serve to spread TRIPS-plus standards for IMPs, they would, by themselves, not be very effective: To subject a group of countries to identical IMP regimes, each state would need to sign a bilateral treaty with all others.¹⁵⁵ In reality, the process is much more efficient due to the “most favoured nation” clause found in art 4 of TRIPS. A country that accepts TRIPS-plus standards for trade with *one* WTO member will have to apply those standards to its economic relations with *all* WTO members.¹⁵⁶

Criticism Bilateral agreements have been judged as problematic for two reasons. One is that these are not agreements between equals. They are typically concluded

¹⁵¹Pugatch (2006), 122.

¹⁵²Roffe (2004), 49.

¹⁵³Trade Promotion Authority Act, 19 U.S.C. §3802(b)(4)(A), quoted by *ibid.*, 5.

¹⁵⁴see generally *ibid.*

¹⁵⁵UK IPR Commission Report, 163.

¹⁵⁶see also Roffe (2004), 18.

between an economic and political heavyweight (such as the US or the EU) and a developing country, which is often dependent on the bigger partner in many respects. Weaker negotiating capabilities of developing countries are not counter-balanced by their greater number, as they are in multilateral negotiations.¹⁵⁷ The second reason is that as a consequence, developing countries find themselves under obligation to implement rigid regimes for patents, copyright and trademarks that largely benefit not their own population, but corporations based in developed countries. Though TRIPS itself is already rather favourable towards rightsholders when compared with the previous situation, bilateral agreements often greatly enlarge this imbalance, as they overrule the flexibilities found in TRIPS. Developing countries are thus seeing their policy space curtailed even further.¹⁵⁸

4.4 WIPO

WIPO is a specialised agency of the United Nations which deals with matters concerning intellectual monopolies. It grew out of the offices that administered the Paris and Berne Conventions (BIRPI—Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle). The organisation in its present form was established in 1970 on the basis of the WIPO Convention (1967).¹⁵⁹ In 1974, it obtained its status as a specialised agency within the UN system by virtue of the UN-WIPO agreement.¹⁶⁰ In 1996, WIPO entered into a cooperation agreement with the WTO to provide developing countries with assistance for the implementation of TRIPS.¹⁶¹ The push to establish WIPO was partly intended to head off any attempt by UN organisations that were not part of the IMP “community”, such as ECOSOC,¹⁶² to deal with intellectual monopolies.¹⁶³ WIPO’s main functions today are to serve as a forum for negotiations on international IMP treaties; to administer such treaties; and to provide legal and technical assistance to developing countries.¹⁶⁴

¹⁵⁷UK IPR Commission Report, 162.

¹⁵⁸Roffe (2004), 49.

¹⁵⁹WIPO Convention.

¹⁶⁰UN-WIPO Agreement.

¹⁶¹WIPO (2001). For the text of the agreement, see http://www.wipo.int/clea/docs_new/en/wo/wo030en.html, visited on 2006/07/21.

¹⁶²United Nations Economic and Social Council

¹⁶³Musungu/Dutfield (2003), 4.

¹⁶⁴UK IPR Commission Report, 158.

The main decision-making body is the General Assembly. It consists of the states that are parties to the WIPO Convention. The most important function of the assembly is to appoint and instruct the Director General and to review his reports, as well as to adopt the organisation's budget. WIPO's day to day work, as well as most negotiations, take place in standing committees, working groups and advisory committees. The organisation's secretariat is the International Bureau, with the Director General as the chief executive.¹⁶⁵

As of July 19, 2006 WIPO has 183 member states. It administers 23 treaties: 15 on industrial monopoly powers, 7 on copyright, and the WIPO Convention. Roughly 85% of WIPO's budget come from the fees that rightsholders pay for the use of the registration systems. The rest is financed by member's contributions and the sale of WIPO publications.¹⁶⁶

4.4.1 Mandate

There are two fundamental documents that describe WIPO's mission and purpose. Unfortunately, they differ significantly from each other. The mandate that the 1967 WIPO Convention sets out for the organisation is rather narrow:

“[...] to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization [...]”¹⁶⁷

According to this, WIPO's only purpose is establishing stricter standards of exclusion and ensuring that they are adhered to. The mandate outlined in the second relevant document is much broader. The 1974 Agreement between the United Nations and WIPO states in art. 2:

“The United Nations recognizes the World Intellectual Property Organization [...] as a specialized agency and as being responsible for taking appropriate action, [...] inter alia, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development, subject to the competence and responsibilities of the United Nations and its organs [...]”¹⁶⁸

WIPO's status as specialised agency of the UN, which flows from this agreement, implies a stronger focus on “*promoting creative intellectual activity*”, rather

¹⁶⁵Musungu/Dutfield (2003), 5 ff.

¹⁶⁶WIPO (2001).

¹⁶⁷WIPO Convention, art. 3(1).

¹⁶⁸UN-WIPO Agreement, Art. 2. Interestingly, WIPO does not list this agreement as a “major event” on its website—see <http://www.wipo.int/treaties/en/general/>, visited on 2006/07/20.

than continuing to merely “*promote the protection of intellectual property*”. It means that the organisation’s activities must be compatible with the goals of the UN and its agencies.¹⁶⁹ In the words of the UK IPR Commission, this requires that WIPO

“should give explicit recognition to both the benefits and costs of IP protection and the corresponding need to adjust domestic regimes in developing countries to ensure that the costs do not outweigh the benefits”.¹⁷⁰

Though such a broad reading of WIPO’s mandate is possible, a restrictive understanding based on the 1967 WIPO Convention prevails to this day.

This is why the question of WIPO’s mandate is an important part of the development agenda debate (see 6.3.2). Some argue that WIPO should limit itself to strengthening the protection of IMPs, as there are other UN bodies to take care of development. Those advocating a reform of the organisation point to its obligation under the UN-WIPO Agreement to use IMPs as tools for promoting development, instead of treating them as an end in themselves. WIPO has in the past consistently followed a narrow interpretation of its mandate by merely promoting intellectual monopolies. It has been questioned whether WIPO is at all able to take into account the concerns of developing countries.¹⁷¹

4.4.2 Governance: problems

In theory it is the member states that determine WIPO’s direction while the secretariat has a merely administrative role. But many argue that it is in fact the secretariat which leads the organisation towards ever-stricter IMP rules.

Pushing for TRIPS-plus standards To avoid losing influence and to remain the main forum for negotiations on IMPs, WIPO has to demonstrate to developed countries that it can deliver the stricter TRIPS-plus standards that these member states are striving for. If the organisation were to give more room to the concerns of developing countries, this might provoke the US, the EU and Japan to shift the forum for IMP negotiations to other multilateral bodies or to regional and bilateral agreements. The secretariat is clearly wary of such a prospect.¹⁷² A case in point

¹⁶⁹Musungu/Dutfield (2003), 19.

¹⁷⁰UK IPR Commission Report, 159.

¹⁷¹Musungu/Dutfield (2003), 5, with reference to UK IPR Commission Report

¹⁷²Musungu/Dutfield (2003), 21.

is its active promotion of the “WIPO Patent Agenda” since 2001, despite much criticism from developing country members.¹⁷³

The Secretariat is also using its power to suppress criticism. This is especially relevant for negotiators from developing countries, whom WIPO provides not only with the necessary funds to attend meetings, but also with the prospect of lucrative and prestigious jobs in the organisation.¹⁷⁴

The rightsholding industry has great influence in the organisation.¹⁷⁵ Besides having long been present as observers and lobbyists in the hallways, rightsholding industry representatives form a committee that advises the Director General, the Industry Advisory Commission (IAC). The Director General stated that the commission was intended to ensure “*a direct input into the policy-making process at WIPO*”.¹⁷⁶ Musungu/Dutfield comment:

“This statement reflects the view in WIPO that the organisation has only two constituencies—the Member States, on the one hand, and the market sector, on the other hand. The general public, consumers and others are not considered as a constituency of the organisation.”¹⁷⁷

Another concern is that the secretariat increasingly abandons multilateral treaty making in favour of “soft law” norms.¹⁷⁸ These can take the form of “Recommendations” or “Resolutions”; there is no defined process for such norms. Besides circumventing the usual multilateral process and being much quicker to adopt, they have the advantage of binding (although not quite as strictly) all WIPO members; a treaty binds only those countries that ratify it.¹⁷⁹ In the development of soft law

¹⁷³see Musungu/Dutfield (2003), 11 f.

¹⁷⁴Drahos/Braithwaite (2002), 113.

¹⁷⁵Musungu/Dutfield (2003), 22.

¹⁷⁶Press release on the first meeting of the IAC http://www.wipo.int/edocs/prdocs/en/1999/wipo_pr_1999_154.html, visited on 2006/07/21, as quoted by Ibid., 8.

¹⁷⁷Ibid.

¹⁷⁸Kwakwa (2002), 187 f explains:

“The term ‘soft law’ generally is used to refer to certain categories of norms, technically non-binding in nature, that states nonetheless follow in practice or to which they at least subscribe. [...] various forms of soft law have been established effectively in various fora and seem to be adhered to by states [...] Soft law, whether in the form of declarations, recommendations, guidelines or codes, can impact the behavior of states and other relevant entities significantly. The increasing use of soft law is widely recognized. Certain multilateral treaties now contain references to ‘internationally recognized norms and standards’ and ‘established principles’ of international law.”

¹⁷⁹Musungu/Dutfield (2003), 6. It is important to note that—different from the WTO—membership in or adherence to WIPO treaties are not compulsory, though in practice the Secretariat actively lobbies member states to become parties to as many treaties as possible.

norms, the secretariat has much more influence than in treaty negotiations. Such norms can even be adopted by advisory bodies without involving member states at all.¹⁸⁰

Other worries are that important discussions are sometimes conducted in committees where no formal records of negotiations are kept; and that the secretariat does not only have functions in norm-setting, but also in implementing those norms through technical assistance. Musungu/Dutfield summarise: “*the way the International Bureau operates raises questions about whether it is an impartial arbiter or whether it is a partisan player.*” The behaviour and the expressed long-term vision of the organisation raise the question “*whether WIPO believes in the absolute benefits of intellectual property at all times and in all places.*”¹⁸¹

Technical assistance

WIPO is the largest provider of IMP-related “technical assistance” to developing countries, not only due to its expertise in the area, but also because of its large financial resources. Training officials and advising the drafting of laws, it helps countries to implement the treaties administered by WIPO, as well as TRIPS (under the 1996 agreement between WTO and WIPO).

These activities have been criticised for two reasons. One is that the secretariat has been accused of giving much more attention to the supposed benefits of intellectual monopolies than to their very real costs.¹⁸² The second reason is that the very nature of the technical assistance programmes gives the secretariat the possibility to exercise undue influence on countries in WIPO negotiations, e.g. by threatening to withhold further assistance. The training that the organisation provides to officials from developing countries does not sufficiently enable them to tailor their country’s laws to its particular needs. Musungu/Dutfield agree with the UK IPR Commission’s conclusion that “*the results of the technical assistance provided on intellectual property by WIPO so far is [sic] not commensurate with the effort and money spent*”.¹⁸³

¹⁸⁰Musungu/Dutfield (2003), 8.

¹⁸¹Ibid., 8 f.

¹⁸²Drahos/Braithwaite (2002), 195. See also Musungu/Dutfield (2003), 16

¹⁸³Musungu/Dutfield (2003), 16 f.

4.4.3 Why was TRIPS not done at WIPO?

Since WIPO is the UN system's specialist organisation for IMP matters, it is worth asking why the TRIPS agreement was not negotiated here rather than in the GATT, and why it is the WTO rather than WIPO administering it.

The main reason is that WIPO lacks a mechanism for conflict resolution, and therefore the power to enforce its rules. By contrast, the WTO can allow member states to impose punitive measures. Its dispute settlement mechanism makes it possible to enforce IMP obligations under TRIPS through the threat of trade sanctions,¹⁸⁴ so that a country violating TRIPS standards may, for example, face higher tariffs on its textile exports. Furthermore, the GATT negotiations of the Uruguay round presented developed countries with the opportunity to obtain stricter IMP standards in return for concessions in other areas such as agriculture. Just as importantly, developing countries were starting to use their numerical strength in WIPO, while they were not part of the consensus that set the agenda in GATT.¹⁸⁵ It has also been argued that IMPs are intrinsically linked to trade, and that it is therefore logical that the WTO should deal with the topic.¹⁸⁶

4.5 Summary: The IMP strictures

IMPs are inextricably linked to trade. Most tradeable IMP goods are exported from developed countries; most license fees flow into developed countries, coming either from developing or other developed nations. Thus, developed nations stand to profit from stricter global standards, while developing countries may face losses.

The 1995 TRIPS Agreement establishes binding global minimum IMP standards for all WTO member states. Critics argue that these mainly serves the interests of rightsholders, while developing countries are losing the possibility to construct a flexible IMP regime that suits their needs. Under bilateral pressure, developing countries signed the agreement mainly for two reasons: Because many of them were unaware of the importance of IMPs to their development, and because they were offered gains in other areas such as textiles and agriculture in return.

The US are probably the single most important state actor on the global IMP scene. Through their trade policy, they are working to spread throughout the world IMP standards that go beyond the requirements of TRIPS—so-called TRIPS-plus

¹⁸⁴see e.g. UK IPR Commission Report, 157.

¹⁸⁵Musungu/Dutfield (2003), 10 f.

¹⁸⁶Musungu (2005), 22.

standards. Bilateral free trade agreements serve a similar purpose. Other developed countries, such as the members of the European Union, also work in this direction, though not quite as consistently.

WIPO, the specialised agency of the UN which deals with matters of intellectual monopolies, grew out of the rightsholders' organisation BIRPI. It drafts and administers international treaties in this area. The scope of its mandate is contested, with some arguing that it is limited to promoting stricter IMP standards. Others, pointing out that WIPO is a part of the UN "family", argue that the organisation should more broadly promote creative intellectual activity.

WIPO's secretariat has been criticised for being biased in favour of developed countries, pushing TRIPS-plus IMP standards and unduly reducing the influence of member states. One vehicle for this are the organisation's technical assistance programs. In the view of some, these tend to emphasise the benefits of stricter IMP standards, while ignoring their economic and social costs.

The following chapters 5 and 6 describe the discussion about a "development agenda" for WIPO. This is a push by a group of developing countries to fundamentally reform the organisation. They want WIPO to incorporate development concerns into all aspects of its work. Chapter 5 will outline the context of this initiative. Chapter 6 will then deliver a thorough summary of the first year of the ensuing discussion, which is still continuing at the time of writing.

5

The context of the development agenda

After chapter 4 has provided some background on the workings of the international regulation of knowledge, it is time to prepare for a review of the discussion on a development agenda at WIPO. Central to this discussion is the Development Agenda Proposal submitted by the Group of Friends of Development.

5.1 Introduction to the development agenda debate

As the preceding chapters have made clear, the global IMP system is unfavourable to developing countries and the public interest in several respects. IMPs make it harder for everyone to take advantage of the public good nature of knowledge (non-rival, non-excludable), and often prevent the realisation of its full potential in digital communication networks. As follow-on inventors, people in developing countries are at a double disadvantage. Not only do they often have to pay to gain access to information. The prices are also frequently set so high as to be out of their reach. In politics, unilateral, bilateral and multilateral policies interlock to construct, maintain and expand the IMP system's imbalance in favour of developed countries.

WIPO is the key organisation for the global framework of the regulation of knowledge. If changes to the system are to be effective internationally, they must be made here. Though WIPO does not administer TRIPS, which is currently the most fundamental IMP treaty, it has great influence on the implementation of the agreement. The organisation's technical assistance programme is an important resource for developing countries adapting their laws to the agreement. WIPO also trains national IMP officials. It therefore has great leverage on the overall IMP policies of these countries.

But as we have seen in section 4.4, WIPO is not a neutral arbiter. It has a tendency to promote IMPs as something that is absolutely beneficial, without taking into account the costs that such monopolistic restrictions on knowledge carry. The organisation follows an extremely narrow interpretation of its mandate. Its secretariat oversteps its purely administrative remit to influence WIPO's activities in favour of developed nations, pushing for TRIPS-plus norms. The rightsholding industry wields an influence over the organisation that is not only considerable in its own right, but also institutionalised in the IAC; meanwhile, other stakeholders of the system are all but ignored. The clout of member states is increasingly reduced by the use of "soft law" norms. In sum, WIPO is a part of the problems ailing the international IMP framework.

These are the reasons why some developing countries are seeking to reform the organisation. At WIPO's General Assembly in 2004, Argentina and Brazil introduced a proposal "for the Establishment of a Development Agenda for WIPO".¹⁸⁷ Their initiative was joined by eventually 12 other developing countries. Together, they form the "Group of Friends of Development" (FOD).¹⁸⁸ Some of these states have a long history of activity in the IMP field (e.g. Brazil and India)¹⁸⁹.

The proposal calls for a more critical and balanced approach to IMPs, taking into account not only the benefits, but also the costs of monopoly protection. It criticises WIPO and other actors for pursuing IMPs as an end in themselves, rather than as a tool for encouraging creativity and development, and urge WIPO to broaden the interpretation of its mandate accordingly. It outlines measures to reform all areas of WIPO's work. According to the proposal, all activities of WIPO should be adjusted so as to take into account the "development dimension", i.e. the impact of each measure on development (see 5.3 and 6.2.1). The organisation's

¹⁸⁷WO/GA/31/11.

¹⁸⁸The countries in this group are Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela.

¹⁸⁹see generally Drahos/Braithwaite (2002)

governance should be made more transparent, and the influence of member states should be strengthened. Future treaties should contain objectives and principles such as those found in art. 7 and 8 of TRIPS 4.2. WIPO should take into account the interests of all stakeholders in the IMP system, not only those of rightsholders. Technical assistance should emphasise the flexibilities that are available for developing countries to design their national regulation according to their needs. The proposal is discussed in detail in 6.2.1.

This initiative caused intense debate between WIPO member states. It was not possible to reach an agreement during the General Assembly. For that reason, more meetings were set up, which go by the name of “Intersessional Intergovernmental Meetings” (IIMs). Their mission was to produce recommendations for the General Assembly in 2005. This is the one-year period under investigation in this thesis.

During the IIMs, it became obvious that member states held fundamentally different views on the issues under discussion. Especially the most developed countries put up strong resistance to the FOD proposal. The debate often turned into a protracted procedural struggle. No consensus could be reached on what measures should be recommended to the 2005 General Assembly. That meeting extended the discussion process for another year. As of July 2006, no results had been reached. But the prominent discussion of the problems of the global IMP system is attracting much attention, alerting politicians and civil society to the importance of the topic. As a result, more stakeholders than before have become actively involved in the discourse. This has led to the emergence of some visionary ideas, such as the campaign for a treaty on access to knowledge, which is discussed in chapter 7.

Before launching, in the next chapter, into an in-depth analysis of the discussion that is still continuing at WIPO, it is necessary to consider the context in which that proposal is situated. Not only does it make explicit references to a number of documents generated in various international organisations. It also draws heavily on ideas and concepts from other sources. To properly understand the proposal, a discussion of these references and inspirations is indispensable.

This chapter will provide the context for the Development Agenda Proposal. The submission makes extensive references to documents from various international bodies. Some of the reference points of the Development Agenda Proposal have already been discussed in this thesis. I provided a short look at the most important provisions of the TRIPS Agreement in 4.2. The question of WIPO’s mandate is touched upon in 4.4.1. Other important ones are briefly explained here, as they are essential for a proper understanding of the proposal. First, we will look

at the flexibilities in the TRIPS Agreement. Next, the WTO's Doha declarations of 2001 merit attention. They are not only an important interpretative resource for TRIPS, but also a major reference point for the FOD's initiative. The UN Millennium Development Goals contribute to the clarification of WIPO's mandate, as they declare development to be the foremost priority of the UN family of organisations. UNCTAD's São Paulo Consensus introduces the concept of "policy space", a certain manoeuvring room which countries should enjoy when implementing their international obligations. Finally, I will give some examples of the contributions made by academia and civil society to the debate about a reform of the IMP system.

5.2 TRIPS

Since the TRIPS Agreement is a central IMP treaty, its interpretation is of great importance to the Development Agenda Proposal. Generally, the FOD are arguing to interpret the provisions of the agreement in a way that gives developing countries more flexibilities in designing an IMP regime to fit their needs. In addition to the objectives and principles in art. 7 and 8 (see p. 42), the TRIPS Agreement incorporates a number of other rules that may be used in favour of developing countries.

Building in large part on the objectives and principles outlined in art. 7 and 8 of TRIPS, the Development Agenda Proposal suggests a number of ways to give these provisions greater practical relevance. It demands that similar articles should be included in the Substantive Patent law Treaty (SPLT) and other treaties currently under discussion.¹⁹⁰ It further invokes TRIPS art. 7 in conjunction with art. 1.1 to argue that states enjoy a degree of flexibility, as they are allowed to "*implement their international obligations in accordance with their own legal systems and practice*".¹⁹¹ The FOD proposal in this context calls for a more balanced approach to the enforcement of IMPs, which takes into account the public interest instead of being based solely on rightsholders' demands. As to WIPO, the group demands that the mandate of WIPO's Advisory Committee on Enforcement should remain "*within the limits of a forum for exchange of information*".¹⁹²

Another important subject in the proposal is the transfer of technology to developing and least-developed countries, which is contained as a fundamental objective

¹⁹⁰WO/GA/31/11, para. IV.

¹⁹¹Ibid., para. VI; IIM/1/4, para. 36

¹⁹²IIM/1/4, para. 19.

in art. 8 of TRIPS.¹⁹³ The FOD point out that art. 40 of that agreement establishes the right to curb anticompetitive practices that slow the transfer of technology,¹⁹⁴ while art. 31(k) allows for the use of compulsory licenses¹⁹⁵ under certain circumstances. They call upon developed countries to provide incentives for companies based in their territory so as to promote technology transfer, e.g. by introducing tax breaks for those corporations that set up research and development (R&D) operations in developing countries.¹⁹⁶

5.3 The Doha Declarations

A significant success for developing countries, the Doha Ministerial Declaration and the Doha Declaration on the TRIPS Agreement and Public Health were adopted in November 2001 by the WTO Ministerial, which is that organisation's highest decision-making body. They are therefore binding; but they do not override the TRIPS Agreement itself. Rather, they have to be considered a resource for the interpretation of TRIPS.¹⁹⁷

On the background of mounting public criticism of the WTO and the increased activity of developing countries in the organisation, the language of the declarations turned out to be quite favourable to developing countries. This applies not only when the texts are compared to TRIPS itself, but even more so when looking at most WIPO texts. It probably also represents a trade-off by developed countries, especially the US, who were willing to compromise on IMPs so as to make gains in other fields of trade, such as tariffs and services. The declarations call upon the TRIPS council (which reviews the implementation of that agreement) to take into account the "development dimension". They also emphasise the flexibilities contained in TRIPS. The declarations make it clear that IMPs are not ends in themselves, but tools to serve the public interest.

The development dimension The Doha Ministerial Declaration instructs the TRIPS Council, which is to review the implementation of the TRIPS Agreement,

¹⁹³WO/GA/31/11, para. 5.

¹⁹⁴Ibid., para. VI.

¹⁹⁵By issuing a compulsory license, a government may force a copyright or patent holder to allow for the use of the protected work by others (e.g. the state itself). The rightsholder may receive royalties, which are usually determined either by law or by arbitration.

¹⁹⁶IIM/1/4, para. 87.

¹⁹⁷UNCTAD-ICTSD (2005), 131.

to “*be guided*” by the objectives and principles in Art. 7 and 8 of the TRIPS Agreement, and to “*take fully into account the development dimension*”.¹⁹⁸ This term is understood to refer not to particular policies, but rather to taking into account the consequences of each measure, old or new, on the economic, social and cultural development of countries. As we shall see in 6.2.1, where it is discussed in more detail, the term is at the very centre of the Development Agenda Proposal.

Emphasis on flexibilities The distinguishing feature of the Doha declarations is that they add weight to the objectives and principles set out in articles 7 and 8 of TRIPS relative to the declarations in the agreement’s preamble. The latter are generally regarded to be more favourable towards rightsholders’ interests:¹⁹⁹

“[...] each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the [TRIPS] Agreement as expressed [...] in its objectives and principles.”²⁰⁰

These articles make it clear that intellectual monopolies are not ends in themselves; rather, they are tools to be used in service of public policy goals. Just like the Doha declarations, the Development Agenda Proposal makes reference to the Articles 7 and 8 in the “Basic Principles”-section of the TRIPS Agreement. It argues for IMPs to be subject to public policy objectives, and to allow member states to interpret the provisions of the agreement according to their needs. In other instances, this concept is used in the Development Agenda Proposal to call for flexibilities with regard to IMP enforcement²⁰¹. But the proposal goes one step further and becomes more concrete when it calls for the inclusion of provisions on “objectives and principles” similar to those of the aforementioned TRIPS articles in WIPO treaties under negotiation, especially the Substantive Patent Law Treaty which is currently under negotiation.²⁰²

Public health In the Doha Declaration on TRIPS and Public Health, the ministers specifically point to public health as an objective which TRIPS should serve, before the background of the effects that strict IMPs have on the prices of pharmaceuticals:²⁰³

¹⁹⁸Doha Ministerial Declaration, para. 19.

¹⁹⁹UNCTAD-ICTSD (2005), 132.

²⁰⁰Doha Declaration on Public Health, para. 5a.

²⁰¹WO/GA/31/11, para. VI.

²⁰²Ibid., para. IV.

²⁰³Doha Declaration on Public Health, para. 3.

“We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines [. . .].”²⁰⁴

In affirming

“that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all”,²⁰⁵

the declaration makes it clear that TRIPS is not intended to stand in the way of public health, and should be interpreted in a manner supportive of access to medicines for all.

The Development Agenda Proposal broadens the Doha declaration’s call for access to medicines into a call for access to knowledge.²⁰⁶ Since public health is only one of the public policy objectives mentioned in Art. 8 of TRIPS, it does not seem far-fetched for the Development Agenda Proposal to also pursue the other objectives listed there.

5.4 The Millennium Development Goals

On September 8, 2000, the UN General Assembly adopted the United Nations Millennium Declaration. It puts development at the centre of the UN’s efforts, and sets out eight “Millennium Development Goals” (MDGs) to be reached by 2015. These include *inter alia* eradicating extreme poverty and hunger, achieving universal primary education, combating HIV/AIDS, malaria and other diseases, and setting up a global partnership for development, which would include addressing the special needs of least developed countries and providing access to essential medicines.²⁰⁷

The MDGs can be considered relevant to the Development Agenda Proposal on two levels. First, they make it unambiguously clear that development is a top priority for the UN system of organisations. All these organisations must work together to help achieve the goals that the UN’s General Assembly has set, and WIPO is no exception. Second, the MDGs place great emphasis on health and

²⁰⁴Doha Ministerial Declaration, para. 17.

²⁰⁵Doha Declaration on Public Health, para. 4.

²⁰⁶IIM/1/4, para. 10, 13, 45, 48.

²⁰⁷UN Millennium Declaration.

education. Both of these areas are heavily affected by the international IMP framework. Essential medicines are often priced out of the reach of patients; compulsory licensing of patents for the production of generic alternatives offers one solution to this problem, if pharmaceutical companies refuse to cooperate. In education, the availability and price of textbooks and other copyrighted materials are important factors. Copyright regulation that provides developing countries, educators and librarians with a stronger negotiating position could greatly increase the accessibility of such things.

The Development Agenda Proposal argues that the MDGs express the commitment of the international community, and of the UN system of organisations in particular, to address the problems that affect developing countries.²⁰⁸ Since WIPO is a member of the UN family of organisations, it is bound by this commitment: “*Development concerns should be incorporated into all WIPO activities*”, and WIPO should interpret its own mandate more broadly (see 4.4.1).²⁰⁹ The IMP system should support the basic rights and public policy objectives expressed in the MDGs.²¹⁰ This especially applies to the technical assistance provided by WIPO.²¹¹

5.5 The São Paulo Consensus

The São Paulo Consensus was adopted by UNCTAD on June 18, 2004. It states as its main goals helping developing countries participate equitably in the world economy, accelerating multilateral trade negotiations under the 2001 WTO Doha Work Programme (see 5.3), and improving national and international coherence.

The São Paulo Consensus is important in so far as it is the first negotiated multilateral text that recognised developing countries’ need for “policy space”, i.e. for flexibility to interpret international agreements in ways that fit their development needs.²¹² Developing countries claimed that this space had “*recently been constrained and narrowed by international rules, and may become even more limited by future international rules.*”²¹³

This concept was met with opposition from developed countries, who were concerned that a mention of “policy space” would give developing countries a

²⁰⁸WO/GA/31/11, para. 1.

²⁰⁹Ibid., para. III.

²¹⁰IIM/1/4, para. 52.

²¹¹Ibid., para. 62.

²¹²São Paulo Consensus, para. 8.

²¹³Raman (2004).

stronger bargaining position in other multilateral negotiations.²¹⁴ The conflict was resolved by invoking “*the need for appropriate balance between national policy space and international disciplines and commitments.*”²¹⁵

The Development Agenda Proposal relies on this concept to argue that different levels of development may require different policies with regard to IMPs.²¹⁶ It also points out that if the costs of IMPs are ignored, manoeuvring space for public policy may be reduced.²¹⁷

5.6 Research and civil society

The Development Agenda Proposal does not build exclusively on documents arising from intergovernmental negotiations. Inputs from other sources are reflected throughout the FOD submission. Many influences can be traced to the research done by the UK government’s Commission on Intellectual Property Rights. This body published a report in 2002, which received much attention from those aware of the shortcomings of the global IMP system. But research was also undertaken by intergovernmental and non-governmental agencies working on the topic. Last but not least, the campaign for access to essential medicines, initiated by *Médicins sans Frontières* in 1999, demonstrated the potential of action by civil society.

The UK IPR Commission Report The Commission was appointed in 2001 by Clare Short, then the UK Secretary of State for International Development. It was tasked with considering how developing countries might best design their national IMP regimes within the context of TRIPS; how the international IMP regime might be improved; and with placing all of this in the wider policy framework necessary to complement IMP regimes, such as competition policy.

Avoiding radical or one-sided conclusions, the commission cast a critical look at the current state of the system. It highlighted the importance of technology transfer, pointing out that TRIPS had strengthened the exclusionary powers of rightsholders, but not the complementing competition policies.²¹⁸ Recurring themes in the report are the importance for developing countries of making full use of the

²¹⁴Raman (2004).

²¹⁵São Paulo Consensus, para. 8.

²¹⁶e.g. IIM/1/4, para. 21a.

²¹⁷Ibid., para. 44.

²¹⁸UK IPR Commission Report - Executive Summary, 12.

flexibilities provided by TRIPS, as well as the integration of IMP regulation with wider development policy.²¹⁹

The commission's advice for improvements in WIPO is clearly mirrored in the Development Agenda Proposal. The report urgently recommends that WIPO should incorporate development objectives into all its activities, and cooperate more closely with other relevant UN organisations. In case WIPO should find its mandate too limited to do so, the WIPO Convention should be amended. The commission also calls for technical assistance to become more responsive to the particular needs of each receiving country. Also, WIPO and WTO should involve all stakeholders in their work. In particular, this would mean allowing more participation by civil society in those organisations.²²⁰ These and other recommendations would prove to become the weft and warp of the proposal made by the FOD.

Think tanks Research-oriented organisations of various stripe have made significant contributions to a detailed, critical review of the IMP system. Naming them all would result in too long a list. By way of example, the South Centre²²¹, the International Centre for Trade and Sustainable Development (ICTSD)²²² and the Quaker United Nations Office (QUNO)²²³ shall be mentioned here. It is not unusual for these organisations to have started out with a focus on trade issues and the WTO, only to expand their activities in the direction of WIPO, incorporating matters of intellectual monopolies and development. The studies and working papers provided by these organisations assist policymakers and campaigners alike to develop effective approaches to improving the international governance of knowledge.

Civil Society: The campaign for access to essential medicines With the prize money they had received from the Nobel Peace Prize, Médecins sans Frontières (MSF) in 1999 started a campaign for access to essential medicines. This is an ongoing effort to improve the availability of medication for diseases that are widespread in developing countries, such as malaria, HIV/AIDS and leishmaniasis. For some illnesses, medicines exist, but they are priced out of the reach of patients in developing countries; others do not promise sufficient revenue for the pharmaceu-

²¹⁹UK IPR Commission Report - Executive Summary, 26, 28.

²²⁰Ibid., 29 f.

²²¹<http://www.southcentre.org>, visited on 2006/07/19.

²²²<http://www.ictsd.org>, visited on 2006/07/19.

²²³<http://www.quno.org>, visited on 2006/07/19.

tical companies to engage in research for a treatment, as most patients are poor. The latter are often referred to as “neglected diseases”.

This effort involves encouraging countries to make use of the flexibilities inherent in the TRIPS Agreement, so that patents do not become obstacles when treating the sick. As the mainstream interpretation of the agreement proved too restrictive, MSF pushed for a clarification of the scope of these flexibilities. Thus, the campaign an important factor in the negotiations for the Doha Declaration on TRIPS and Public Health.²²⁴

Other civil society organisations also became involved with the campaign, e.g. the US group Consumer Project on Technology (CPTech).²²⁵ The expertise that these groups acquired in the course of the campaign encouraged them to broaden their activities from a push for access to medicines to the wider effort for greater access to knowledge. This, in turn, did not only increase the scope and numbers of the civil society NGOs contributing to the effort. It also helped them to unite their efforts in their respective areas of expertise under the common label of Access to Knowledge (A2K). The draft for an A2K treaty discussed in chapter 7 is perhaps the most visible outcome of this growing movement.

5.7 Summary

The Development Agenda Proposal builds on concepts that are established and recognised by other international bodies. These are in particular the objectives and principles of the TRIPS Agreement, which make it clear that IMPs are tools to be used at the service of society. These were given additional weight by the Doha declarations. The UN’s Millennium Development Goals establish development as a priority for the UN family of organisations, of which WIPO is a part. UNCTAD’s São Paulo Consensus establishes that all countries should enjoy a certain manoeuvring room—“policy space”—to implement their international obligations according to national circumstances.

An influential document from outside the UN system is the report of the UK Commission on Intellectual Property Rights.²²⁶ The Development Agenda Proposal draws upon it not only to identify many of the problems ailing the international IMP system, but also to propose solutions. Civil society activities, in partic-

²²⁴UK IPR Commission Report - Executive Summary, 28.

²²⁵<http://www.cptech.org/>, visited on 2006/07/27.

²²⁶UK IPR Commission Report.

ular the campaign for access to essential medicines, provided additional input with regard to the needs of society at large.

6

A development agenda for WIPO?

The aim of this chapter is to produce an overview of the discussion on a development agenda for WIPO, as it unfolded within the organisation from 2004 on. The period of analysis starts with the WIPO General Assembly in September 2004, encompasses three intersessional intergovernmental meetings (IIMs), and ends with the General Assembly 2005. I will describe the different views that member states hold of the international IMP system, and of WIPO as an organisation. Which conflicts emerge with regard to these two topics? This is the question this chapter sets out to answer.

6.1 A word on method

The material used for this analysis consists of the official reports from the IIMs and the General Assemblies during the period of investigation, as well as the proposals submitted for debate by WIPO member states. Where necessary for clarification, additional material from publications and journalistic articles was used; but the greater context is provided by the rest of this thesis.

The reports contain a list of the country delegations, intergovernmental organisations and non-governmental organisations (NGOs) in attendance, and an intro-

ductory section consisting of the opening of the meeting, the election of a chairperson, and the adoption of the agenda. The main part is made up of the protocol of the debate during the meeting, rendering the statements made (quotes from the reports are in reported speech). The report concludes with the meeting decisions and a list of participants.

The first part of this chapter looks at the proposals submitted by member states. They are summarised, the measures they propose listed, and the criticisms lodged against them by others reflected. The Development Agenda Proposal receives a large part of the attention here, as it is at the root of the debate. Different from most of the other proposals, it is also rather long and cross-cutting in scope. The second part of this analysis relies on the protocols of the statements made by delegations and observing NGOs (the latter are considered separately).

The protocols were examined to inductively determine which topics carried the greatest weight in the debate. After drafting a tentative list of those topics, statements were collected that corresponded to them. These statements were then grouped by affinity of the views expressed. Finally, the resulting groups of statements were summarised to produce a resumé of the discussion on the topic concerned. At the end of the chapter, there is also a categorised summary of issues mentioned by NGOs, generated in the same way.

This method has the advantage of producing a concise, readable text that provides a good overview of topics discussed, as well as of the disagreements that exist on these topics. Its disadvantage is that during the aggregation process, detail and intermediary views are partially lost. Yet for the present purpose of locating conflicts, it serves the investigation well. Furthermore, the fact that the 2005 General Assembly decided that more meetings were needed after the IIM period ended in virtual deadlock (as well as the dominance of procedural haggling that has persisted since then) indicates that the differences of opinion are rather marked. This makes the loss of analytical detail appear bearable.

6.2 Proposals

In the first of what was to become a series of three meetings, the task for WIPO member states was to discuss the proposal for a Development Agenda for WIPO by the Group of Friends of Development,²²⁷ as well as other proposals submitted by member states. There was a proposal from the US “for the establishment of a

²²⁷WO/GA/31/11.

partnership program in WIPO”;²²⁸ another one from Mexico “on intellectual property and development”;²²⁹ and one from the UK.²³⁰ Also, the Group of Friends of Development had submitted a second document, “an elaboration of issues raised in Document WO/GA/31/11”.²³¹

All of the new proposals submitted were reactions to the document WO/GA/31/11 that started the debate at the preceding General Assembly. The proposals are typically divided into two parts. One makes general remarks on the merits and/or problems of IMPs, WIPO and the international IMP system. The other proposes measures that WIPO should take to ameliorate or overcome these, with varying degrees of concreteness. (The second FOD paper is an exception to this rule, see 6.2.1.)

This section discusses the proposals in the order that they were submitted in, except for the two FOD and the two UK papers, which are each considered jointly. First, I will describe each proposal, so as to give an idea of its essence and contents. Then, I will list the measures it asks WIPO to take. Lastly, there will be a short reflection of the criticisms lodged by other parties against the proposal in question.

6.2.1 Argentina and Brazil: “Proposal for the establishment of a Development Agenda in WIPO”

The Development Agenda Proposal is extremely broad, concerning, in effect, all areas of WIPO’s work. It attempts to reform the organisation at both the executive and the structural level. It makes extensive references to the TRIPS objectives and principles, which *inter alia* state that IMPs are subject to public policy goals and should contribute to “*the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users [...]*”.²³²

What is referred to as “the Development Agenda Proposal” herein is really two documents. The first one, which started the discussion in WIPO, was submitted at the 2004 General Assembly. It is titled “Proposal by Argentina and Brazil for the Establishment of a Development Agenda in WIPO” (WIPO document number WO/GA/31/11). The second document is titled “Proposal to establish a Development Agenda for WIPO: an elaboration of issues raised in Document

²²⁸IIM/1/2.

²²⁹IIM/1/3.

²³⁰IIM/1/5.

²³¹IIM/1/4.

²³²TRIPS, art. 7.

WO/GA/31/11". This paper was submitted before the first IIM in April 2005, and bears the WIPO document number IIM/1/4.

As the title implies, this second document provides more detail on some of the topics addressed in the first document. After an introductory section on "promoting development and access to knowledge for all", the proposal talks about a review of WIPO's mandate and governance. This is followed by a discussion of "pro-development norm-setting" in WIPO. The paper also suggests that principles and guidelines should be drawn up for WIPO's technical assistance programs. Finally, the submission mentions technology transfer, including related competition policy issues. The second document is extremely long and detailed. Where most proposals in this debate are about six pages long, document IIM/1/4 has thirty.

The following pages give a short overview of the main recommendations contained in the Development Agenda Proposal, i.e. both documents. While WO/GA/31/11 terminates with a short list of concrete recommendations, the suggestions IIM/1/4 makes are much more detailed. Yet these documents should be considered as a single proposal, with the second document representing an elaboration of parts of the first.

Introduction The introduction highlights the importance of development in other international fora, e.g. the UN or the WTO (see chapter 5). It states that WIPO should assume a more critical, balanced approach to IMPs, perceiving intellectual monopolies as tools, not as an end in themselves. Particularly, the organisation should scrutinise the implications of its IMP policies for developing countries. This would mean abandoning the "one size fits all"-approach to norm-setting and technical assistance, where identical rules come to govern countries with different circumstances. It would also demand that WIPO weigh the costs and benefits generated by IMP protection. Furthermore, WIPO's treaties, as well as the technical assistance given by the organisation, should make sure that available public interest flexibilities are implemented.

The "development dimension" At the heart of the Development Agenda Proposal is the concept of the "development dimension". It is generally understood to refer not to particular measures or policies, but rather to the impact on development that each measure or policy may have.

The term's most prominent mention before the Development Agenda Proposal is to be found in the Doha Ministerial declaration of 2001 (see 5.3). In the doc-

ument submitted to the 2004 General Assembly,²³³ it is found in the headings of five of the nine paragraphs that the paper consists of. Each time, it urges WIPO to fully incorporate development concerns into a particular part of its activities (e.g. norm-setting, technology transfer or technical assistance). The FOD argue that the development dimension, after its importance has been recognised in other international bodies such as the WTO, should have a central role in WIPO's activities:²³⁴ *"The basic proposal of the "Development Agenda" is that development should be a central dimension in any negotiation involving IP systems."*²³⁵

The proposal seeks to do away with the *"misconception that the development dimension of intellectual property is the same thing as technical assistance"*.²³⁶ It spells out a number of implications of the development dimension in the field of IMPs:²³⁷

- When WIPO is developing new IMP norms, the process should be *"based on clearly defined principles and guidelines and on an assessment of their development impact."*²³⁸ It should be recognised that there are different levels of development, and countries should be given "policy space" to be able to pursue their public interest goals.
- WIPO should not limit itself to IMPs. It should also take into account systems where knowledge is produced on a non-proprietary basis, such as commons-based peer production. The organisation should recognise the benefits and costs of each system.
- The organisation should also take specific measures to promote the transfer of technology to developing countries, and enhance their capacities for absorption. It should also constantly monitor how this transfer contributes to a country's economic, social and cultural development.
- Technical assistance should be adapted to the demands of developing countries. It should take into account the interests of all stakeholders in the IMP system, not only those of rightsholders. Assistance should be based on clear principles and guidelines, and should be delivered in a transparent manner.

²³³WO/GA/31/11.

²³⁴Ibid., para. III.

²³⁵IIM/1/4, para. 3.

²³⁶Ibid., para. 19.

²³⁷Ibid., para. 21.

²³⁸Ibid.

- WIPO should recognise that there are other groups with a stake in the IMP system than just rightsholders. This does not only include developing countries, but also society at large.²³⁹

WIPO's mandate and governance The FOD consider WIPO's mandate to be broad enough to include development. This view is based on the 1974 WIPO-UN agreement (see 4.4.1). To remove uncertainties, they advocate amending the 1967 WIPO Convention to expressly include development as a goal of the organisation. The proposal calls for a stronger role for WIPO member states, redistributing power away from a Secretariat which some perceive as overly activist in favour of rightsholders.²⁴⁰ Though the latter are the source of over 80% of WIPO's funds (paid as fees for usage of the various IMP protection systems), the proposal argues that rightsholders do not "fund" WIPO; it rather is an intergovernmental organisation which answers only to its member states. To give member states better control of what the organisation does (make WIPO more "*member-driven*",²⁴¹ in the proposal's words), and to improve its efficiency, the FOD call for creating an independent WIPO Evaluation and Research Office (WERO). Also, civil society groups should be able to participate more intensely in all WIPO processes.

Norm-setting The proposal puts great emphasis on the effective use and promotion of flexibilities in the IMP system, as different countries show different levels of economic, social and technical development. It also insists on an assessment of the development impact, as well as the costs and benefits of new regulations — especially with a view to the ongoing negotiations on the Substantive Patent Law Treaty (SPLT) and the Broadcast Treaty. Going far beyond current WIPO practice, the proposal calls for the consideration of alternatives to intellectual monopolies:

“[...] any initiative involving the creation of new or expanded intellectual property rights should only be adopted if proven to be superior, in social and economic terms, to solutions based on the creation of public goods.”²⁴²

The FOD also demand that there should be principles and guidelines for norm-setting, referring to the concerns mentioned above. This would include relegating the Secretariat to the merely administrative role it officially holds, representing quite a change from the present:

²³⁹IIM/1/4, para. 49.

²⁴⁰see Musungu/Dutfield (2003), 8.

²⁴¹See e.g. IIM/1/4, art. 25

²⁴²Ibid., para. 45.

“The WIPO Secretariat has often played an active role in norm-setting processes and in general there has not been an adequate debate on the feasibility and desirability of new, expanded, or modified rules. The points of view of developing and least developed countries have been ignored in general and negotiations have been launched without real consensus.”²⁴³

The FOD also demand that WIPO should recognise all stakeholders as users of the IMP system, not just rightsholders. This refers to the general public, and especially to “*vulnerable segments of the population*”.²⁴⁴ Care should be taken that new regulations do not limit the possibilities for other models of governing knowledge and encouraging creativity, such as Free Software and Creative Commons.

Principles and guidelines for technical assistance WIPO provides developing countries with assistance for implementing TRIPS, under a 1995 agreement with the WTO. The proposal demands that this assistance should take into account the particular circumstances of each country. It should also inform the countries about available flexibilities and ensure that the costs of IMP protection do not outweigh the benefits.

The second document lists a number of concerns the FOD hold about the provision of technical assistance. The common line of these is that WIPO administers a “one size fits all”-solution, while largely ignoring the differences between countries, as well as the interests of society at large. The document also alleges that technical assistance tends to overemphasise the benefits of strict IMP protection, while remaining silent about the costs.

To remedy these problems, the FOD propose that the technical assistance programs should be reformed to become “*tailor-made and demand-driven*”.²⁴⁵ Laws and regulations should be adapted to each country’s needs, making full use of available flexibilities. WIPO should employ only independent consultants, and publish their names; this would make direct rightsholder involvement both more difficult and more easily detectable. Generally, all important information about the technical assistance programs should be made public.

Technology transfer WIPO should respond to the failure of the current strict IMP system to enable the transfer of technology to developing countries. A treaty

²⁴³ IIM/1/4, para. 42.

²⁴⁴ Ibid., para. 49.

²⁴⁵ Ibid., para. 66.

on access to knowledge and technology could help, by letting developing countries access publicly funded research in developed countries.

WIPO should recognise — as TRIPS does — the transfer and dissemination of technology as a fundamental goal of the IMP system. The organisation should explore what it can do to promote technology transfer. The proposal points out that competition policy is important in this area, as IMPs may be used to contrary to the objectives and conditions under which the monopoly power is granted. WIPO should therefore assist in enabling developing countries to deal with anti-competitive behaviour.²⁴⁶

Measures proposed

The first document (WO/GA/31/11) lists eight measures to be taken:

- WIPO could adopt a high-level declaration on IMPs and development, addressing the concerns raised by member states.
- It could also amend the 1967 WIPO Convention to expressly include development as a part of WIPO's mission.
- Future treaties (including those currently under negotiation) should include objectives and principles similar to those in Art. 7 and 8 of TRIPS.
- With respect to technical assistance, the program should be tweaked to strengthen national IMP offices, so that they can play a more active part in their national development policy.
- To promote the transfer of technology, WIPO could create a dedicated committee on the subject.
- An international seminar, jointly organised by WIPO, WTO and UNCTAD, could help to better understand the relation between IMPs and development, especially if civil society and academia are actively involved.
- WIPO should change its terminology with regard to NGOs, so that the term refers only to public interest groups, not to rightsholders organisations.
- Finally, WIPO should establish a working group to discuss the further implementation of the development agenda.

²⁴⁶IIM/1/4, para. 89–97.

While IIM/1/4 does not include a final remark, WO/GA/31/11 concludes stating that

“[a] vision that promotes the absolute benefits of intellectual property protection without acknowledging public policy concerns undermines the very credibility of the IP system. Integrating the development dimension into the IP system and WIPO’s activities, on the other hand, will strengthen the credibility of the IP system and encourage its wider acceptance as an important tool for the promotion of innovation, creativity and development.”²⁴⁷

Criticism by others

The US criticised the FOD proposal as being based on erroneous presumptions:

“[The US delegation] felt that the proposal submitted by Argentina and Brazil, and its co-sponsors appeared to be premised on the misconception that strong intellectual property protection might be detrimental to global development goals and that WIPO had disregarded development concerns.”²⁴⁸

The US also considered that the FOD’s demand for flexibilities in WIPO treaties was unjustified, as those treaties already provided sufficient policy space; no country was obliged to join them.²⁴⁹

Other Group B countries held the Development Agenda Proposal to be premature, and contended that WIPO was on the right track. Before any changes were made, there should be a stock-taking of WIPO’s activities and merits.²⁵⁰

Bahrain, in its proposal, criticised the Development Agenda Proposal for not taking into account the financial implications of the measures it proposed. It also stated that “[m]atters relating to the functioning and management of WIPO should not be a subject of discussions on the development agenda”, meaning that development concerns should not be used to change the organisation’s structure. It also chided the FOD for alleging that the WIPO Secretariat was exercising undue influence on negotiations.²⁵¹

²⁴⁷WO/GA/31/11, para. IX.

²⁴⁸WO/GA/31/15, para. 195.

²⁴⁹Ibid.

²⁵⁰Ibid., para. 175.

²⁵¹IIM/2/2, 7.

6.2.2 The US proposal “for the establishment of a partnership program in WIPO”

The US, in its proposal, emphasises a positive correlation between strong and wide-ranging IMP protection and development, and called upon WIPO not to let its expertise be “*diluted*”.²⁵² It also argued that WIPO, while it had always taken development concerns into account, was not a core development agency of the UN. It proposed to establish a database to match supply and demand in “*intellectual property development assistance*”, i.e. technical assistance.²⁵³

The proposal’s language sticks with the traditional WIPO understanding that stricter and more far-reaching IMP protection are key to development; if there are problems with the system, they can be solved by either adding features for efficiency or by expanding the scope of protection. “*The United States fundamentally believes that strong intellectual property protection is beneficial to the economic development of all countries.*”²⁵⁴ The US proposal claims that WIPO has always had a “development agenda”, and therefore no fundamental changes are needed:

“The United States believes that pursuing a ‘development agenda’ has been an integral part of WIPO’s mission since its incorporation into the U.N. family of organizations under its 1974 Agreement with the U.N.”²⁵⁵

Measures proposed

The United States propose a “WIPO Partnership Program”, an “*Internet-based tool to facilitate the strategic use of intellectual property by developing countries and to maximize WIPO’s positive impact on development.*”²⁵⁶ The two main components of this partnership program would be a database, which would match developing countries requiring technical assistance with developed-country institutions and NGOs providing it; and a WIPO Partnership Office, which would “*aggressively*”²⁵⁷ seek out potential partners and donors.

²⁵²IIM/1/2, para. 4.

²⁵³Ibid., para. 9.

²⁵⁴Ibid., para. 8.

²⁵⁵Ibid., para. 19.

²⁵⁶Ibid., para. 9.

²⁵⁷Ibid., para. 13.

Criticism by others

Disapproval of the US proposal came mainly from the FOD, but also from some other developing countries. Brazil pointed out²⁵⁸ that the US had taken what was a single point in the integral whole of the Development Agenda Proposal, and presented it to be an entire development agenda in itself: the idea of establishing a database to improve information sharing appears in the second document submitted by the FOD.²⁵⁹ This would seem to limit the development agenda to matters of technical assistance, instead of recognising its broad approach. Brazil also decried the US version of that idea as an attempt to privatise technical assistance, leading to even stronger rightsholder influence on the programs.²⁶⁰ Another critical remark came from Nigeria, which called attention to the fact that not all countries have suitable Internet connections to make efficient use of such a web-based database.²⁶¹

6.2.3 The Mexican proposal “on intellectual property and development”

The Mexican proposal agrees with the US submission in its focus on the benefits of strict IMP protection for developing countries, as well as in its positive assessment of WIPO’s past development work. It puts forward that WIPO should embark on a campaign to “disseminate [...] the intellectual property system in societies in developing countries, highlighting its benefits and the opportunities arising from it.”²⁶²

Mexico warns against strengthening flexibilities for developing countries:

“The viability and success of the national systems require an international standard- setting framework based on clear, predictable and non-discriminatory rules, as well as minimum protection standards not subject to modifications resulting from the political, economic, social and even cultural changes generated by the members of the international community.”²⁶³

Measures proposed

The Mexican proposal calls upon WIPO to assess the situation of national IMP systems in developing countries, as well as the levels to which the system is observed.

²⁵⁸IIM/2/10, para. 120.

²⁵⁹IIM/1/4, para. 72.

²⁶⁰IIM/2/10, para. 120.

²⁶¹Ibid., para. 139.

²⁶²IIM/1/3, 5.

²⁶³Ibid., 4.

It also suggests that WIPO should embark, in the scope of technical assistance, on a campaign to raise awareness of the advantages that a strict IMP system brings:

“To include or integrate into the WIPO Cooperation for Development Program activities designed to disseminate directly and immediately the intellectual property system in society in developing countries, highlighting its benefits and the opportunities arising from it.”²⁶⁴

Criticism by others

As with most other proposals except for that of the African Group, the FOD criticised the Mexican submission for reducing the Development Agenda to a matter of technical assistance.²⁶⁵ Furthermore, Brazil felt that the wording of the proposal²⁶⁶ implied that the average person in a developing country was “ignorant”, and considered this inappropriate.²⁶⁷

6.2.4 The UK proposal

The UK submitted a proposal for the first IIM in April, which made statements of a more general nature. For the second IIM, it reformulated some points of that statement into a second proposal.

The first proposal was dominated by references to the UK IPR Commission Report.²⁶⁸ The report had called for WIPO to integrate development objectives into its approach to the promotion of IP protection in developing countries, and recognise both the benefit and the cost of such monopoly protection. It also demanded that WIPO, when providing technical assistance, should be much more responsive

²⁶⁴IIM/1/3, 5.

²⁶⁵IIM/1/6, para. 33.

²⁶⁶The paragraphs at issue here reads:

“The lack of knowledge of the system on the part of the population is commonly observed and, in some cases, the population considers the failure to observe the system or infringements thereof as conduct which cannot be sanctioned or is socially acceptable; for this sector the benefits derived from the intellectual property system and the use of the system as a development factor are completely alien. Lack of awareness of the system has become a cause of inefficiency as well as an obstacle to development.

The sanction of conduct which infringes intellectual property is of no use, if it is not complemented by appropriate dissemination and understanding of the system. In addition, ignorance and the failure to observe the system lead to the formation of criminal groups, on occasions of a cross border nature and linked to other unlawful activities such as money laundering.” IIM/1/3, 4

²⁶⁷IIM/1/6, para. 97.

²⁶⁸UK IPR Commission Report.

to the particular needs of each receiving country. Also, the authors considered that WIPO should fund research on the link between IMPs and development.²⁶⁹

While ostentatiously agreeing with these statements, the UK proposal demanded that these things should be taken care of in a “*rejuvenated*” version of the Permanent Committee on Cooperation for Development related to Intellectual Property (PCIPD).²⁷⁰ The PCIPD is a WIPO body dealing with matters of technical assistance, which meets once every two years. See 6.3.3 for a debate on the possibilities and limitations of that body.

Measures proposed

The first UK submission states that integrating IMP policies with overarching development plans is within WIPO’s mandate, and concedes that the mandate should be broadened if this was found not to be the case.²⁷¹ It further proposes “*rejuvenating*” the PCIPD to evaluate the development impact of WIPO’s technical assistance.²⁷² To this end, members would recognise the broad mandate of that body, and the committee would give itself a new work program. This would include a stock-taking of current WIPO activities in technical assistance, as well as research into evaluating the program’s efficiency.²⁷³ The proposal envisions that the PCIPD would thus become “*a resource of development expertise upon which other bodies can draw*”.²⁷⁴ It also calls for further harmonisation of patent laws. The UK believes that the subject of technology transfer is only of limited relevance to WIPO.²⁷⁵

Criticism by others

The UK proposal received a critical review from the FOD. Brazil pointed out that it limited the development agenda to technical assistance.²⁷⁶ Argentina remarked that the UK submission and the Development Agenda Proposal were both substantially based on the UK IPR Commission Report; but that they differed very much in the specific action they proposed. While the FOD saw development as an issue to be

²⁶⁹See UK IPR Commission Report, 155-167.

²⁷⁰IIM/1/5, 5.

²⁷¹Ibid., 4.

²⁷²Ibid., 5.

²⁷³Ibid., 4.

²⁷⁴IIM/2/3, 3.

²⁷⁵IIM/1/5, 7.

²⁷⁶IIM/1/6, para. 33.

considered in all areas of WIPO, the UK feels that it could be appropriately taken care of in the very limited framework of the PCIPD.²⁷⁷

6.2.5 The Bahraini proposal “on the importance of intellectual property in social and economic development and national development programs”

The submission by Bahrain,²⁷⁸ co-sponsored by Lebanon, Jordan, Qatar, Yemen, the United Arab Emirates, and Oman, is titled “Proposal by the Kingdom of Bahrain on the Importance of Intellectual Property in Social and Economic Development and National Development Programs”.²⁷⁹ This proposal emphasises that WIPO’s work has always been balanced and has incorporated a development dimension; that all issues pertaining to development can be resolved by modifying WIPO’s technical assistance program; and that questions of development are unrelated to WIPO’s structure and governance, and should be discussed separately. Consequently, Bahrain proposes that the PCIPD should deal with the issues at hand. It suggests that WIPO should expand its technical assistance and work on raising the population’s awareness to the IMP system.

Measures proposed

The submission calls on WIPO to expand technical assistance, engage in awareness-raising and help developing country businesses build capacity for licensing negotiations.

Criticism by others

The Bahraini proposal, though submitted for the second IIM, was not discussed at that meeting. This was apparently because the Egyptian delegation had pointed out that the proposal’s thrust seemed inconsistent with a declaration which the King of Bahrain, as well as the heads of state of the co-sponsors, had signed roughly a week

²⁷⁷IIM/1/6, para. 94.

²⁷⁸IIM/2/2.

²⁷⁹Ibid.

before the meeting.²⁸⁰ The proposal was only formally presented by the delegation at the third IIM.

As with most other proposals, the FOD criticised this one for being limited to technical assistance, instead of understanding development as a concern affecting all areas of WIPO's work and structure.²⁸¹

6.2.6 The African Group proposal: “The African Proposal for the establishment of a Development Agenda in WIPO”

For the third IIM session, there was a new proposal from the African Group.²⁸² The document stated that the international IMP architecture should be made more democratic and responsive to the needs of developing countries. It also requested that the IMP system should be compatible with human rights norms, such as access to food, medicines, knowledge and development.²⁸³

One, but not the only, way to achieve this would be to implement available international flexibilities in national legislation through technical assistance. The proposal also recommended relaxing patent rules to increase technology transfer, and advocated that there should be a recurring review of WIPO's development activities. It made a point of stating that IMPs were only one mechanism among others to promote creativity.

Measures proposed

The African group called for all WIPO development activities to be consistent with the existing international framework (e.g. MDGs). It asked the organisation to

²⁸⁰A few days before the meeting, the Second South Summit had taken place in Doha, Qatar. There, the leaders of the Group of 77 — a loose coalition of developing countries within the UN with currently some 130 members, including China and India — called

“on WIPO as a UN Agency, to include in all its future plans and activities, including legal advice, a development dimension that includes promoting development and access to knowledge for all, pro-development norm -setting, establishing development-friendly principles and guidelines for the provisions of technical assistance and the transfer and dissemination of technology”. IIM/2/10, para. 30

Among the signatories were the heads of state of Bahrain, Qatar, Lebanon and other countries which had expressed their support for the proposal of Bahrain. Egypt pointed out that while Bahrain's proposal stated that WIPO had always taken into account the development dimension, the message from the South Summit would seem to suggest otherwise. *ibid.*, para. 43

²⁸¹IIM/3/3, para. 48.

²⁸²IIM/3/2.

²⁸³*Ibid.*, 4.

make its technical assistance “*development oriented and demand-driven*”.²⁸⁴ The African group also urged WIPO to coordinate more closely with UNCTAD and other organisations.

It recommended that WIPO should promote the relaxing of patent rules to support technology transfer, and create a dedicated technology transfer body in the organisation. WIPO should work with UNCTAD to draw up a list of essential technologies for developing countries. With regard to the informal sector of the economy, WIPO should study the costs and benefits of IMP protection, especially for employment.

WIPO should also examine the flexibilities under the TRIPS Agreement and the Doha declaration, and give practical advice to developing and least developed countries on how to enable them gain access to essential medicines and food, as well as to information and knowledge for education and research.²⁸⁵

Criticism by others

As the paper had only been submitted very shortly before the third IIM, most delegations did not have the time to study it properly. As a result, there was little discussion of the submission and its proposed measures. The United States felt that the African proposal took a very extensive view of WIPO’s remit. The delegation remarked that it was up to each member state to formulate and implement its national economic and cultural policies, and that WIPO should not attempt to interfere here.²⁸⁶

6.2.7 Comparison of proposals

The FOD proposal calls for a far-reaching reform of WIPO. This begins with amending the WIPO Convention, passes through re-calibrating the balance of power between member states and the Secretariat, and does not quite end with a thorough reworking of technical assistance programs. Such a strong desire for change would seem to express a high degree of dissatisfaction with the way WIPO currently functions.

The proposals from the US, Mexico, the UK and Bahrain, on the other hand, do not set out to reshape the organisation, but rather to make it perform its functions

²⁸⁴IIM/3/2, 4.

²⁸⁵Ibid., 5.

²⁸⁶IIM/3/3, para. 46.

along the current lines more efficiently. This, according to the submission, would be done through various minor adjustments of the technical assistance programs.

It is hard to contradict the repeated observations by the Friends of Development, in particular Brazil, that none of the other proposals—apart from that of the African Group—quite match the scope of the submission by Argentina and Brazil. If the breadth of each proposal is applied as a criterion, the submissions can be clearly divided into two groups. The first one, containing the proposals by the US, Mexico, the UK and Bahrain, states and re-states that development concerns should be addressed within WIPO only in the framework of technical assistance, with the PCIPD being the body where the discussion should take place.

The second group encompasses the proposals by the FOD and the African Group. While both state a number of concrete measures which WIPO should take, these clearly surpass the narrow limits of the organisation's technical assistance activities. These activities, as we recall, are only intended to help developing countries implement TRIPS and the treaties administered by WIPO, and they do so along the lines laid out by the WIPO Secretariat. This usually means a rather strict interpretation of international agreements, with little attention given to the flexibilities provided in them, and a stronger emphasis placed on the benefits of IMPs compared to their costs.²⁸⁷

6.3 The discussion on a development agenda for WIPO

The level of detail in the following sections does not necessarily correlate with the time or number of comments the individual topics received. The focus of this analysis is on the substantial conflicts, while a remarkable amount of time was spent discussing procedural matters during the debate, which are only of peripheral interest to the present research.

Meeting decisions

The decision of the 2004 General Assembly was to convene an unspecified number of IIMs, which would discuss the first Development Agenda Proposal.²⁸⁸ This decision was made based on a draft decision that Brazil had suggested to the assembly. The debate, though not substantial, was not conflictive either.

²⁸⁷ see Musungu/Dutfield (2003), 16 f.

²⁸⁸ WO/GA/31/11.

At the first IIM, it became clear that more time would be needed before an agreement could be reached. The meeting decided that there would be an additional third IIM in July 2005, as more time was needed to examine the various proposals. Member states were invited to submit proposals written in “*operational and actionable language*”.²⁸⁹ At the second IIM, there were scant results. The final Summary by the Chair stated only that an exchange of views on certain issues had taken place, and that deliberations would be continued at the next IIM.²⁹⁰

The inability to decide on recommendations for the 2005 General Assembly lead to a deadlock. At one point, Brazil said with exasperation that “*it seemed the United States totally rejected anything that could bring about changes in the modus operandi of the Organization in favor of developing countries.*”²⁹¹ Finally, at an impromptu gathering scheduled for this purpose, a factual report was adopted, containing the statements of member states, but no recommendations. The choice of a forum for the continuation of the debate was left to the General Assembly.

The official report from the 2005 General Assembly reflects the controversial discussion about the appropriate forum for the debate. However, as the final compromise was struck in an informal session with no publicly available records, it is not documented how this solution was reached. The meeting decided to continue the discussion in the Provisional Committee on a Development Agenda (PCDA). A “provisional committee” is a body that is neither mentioned in the WIPO rules of procedure, nor is it a traditional institution within the organisation, and it is not quite clear what its competence is.²⁹² In this body, deliberations should continue until the 2006 General Assembly, where the PCDA should present its recommendations.²⁹³

6.3.1 Relation between IMPs and development

The relation between IMPs and development was the subject of many statements. While all delegations nominally agreed that monopoly powers were merely tools for encouraging creativity, assessments about the precise value of these tool varied wildly. Most remarks on the subject were rather general in nature.

It was apparent that there were two competing mind-sets about the relationship between IMPs and development. Some developed countries, especially the US,

²⁸⁹IIM/1/6, para. 165.

²⁹⁰IIM/2/10, para. 256.

²⁹¹IIM/3/3, para. 99.

²⁹²New (2005d) IPWatch.

²⁹³WO/GA/32/13, 146.

Japan and Switzerland, insisted that intellectual monopolies were of unquestionable benefit to developing countries. The US flatly rejected the FOD's proposals regarding principles and guidelines for norm-setting, as they held them to be based on "two misconceptions: (1) that WIPO had disregarded development concerns and (2) that strong intellectual property protection was detrimental to global development goals."²⁹⁴ Other developed countries, such as the UK and Canada, took a somewhat more differentiated approach. Most developing countries, on the other hand, held that IMPs were only tools that could be applied flexibly for the greater purpose of economic, cultural and social development.

Flexibilities—necessary? The Development Agenda Proposal repeatedly demands that developing countries should enjoy the maximum of flexibilities and "policy space" afforded by TRIPS. Many developing countries seconded this notion, with respect to WIPO's technical assistance as well as to future WIPO treaties.

The FOD and India pointed out on various occasions that countries which were now developed had themselves enjoyed considerable flexibilities, since when they had been developing, there were no international IMP norms as strict as today's. Only when these countries had achieved a high stage of economic development did they start to advocate a stricter regulation of intellectual monopolies, thus in effect kicking away the ladder for those who would follow them:

"[T]oday's main industrialized countries had used IP in their development processes. But they had done so in a parsimonious and measured way under a thoroughly flexible framework, which had now, to a large extent, been taken away, therefore depriving developing countries of the same successful path undertaken by them."²⁹⁵

Pakistan pointed out that developing countries were still grappling with the cost of implementing the minimum standards imposed on them in TRIPS. Nonetheless, at the same time, there were even higher standards being implemented in WIPO treaties, which developing countries would then be pressured into accepting by bilateral free trade agreements (see 4.3). It requested that when deliberating new norms, WIPO should assess the impact those rules would have on development.²⁹⁶ The US, on the other hand, contended that WIPO treaties provided a sufficient number of flexibilities, starting with the fact that no country was obliged to join them.²⁹⁷

²⁹⁴IIM/2/10, para. 169.

²⁹⁵WO/GA/32/13, para. 118.

²⁹⁶IIM/2/10, para. 168.

²⁹⁷WO/GA/31/15, para. 195.

IMPs: Distribution of costs and benefits Many developing countries argued that the costs and benefits of the global IMP system were distributed rather unevenly, with developing countries bearing the costs and developed countries enjoying the benefits. India was most outspoken on this when it stated that

“[t]he developed countries continued to pay lip service to ‘development’ in the context of intellectual property protection, but they did so rather self-servingly. The term ‘development’ as used by these countries, including in WIPO, meant quite the opposite of what developing countries understood when they referred to the development dimension. According to developed countries, development meant increasing a developing country’s capacity to provide protection to the overwhelmingly developed country owners of IP rights. This was indeed a strange interpretation of the term ‘development dimension’.”²⁹⁸

What role for development in WIPO? Competing views were also in evidence with regard to the role that development issues should have in WIPO. The US expressed their conviction that there were other dedicated development agencies within the UN system, and that WIPO therefore should “*continue to focus on promoting intellectual property protection*”.²⁹⁹ They feared that including a “development dimension” into WIPO’s work would distract the organisation from its perceived mission and weaken the global IMP system.³⁰⁰

Brazil, on the other hand, did not consider this a great risk. It reiterated that the purpose of the Development Agenda Proposal was “*to broaden the scope and view of the Organization to make it more UN-like*”.³⁰¹

6.3.2 WIPO’s mandate and governance

WIPO’s mandate

The question of WIPO’s mandate had been addressed in the Development Agenda proposal, which suggested amending the narrow 1967 WIPO Convention to make it unequivocally clear that development was part of WIPO’s mission. (Please refer to 4.4.1 for a discussion of the different implications of the convention and the 1974 UN-WIPO agreement.) Most commenting delegations did not consider such an amendment necessary, as in their view, the present mandate of the organisation was sufficiently broad to allow WIPO to pursue a development agenda. Much more

²⁹⁸WO/GA/31/15, para. 201.

²⁹⁹IIM/2/10, para. 44.

³⁰⁰WO/GA/31/15, para. 181.

³⁰¹IIM/2/10, para. 207.

of an issue was the question *how* WIPO should address development concerns. Developed countries generally expressed satisfaction with the present state of affairs at WIPO. They emphasised that the organisation had always promoted development in a balanced fashion (mostly pointing to its technical assistance activities); but that development was not a core concern for WIPO, as there were other agencies in the UN system specialising in this field.³⁰² For example, the USA held that

“[d]evelopment, in general, was the domain of other UN Agencies, not WIPO. The Delegation stated that WIPO must continue to focus on promoting intellectual property protection. It did not believe that the UN needed another development agency as it already had several such agencies [...]”³⁰³

It further emphasised that the spreading of higher standards of protection was in itself a contribution to development.³⁰⁴

The FOD begged to differ. Brazil explained that the development agenda proposal was seeking to achieve “*a more typical UN agency type role for WIPO*” in the IMP field.³⁰⁵ This relates to a remark by Argentina during the 2004 General Assembly, stating that the Development Agenda Proposal was “*not innovative*”.³⁰⁶ South Africa encouraged WIPO member states to not be afraid of deep-seated reform and transformation. It likened the process that WIPO was undergoing now to the “*radical reform*” that South Africa began in the 1990s, going from apartheid to inclusive democracy.³⁰⁷

WIPO’s governance

The FOD and the African Group considered it very important that WIPO should address development concerns systematically.³⁰⁸ South Africa acknowledged that WIPO had done development-related work, but remarked that such work had always happened at the initiative of the Director General; it would be better to incorporate such measures firmly into WIPO’s international activities.³⁰⁹ For the African Group, Egypt expressed the hope that WIPO would be

³⁰²IIM/1/6, e.g. para. 35, 42, 54.

³⁰³Ibid., para. 35.

³⁰⁴WO/GA/31/15, para. 195.

³⁰⁵IIM/1/6, para. 33.

³⁰⁶WO/GA/31/15, para. 156.

³⁰⁷IIM/2/10, para. 188.

³⁰⁸WO/GA/31/15, para. 161.

³⁰⁹Ibid.

“integrating the development dimension in WIPO through a fully fledged institutional framework, with a bearing on all of WIPO’s activities and by ensuring that development be addressed in a systematic and holistic way.”³¹⁰

The EU, on the other hand, held that WIPO was promoting IMPs in a balanced fashion, and that WIPO treaties were also balanced. It favoured WIPO maintaining its current direction, with some changes for increased efficiency.³¹¹

As for the question of considering development concerns in WIPO treaties, the US recalled that “*sovereign nations were themselves responsible for formulating their own national economic and cultural policies, consistent with the international obligations that they had voluntarily taken on.*”³¹² Brazil retorted that

“the issue at hand was not really the choice, or the sovereign rights to adhere or not to a specific treaty, but the expectation that the Member States of the Organization should have the right to actually influence the substance of those treaties.”³¹³

It felt that all member states should be able to influence the treaty negotiation processes in WIPO and see their concerns addressed, not just developed countries.

Also under discussion was the transparency of norm-setting processes within WIPO. The FOD pointed to the “Casablanca Meeting”³¹⁴ as an example of how negotiations within WIPO should not be conducted. They were joined in their criticism by Pakistan.³¹⁵

As for greater inclusion of all stakeholders, member states pronounced themselves either in favour or stayed silent; there did not seem to be substantial opposition to admitting groups representing users as observers.³¹⁶

³¹⁰WO/GA/31/15, para. 160.

³¹¹IIM/1/6, para. 54.

³¹²IIM/3/3, para. 46. Here, the reader should be reminded that WIPO is not the only actor in the ratcheting up of IMP standards. As explained in chapter 4, unilateral measures as well as bilateral and multilateral agreements have also an important role.

³¹³Ibid., para. 48.

³¹⁴At this consultative meeting in February 2005, the WIPO Secretariat convened a hand-picked group of member states to work on a consensus in order to achieve progress on the long-stalled SPLT. Out of the group of Friends of Development, only Brazil was present, and voiced its objection to the outcome of the meeting (“Casablanca Declaration”). Yet in spite of the lack of consensus, the Secretariat included the outcome in the relevant committee’s future work program.

³¹⁵IIM/1/6, para. 64, 94, 96.

³¹⁶This does not necessarily indicate that all member states would appreciate a stronger involvement of public interest NGOs in all WIPO activities, especially if that involvement reduced the influence of rightsholder-interest NGOs. But as it is difficult to clearly separate the latter from the former, a (hypothetical) position favouring one set of NGOs and excluding the other would quickly become untenable.

Evaluation of WIPO's work

On the FOD proposal for the establishment of a WERO, the UK commented that an evaluation of WIPO's activities would certainly be helpful, but that the establishment of such a body entailed considerable cost and complexity.³¹⁷ Other Group B³¹⁸ delegations expressed the view that there already were sufficient mechanisms for evaluation and review within WIPO.³¹⁹ The EU insisted that before incurring the considerable cost of setting up such an institution as WERO, stock should be taken of the contributions made by WIPO towards achieving the MDGs, to avoid duplicating the efforts of other UN bodies.³²⁰

Supporters of the idea pointed to various other international organisations such as the UNDP and the IMF, which had instituted such review bodies. Seconded by the FOD, Pakistan pointed out that developing countries were increasingly faced with the cost of adopting higher IMP standards—such as the minimum standards of TRIPS, WIPO's TRIPS-plus treaties as well as bilateral trade agreements—, and that the social and economic benefits of these had yet to materialise. Although putting a moratorium on new global IMP norms might be the best solution, at least WIPO should, when proposing new instruments, supply a detailed assessment of their development impact.³²¹ While the notion of such assessments did not seem controversial in itself, there was little progress on who would conduct them and what they would entail.

6.3.3 Technical assistance — reform, improve, expand?

During the 2004 General Assembly, virtually all developing countries that spoke thanked WIPO for including them in the technical assistance programs. Yet opinions differed on how to proceed from there. Developed countries generally favoured extending the program more or less in its current shape, so as to promote more efficiently the virtues of strict IMP protection. Most developing countries, on the other hand, were of the view that the technical assistance program should, in future, incorporate advice on how to benefit from flexibilities in international instruments, and how to minimise the cost of IMP protection while maximising the benefits. They warned that higher IMP standards were already putting a strain on

³¹⁷IIM/3/3, para. 58.

³¹⁸Group B is an informal group of developed countries within WIPO. It includes the US, most western European countries, Canada, Australia, Japan and others.

³¹⁹Ibid., para. 70.

³²⁰WO/GA/31/15, para. 175.

³²¹Ibid., para. 198.

the institutions of developing countries,³²² and emphasised that IMP policies must not exclusively aim for higher levels of protection. Instead, those policies should use IMPs as an instrument to support public policy objectives.³²³

The proposal by the US to set up a web-based “partnership program” for donors and recipients of technical assistance was met with mixed views. While most developed and some developing countries applauded the idea, Brazil and India voiced concerns that it would amount to a privatisation of technical assistance. Instead of an at least nominally impartial WIPO Secretariat, this program would involve rightsholders advising developing countries directly. In the view of Brazil, these would rather tend to advocate restrictive IMP policies than place more emphasis on public interest flexibilities.³²⁴ Speaking for Group B, Italy suggested that WIPO, before embarking on a reform of its technical assistance programs, should evaluate its present activities to see if those activities had met the needs of recipients, and how WIPO programs in this field could better be coordinated with those of other international agencies and donors.³²⁵ Canada summarised that many countries had described technical assistance as very valuable, but that on the other hand it was clear that technical assistance needed better integration with other fields of development policy. It suggested that the PCIPD should deal with the issue.³²⁶

Which forum for the debate?

The question of the appropriate forum for the debate took up a great deal of the time allotted to the development agenda debate. At issue was if the debate should be continued in the IIM or a similar forum, or if it should be handed over to a “reinvigorated” PCIPD. This was of great interest, as the forum of the discussion in effect defines the consequences that the debate on a development agenda can have for WIPO.

The PCIPD is a committee with a mandate for discussing technical assistance, meeting once every two years. Contrary to the IIMs, it does not have the mandate to comment on the mandate and structure of other WIPO bodies, nor on the way work

³²²WO/GA/31/15, para. 168.

³²³e.g. Egypt *ibid.*, para. 202.

³²⁴IIM/2/10, para. 120. The Development Agenda proposal demands that technical assistance should be “*neutral, impartial, non-discriminatory and be designed to suit the needs of each recipient country and respond to the needs and specific problems that the countries faced. It should be carried out and designed by independent consultants and avoid any type of conflict of interest*”. *ibid.*, para. 131.

³²⁵IIM/2/10, para. 22.

³²⁶*Ibid.*, para. 128.

is conducted there. Moving the debate to the PCIPD would therefore likely result in preventing the FOD initiative from changing the organisation much, as it would frame the development agenda as being merely a matter of technical assistance. This would have been contrary to the intentions of the FOD, who were trying to integrate development concerns into *all* areas of WIPO.³²⁷

Thus a large number of developing countries, with the Group of Friends of Development at their core, insisted that the debate should progress in the frame of the IIMs, while many developed countries, most notably the US and the UK, proposed time and again that the PCIPD deal with the issues under discussion.

Brazil described the intention of those wanting to relegate the discussion to a rejuvenated PCIPD as that of “*creating a garbage can for development issues*” in WIPO;³²⁸ India agreed, characterising the PCIPD as “*singularly lacking in teeth*”,³²⁹ and affirming that asking to move the discussion to the PCIPD amounted to asking member states to “*change from a horse to a mule midstream*”.³³⁰ Argentina called the continuation of the IIM process as “*essential to fulfil the commitment adopted by the Assembly in 2004*”, and said that moving the discussion to the PCIPD would render it a mere “*rhetorical exercise*”.³³¹ Group B, on the other hand, affirmed its belief that “*a suitably strengthened and reinvigorated PCIPD would be an appropriate body for WIPO Members to exercise their responsibility in guiding and mainstreaming the development objectives in WIPO.*”³³²

The discussion reached a climax when Brazil remarked that it had reviewed an explanation given by WIPO’s International Bureau which essentially stated that the PCIPD had no mandate at all. Brazil concluded that it was therefore inappropriate to move any issues there.³³³ The US retorted that “*because there was no mandate, there was indeed no limitation on what could be discussed in the PCIPD.*”³³⁴

The 2005 General Assembly decided that discussions would be continued in the newly created PCDA, but made no clarification with regard to the mandate and status of that body. Though this ambiguity was probably elementary to reaching that compromise, the question of the appropriate forum remains unanswered, and is likely to take up much time in future negotiations.

³²⁷IIM/2/10, para. 207.

³²⁸Ibid.

³²⁹Ibid., para. 214.

³³⁰IIM/3/3, para. 144.

³³¹WO/GA/32/13, para. 112.

³³²IIM/3/3, para. 29.

³³³Ibid., para. 120.

³³⁴Ibid., para. 122.

6.3.4 A treaty on access to knowledge and technology?

The first document of the Development Agenda Proposal mentions an A2K treaty in the context of technology transfer. It looks to such a treaty to establish a regime which would promote the access of developing countries to publicly funded research in developed countries.³³⁵

Discussion was divided along the usual lines, roughly between developed and developing countries. Whereas the former deemed such a treaty unnecessary, the latter were generally in favour. Brazil and India highlighted that a treaty on access to knowledge and technology would help to create “*a truly development-oriented IPR system*”.³³⁶ Alluding to the title of the book published by WIPO’s Director General Kamil Idris (“*Intellectual Property: A Power Tool for Economic Growth*”),³³⁷ Brazil called such a treaty “*the real power tool for development that WIPO should pursue*”.³³⁸

Other countries put great hopes into what such a treaty could do for technology transfer, by protecting the public domain from the encroachment of private claims as well as by providing an occasion to discuss “*fundamental issues*”, such as ways for developing countries to access foreign patent information.³³⁹ Both Chile and Brazil looked to such a treaty to protect the public domain from the encroachment of private claims, ensuring that information would remain publicly available.³⁴⁰ Honduras hoped that the treaty would help developing countries by making it easier to turn basic research into applied technology, especially in areas such as water, sanitation, health, agriculture, education, and food.³⁴¹

Developed countries viewed the idea of a treaty on access to knowledge and technology far less enthusiastically. Japan considered such a discussion premature.³⁴² The UK saw a role for WIPO in the debate on such a treaty, but contended that it contained elements which appeared to go beyond WIPO’s competence.³⁴³ The US strictly opposed the elaboration of a treaty on access to knowledge, alleging that the proposal was based on false presumptions. It held that the IMP system was very good at bringing information into the public domain. It believed

³³⁵WO/GA/31/11, para. V.

³³⁶IIM/2/10, para. 49.

³³⁷Idris (2003).

³³⁸IIM/3/3, para. 93.

³³⁹Ibid., para. 98.

³⁴⁰Ibid., para. 88, 93.

³⁴¹Ibid., para. 98.

³⁴²Ibid., para. 86.

³⁴³Ibid., para. 82.

that such an agreement “*could impede, rather than promote, access to technology, particularly in the light of the premises upon which it was based.*”³⁴⁴

NGO comments The topic of a treaty on access to knowledge and technology was at the centre of numerous statements by observing NGOs. Especially reform-oriented organisations, most of them advocating the interests of developing countries and/or users, pronounced themselves strongly in favour of such an accord. Some groups recommended that the Standing Committee on Patents (SCP) and the Standing Committee on Copyright and Related Rights (SCCR) should discuss its possible elements.³⁴⁵ It was pointed out that there was broad constituency of stakeholders in favour of it, such as

“groups representing librarians, educators, blind people and the visually impaired, scientists, academic scholars, development groups, consumer organizations, free software advocates, public interest civil society groups, governments and innovative corporations”.³⁴⁶

6.3.5 NGO participation

Interest of NGOs in the development agenda debate was intense. At the first IIM, no less than 57 NGOs were present as observers. This number was somewhat reduced, to 33 groups at the second IIM and 38 at the third.³⁴⁷ Though only three NGOs attended the General Assembly 2004, this is probably due to the fact that substantive debate rarely takes place here. The focus is more on program and budget issues. Furthermore, it is never quite certain when a particular agenda item will come up for discussion; this is a disincentive especially for those groups with limited financial means, who cannot afford to send a representative to Geneva for extended periods of time. NGOs usually receive some opportunity to make a statement during the meeting. They also use the opportunity to inform country delegates of their interests, and to network with each other.

Non-governmental organisations made many and diverse contributions to the debate. During the first IIM alone, 31 statements were made by different non-governmental groups. Though it might be tempting to try and separate these groups into subsets—e.g. “rightsholder-interest” and “user-interest” groups—the situation is not that simple. While some groups might be easily subsumed under such

³⁴⁴IIM/3/3, para. 89.

³⁴⁵IIM/1/6, para. 123.

³⁴⁶IIM/3/3, para. 114.

³⁴⁷The report for the 2005 General Assembly does not record the number of NGOs present.

terms, an organisation of independent music publishers pointing to copyright as one cause for excessive market concentration in its field of business³⁴⁸ is not comfortably pigeonholed into these categories.

A division along these lines also poses another difficulty. As monopolies on ideas, copyright and patents are granted by society as an investment, in the hope of reaping future benefits by incurring costs in the present. It is therefore by no means illogical that an association representing film producers—rightsholders—should state that fostering a strong audiovisual industry was in the public’s best interest.³⁴⁹ On the other hand, a group advocating Free Software interests might argue that non-proprietary models of knowledge regulation, by encouraging competition, might help business.³⁵⁰ There is no neat way of separating the interests of business and society at large.

If a distinction must be made, it rather seems appropriate to distinguish between camps that I take the freedom to label “conservative” and “progressive”³⁵¹ Considered as conservative are those suggestions aimed at preserving WIPO as it is, working for the expansion and the tightening of IMPs. Labelled as progressive are those statements that support the gist of the Development Agenda Proposal, wanting to reform WIPO to take into account a broader spectrum of interests. It is also important to note that the characterisation is better applied to statements instead of groups, as wishing to divine a group’s “character” from a reduced number of statements would be presumptuous. A detailed analysis of the NGO ecosystem surrounding institutions such as WIPO remains a desideratum.

Examples of conservative statements are:

- underlining the importance of copyright as a stimulus without regard to the costs of such monopolies;³⁵²
- calling for stronger patent protection for medicine;³⁵³
- highlighting the importance of fighting illicit reproduction of copyrighted works (“piracy”);³⁵⁴

³⁴⁸IIM/1/6, para. 136.

³⁴⁹Ibid., para. 117.

³⁵⁰Ibid., para. 124.

³⁵¹This is not meant to imply, or indeed indicate, any political affiliation of the group in question, in any country. The frame of reference is exclusively that of WIPO reform. The terms are also not intended to imply approval or disapproval on the author’s part

³⁵²Ibid., para. 116.

³⁵³Ibid., para. 115.

³⁵⁴Ibid., para. 122.

- affirmations that WIPO has always included development in its work;³⁵⁵
- emphasising that WIPO should keep pursuing its present course;³⁵⁶

Instances of statements classified as progressive include:

- those pointing out that libraries are suffering from overly restrictive copyright licenses;³⁵⁷
- warnings that “technical protection measures” (TPMs), backed by anti-circumvention legislation, effectively override fair use provisions;³⁵⁸
- broaching the negative impact of patent-driven R&D on medicine availability;³⁵⁹
- calling attention to the existing imbalance of power between rightsholders and users of knowledge³⁶⁰, and stressing that the rights of all stakeholder groups should be considered;³⁶¹
- highlighting the importance of alternative models for regulating knowledge, as well as open standards;³⁶²
- the assertion that monopolies on ideas are only tools, not ends in themselves, and that these tools must be put to good, but limited use;³⁶³
- advocating the importance of access to knowledge;³⁶⁴

6.4 Summary

In the debate, profoundly different assessments of the value of IMPs are in evidence. On the one hand, the US insist that strong IMP protection is of unquestionable benefit to development, and that any exception mitigates the beneficial effects. Most developed countries exhibit a more differentiated stance. They accept that

³⁵⁵IIM/1/6, para. 121.

³⁵⁶Ibid., para. 139.

³⁵⁷Ibid., para. 113.

³⁵⁸Ibid., para. 133.

³⁵⁹Ibid., para. 129.

³⁶⁰Ibid., para. 130.

³⁶¹Ibid., para. 141.

³⁶²Ibid., para. 124 f.

³⁶³Ibid., para. 127.

³⁶⁴e.g. *ibid.*, para. 123.

IMPs have costs; but they mostly warn against making profound changes to the system without first considering the problem in-depth. Most of them joined the US in demanding that the discussion should be moved to the less powerful PCIPD.

The FOD argue that IMPs are only tools to be used in the service of society, and that the public interest must take precedence over monopoly protection. They insist that public policy goals such as health and education must be given priority over the protection of monopolies. A central demand was that WIPO should weigh the costs and benefits of new norms before establishing them. They also argue that the work WIPO has done in the past has not, in fact, had development as a priority. In a range of intermediary opinions, most developed countries argue for tweaking WIPO's technical assistance programs to better take into account the needs of particular countries; most developing countries emphasise the need for flexibilities and policy space, while emphasising the importance of IMPs.

This difference in perspectives also calls into question the balance of power within the organisation. If WIPO is to become more "member-driven", power shifts away from the Secretariat, which has established the current policies, and towards the General Assembly, where developing countries by far outnumber the developed ones who in the past have been so successful at setting the organisation's agenda.

WIPO's mandate and governance are also a matter of discussion. One side adheres to the 1967 WIPO Convention, which states that the organisation's purpose is to "*promote the protection of intellectual property throughout the world*".³⁶⁵ The other invokes the 1974 UN-WIPO Agreement, which defines WIPO as "*being responsible [...] for promoting creative intellectual activity and the transfer of technology [...]*".³⁶⁶ This reflects the tension between WIPO's roots as a rightsholder organisation and its present as a part of the UN system.

The conflict about the scope that WIPO's development agenda should have was apparent in the acrimonious dispute about the appropriate forum for the discussion. It was this point that led to a deadlock at the last IIM. Those who would limit the development agenda to a matter of technical assistance favoured moving the discussion to a subcommittee with a limited mandate. Member states that saw the agenda as a broad and cross-cutting proposal fought to continue the debate in a high-level body. While the former forum would limit the potential effects of a final agreement to the realm of technical assistance, the latter would allow for

³⁶⁵WIPO Convention, art. 3.

³⁶⁶UN-WIPO Agreement, art. 2.

far-reaching changes in WIPO's structure and governance. It could be inferred that those countries which are not interested in reforming WIPO are deliberately extending the discussion of procedural matters, such as that about the appropriate forum for the debate. Such a tactic would serve to delay substantive debate on a development agenda for WIPO.

As for WIPO's technical assistance programs, there was little dissent that these were necessary and should be strengthened, as well as coordinated better with national policies such as development plans. Yet this was as far as agreement went. Those countries that were generally satisfied with WIPO's present course favoured intensifying technical assistance, additionally broadening it with programs to raising awareness to the benefits of the IMP system. Reform-oriented countries, on the other hand, called for several changes in the programs. Most importantly, they demanded that the assistance should include advice for countries on how best to make use of existing flexibilities in the system.

Reform-oriented countries also embraced the proposal for a treaty on access to knowledge and technology as an opportunity to discuss the fundamentals of the IMP system. They saw it as a chance to make the system more development-oriented, to promote the transfer of technology, and to protect the public domain from the encroachment of private claims. They were joined by progressive NGOs, which showed that there was a broad constituency of stakeholders interested in such a treaty. Developed countries, on the other hand, opposed the treaty, either portraying it as counterproductive, or by deeming it beyond WIPO's competence.

The contributions made to the debate by NGOs show that there is indeed a broad range of stakeholders to the IMP system, with a corresponding variety of interests. Those groups labelled as conservative above (see 6.3.5) point out the importance of monopoly powers especially for copyright-based industries and the pharmaceutical sector. The organisations classified as progressive are largely united in their call for "access to knowledge", which each group focuses according to its area of specialisation. These groups bring the perspective of users to the discussion. They tend to see IMPs as only one of several possible ways of fostering creativity, and push for WIPO to take this into account.

Whatever the deep determinants of radical change, rarely in history is it not accompanied by an act of inscription in which words carry visionary ideals in defiant flight of established authority.

Peter Drahos (2005): Access to Knowledge: Time for a Treaty?

7

A Treaty on Access to Knowledge?

As has become clear from the discussion of the global IMP framework as well as from the analysis of the debate on a development agenda for WIPO, the international system for regulating knowledge is severely out of balance. Throughout this work, we have cast a broad look at the past and present of the IMP system. Now, a glimpse of a possible future seems in order.

How can the system be reformed? How can be assured that the concerns of those disadvantaged by the rules today will be taken care of in the future? How can the regulatory framework be turned to serve everyone, not just large rightsholders in developed countries? One possible—if necessarily partial—answer to these questions is a treaty on access to knowledge and technology. Such an agreement is suggested in the Development Agenda Proposal.³⁶⁷ The issue received great support from civil society groups during the WIPO debate (see 6.3.4). Yet no way forward became obvious.

³⁶⁷WO/GA/31/11, para. V.

7.1 Why an A2K treaty?

The push for an A2K treaty flows from the Development Agenda Proposal submitted to WIPO by Argentina and Brazil; but it has been carried forward by a large coalition of civil society groups. These groups suggest a broad range of issues the treaty might cover. Two central ones are the need for strong and explicit limitations and exceptions in copyright and patent law, and the promotion of access to publicly funded research.³⁶⁸

To prevent the transnational system of knowledge regulation that is built on the TRIPS Agreement from growing even more one-sided, an organised, collective movement is needed. This movement should promote and enhance the supply of knowledge as a public good. But Reichman and Maskus point out that we do not currently know how to strike the balance between public and private interests. A period of experimentation under pro-competitive conditions is needed, similar to that which occurred after the establishment of the Paris and the Berne Conventions.³⁶⁹ To allow for such experimentation, all actors will need more manoeuvring room, not less.

7.2 Considerations for getting there

There are three groups which have an interest in pushing for an A2K treaty: developing countries, innovative businesses and civil society. Being the only actors with the status of sovereign states, developing countries will be crucial to bringing the idea of a treaty to the international institutions into the UN system and agencies, as well as the WTO. But such initiatives will have to overcome a problem that has long hobbled developing countries on the road to achieving better terms in negotiations: a deplorable lack of coordination.

Coordination between developing countries In the past, developing countries have not managed to put up effective resistance to the build-up of restrictive IMP standards. As things stand, they remain marginal players in the negotiation game. Even modest multilateral gains like the Doha Declaration on TRIPS and Public Health have been too easily given away.³⁷⁰ Drahos lists the reasons:

³⁶⁸Drahos (2005) Bridges, 16.

³⁶⁹Reichman/Maskus (2004), 320.

³⁷⁰Drahos (2005) Bridges, 15.

“Key factors that explain the negotiating failures of developing countries are a lack of trust amongst developing country groups, a myopic focus on single issues rather than the game in aggregate, insufficient political support from the capitals for negotiators, inadequate technical analyses of issues, a failure of co-ordination across and within bilateral and multilateral fora and, finally, a lack of boldness of vision.”³⁷¹

Yet negotiating a treaty on access to knowledge would pose challenges for the coordination between developing countries that they have repeatedly failed to meet.³⁷² However, things get more difficult still. To be effective, an A2K treaty could not remain limited to IMPs. It would have to cut across various areas of regulation, including competition and trade policy. Musungu doubts that an A2K treaty can stay limited to WIPO. He recommends that it should be pursued in the frame of an UN-wide discussion. This could encompass organisations such as UNESCO, WHO, UNCTAD and the ECOSOC Commission on Science and Technology for Development.³⁷³

To achieve positive results across such a range of fora, and not lose the gains made in one forum in the next, developing countries would have to overcome some persistent problems. They would have to clearly identify their own interests in the field of knowledge regulation, and develop coherent policies and negotiating strategies. This would have to be done in spite of limited resources and expertise.³⁷⁴

A solution could be for developing countries to make coordination in itself a policy priority. On a national level, this would mean to better coordinate IMP policy between their various government agencies, such as the IMP office, the ministry of economics, the ministry of justice, the foreign ministry and the country’s Geneva mission. Once domestic alignment is achieved, it might become easier for these countries to coordinate their approaches on an international level. This might eventually lead to IMP rules that are development-friendly and widely perceived as being legitimate.³⁷⁵

A permanent high-level working group on trade-related innovation policies could be an effective way for developing countries to build a common negotiation strategy. This group could examine how to best integrate existing law with new standards, so as to achieve an legal environment friendly to innovation and com-

³⁷¹Drahos (2005) Bridges, 15.

³⁷²Ibid., 15 f..

³⁷³Musungu (2005), 17.

³⁷⁴Abdel Latif (2005) Trade-related Agenda, Development and Equity (TRADE) Working Papers, 38.

³⁷⁵Ibid.

petition. Similar groups could be established at the regional level. Such groups would also make developing countries less dependent on *pro bono* legal counsel (as well as WIPO's technical assistance).³⁷⁶

Musungu considers the treaty idea “*a significant strategic organising tool for most of the substantive issues raised in the [FOD proposal at WIPO for a] development agenda*”,³⁷⁷ and is confident that it will help to address the fundamental challenges that IMPs pose with respect to development. Reichman and Maskus agree, arguing that “*experience demonstrates [...] that any coalition of developing country interests will be more effective than the absence of such a coalition*”. In the absence of a firm common position, developing countries could at least find compromises to block harmful proposals.³⁷⁸

A long-running campaign for an A2K treaty would give them the opportunity to build a coalition around the issues of knowledge and development. “*Developing countries have numbers, but not unity and co-ordination. Creating another opportunity for these two things to emerge is in itself a worthwhile goal.*”³⁷⁹

Innovative Businesses The increasingly heated debate about the future of the IMP system does not only reflect a north-south conflict. It also mirrors a conflict between small, innovative firms and large corporations that often do not innovate themselves, but rather buy up ideas from the former and profit by distributing them. Some parts of the entertainment and the pharmaceutical industry, for example, are clearly dependent on ever further-reaching powers of exclusion. They have designed their business models to fit a world where knowledge is distributed in an industrial manner, and are struggling to adapt themselves to circumstances that make networked and commons-based approaches more efficient (see 3.2.1). But other entrepreneurs in the same field, especially small, innovative businesses, may find that they would benefit more from easy and cheap access to existing ideas (such as basic research) than from stricter copyright and patent regulation. Many other industries are realising that they stand to gain more from greater access to knowledge than from higher fences built around it.³⁸⁰

Draho highlights that the fate of a treaty will depend on successfully involving those innovative business, especially the segment of entrepreneurs that see alterna-

³⁷⁶Reichman/Maskus (2004), 315.

³⁷⁷Musungu (2005), 15.

³⁷⁸Reichman/Maskus (2004), 316.

³⁷⁹Draho (2005) Bridges, 15 f..

³⁸⁰Reichman/Maskus (2004), 310.

tive models of knowledge regulation as the force that will drive the knowledge markets of the 21st century.³⁸¹

Civil society As illustrated in 6.3.4 and affirmed by Musungu,³⁸² the FOD proposal for an A2K treaty has attracted massive attention and support from civil society groups. The number of these groups is large, and their goals diverse. Some focus on development, others on consumer, civil or human rights. Some represent more or less clearly definable constituencies, such as libraries or the visually impaired. Some draw on the support of large numbers of individuals with corresponding interests, like groups promoting Free Software or the protection of the public domain.

Though it would seem at first glance that such a diverse lot would find it hard to agree on anything, these groups have recognised that their common interest is a reform of the IMP system. The most obvious sign for this is the Geneva Declaration on the Future of WIPO,³⁸³ which endorsed the Development Agenda Proposal when it was introduced to WIPO's 2004 General Assembly. It is signed by hundreds of NGOs, academics, scientists and other individuals. The declaration demands that WIPO should focus more on the needs of developing countries, and that it should start seeing intellectual monopolies as one tool among others for fostering creativity, not as ends in themselves:

“The functions of WIPO should not only be to promote ‘efficient protection’ and ‘harmonization’ of intellectual property laws, but to formally embrace the notions of balance, appropriateness and the stimulation of both competitive and collaborative models of creative activity within national, regional and transnational systems of innovation.”³⁸⁴

Some have gone even further, advocating the transformation of the “World Intellectual Property Organisation” into a “World Intellectual Wealth Organisation”, which should be “*dedicated to the research and promotion of novel and imaginative ways to encourage the production and dissemination of knowledge*”.³⁸⁵

Among the three groups of actors described, civil society presently appears to be the most active. It is essential to concentrating the diffuse interest of the public in favour of a more balanced regulation of knowledge.³⁸⁶ A large coalition of

³⁸¹Drahoš (2005) Bridges, 17.

³⁸²Musungu (2005), 15.

³⁸³Geneva Declaration on the Future of WIPO.

³⁸⁴Ibid., 2.

³⁸⁵FSFE (2004).

³⁸⁶Musungu (2005), 23.

NGOs have taken the lead and produced a first draft for an A2K treaty³⁸⁷ as part of a wider campaign for a reform of the system. In the drafting exercise, each group added proposals from the point of its respective expertise.

Though it is clearly a rough draft with a number of unfinished placeholders, it provides a first glimpse of the direction such a treaty might take. It is therefore worthwhile to consider some basic features of the text. It should not be forgotten, though, that this is a preliminary proposal of only one side. Were it to enter a negotiation process, it would be liable to change. On the other hand, the document at least provides a starting point.

7.3 A first draft for a treaty on access to knowledge

The preamble states the purposes of the treaty, and makes it clear that the treaty covers a much wider area than is customary for IMP agreements. This is unsurprising, since the treaty is concerned with the regulation of knowledge, for which limited monopolies on ideas are only one tool among many. *Inter alia*, it makes references to the importance of knowledge resources in supporting innovation, development and social progress; the private misappropriation of social and public knowledge resources; the importance of protecting and supporting the interests of creative individuals and communities; and the promotion of technology transfer.

Attempting to build from scratch a completely new system for the regulation of knowledge would be a doomed undertaking. Countries have signed agreements such as TRIPS, and have to adhere to the commitments they have made. Replacing those agreements with something completely new would therefore hardly work. With this in mind, the draft treaty builds on TRIPS, but uses to the full the flexibilities it provides.

TRIPS establishes minimum standards of exclusion. Member states, if they wish to, may impose even stricter standards. The A2K treaty turns this principle on its head: It establishes the TRIPS minimum standards as the *maximum*, and defines binding minimum standards for access to knowledge. Members can choose to provide greater access if they want.

The duration of the copyright monopoly provides an example for this technique. TRIPS mandates a minimum of 50 years. States party to the A2K treaty, on the other hand, agree “*not to extend the term of protection beyond the minimum*

³⁸⁷ (2005) Treaty on Access to Knowledge. Draft 9 May 2005. online (Available at: <http://www.cptech.org/a2k/consolidatedtext-may9.pdf>) – visited on 2006/06/29.

required term”, and may set shorter terms if they want to. This turns the TRIPS *minimum* term of 50 years into a *maximum* duration.³⁸⁸

A similar mechanism is applied to the exceptions and limitations to copyright. TRIPS, as most other IMP agreements, list the minimum powers for exclusion that member states must provide to rightsholders. The A2K treaty explicitly lists the minimum *exceptions* that the public must enjoy. These include provisions on the educational use of copyrighted works, on reverse engineering (which is particularly important for software), and the use of works in libraries.

The draft also calls for consideration of the public interest when there is an argument about the TRIPS compliance of an exception. It includes limits on patentable subject matter (e.g. higher life forms cannot be patented), the compulsory licensing of copyrighted works in developing countries, as well as a host of other stipulations designed to ensure a balance between remuneration for authors and access to knowledge for the public. Open standards,³⁸⁹ the control of anti-competitive practices and the establishment of a repository of public knowledge (“Knowledge Commons”) are other important points.

Though the future for such a treaty is highly uncertain, the draft provides a basic NGO consensus. This not only helps to consolidate a loose coalition of diverse groups working for greater access to knowledge. It could also become a crystallisation point for efforts by other actors, such as developing countries. An optimist might even see the paper as a first input for negotiations on a treaty that ensures access to knowledge for all.

7.4 Summary

The international IMP system puts developing countries at a disadvantage. Each country by itself also has too little negotiating power to change this. For this reason, it is essential that developing countries improve their internal and external coordination. A permanent high-level working group could help developing countries to build a common negotiation strategy.

Instead of stricter standards, developing countries need room to experiment with flexible IMP regimes. An A2K treaty might secure such manoeuvring space.

³⁸⁸An open question is why the draft does not seek to establish a similar maximum limit for the term of patents. This might be due to the fact that the patent term has not been as frequently extended as that of copyright, or that it is not perceived as equally controversial.

³⁸⁹Here, a standard is considered open when it is fully documented, freely implementable and maintained through an open process.

An A2K treaty might cover such issues as limitations to copyright and patents and access to publicly funded research.

Such a treaty could most likely not stay limited to IMPs. It would have to encompass not only other methods of regulating knowledge, but also fields such as competition and trade policy. A campaign for such a treaty should seek to enlist the help of innovative businesses and civil society groups. While the former are interested in a positive business environment for themselves, the latter aggregate the otherwise diffuse interest of users of knowledge.

There is a tentative draft for such a treaty, prepared by a large group of NGOs. Instead of establishing minimum standards of exclusion, it sets a maximum for the extent of intellectual monopoly powers. It also emphasises the importance of open standards and the control of anticompetitive practices. It further envisages a repository of publicly available knowledge which is protected from appropriation.

Monopoly [...] is a great enemy to good management.

Adam Smith (1776): *The Wealth of Nations*

8

Conclusions

We live in a society in which the network has become the dominant pattern of organisation in economy, culture and power. Due to the “information technology revolution”, in particular the emergence of widespread digital networks, communication has become easier and cheaper. This has led to a qualitative change in the structures of society. Not only is more communication happening; it also runs along different lines. The hierarchical structures associated with the industrial mode of development are giving way to the networks that come with the informational mode of development.

In the network society, knowledge is the primary resource of productivity. Access to knowledge determines who can be economically successful. It is not easy to tell which consequences the inherent properties of networks have for the generation and distribution of, and access to, knowledge. But it can be said that in the network, knowledge does not flow everywhere equally. It concentrates in and around certain hubs. As knowledge is the input of its own production process, there are marked inequalities between those who have access to knowledge and those who do not; but they are not necessarily greater than was the case in the hierarchies of the industrial age.

The ways in which knowledge is created and distributed have undergone profound change. The distributor-centred model that dominated the 20th century is being replaced by various network-centred modes of creativity. Commons-based peer production, though not a new concept, has greatly gained in efficiency compared to producing knowledge through markets or firms. It is therefore desirable that regulators, when looking to stimulate the creative forces of society, take this model into account on at least an equal footing with intellectual monopolies. Restrictions should not interfere with other modes of regulation, commons-based or otherwise.

IMPs are inextricably linked to trade. The international framework of IMP rules is set up to the advantage of developed countries. These, in particular the US, are continuously ratcheting up IMP standards through unilateral, bilateral and multilateral processes and institutions, paying little attention to the interests of developing countries and the public. Yet historically, IMPs have been used flexibly by states to make their national economies more competitive. Today, such flexibility would benefit developing countries as well. Yet different from the nations that preceded them on the path of economic development, they are faced with rules that constrict their room for adaption and experimentation. Recent decades have seen the construction of a highly restrictive global framework of intellectual monopoly powers. For developing countries, this makes it systematically hard to achieve progress.

WIPO, the most important organisation in setting and administering these rules, is under heavy influence from developed country governments and rightsholders. It cannot be relied upon to establish a balanced regime if left to its own devices. If WIPO is to fulfil its role as a specialised agency of the UN, it has to abandon its ideological blinkers and take into account the interests of developing countries and the public, instead of single-mindedly pushing for stricter IMP standards. Such a change would involve firmly incorporating the flexibilities in TRIPS and other agreements into the technical assistance given by the organisation. It would also require WIPO to realise that its constituencies are not only member states and the market sector, but also consumers, academics and the public in general.

The Development Agenda Proposal is a first step towards such change. It is by no means an anomaly of international diplomacy. Rather, the initiative is integrated into a broad context of other international agreements and declarations. It also reflects influences from academia and civil society. This enables the document

to take into account the interests of a far greater range of stakeholders than usual at WIPO.

The discussion started by the proposal revolves around a conflict of principle: do stricter IMP standards really lead to economic development? Or should flexible regimes be given preference? Developing countries call for “policy space” to use IMPs as their specific national situations demand it. Countries at a high level of economic development tend to point to the importance of having a uniform, harmonised international system with few exceptions and flexibilities. Though a possible correlation could not be thoroughly analysed here, it appears that whether a country is a net importer or a net exporter of knowledge products works as a reasonably accurate predictor for its stance in this discussion (see maps on page 39). The US claim that strict IMP standards are unequivocally advantageous to development contradicts the evidence considered in this work. Coming from the main beneficiary of the present system, it appears also rather self-serving.

The remaining conflicts are linked to this fundamental disagreement. WIPO’s governance, the scope of the development agenda and the design of its technical assistance activities are all dependent on the goal that the organisation’s member states set for WIPO.

There are two ways to view the constellation of conflicts in this discussion. Emphasising the extremes, it is easy to point out that member states were unable to reach a consensus, and that the discussion remains fruitless. But looking at the process, it becomes clear that at least a minimal agreement was not far off on some occasions. In particular during the third IIM, the US was the only country blocking the continuation of the process in the high-level IIM forum. In WIPO, decisions are usually made by consensus instead of through a vote. This, combined with the secretariat’s fear of losing influence in the UN system, made it possible for a single country to prevent progress for everyone else.

The persistent lack of an outcome can be viewed as an indication that the stakes are high for all actors. The US have substantial economic interests in seeing WIPO continue down its present tracks. For other developed countries, the picture is not quite as clear-cut. Accordingly, their positions are more ambivalent, and they are more open to compromise.

Developing countries clearly stand to gain from a reform of the organisation that would broaden its approach to include development. They must make up in numbers and unity what they lack in economic and political weight. But this requires them not only to become aware of their interests in the regulation of knowl-

edge, but also to coordinate those interests both internally and between countries. The initiative taken by the FOD represents both a wake-up call and an opportunity for them to start attending to their interests in the regulation of knowledge.

Yet a reform of WIPO would only change one node of the regulatory network, albeit a large one. Much greater progress could be made with a treaty on access to knowledge. Setting global minimum standards for access to knowledge would offer a firm base from which to reform the global governance of knowledge in a way that reflects the needs of all its stakeholders. In their own interest, developing countries should start taking the necessary first step and improve their coordination. They have little to lose. A treaty on access to knowledge remains, for the present, a pipe-dream. But that was also where the TRIPS Agreement started out.³⁹⁰

Is WIPO's approach viable? As a result of the analysis, it can be concluded that WIPO's approach to regulating access to knowledge is not viable in a network society. It neither suits the needs of developing countries nor those of users and society at large. The laws and regulations that were developed and adopted in the past are by and large aimed at supporting an industrial manner of producing and distributing knowledge. In a network society where digital communication networks are rapidly gaining importance, other ways of producing knowledge may be more effective. Legacy regulations, largely designed to cater to the needs of centralised distributors, can easily become too restrictive and prevent human creativity from reaching its full potential.

Large rightsholders are feeling the competition from new and innovative businesses as well as from commons-based peer production, and are worried about their future prospects. This is the origin of the push for stricter global standards of exclusion, which is articulated through the governments of the most economically developed countries. But attempts to preserve outdated business models through the political route should not be allowed to slow the rise of alternative methods, which may be better suited to the new environment. If the tension between rules and reality becomes too great, economic and cultural development will be slowed as the interests of the few continue to trump those of the many. To prevent this, the international system that is governing access to knowledge needs wide-ranging reform.

Developing countries are in a special position here, and in a certain way it is an advantageous one. Though most developing nations have recently begun to im-

³⁹⁰Drahos/Braithwaite (2002), 196.

plement stricter IMP laws in the face of international pressure, the constellation of interests in these countries often differs substantially from that found in developed states. There is usually no local rightsholding industry of a similar size as in the US or the EU to lobby the national government in its favour. Stricter standards will benefit corporations in developed countries much more than the local economy. This economy is likely to have a greater interest in the freedom to adapt existing knowledge to its needs than in building fences around new ideas. To an even larger degree, the local population stands to gain from IMP legislation that respects the concerns of users. These two groups combined should be able to influence their governments to attend to their interests. Constituting a powerful force, they could bring their governments to experiment with more flexible IMP regimes. This experimentation might in turn benefit developed countries, where the interests of users, having begun to organise only recently, face the entrenched lobbies of rightsholders.

Future research The debate on a profound reorientation of the governance of knowledge has only just begun. Consequently, there are far more questions than answers, and opportunities for researchers abound. There is currently little reliable economic data, and less consensus, on the impact of different IMP regimes on national and global economies. A more solid empirical base, replacing faith with facts, could help policymakers to realistically gauge the effects of new and existing IMP rules on the economy, culture and development. The development impact assessments which the FOD demand from WIPO would be but one application for such information.

The efforts to grasp the economic and cultural relevance of commons-based peer production should be greatly increased. How does a project like Wikipedia change the way in which knowledge is established and distributed? What factors of peer production determine its effectivity? What is the real extent of the use of Free Software? Which new forms of creativity are developing, how are information and power distributed in networks, and what does all this mean for our culture? These are only a few questions out of many possible ones, and a lot of them fall on the home turf of cultural sciences.

The debate on a development agenda for WIPO does not only provide the organisation with an opportunity for change. If used wisely, and given a considerable amount of luck, it may one day be remembered as the moment when a reform of

the entire system was started. It is an attempt by a number of developing countries to bring the organisation closer to the mainstream of the UN system, and have it consider the development implications of its work. Strong forces are lined up against such a change, and the outcome of the venture is open.

The discourse on the regulation of knowledge, however, extends far beyond WIPO. While intellectual monopoly powers were long regarded as an arcane legal discipline, they are now at the centre of a heated discussion. A great number of stakeholders have become aware of the need for action. The time when rightsholders encountered virtually no resistance when pushing their interests is over. This is a promising start for the long walk towards making access to knowledge a reality for all.

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