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## **Cosmopolitan Legalism Meets ‘Thin Community’: Problems in the Global Governance of Intellectual Property**

IN THE RUN-UP TO THE CANCÚN MINISTERIAL MEETING OF THE WORLD Trade Organization (WTO), the office of United States Trade Representative (USTR), European Union negotiators and a number of developing countries finally concluded an agreement over the supply of cheaper ‘generic’ AIDS drugs in developing countries. Two years after the Doha Declaration on the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement and Public Health, the final obstruction to getting medicines into countries with no domestic capacity seems to have been removed. This delay has no doubt cost many lives, and it remains to be seen whether this compromise on pharmaceutical patents will finally deliver the drugs to the poor in sub-Saharan Africa who so desperately need them. Although this is the most serious and high-profile issue surrounding the TRIPs agreement it is far from an isolated issue in the global governance of intellectual property. Without disputing the seriousness of the health issue, here I want to look at the more general problems of which this dispute is only the most obvious manifestation.<sup>1</sup>

Since 1995 intellectual property rights (IPRs) have been subject to the TRIPs agreement, which is overseen by the WTO. While this agreement does not determine national legislation, to be TRIPs-compliant, WTO members’ domestic intellectual property law must establish the minimum level of protection for IPRs laid out in TRIPs’s

<sup>1</sup> This paper was originally prepared for the panel on the Governance of Global Issues: Effectiveness, Accountability and Constitutionalisation, at the European Consortium for Political Research, joint sessions of workshops, University of Edinburgh, 2003. I thank the participants there for their comments that helped improve the focus of the argument presented here. Two referees for *Government and Opposition* also provided excellent advice regarding the clarification of key points and I acknowledge their help, while noting that all remaining shortcomings are my own.

73 articles. The agreement covers not only general provisions and basic principles, but also represents an undertaking to provide legal mechanisms for the enforcement of IPRs. Importantly, the WTO's cross-sectoral dispute settlement mechanism encompasses international disputes about IPRs. Prior to 1995, while there were long standing multilateral treaties in place regarding the international recognition and protection of IPRs, overseen by the World Intellectual Property Organization (WIPO), these were widely regarded as toothless in the face of 'piracy' and the frequent disregard for the protection of non-nationals' intellectual property outside the most developed countries (and even sometimes between them).

In addition to the advantages to be gained by having a tougher multilateral enforcement mechanism, the US government (alongside allies in the European Union) wanted to move the international regulation of IPRs to the new WTO (at the expense of regulatory competence located with WIPO) because their negotiators surmised that they were more likely to gain agreements to their advantage by linking these issues to the international trade regime.<sup>2</sup> Indeed, a number of large multinational corporations with a particular interest in protecting their IPRs played a major role in the negotiations which led to the TRIPs agreement, drafting the majority of the document that became the broadly successful position advocated by the office of the USTR during the Uruguay Round.<sup>3</sup> These companies therefore had a significant impact on the particular view of IPRs that has subsequently become the potential set of globalized norms lying at the heart of the TRIPs agreement.

Although there are still some members of the WTO who are in a transitional period, the TRIPs agreement establishes for the first time a potentially global settlement for the recognition and protection of IPRs. For the developed countries, TRIPs compliance has involved some legislative reorientation and occasionally new laws (or judicial reinterpretations of existing laws); for the developing countries, often with little or no tradition of IPRs, compliance is considerably

<sup>2</sup> J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge, Cambridge University Press, 2000, pp. 61–4.

<sup>3</sup> C. May, *A Global Political Economy of Intellectual Property Rights: The New Enclosures?*, London, Routledge, 2000, pp. 82–4; S. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Cambridge, Cambridge University Press, 2003, ch. 5.

more difficult and expensive to achieve. In recognition of these difficulties some developing country members of the WTO are currently covered by the transitional arrangement (recently extended to 2016 in regard of pharmaceutical patents). However, such arrangements only cover those developing countries who were original members of the WTO, not those who have subsequently acceded to the agreement. Bilateral trade and investment treaties with the US have further undermined these arrangements, by requiring developing country partners to immediately establish IPR protection at levels above those required by TRIPs. Nevertheless developing countries remain eligible for extensive technical support (under Article 67 of the agreement) to enable them to build the legal capacity to establish TRIPs compliance.

There are tensions in this attempt to move towards a more harmonized global governance regime for IPRs. Developed countries' governments accept the legitimacy and usefulness of IPRs, but this has been met by considerable doubts among NGOs and other groups regarding the social utility of making property from knowledge, as well as widespread suspicion in developing countries of what IPRs seem intended to do. Below, I briefly lay out the historical context for the global governance of IPRs and some key issues regarding the TRIPs agreement. I then explore the tension between a cosmopolitan view of the justification of IPRs encapsulated in the TRIPs agreement, alongside the problems that arise from continuing global inequalities and the relatively 'thin community' that TRIPs attempts to govern. At the heart of this problem is the balance between private rewards and public benefits on which IPRs have been traditionally built, a balance which has been undermined by a systematic privileging of owners' rights in the face of users' poverty. I conclude that this is a political economic problem, not a merely arcane technical legal issue. There is no effective globalized mechanism through which the social costs of the protection of IPRs can be ameliorated; the global polity is too under-developed for this task. States may need to reassert their sovereignty over IPRs-related issues if they are to secure the policy outcomes they require, rather than rely on global governance.

## TRIPS: HISTORICAL CONTEXT AND KEY ISSUES

While the history of intellectual property itself stretches back to fifteenth-century Venice,<sup>4</sup> for the first 350 years of its legislative existence it was almost entirely a national issue.<sup>5</sup> However, as part of the nascent multilateralism of the mid-nineteenth century,<sup>6</sup> and partly building on a number of bilateral copyright treaties earlier in the century, diplomacy between the major trading nations established two intellectual property agreements which broadened the governance of IPRs beyond national borders. However, this is not to say that this was a smooth nor uncontested expansion of governance arrangements. Although patents had been recognized for some centuries, prior to the ratification of any international agreement for their protection, on both sides of the Atlantic the protection of intellectual property (and specifically patents) was the subject of a forthright political debate between supporters and abolitionists.

The abolitionists focused on three main (still familiar) arguments: claims that there was a 'natural' right to own intellectual property, they noted, obscured the necessary legal *construction* of IPRs, which, unlike material (rival) property, is not characteristically scarce (of which more below); secondly, while arguments about just rewards had some weight, the abolitionists noted that seldom were the rewards distributed fairly, and seldom did real innovators garner these rewards; and thirdly, despite the claimed 'incentive to invent' patents were actually a disincentive to rival inventors once first inventions were patented. Furthermore, man had seemingly been quite innovative throughout history without recourse to intellectual property.<sup>7</sup> In the end supporters mobilizing a similar agenda of justification to the one relied on today (detailed below) won the

<sup>4</sup> Space precludes a full typology of IPRs to be set out here, but see May, *A Global Political Economy of Intellectual Property Rights*, op. cit., pp. 6–11, for a fuller treatment. Where aspects of specific forms of intellectual property are important for the argument below they are covered in the discussion.

<sup>5</sup> S. Sell and C. May, 'Moments in Law: Contestation and Settlement in the History of Intellectual Property', *Review of International Political Economy*, 8: 3 (autumn 2001), pp. 467–500.

<sup>6</sup> C. Murphy, *International Organisation and Industrial Change: Global Governance since 1850*, Cambridge, Polity Press, 1994.

<sup>7</sup> F. Machlup and E. T. Penrose, 'The Patent Controversy in the Nineteenth Century', *Journal of Economic History*, 10: 1 (May 1950), pp. 1–29.

argument, but as Mark Janis notes, patents' supporters shared 'many of the concerns promulgated by the patent abolitionists'.<sup>8</sup> While the abolitionists had seen the non-availability of patents in some jurisdictions as giving those countries an unfair advantage, suggesting patents should be abolished to re-establish free trade, the internationalists sought to widen the scope to halt, in the words of John Stuart Mill 'attempts which, if practically successful, would enthrone free stealing under the prostituted name of free trade'.<sup>9</sup> The origins of the global governance of IPRs lie in a forthright debate regarding patents' shortcomings, and significantly, 'theft' by foreigners.

In the last decades of the nineteenth century, two sets of conferences focused on the international coordination of protection for IPRs, reflecting the success of those who supported the internationalist position. These resulted in the Paris Convention (covering patents), completed in Madrid in 1891, and the Berne Convention for the Protection of Literary and Artistic Works (1886). By 1893 the common issues across both conventions had led to the establishment of a combined secretariat, functioning under various names until the establishment of WIPO at the end of the 1960s. An agency of the United Nations since 1974, WIPO also administers other international treaties covering intellectual property (including trademarks, geographic indicators and industrial designs) and is responsible for promoting technology transfer by supporting the recognition of IPRs in developing countries. Thus, by the 1970s WIPO oversaw a complex of different agreements on various forms of intellectual property, all with differing signatories, with divergent mechanisms for negotiating settlements in international disputes and little harmonization in their underlying principles. Most importantly with no explicit rules on enforcement, there was no effective mechanism for the settlement of disputes between members regarding the protection offered to non-nationals.<sup>10</sup> States enjoyed enormous discretion over how they legislated to protect IPRs and many IPR-importing countries' governments did not perceive accession to *all* of WIPO's treaties as in their immediate national interest.

<sup>8</sup> M. D. Janis, 'Patent Abolitionism', *Berkeley Technology Law Journal*, 17 (2002), pp. 899–952; 947.

<sup>9</sup> J. S. Mill, *Principles of Political Economy*, 7th edn, 2 vols, London, Longmans, Green, Reader & Dyer, 1871, vol. II, p. 552.

<sup>10</sup> D. Matthews, *Globalising Intellectual Property Rights: The TRIPs Agreement*, London, Routledge, 2002, p. 11.

Nevertheless, 'cooperation with developing countries' remained at the heart of WIPO's self-nominated mission. Extensive legal support through training, model legislation and advice was intended to aid the creation, or modernization, of IPR-related laws, to establish a knowledgeable judiciary as well as knowledgeable legal professionals, and to generally support developing countries establishing a robust legal structure for the protection of IPRs.<sup>11</sup> However, the differences between the various members' perceptions of their national interest undermined attempts in the 1970s and 1980s to establish a more workable dispute settlement procedure. While the conventions overseen by WIPO allowed some voluntary harmonization of protection across the various forms of IPRs, growing concerns among important (and globalizing) industrial and service sectors in the richer developed countries regarding piracy were largely frustrated at a time when IPRs were moving steadily to the centre of the commercial concerns of a number of important globalizing industrial sectors.

The main political pressure from the developed countries to include intellectual property in the Uruguay Round therefore partly originated in the response by the content industries to a series of technological innovations, centred on information and communications technologies (ICTs) which enhanced both the possibilities of an international (commodity) trade in information- and knowledge-related goods, and also enlarged the possibilities of 'theft' and 'piracy'. Trade negotiators from the developed countries were heavily (and successfully) lobbied on this issue while they themselves already believed that the complex of 24 multilateral treaties administered by WIPO produced too much rule diversity. But these arguments did little to stimulate developing countries' interest in including IPRs in multilateral trade negotiations.

To 'encourage' a change of heart regarding the negotiation of the TRIPs agreement, the USTR threatened bilateral trade sanctions (under the special 301 section of the Omnibus Trade and Tariff Act, 1988), and utilized such measures against the Indian pharmaceutical industry among others.<sup>12</sup> This stick was combined with the carrot of a promise to open up agricultural markets and an offer to abolish

<sup>11</sup> World Intellectual Property Organization [WIPO], *WIPO: General Information*, Geneva, WIPO, 1993, pp. 55–7.

<sup>12</sup> Matthews, *Globalising Intellectual Property Rights*, op. cit., p. 31.

the Multi-Fibre Arrangement which constrained developing countries' textile exports.<sup>13</sup> The developing countries generally lacked the expertise and resources to fully resist this bilateral pressure. Thus, while even in 1989 for many it was clear what the detrimental effects of an international trade agreement on IPRs would likely be,<sup>14</sup> this was not the same as being able to withstand the considerable political resources brought to bear to secure the TRIPs agreement in the final settlement of the Uruguay Round. The combination of political pressure and weakened resistance due to the complexity of the negotiations relative to the limited resources developing countries could dedicate to them, ensured that when the developing countries joined the new WTO they had to accede (with some transitional arrangements, to be sure) to the TRIPs agreement as well.<sup>15</sup> In itself, the manner in which the TRIPs agreement was negotiated has led Daya Shanker to argue that, even if the agreement's undertakings themselves present the problems I examine below, its diplomatic origins render it largely illegitimate.<sup>16</sup> However, in parallel to the arguments developed below, Shanker suggests that diplomatic negotiation to revise TRIPs is preferable to the non-compliance that the agreement's illegitimacy might imply.

The keystone of the TRIPs agreement is the adoption in the realm of intellectual property of the principles that are central to the WTO (like the GATT before it): national treatment; most-favoured nation treatment (MFN); and reciprocity. While reciprocity as a principle

<sup>13</sup> May, *A Global Political Economy of Intellectual Property Rights*, op. cit., p. 88.

<sup>14</sup> P. Gakunu, 'Intellectual Property: Perspective of the Developing World', *Georgia Journal of International and Competition Law*, 19: 2 (special trade conference issue, 1989), pp. 358–65.

<sup>15</sup> Extended discussions of the negotiations that led to TRIPs can be found in Matthews, *Globalising Intellectual Property Rights*, op. cit., ch. 2, and T. P. Stewart, *The GATT Uruguay Round. A Negotiating History (1986–1992)*, Deventer, Kluwer Law and Taxation Publishers, 1993, pp. 2245–333. Ironically, it now seems likely that further attempts at the global harmonization of patents (and a levelling up of protection) will be carried forward through the WIPO Patent Agenda, just as the developing countries have organized significant resistance to the hard-line TRIPs approach at the WTO, see C. Correa and S. F. Musungu, *The WIPO Patent Agenda: The Risks for Developing Countries*, Trade-Related Agenda, Development and Equity, Working Papers, 12, Geneva, South Centre, 2002.

<sup>16</sup> D. Shanker, 'Legitimacy and the TRIPs Agreement', *Journal of World Intellectual Property*, 6: 1 (2003), pp. 155–89.

does little in itself to change the intellectual property regime, the introduction of MFN does change the international governance of IPRs somewhat. Under the auspices of WIPO there were many smaller scale treaties and conventions; under TRIPs all such specialized agreements immediately apply to all the members of the WTO. Where there had been resistance to incorporate particular sectoral conventions in the past, by inclusion into the WTO their scope becomes as wide as the main IPR conventions. Furthermore, national treatment ensures favouritism accorded to domestic inventors or prospective owners of IPRs relative to non-nationals is rendered illegal. This is an important shift as many national IPR systems have favoured domestic 'owners' either through legislative or procedural means. Indeed, in the past, many industries in then developing countries (such as the US publishers in the nineteenth century) 'pirated' non-national intellectual property by awarding protection to nationals who were known not to be the original innovators.

The TRIPs agreement is not a model piece of legislation that can be incorporated directly into national law. Rather, it sets the minimum standards that should be reflected in the national legislation of all WTO members. It does not preclude members setting more rigid or stronger protection for IPRs except where such extensions above and beyond the minimum standards represent an infringement of the agreement's articles in some way. National legislatures are required therefore to ensure IPRs are protected but the method for this protection is only important as regards its consequences, not its form; the agreement is concerned with ends not means. The agreement's recognition that 'intellectual property rights are private rights' is partly balanced by an explicit allowance of the need for the 'public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives'. But crucially, the previous problem of international enforcement of IPRs is reflected in TRIPs' promotion of 'adequate' protection through the application of a global set of standards. Unlike WIPO's stewardship of previous conventions, the WTO offers a considerably more robust mechanism for states to appeal to where the national laws of a particular country are seen to impede the rights of other nationals.

By bringing intellectual property under the purview of the WTO, the TRIPs agreement stipulation that 'procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade'

is central to intellectual property law.<sup>17</sup> The protection of IPRs (or more often their non-protection) should not be used to disrupt trade flows. For instance, if only nationals are protected, this would act as a barrier to non-nationals who would receive no protection for the IPR element of goods or services they wished to export to that jurisdiction. Currently the most politically explosive effect of TRIPs is to render the importation of generic pharmaceuticals illegal for any WTO member (when patents have been granted for the original compound) except in tightly prescribed circumstances,<sup>18</sup> even if they have enacted the health emergency provisions of the agreement, as reasserted within the Doha Ministerial Declaration.<sup>19</sup> As such while formally available as a solution to health crises, cross-border compulsory licensing has proved exceptionally difficult to execute while maintaining TRIPs compliance.

Overall, this extension of the protection of intellectual property in the international realm as well as the harmonization of law across WTO members represented a major triumph for the 'US pharmaceutical, entertainments and informatics industries that were largely responsible for getting TRIPs on the agenda' of the Uruguay Round.<sup>20</sup> The TRIPs agreement is significant in the extension it represents for the rights of the owners of intellectual property. Indeed, Samuel Oddi argues that the use of a natural *rights* discourse (utilizing the narratives of justification I briefly lay out in the next section) tries to establish that

these rights are so important that individual [WTO] member welfare should not stand in the way of their being protected as an entitlement of the creators. This invokes a counter-instrumentalist policy that members, regardless

<sup>17</sup> General Agreement on Tariffs and Trade [GATT], *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Geneva, GATT Publication Services, 1994, section AIC, p. 19.

<sup>18</sup> See F. M. Abbott, *Compulsory Licensing for Public Health Needs: The TRIPs Agenda at the WTO after the Doha Declaration on Public Health*, Occasional Paper, 9, Geneva, Quaker United Nations Office, 2002, for discussion of the constrained circumstances in which compulsory licences can actually be used under TRIPs.

<sup>19</sup> For a discussion of IPRs, AIDS and the pharmaceutical industry, see C. May, 'Unacceptable Costs: The Consequences of Making Knowledge Property in a Global Society', *Global Society*, 16: 2 (April 2002), pp. 123–44.

<sup>20</sup> B. M. Hoekman and M. M. Kosteci, *The Political Economy of the World Trading System. From GATT to WTO*, Oxford, Oxford University Press, 1995, p. 156.

of their state of industrialisation, should sacrifice their national interests in favour of the posited higher order of international trade.<sup>21</sup>

While the TRIPs agreement includes instrumentalist justifications alongside the more rights-oriented language, Oddi (and others, including myself) argue that it is the rights side of any balance between individual rights and public developmental benefits that is systematically privileged throughout the agreement's text.

While the agreement itself is a complex and wide ranging set of requirements on signatories,<sup>22</sup> at the core is a particular set of norms regarding the treatment of knowledge as property. These norms underpin the entire agreement and are based on the notion that the private ownership of knowledge as property is a major spur to continued economic development and social welfare. They further emphasize the development of knowledge as an individualized endeavour, and the legitimate reward of such individualized effort. Most obviously this includes a foundational norm of commodification of knowledge and information. While the agreement is potentially quite flexible, as evidenced by the negotiations over the Doha Ministerial Declaration, the forces which support a particular reading of the agreement are difficult to overcome. The Doha declaration itself, despite extensive negotiations *only* reasserted the broad thrust of the original text's invocation of health emergencies as legitimate reasons for the circumvention of IPR laws regarding pharmaceuticals. However, these norms of property ownership in knowledge and information are hardly universal and therefore represent a major problem for the legitimization of the *global* governance of IPRs.

#### THE NORMATIVE UNDERPINNINGS OF INTELLECTUAL PROPERTY

The most important aspect of IPRs is their formal construction of scarcity where none necessarily exists. Knowledge and information,

<sup>21</sup> A. S. Oddi, "TRIPs – Natural Rights and a "Polite Form of Economic Imperialism", *Vanderbilt Journal of Transnational Law*, 29 (1996), pp. 415–70, 440.

<sup>22</sup> Space precludes a detailed account of TRIPs numerous sections; K. Maskus, *Intellectual Property Rights in the Global Economy*, Washington, DC, Institute for International Economics, 2000, ch. 2, offers a good concise summary of the agreement, as does Matthews, *Globalising Intellectual Property Rights*, op. cit., ch. 3, but also see the discussion in May, *A Global Political Economy of Intellectual Property Rights*, op. cit., ch. 3.

unlike material things, are not necessarily rivalrous, coincident usage does not detract from utility. In this sense, most of the time, knowledge (before it is made property) does not exhibit the characteristics of material things. Take the example of a hammer (as material property); if I own a hammer and we would both like to use it, our utility is compromised by sharing use. I cannot use the hammer while you are, you cannot while I am, our intended use is rival. Thus, for you to also use my hammer, either you have to accept a compromised utility (relying on my goodwill to allow you to use it when I am not) or you must also buy a hammer. The hammer is scarce. However, the idea of building something with hammer and nails is not scarce. If I instruct you in the art of simple construction, once that knowledge has been imparted, your use of that information has no effect on my own ability to use the knowledge at the same time, there is no compromise to my utility. We may be fighting over whose turn it is to use the hammer, but we do not have to argue over whose turn it is to use the idea of hammering a nail into a joint, our use of the idea of cabinet construction is non-rival. Ideas, knowledge and information are generally non-rivalous.

Certainly, if you and I were both cabinet-makers, then instructing you in cabinet construction might lead you to compete for my customers, possibly reducing my income. We might say that any secrecy regarding my skills was anti-competitive. There are also other cases where knowledge may produce advantages for the holder (often called information asymmetries), by enabling a better price to be extracted, or by allowing a market advantage to be gained. In both cases information and knowledge *is* rivalous, and wider availability of this knowledge would cause market advantage to be compromised. However, rivalousness is not necessarily of any wider social benefit: competition is often beneficial to customers, while information asymmetries produce market choices that are not fully informed and which therefore can be inefficient, or even harmful. Thus, when information is 'naturally' rivalous, the social good may be best served by ensuring that it is shared, not hoarded. For instance, many problems for buyers in the second-hand car market could be ameliorated if all car dealers were required to reveal *all* they knew about the cars they were selling. This would likely reduce the price they could obtain for much of their stock, but would enhance the general satisfaction (and even safety) of second-hand car buyers. Leaving aside special cases like this, generally speaking it is difficult to extract

a price for the use of non-rival (knowledge) goods, so a legal form of scarcity (IPRs) is introduced to ensure a price can be obtained for use.

Material property is ‘naturally’ scarce and therefore is rival in potential use, whereas knowledge in most cases is non-rival prior to becoming intellectual property. However, Karl Polanyi suggested the idea that labour, land and money themselves might be commodities required that a ‘commodity fiction’ be developed during the transformation from feudalism to capitalism.<sup>23</sup> The rendering of things not originally produced for sale as commodities required a story to be told about these resources which was not necessarily linked to their real existence or production but rather narrated a propensity to be organized through markets. This reliance on the narrative of the advantages of market organization is central to the norms on which IPRs are founded. As Arnold Plant stressed 70 years ago, unlike ‘real’ property rights, patents (and other IPRs)

are not a *consequence* of scarcity. They are the deliberate creation of statute law; and, whereas in general the institution of private property makes for the preservation of scarce goods, tending (as we might somewhat loosely say) to lead us ‘to make the most of them’, property rights in patents and copyright make possible the *creation* of scarcity of the products appropriated which could not otherwise be maintained. Whereas we might expect the public action concerning private property would normally be directed at the prevention of the raising of prices, in these cases the object of the legislation is to confer the power of raising prices by enabling the creation of scarcity.<sup>24</sup>

This protection of rights for the express purpose of raising prices is, of course, the central issue that we will return to below.

The ‘knowledge commons’, from which intellectual property has temporarily rendered certain ‘items’ as scarce property, have been recognized in law since early forms of intellectual property were codified in the Renaissance. Limits on the period of protection (making IPRs temporary) are used to put socially useful knowledge back into these commons. This also recognizes that many aspects of ‘new’ knowledge are actually drawn from the extant pool of information and knowledge represented by these commons, and thus the continued vitality of the commons is also crucial for continuing

<sup>23</sup> K. Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time*, Boston, Beacon Press, 1944 (reprinted 1957), pp. 72ff.

<sup>24</sup> A. Plant, ‘The Economic Theory Concerning Patents for Inventions’, *Economica*, 1 (February 1934), pp. 30–51, 31.

innovation and creativity. Such extraction from these commons was originally (in the seventeenth and eighteenth centuries) regarded as a privilege accorded only in certain circumstances; duties such as training in the practices covered, or the use of the technologies towards specific ends were part of the grant of temporary monopoly. However, the subsequent history of intellectual property has seen these monopoly grants gain the status of rights.<sup>25</sup> These rights construct a scarcity of legitimate use which is far from natural nor of self-evident benefit to all, and therefore significant time and effort is spent telling stories about intellectual property that are meant to justify its existence as a set of legal rights.

While not entirely absent, the public good is only recognized under TRIPs as a *residual* after *all* other possible rights have been exercised. Any public-regarding aspect of IPRs is subsumed beneath the normative narratives of individual rights that are central to the justification of intellectual property.<sup>26</sup> Not only commentators, but also legal documents, judgments and, most importantly, the TRIPs agreement itself and its subsequent arbitration at the WTO, sometimes explicitly, but always implicitly, draw on material property-related narratives to justify the recognition of property in knowledge.

The first narrative of justification argues for labour's desert: the effort that is put into the improvement of nature requires that it should be rewarded. In John Locke's influential formulation this was modelled on the improvement of land. The application of effort to produce crops and/or improved resource yields justified the ownership of specific tracts of land by whoever worked to produce such improvement. Starting from this initial position Locke then argued there was also a right in disposal (or alienation), mediated by money. This led him to conclude that all property, even after its initial alienation, could be justified on the basis that it had originally been produced through the labour of an individual. More importantly, property was also justified because it encouraged the improvement of nature through the reward of effort. Therefore the Lockean argument supports property by suggesting property encourages individual effort through the reward of ownership in the fruits of work. In contemporary debates around intellectual property the

<sup>25</sup> Sell and May, 'Moments in Law', op. cit.

<sup>26</sup> May, *A Global Political Economy of Intellectual Property Rights*, op. cit., pp. 22–9 and *passim*.

argument that patents and other intellectual properties reward the effort which has been put into their development (the research investment made to develop a patented innovation; the marketing expense in establishing a trademark) is a commonplace.

However, sometimes this argument is supported through the mobilization of a secondary justificatory narrative; the notion of property's links with the self as proposed by Georg Hegel. Here the control and ownership of property is a significant part of the (re) production of selfhood, inasmuch as selfhood relates to the establishment of individual social existence. It is the manner in which individuals protect themselves from the invasions and attacks of others. For Hegel, the state legislates for property as part of its bargain with civil society. Individuals allow the state to operate in certain areas but protect their individuality (and sovereignty) through the limitations that property rights put upon the state vis-à-vis the individual's own life and possessions. In intellectual property law on the European continent this also supports the inalienable moral rights that creators retain over their copyrights even after their formal transfer to new owners. In Anglo-Saxon law this mode of justification has been less well received due to its implications for the final alienability of intellectual property. Nonetheless, especially where 'passing off' of trademarks, and the use of copyrighted material (sampling of music, for instance) are concerned, this narrative can sometimes be noted in the calls for redress based on the diminution of reputation, or the ownership of (self) expression.

However, there is a third set of additional and important justifications which often underpin the role of intellectual property in the TRIPs agreement and elsewhere. In this story the emergence of property rights was a response to the needs of individuals wishing to allocate resources among themselves.<sup>27</sup> Thus, Douglas North argues that the enjoyment of benefits (and the assumption of costs) takes place in social relations through the mobilization of useful resources. The institution of property arose to ensure that such resources have attached to them the benefits (and the costs) that accrue to their use, and this increases 'efficiency'.<sup>28</sup> Property rights took the

<sup>27</sup> Ibid., pp. 18–21.

<sup>28</sup> D. C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge, Cambridge University Press, 1990, pp. 34–5, while a recent popular iteration of this perspective can be found in H. de Soto, *The Mystery of Capital*, London, Bantam Press, 2000.

place of social (trust) relations, and allowed complex trade relations to form over distance. But, part of the continuing fluidity in the legal constitution of property rights has been the widespread attempt by 'owners' to secure benefits while keeping costs externalized. Social efficiency would be best served by costs accruing to the property that delivers the benefit; however for individual owners it is more efficient to have the costs met by others. Mobilizing an history of material property, this third set of justifications suggests that the development of modern economies is predicated on the institution of property, and its ability to ensure the efficient use of limited resources. In this justification, it is this efficiency requirement that drives the historical development of property rights, and now underpins the commodification of knowledge. Even when it is accepted that this allocation of (knowledge) resources may not be 'optimal', property rights are still presented as the most efficient method of allocation available, even though they often produce a less than perfect solution. This narrative of the efficient allocation of scarce resources is then brought to bear on the allocation and use of knowledge in the putative contemporary global society.<sup>29</sup>

The construction of scarcity through the commodification of knowledge plays a vital role in the operation of contemporary global capitalism. But, considerable effort is required to support the argument that such scarcity is socially beneficial. The problem is that, when the recognition of property rights is coexistent with scarce resources, as John Commons noted, 'the mere holding of property becomes a power to withhold, far beyond that which either the labourer has over his labour or the investor has over his savings, and beyond anything known when this power was being perfected by the early common law or early business law'.<sup>30</sup> This is even more pronounced when the scarcity itself is legally constituted through the imposition of (intellectual) property rights. It is this move from

<sup>29</sup> D. G. Richards, 'The Ideology of Intellectual Property Rights in the International Economy', *Review of Social Economy*, 60: 4 (December 2002), pp. 521–41, links this third set of justifications back to Jeremy Bentham and utilitarianism, although it seems to me a much less clear line of development than the explicit philosophical foundations of the first two narratives, which in itself may be a comment on the ubiquity of utilitarianism in contemporary political discourse, of course.

<sup>30</sup> J. R. Commons, *Legal Foundation of Capitalism*, Madison, University of Wisconsin Press, 1924 (reprinted 1959), p. 53.

holding to *withholding*, the ability to restrict use, which is of crucial importance in the political economy of IPRs. When the resources required for social existence are scarce, then the distribution of the rights to their use (property rights) becomes a central, if not *the* central issue of political economy. When such resources are potentially freely available (as is knowledge), then the imposition of property rights introduces this scarcity and supports the mobilization of social power as regards the benefits from their use.

Conventionally when intellectual property is eulogized, it is on the basis of the protection of the creators, the owners of such knowledge, which is made property. Their rights are protected so as to act as a general spur to innovation and socially useful activity. Arguments about just desert and selfhood are allied to the need for social efficiency in the allocation of resources. However, Jeremy Waldron argues that all this talk of property 'sounds a lot less pleasant if . . . we turn the matter around and say we are imposing *duties*, restricting *freedom* and inflicting *burdens* on certain individuals for the sake of the greater social good'.<sup>31</sup> Which is to say IPRs limit the actions of others regarding knowledge vis-à-vis the owners of intellectual property, and as such non-owners are being forced to sacrifice their particular wants or needs on the altar of social necessity. Non-owners' 'rights' are constrained because these rights are regarded as less important in law than the support of the social good of innovation by IPRs. While, as Waldron points out, in the realm of copyright the limitation on activities (unauthorized copying or plagiarism) is hardly life threatening, the very real consequences of the distribution and control of patents lead to a more critical conclusion regarding the social good served by their general protection.

To ensure the continuing supply of innovation (knowledge as a public good), states' laws have legislated a time-limited enclosure of knowledge and information to encourage intellectual effort. When this was based on political communities where the potential existed (if not always acted on) for those suffering the social costs of information or knowledge withholding to take some form of political action, the balance between private rights and public benefits was flexible and broadly legitimate. This is to say that when

<sup>31</sup> J. Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property', *Chicago-Kent Law Review*, 68 (1993), pp. 841–87, 862.

the justifications mobilized to underpin the protection of IPRs were based on a cosmopolitan entity delimited by national jurisdiction, the inherent problems with commodifying knowledge could be ameliorated through legal amendment (or social values promoted through the use of judicial precedent) in response to the national polity. However under the TRIPs agreement, while these cosmopolitan narratives have been used to produce a global legal settlement for IPRs, the political mechanisms that can ameliorate the social effects on user communities remain relatively under-developed. The cosmopolitanism of the narratives of justification that are suffused throughout the TRIPs agreement are not matched by a similarly scaled (global) polity, as I discuss below.

#### WHERE COSMOPOLITAN LEGAL NARRATIVES AND 'THIN COMMUNITY' CLASH

The TRIPs agreement is far from uncontested in developing countries, many of which are experiencing severe mismatches between domestic custom or tradition and TRIPs-related legislative changes. While there is no fixed developing country position on IPRs across sectors or countries, the current (TRIPs engendered) globalized social bargain between private rewards and public benefits may not be as appropriate to developing countries as it is to developed and wealthy countries. In its contemporary globalized form, this bargain privileges the rights of owners (predominantly domiciled in rich, developed countries) and downplays or marginalizes the social costs (and curtailed public benefits) widely experienced in the developing countries.

On one side many developing countries elites and governments are keen to join the international trading community and see the need to adopt the increasingly universalized rules of the system as part of this process. But, conversely there are vocal constituencies in many countries that have prompted a political response less supportive of an unqualified adoption of TRIPs related standards. Perhaps best known is the Indian farmers' rights movement which has organized resistance against bio-piracy and the patenting of genetically altered seeds. Furthermore, policy-makers and legislators are starting to question the claims regarding the social necessity of supporting innovators whatever their nationality. Here, the question

of patents for AIDS-related medicines has gained the most attention, although issues around the control and use of scientific information have also been raised in developing countries.

In another context Deborah Bräutigam has suggested that 'economic reformers need to be able to communicate with and (often) compensate losers'.<sup>32</sup> She stresses that some form of 'safety-net' or compensation package needs to be put in place to ensure that the 'losers' from any particular set of policy reforms do not become a critical block of resistance. She also argues that 'political sustainability may dictate less orthodox reform sequences'.<sup>33</sup> This is to say that the immediate adoption of all structures 'required' by liberalization may itself be counter-productive in the medium term for the establishment and consolidation of these very structures. There is a real need to (again) recognize the central balance between private rewards and public benefits that has been central to the legal history of IPRs in national legislation. This 'one-size-fits-all' legal settlement has revealed the central problem for the globalization of IPRs. Its effects already suggest that, without a well-developed global society, able to mediate between private rewards and social goods/public benefits, the notion of a global regime for IPRs is currently difficult (if not impossible) to justify.

The global governance of IPRs closely reflects the depiction of the contemporary (global) polity suggested by Richard Higgott and Morten Ougaard. While there is a 'thick interconnectedness' between 'political structures, agents and process, with transnational properties', these are as yet only linked by a 'thin community that transcends the territorial state'.<sup>34</sup> The global polity has yet to replace the sovereign national polity in the realm of political economic governance, although sovereignty itself is often partly compromised by emergent structures of global governance. However, without the replication of the (by no means universal) democratic elements of state rule at the global level, any global polity will remain only a thin community, unable to fully articulate global community interests.

<sup>32</sup> D. Bräutigam, 'Foreign Aid and the Politics of Participation in Economic Policy Reform', *Public Administration and Development*, 20: 3 (2000), pp. 253–64, 262.

<sup>33</sup> *Ibid.*

<sup>34</sup> R. Higgott and M. Ougaard, 'Introduction: Beyond System and Society – Towards a Global Polity', in M. Ougaard and R. Higgott (eds), *Towards a Global Polity*, London, Routledge, 2002, p. 12.

Without state-like mechanisms at the supra-national level, any global polity remains unable to enact fully the social controls that have historically been secured through democratic accountability. There remains no developed mechanism through which community empathy can be translated into globalized political action *inside* the structures of global governance, although significant political mobilization takes place outside.

The TRIPs agreement and the political economy of its negotiation, alongside the international (industry-based, 'insider') lobbying groups involved in establishing and expanding the (specific) agenda of IPR-governance, all fit with the notion of 'thick interconnectedness'. Not only via the internet (which itself is very unevenly globalized) but also through the use of new (patented) technologies and the increasingly globalized reach of brands, the *globalized* interconnectivity of the political economy of knowledge commodification becomes more pronounced by the day. However, there remains only a 'thin community' as regards the socio-political justification of IPRs on which the TRIPs agreement is founded. Mechanisms (like those previously encoded in domestic law) to recognize the social values of (and social costs to) this community of the enforcement of IPRs are absent. The nascent global polity is still treated as an external element; NGOs and others may be placated but they are not treated as legitimate political actors representing the community of interest as regards IPRs. This is the problem: *how can the communal interest (which domestic laws have allowed to be recognized) be effectively (re)introduced at the global level of governance?*

We should recall that before the end of the nineteenth century (and for many countries, into the twentieth), non-national intellectual property was seldom recognized at all. The US book trade famously thrived in the nineteenth century publishing 'unauthorized' work of European authors, only recognizing the rights of non-US authors in 1891. But perhaps less often noted, US industrialization proceeded apace with technologies that were patented abroad, but freely available (through 'piracy') to entrepreneurs in America, especially in the petro-chemical sector. As Peter Gakunu noted before TRIPs had even been finally negotiated, in the past

perhaps the developmental aspects of intellectual property were more interesting to the United States than the trade aspects are at the present time. Now that the United States is at its present level of technological

development, the trade aspects of intellectual property become more important for it than the development aspects.<sup>35</sup>

Certainly the discourse privileging trade interests in IPR-protection has almost completely drowned out the development interest, to the extent that development issues have often been folded into an account of IPRs that suggests that productivity and efficiency must be maximized through the commodification of knowledge for trade. For many developing countries these issues are secondary to the more pressing need to access information and knowledge that will support their further economic development. In a very real sense the two sides are talking past one another.<sup>36</sup> This might suggest that the location of the global governance of IPRs in the WTO (at least for the developing countries) is the real problem, foregrounding as it does the 'trade related-ness' of IPRs.

When the experience of the newly industrialized countries (NICs) of East Asia is examined, the tension between trade and development issues becomes even clearer. The reliance on weak (or non-existent) IPR protection in the early stages of development benefited the NICs quite extensively. Surveying a number of studies, Nagesh Kumar concludes that

the east Asian countries, viz., Japan, Korea and Taiwan have absorbed substantial amount[s] of technological learning under weak IPR protection regime[s] during the early phases [of economic development]. These patent regimes facilitated the absorption of innovation and knowledge generated abroad by their indigenous firms. They have also encouraged minor adaptations and incremental innovations on the foreign inventions by domestic enterprises.<sup>37</sup>

As these local industries started to innovate themselves, a stronger regime of protection was established, *but only then*. Here, the character of national laws (only recognizing national invention or creation) supported this appropriation of foreign knowledge and information as it did when the US, and before that Britain, were 'developing countries'. As Dru Brenner-Beck pointed out in his extensive study of those countries which had utilized

<sup>35</sup> Gakunu, 'Intellectual Property: Perspective of the Developing World', op. cit., p. 364.

<sup>36</sup> R. Bawa, 'The North-South Debate Over the Protection of Intellectual Property', *Dalhousie Journal of Legal Studies*, 6 (1997), pp. 77-119, 96.

<sup>37</sup> N. Kumar, 'Intellectual Property Rights, Technology and Economic Development', *Economic and Political Weekly*, 38: 3 (18 January 2003), pp. 209-25, 216.

non-recognition of IPRs as a development strategy: 'former pirate activities strongly contributed to the development of the infrastructure and technical capacity necessary to ensure that the touted advantages of intellectual property protection actually materialise'.<sup>38</sup> The protection of IPRs only makes policy sense once a certain level of technological momentum has been achieved.

Furthermore given the current debates regarding pharmaceutical patents, it is as well to note that France, Germany, Japan and Switzerland, among others, only extended patent protection into this sector in the 1960s and 1970s, by which time their industries had matured. Indeed, since the fifteenth century the restrictions on who was recognized as an owner of IPRs has represented a strategic development policy to encourage the importation of innovation by domestic companies (and before them artisans). Thus, it is ironic that, having reached the heights of economic development, the governments of the most developed countries now argue in multilateral negotiations that the very protection they ignored in their years of speedy expansion will actually aid and support the economic development of other countries. Their claims regarding the benefits of IPR protection fail to recall that the social bargain they wish to reproduce was constructed through national political mediation of interest, and not the imposition of a 'one size fits all' model across the global system. Furthermore, this social bargain is not ahistorical, but rather reflects the extent of nationally generated innovation and techno-economic development. The bargain on which IPRs are built is historically contingent, not a reflection of natural rights.

The world is not sufficiently globalized (whatever commentators celebrating the 'borderless world' claim) for any political and legal settlement to closely follow previous national political bargains; the justifications that have previously been used to underpin IPRs do not have sufficient purchase on the current global situation without a mechanism for recognizing the social costs or down-side of any 'bargain' which promotes private rewards. As Graeme Dinwoodie stresses:

the incorporation of intellectual property agreements within trade mechanisms might (if trade concerns become paramount) deprive intellectual property policymaking of the rich palette of *human values* that historically

<sup>38</sup> D. Brenner-Beck, 'Do As I Say, Not As I Did', *UCLA – Pacific Basin Law Journal*, 11 (1992), pp. 84–118, 115.

has influenced its formulation. Considering only the ability to exploit comparative advantage in the ownership of intellectual property rights would appear to make international intellectual property policy less multi-dimensional.<sup>39</sup>

It is this lack of multi-dimensionality that is the key problem: given the vast inequalities evident in the world, the impact of these inequalities is not recognized when the social costs that are required for the continued support of private rewards remain largely hidden in multilateral policy discussions. There is also considerable tension between the Universal Declaration of Human Rights, which aims to ensure everyone's right to enjoy the fruits and benefits of cultural life and scientific development, and the TRIPs agreement's underlying logic. While there is also some allowance for the enjoyment of private benefits from innovative and creative activity, the Declaration implies that it is (global) societal benefits that should be given priority.<sup>40</sup> However, the TRIPs agreement and the political forces behind its promotion have always been more concerned to ensure the maximum reward is captured by 'owners' rather than promote any notion of social justice, outside the relatively formalized calculation of overall globalized social 'efficiency' centred on innovation rather than its diffusion.

#### POLITICAL RESPONSES?

The current settlement for IPRs may work well for the developed countries, but for developing countries the central bargain at the centre of IPRs makes little sense. The private rights of IPR 'owners' in the richer states are being purchased at too great a social cost in the developing world. Before TRIPs this was reflected in the de facto acceptance by developed countries' governments of widespread non-recognition of their nationals' intellectual property by developing countries. This was by no means a perfect solution, and a return to the essentially ungoverned character of the pre-TRIPs world of intellectual property is improbable, given the increasing acceptance of the 'rule of law'. However, the current settlement does not command sig-

<sup>39</sup> G. Dinwoodie, 'The Architecture of the International Intellectual Property System', *Chicago-Kent Law Review*, 77: 3 (2002), pp. 993–1014, 1004 (emphasis added).

<sup>40</sup> P. Cullet, 'Patents and Medicines: the Relationship between TRIPs and the Human Right to Health', *International Affairs*, 79: 1 (January 2003), pp. 139–60, 152.

nificant support outside the developed world, and efforts at norm (re)production are already coming up against the very real problems that TRIPs-compliance produces in many developing countries. Furthermore, Jerome Reichman suggests that behind the ratcheting up of IPR enforcement standards is a protectionist rationale, to protect hi-tech companies from the sorts of labour-cost related competition that commodity manufacturing already has to deal with.<sup>41</sup> This is not the first time such an argument has been made. However, the challenge is to square the problems of 'protection' with the real need to offer some protection of the rights of innovators and creators.

This, then, returns us to the political realm. There are two broad directions in which negotiations regarding TRIPs could move in response to the problems that beset the developing countries as regards IPRs. The need to offer varying private-public bargains in different parts of the world, essentially differential protection, could be recognized. Or the negotiations could establish a mechanism that allows social costs (even if these costs are not evident across all signatories to the agreement) to play a larger role in the (non)protection of IPRs at the global level: i.e. to expand the use of compulsory licences, and/or limit the scope of protection in particular (developing country) jurisdictions.

The move to differential protection (although widely supported in developing countries and by various NGOs) requires a step back from the harmonization of intellectual property law that is at the heart of the TRIPs agreement. Here there would be an inner group of countries which continued to apply TRIPs compliant law, and to perhaps even further develop this law in the manner in which recent multilateral negotiations at WIPO have suggested. However, outside this realm of TRIPs compliant jurisdictions countries would not apply IPR legislation uniformly (or even similarly). The problem of parallel imports (which has moved to the centre of the arguments put forward by the pharmaceutical companies) would need to be addressed, to ensure that in those countries where the bargain between private rights and public benefits was deemed broadly acceptable, this would not be undermined by imports that violated the private rewards allocated to innovators and IPR-owners. One way

<sup>41</sup> J. H. Reichman, 'From Free Riders to Fair Followers: Global Competition under the TRIPs Agreement', *New York University Journal of International Law and Politics*, 29 (1997), pp. 11-93.

of achieving this pattern of differential treatment would be to lengthen the transition period for developing country members of the WTO (and allow countries to return to this transitional group despite having now acceded fully to the agreement).

A clear threshold would need to be set for when full accession to TRIPs would be required, and clear parameters set for how non-protected IPRs might be used in the developing world, alongside management mechanisms for the trade in IPR-related products (and services) between TRIPs compliant and non-compliant countries. Rafik Bawa has suggested that the threshold should be at the point where a country's economy moves from simple copying and imitation to the beginnings of innovation and domestically generated technological advance. This threshold level of development, Bawa suggests, requires a literate workforce including trained scientific and technical personnel to attract foreign investment, utilize transferred technology and perhaps most importantly 'implement and sustain domestic inventive ability'. Alongside this, there is also the need for industry and industrial infrastructure to be well developed, and for some basic level of domestic capital mobilization alongside a growing entrepreneurial group in society. This he suggests would 'enable domestic enterprises to participate in and gain from the incentives provided' by the protection of IPRs.<sup>42</sup> While these criteria seem perfectly reasonable, the actual levels will differ between different countries; whatever body might be empowered to make these decisions is undoubtedly going to find applying such criteria difficult, and politically delicate.

Interestingly, differential protection is not necessarily an alien solution to those in the pharmaceutical industry. Jean-Pierre Garnier, Chief Executive Officer of GlaxoSmithKline recently suggested:

in the poorest countries of the world – and there is a list prepared by the WHO – they should be able to disregard patents. That's what I'm for, in all the diseases that constitute healthcare crises for those countries. So it's HIV, and malaria and TB and infectious diseases and so forth.

What I don't agree is that patents would be disregarded in China, in India and so forth and those companies would be able to prosper by pirating our discoveries made in Europe and the US and therefore we'd be shut out of 80% of the world population. That is not fair.<sup>43</sup>

<sup>42</sup> Bawa, 'The North-South Debate', op. cit., pp. 108 and 109.

<sup>43</sup> Quoted in: S. Boseley, 'Saving Grace', *Guardian* (special section), 18 February 2003.

The notion of a threshold, in an industry where the perceived problems of IPRs (for both sides) are most obvious, is clearly acceptable to one major player, although debates would no doubt be fraught about which countries were on which side.<sup>44</sup> It would also be unlikely that countries approaching the threshold would voluntarily give up the perceived advantages of exemption from TRIPs compliance, and therefore there would need to be a reasonably robust mechanism to ensure that the benefits of being outside TRIPs were only enjoyed by those countries where the social costs of patent protection continued to outweigh the (expected) social benefits of supporting innovation and domestically generated technological advance. However, the move to inner- and outer-TRIPs compliance might prove beyond the realms of political possibility with the US government's determination to uphold TRIPs' universality, while the management of the cross-threshold trade in IPR-related goods and services would be fraught with possibilities for dispute (especially between US-based companies and 'pirates' in the non-TRIPs compliant sector).

Given the political problems that moving to differential protection might involve, a second political possibility may be more hopeful. This reflects the stipulations regarding the compulsory licensing of pharmaceuticals in health emergencies laid out in the Doha Declaration, and the national histories of many IPR regimes. This would require the WTO to establish more formally a mechanism which allows social costs to be factored into the global governance of IPRs. As it stands, within the WTO's complex legislative structure there are significant, if widely disregarded, undertakings pertaining to the special needs of developing country members. It will take some political will to explore these intra-WTO possibilities, but this is far from impossible, nor – as the Doha Declaration suggests – unlikely. In the past, 'compulsory licensing' has been the tool of choice for governments to utilize when the normal protection of a particular patent, copyright or other IPR has proved to have unacceptable costs in its enactment. This approach has sometimes been resisted on the basis that this distorts the market. However as Catherine Parrish has noted in regard of US domestic copyright law: 'the market by its very nature is distorted because it is based on an artificial right: copyright. A compulsory license prevents that artificial

<sup>44</sup> See the discussion of the history of specific 'pirate' countries in Brenner-Beck, 'Do As I Say, Not As I Did', op. cit.

*distortion from growing too large*'.<sup>45</sup> Such logic is equally applicable to patents as well as other IPRs, and perhaps even more salient at the global level of governance.

Certainly, the manner in which the majority of patents are used in Africa does little to support the rhetoric of their supporters as regards the developmental advantage of IPRs. Rather than facilitating the importation of new technologies for production (or service fulfilment), patents have historically been used to maintain import monopolies.<sup>46</sup> They have not been 'worked' and therefore do the precise opposite of what is intended: the patent holder is protected from any copying or competition regarding their technology while also gaining new markets through imports; local production – either by the patent holder or by imitators – is foreclosed ensuring no real economic developmental benefits can be gained (apart from the direct consumption of the product). Of course this should be no real surprise as the driving force behind TRIPs-related diplomacy was an agenda of *trade* not development, and considerable efforts were mobilized in the negotiations behind TRIPs to ensure that the notion of 'working' patents was diminished as a justification for compulsory licence.

In the past, two key rationales for compulsory licensing of patented technologies have been: the non-working of patents in the jurisdiction in which they have been registered; and where they have been worked but the price level has restricted socially desirable usage. In both cases compulsion has been regarded as sometimes legitimate. Therefore, in the wake of the terrorist acts of 11 September, when the US citizenry was suddenly threatened by anthrax, their government wasted little time ensuring that the necessary drugs were available.<sup>47</sup> The threat of compulsory licensing to deal with a health crisis where the dead could be counted on the

<sup>45</sup> C. Parrish, 'Unilateral Refusals to License Software: Limitations on the Right to Exclude and the Need for Compulsory Licensing', *Brooklyn Law Review*, 68: 2 (2002), pp. 557–87, 585 (emphasis added).

<sup>46</sup> T. Kongolo, 'The African Intellectual Property Organisations', *Journal of World Intellectual Property*, 3: 2 (March 2000), pp. 265–88, 275.

<sup>47</sup> K. Singh, 'Anthrax, Drug Transnationals, and TRIPs', *Foreign Policy in Focus*, 29 April 2002 (available at [http://www.fpif.org/outside/commentary/2002/0204trips\\_body.html](http://www.fpif.org/outside/commentary/2002/0204trips_body.html) (15 May 2002)).

fingers of one hand, was used to wrest significant reductions in price. Not a few commentators noted the different attitude of the same administration when the deaths were AIDS-related, in sub-Saharan Africa, and counted in the millions.

More generally, the possibilities of compulsory licensing in the TRIPs agreement appear under Article 31 'Other Use Without Authorisation of the Right Holder'<sup>48</sup> although the usual terminology of compulsory licence is conspicuous by its absence here and elsewhere in the agreement (although it *does* reappear in the Doha Declaration on the TRIPs Agreement and Public Health). Furthermore, rather than merely harmonizing previous arrangements, Article 31 adds restrictions (specifically on pre-licence efforts at agreement with the patent holder; and the limitation of the scope of use of the compulsory licence) which did not appear in Article 5a of the Paris Convention which it replaces.<sup>49</sup> To some extent this was to be expected, given the extensive lobbying by various US-based industry organizations,<sup>50</sup> as the provisions under Article 5a (which had been revised during the 1960s to favour the sovereign right of states to appropriate property where they deemed the public interest to be served by such appropriation) had in the view of many industry representatives, become much too extensive.<sup>51</sup> Thus, it is no accident that the use of compulsory licences is quite severely circumscribed by Article 31 of TRIPs, at least in the dominant interpretation put upon the text by the USTR and EU representatives.

Restricting use further, Carlos Correa notes that despite the legitimacy of compulsory licences within TRIPs, 'some countries that

<sup>48</sup> GATT, *Final Act Embodying the Results of the Uruguay Round*, op. cit., section A1C, pp. 14 and 15.

<sup>49</sup> Oddi, 'TRIPs – Natural Rights', op. cit., p. 456, see E. R. Gold and D. K. Lam, 'Balancing Trade in Patents: Public Non-Commercial Use and Compulsory Licensing', *Journal of World Intellectual Property*, 6: 1 (2003), pp. 5–31; 14–19, for an account of the negotiating history of Article 31 of TRIPs' treatment of 'non-commercial use'.

<sup>50</sup> For Intel and other members of the Semiconductor Industry Association's impact on Article 31 of TRIPs see P. Drahos, and J. Braithwaite, *Information Feudalism. Who Owns the Knowledge Economy*, London, Earthscan, 2002, pp. 148 and 149.

<sup>51</sup> J. H. Reichman and C. Hasenzahl, *Non-Voluntary Licensing of Patented Inventions*, Geneva, UN Conference on Trade and Development and International Centre for Trade and Sustainable Development, 2002, pp. 6–8.

have provided for them in their legislation have faced the threat of unilateral retaliations, or the suspension of aid, by some developed countries', primarily the US and the EU.<sup>52</sup> However, as Richard Gold and Daniel Lam point out, the very public costs that have been evidenced during the AIDS crisis have prompted a return to the negotiating history and a reinterpretation of *exactly* what is permitted under TRIPs.<sup>53</sup> This led both to the Doha Declaration on the TRIPs Agreement and Public Health and a major political effort to restart negotiations on TRIPs (non-)compliance by developing country members of the WTO. But, although the mechanism exists to recognize heavy (or problematic) social costs in developing countries of granting specific patents, the use of this 'flexibility' with TRIPs currently remains subject to the more usual political machinations of bilateral trade negotiation. Jagdish Bhagwati, doyen of free-market economists, has gone as far as suggesting that the use of bilateral mechanisms alongside the dispute resolution mechanism has rendered the global governance of IPRs tantamount to the WTO becoming 'a royalty protection agency, acting like a Mafia protection racket'.<sup>54</sup> How long this can continue in the face of growing political opposition remains to be seen.

## CONCLUSION

We are currently in a transitory period, where the global governance regime for IPRs has been established but the political community on which the justification of intellectual property itself depends is far from globalized. While mechanisms exist at the national level to ameliorate problems that the balance of private rewards and public benefits might produce, similar mechanisms remain difficult to enact at the global level. There is little way for developing countries to meaningfully factor in the national social costs of strong IPR laws.

<sup>52</sup> C. Correa, 'Pro-competitive Measure under TRIPs to Promote Technology Diffusion in Developing Countries', in P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights. Knowledge, Access and Development*, Basingstoke, Palgrave Macmillan and Oxfam, 2002, p. 50.

<sup>53</sup> Gold and Lam, 'Balancing Trade in Patents', *op. cit.*

<sup>54</sup> Quoted in J. Nissé, 'WTO turned by America into "Mafia racket"', *Independent on Sunday*, (Business Section), 4 May 2003, p. 1.

Whereas in national political debates those groups shouldering the immediate social costs may have a number of political avenues through which counter-measures can be mobilized, with the exception of breaking international agreements, there is much less scope for such mediation at the global level. Thus while there are considerable organizational structures for the global governance of IPRs any mechanisms for the realization of a global polity or community interest within these interactions is currently severely underdeveloped. Perhaps the biggest problem is the continuing discourse of *rights* when it comes to the propertization of knowledge and information. There is a need to recall that both the history and use of IPRs is actually predicated on the uses to which the knowledge generated (through the system of protection of innovation and creativity) is put. Too often this is lost sight of in the appeal to protect owners against 'theft' and 'piracy'; too often it is forgotten that the origins of IPRs are not in political (or natural) rights but rather in the limited award of monopoly privileges, with linked duties incumbent on the 'rights' holder.

If the global political economy of IPRs tells us one thing it is that the world is far too insufficiently globalized for the imposition of a global legal settlement that does not allow for the divergent social developmental interests of all countries to be recognized (and acted upon). In the governance of IPRs this requires not only greater historical sensitivity to the manner in which IPRs have been governed in the past, it also requires an explicit recognition of the social bargain that lies at the centre of the justification of intellectual property. Although the cosmopolitan legal justifications of IPRs have some salience, this is undermined when the social costs of the propertization of knowledge are accorded too little weight in global political processes. The lack of an established and extensive global polity is in direct contrast to the extensive interactions and structures that have been developed across the global system, specifically the emerging global market for knowledge- and information-related goods and services.

At its simplest the global system's thick interactions now need a global polity beyond the relatively 'thin community' which as yet has been unable to ensure that the economic development of the global system overall benefits *all* of the global population, if not equally then at least, absolutely. For commentators like David Held, global governance, however imperfectly, represents a nascent 'universal law',

prompting a new 'public life' to emerge.<sup>55</sup> Whether new social movements and, perhaps most importantly, the global justice movement, can hold the already solidifying structures of global governance to account remains to be seen. But, without the development of a robust global polity it is difficult to see how the problems of the global governance of IPRs can be successfully addressed, unless the ability of states to act in their own interests is reasserted. Either, the global governance of IPRs needs to more resemble the previous national regimes of governance, or states' governments need to reassert their sovereignty over certain aspects of the governance of IPRs. In the realm of pharmaceutical patents, at least, it is the latter solution that is gaining ground, rather than the former. It may be the case that, when the issues become so politically charged, the notion of an emergent global polity collapses under the weight, returning the political response to the national level, where many governments feel the need to respond to a domestic polity whose interests are likely to be somewhat different from the global class of knowledge 'owners'.

<sup>55</sup> D. Held, 'Law of States, Law of Peoples: Three Models of Sovereignty', *Legal Theory*, 8 (2002), pp. 1–44.