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Manifesto on WIPO and the future of intellectual property

James Boyle

There are systematic errors in contemporary intellectual property policy and that WIPO has an important role in helping to correct them.

Introduction

Intellectual property laws are the legal sinews of the information age; they affect everything from the availability and price of AIDS drugs, to the patterns of international development, to the communications architecture of the Internet. Traditionally, those laws have been made as state-facilitated contracts among affected industries. Yet intellectual property rights are not ends in themselves. Their goal is to give us a decentralized system of innovation in science and culture: no government agency should pick which books are written or have the sole say over which technologies are developed.

Instead, the creation of limited legal monopolies called intellectual property rights gives us a way of protecting and rewarding innovators in art and technology, encouraging firms to produce quality products, and allowing consumers to rely on the identity of the products they purchased. The laws of copyright, patent and trademark are supposed to do just that - at least in some areas of innovation - *provided* the rights are set at the correct levels, neither too broad nor too narrow.

The World Intellectual Property Organization (WIPO) has built itself around the attempt to promote and harmonize intellectual property laws internationally, though the organization's actual responsibility within the UN system is significantly broader. That is, "promoting creative intellectual activity and facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development."

WIPO is only 34 years old, but its history stretches back 120 years, to the treaties of Paris and Berne. During that period, WIPO and the international secretariats that were its precursors have done work of great value. But times have changed since 1883, and even since WIPO itself was founded in 1970; at the same time, some of the oldest lessons of intellectual property law have apparently been forgotten or ignored. While WIPO has a uniquely influential role to play in setting innovation policy worldwide, fundamental changes need to be made in both role and attitude if the organization is to serve its real goal - the promotion of innovation in science, technology and culture for the benefit of the peoples of the world.

The Maximalist ‘Rights Culture’ and the Loss of Balance

As intellectual property protection has expanded exponentially in breadth, scope and term over the last 30 years, the fundamental principle of balance between the public domain and the realm of property seems to have been lost. The potential costs of this loss of balance are just as worrisome as the costs of piracy that so dominate discussion in international policy making. Where the traditional idea of intellectual property wound a thin layer of rights around a carefully preserved public domain, the contemporary attitude seems to be that the public domain should be eliminated wherever possible. Ideas and facts could never be owned. Yet contemporary intellectual property law is rapidly abandoning this central principle. Now we have database rights over facts, gene sequence, business method and software patents, digital fences that enclose the public domain together with the realm of private property . . . the list continues. And while these rules differ from nation to nation, the pressure is to harmonize them only *upwards*, adopting the strongest protections of facts, the longest copyright terms, the greatest scope of patentability.

- Intellectual property policy is in the sway of a maximalist "rights-culture" which leads debates astray. The

assumption seems to be that to promote intellectual property is automatically to promote innovation and, in that process, the more rights the better. But both assumptions are categorically false. Even where intellectual property rights *are* the best way to promote innovation, and there are many areas where they are not, it is only by having rules that set the correct *balance* between the public domain and the realm of private property that we will get the innovation we desire. Yet trade treaties require very high "floors" of international intellectual property protection while rarely imposing "ceilings," even though too *much* intellectual property protection is just as harmful, and as distorting of trade flows, as too *little*. This asymmetry is reflected in the international policy-making process.

- As an organization that specializes in the subject, WIPO should be comparatively immune from the fallacy that intellectual property policy should always aim towards stronger rights. But since the alternative is to make intellectual property policy through trade organizations in which the developing countries have even less influence, in many areas states have used

WIPO and International Development: One-Size (‘Extra Large’) Fits All?

- The history of development in intellectual property is one of change. The countries that now preach the virtues of expansive minimum levels of intellectual property protection, did not themselves follow that path to industrial development. Intellectual property protections changed over time, responding to the internal and external economic and technological context. Given this history, one would expect that international intellectual property agreements, whether made through trade treaties or in the context of WIPO, would be highly sensitive to the idea that "one size does not fit all"

when it comes to intellectual property policy and developing countries - who themselves are hardly a homogeneous group.

- Even where flexibility and exceptions are built into the international regime, developing countries often lack the technical and legal expertise to take full advantage of them. In intellectual property law, exceptions and limitations are deeply important. They are part of the policy rather than merely a suspension of it. Thus it is just as important to WIPO's mission to enable developing countries to make use of the flexibility built into the system as it is to persuade them to adopt and implement the latest draconian digital rights management legislation. In practice, however, the resources flow only one way.

Blindness to Alternatives: In and Out of the System

- Even when the system of intellectual property works just as it is supposed to, it clearly will not solve certain pressing human problems. It is thus incumbent on organizations such as WIPO to be more hospitable to proposals that attempt to reform, or to supplement the intellectual property system, or to offer alternatives to it. It is tragic that it has taken 120 years for us to return to the exploration of mechanisms for encouraging innovation - such as state sponsored prize systems whose products are distributed at marginal cost - that were widely discussed and even sometimes practiced in the years before the Paris and Berne conventions.
- Alternatives can also exist *within* the current system - using the rights currently provided. Yet policy-makers have sometimes seemed either uncomprehending or actively hostile to such attempts, as if the intellectual property system required fidelity to a certain business-model of innovation. A perfect example is the remarkable hostility shown by some national

governments to a recent proposal that WIPO explore the potential of these open and collaborative efforts. The proposal was warmly received by WIPO staff. Yet it was squashed by pressure from companies pursuing a different business model, who were able to rely on the language of the "rights culture" to convince state decision makers that only 'closed source' models were legitimate.

Guiding Principles of Rational and Humane Intellectual Property Policy

If we are to have an intellectual property policy that genuinely promotes innovation, international development and human well-being, we need to expose the assumptions of the maximalist rights culture to the democratic scrutiny they have so sorely lacked. More than 50 years ago, environmentalists taught us to see beyond a disconnected set of problems in the natural world - polluted streams and air, disappearing wetlands - to a larger interconnected system called the environment. Successful development could only proceed if it were sustainable; the environmental impact must be part of the analysis. Similarly, both nationally and internationally, we need to recover the traditional insight of our intellectual property laws; that it is not *rights* that generate progress, but the *balance* between rights and the public domain, a balance that is highly context dependent. One size cannot fit all.

This argument has implications far beyond WIPO, of course, but it also implies the need to reorient WIPO's mission in the coming century. WIPO has made some halting steps towards this in its most recent Medium Term Plan, but if it is to fulfill its goal of encouraging intellectual activity, and serving the citizens of the world, it must abandon the tunnel vision of the maximalist rights culture and adopt the following seven principles.

1. Balance

Intellectual property policy must maintain a balance between the realm of protected

material and the public domain. When WIPO documents speak of "balance" they generally refer to a balance between producer and consumer, or developed and developing nations. But the intellectual property system depends on a different, and neglected, kind of balance. Science, technology and the market itself depend on a rich "commons" of material available to all, just as they also depend on the incentives provided by intellectual property rights. Too many rights will slow innovation as surely as too few. The WIPO secretariat should be required to perform an "Intellectual Environmental Impact Statement" on each new proposal for the expansion of rights, detailing its effects on the public domain, and the commercial, innovative, artistic and educational activities that depend on the public domain.

2. Proportionality

Each piece of intellectual property legislation imposes costs as well as benefits on the public. Extending the copyright term retrospectively, for example, denies a twenty year swath of culture to the public in order to benefit the tiny minority of works that are still being exploited commercially. Any other regulation that enforced massive costs for tiny benefits would be subject to intense scrutiny. Intellectual property regulation through WIPO should be no exception. A formal, detailed and specific statement of costs and benefits should accompany any proposed action.

3. Developmental Appropriateness

The history of intellectual property law over which WIPO has presided is actually one of considerable change, with a considerable variation in the rules both over time and space, at different moments of economic development. In tune with this history, WIPO needs to be a counterforce to the tendency to impose 'one size fits all' solutions worldwide, not the place where "TRIPS-plus" standards are to be pursued.

4. Participation and Transparency

Intellectual property law always had implications beyond the regulation of competitors in the same industry, but today those implications are so great and so pressing that they demand a much more participatory and transparent procedure. WIPO needs to continue the welcome steps it has already taken to increase the participation of civil society groups in the discussion and debate. When intellectual property implicates everything from access to essential medicines and free speech to education and online privacy, it cannot be made according to the assumptions of a narrow coterie of lawyers and industry groups.

5. Openness to Alternatives and Additions

Intellectual property is a remarkable human invention, but it cannot solve all problems. A pharmaceutical innovation system built on patents, for example, will not cure the diseases of the global poor. To solve those problems, and others like them, we must think more imaginatively about alternative and additional methods of encouraging and organizing innovation. WIPO, which has long had expertise in thinking about the limits of intellectual property, and which has certainly presided over developments far outside of the narrow range of copyright, patent and trademark, should become the most prominent global institution in which those alternative methods are proposed and debated. WIPO must be the institution in which we join, rather than fight, the search for alternatives.

6. Embracing the Net as a Solution, Rather than a Problem

From the mid-1990's onwards, the tendency in international intellectual property has been to treat the Internet as a threat rather than an opportunity. Despite the fact that the Net has demonstrated again and again the possibility of generating, through dispersed collaborative networks, innovation and intellectual activity of exactly the kind WIPO is supposed to foster, policy makers have focused only on the threat of illicit

copying. WIPO should establish a standing committee which focuses on two key issues: the barriers that traditional intellectual property erects against global educational and cultural access, and the ways in which the traditional rules of intellectual property need to be rethought when they are applied to the citizen-publishers of cyberspace.

7. Neutrality

Within the realm of existing intellectual property rights, our policy must be neutral between different methods of using those rights to encourage innovation. For example, both closed source, proprietary and open source, collaborative software developers use the intellectual property system to generate innovation of global worth. It is not WIPO's job to pick winners in this competition between different methods of innovation. WIPO should be as concerned about the impact of software patents on open source software development, as it is about the impact of software piracy on closed source software development. Intellectual property rights are tools, and WIPO needs to respond creatively and flexibly to the new ways in which those tools can be used, not view any new method of innovation as somehow illegitimate.

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Proposal Submitted by Argentina and Brazil to WIPO General Assembly (WO/GA/31/11)

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Development, the most important challenge facing the International Community

At the dawn of a new Millennium, development undoubtedly remains one of the most daunting challenges facing the

international community. The importance of facing up to this challenge has been widely acknowledged in many international fora at the highest level. The United Nations adopted the Millennium Development Goals, which established a firm commitment by the international community to address the significant problems that affect developing countries and LDCs. The Programme of Action for the Least Developed Countries for the Decade 2001-2010, the Monterey Consensus, the Johannesburg Declaration on Sustainable Development and the Plan of Implementation agreed at the World Summit on Sustainable Development, the Declaration of Principles and the Plan of Action of the first phase of the World Summit on the Information Society, and most recently the Sao Paulo Consensus adopted at UNCTAD XI, have all placed development at the heart of their concerns and actions. This has also been the case in the context of the current Doha round of multilateral trade negotiations of the World Trade Organization (the "Doha Development Agenda"), which was launched at the WTO's 4th Ministerial Conference, in November 2001.

The development dimension and intellectual property protection

Technological innovation, science and creative activity in general are rightly recognized as important sources of material progress and welfare. However, despite the important scientific and technological advances and promises of the 20th and early 21st centuries, in many areas a significant "knowledge gap" as well as a "digital divide" continue to separate the wealthy nations from the poor.

In this context, the impact of intellectual property has been widely debated in past years. Intellectual property protection is intended as an instrument to promote technological innovation, as well as the transfer and dissemination of technology. Intellectual property protection cannot be seen as an end in itself, nor can the harmonization of intellectual property laws leading to higher protection standards

in all countries, irrespective of their levels of development.

The role of intellectual property and its impact on development must be carefully assessed on a case-by-case basis. IP protection is a policy instrument the operation of which may, in actual practice, produce benefits as well as costs, which may vary in accordance with a country's level of development. Action is therefore needed to ensure, in all countries, that the costs do not outweigh the benefits of IP protection.

In this regard, the adoption of the Doha Declaration on the TRIPS Agreement and Public Health at the 4th Ministerial Conference of the WTO represented an important milestone. It recognized that the TRIPS Agreement, as an international instrument for the protection of intellectual property, should operate in a manner that is supportive of and does not run counter to the public health objectives of all countries.

The need to integrate the "development dimension" into policy making on intellectual property protection has received increased recognition at the international level. Also in the framework of the WTO, paragraph 19 of the WTO's Doha Ministerial Declaration, in setting a mandate for the TRIPS Council in the context of the Doha Development Agenda, refers explicitly to the need to take fully into account the development dimension.

Integrating the development dimension into WIPO's activities

As a member of the United Nations system, it is incumbent upon the World Intellectual Property Organization (WIPO) to be fully guided by the broad development goals that the UN has set for itself, in particular in the Millennium Development Goals. Development concerns should be fully incorporated into all WIPO activities. WIPO's role, therefore, is not to be limited to the promotion of intellectual property protection.

WIPO is accordingly already mandated to take into account the broader development-related commitments and resolutions of the UN system as a whole. However, one could also consider the possibility of amending the WIPO Convention (1967) to ensure that the "development dimension" is unequivocally determined to constitute an essential element of the Organization's work program. We therefore call upon WIPO General Assembly to take immediate action in providing for the incorporation of a "Development Agenda" in the Organization's work program.

The development dimension and intellectual property norm-setting: safeguarding public interest flexibilities

WIPO is currently engaged in norm-setting activities in various technical Committees. Some of these activities would have developing countries and LDCs agree to IP protection standards that largely exceed existing obligations under the WTO's TRIPS Agreement, while these countries are still struggling with the costly process of implementing TRIPS itself.

The current discussions on a draft Substantive Patent Law Treaty (SPLT) in the Standing Committee on the Law of Patents (SCP) are of particular concern. The proposed Treaty would considerably raise patent protection standards, creating new obligations that developing countries will hardly be able to implement. In the course of discussions, developing countries have proposed amendments to improve the draft SPLT by making it more responsive to public interest concerns and the specific development needs of developing countries.

A consideration of the development dimension of intellectual property must be quickly brought to bear on discussions in the SCP. If discussions on the SPLT are to proceed, these should be based on the draft treaty as a whole, including all of the amendments that have been tabled by developing countries. Moreover, Members should strive for an outcome that

unequivocally acknowledges and seeks to preserve public interest flexibilities and the policy space of Member States. Provisions on “objectives and principles”, reflecting the content of Articles 7 and 8 of the TRIPS Agreement, should be included in the SPLT and other treaties under discussion in WIPO.

While access to information and knowledge sharing are regarded as essential elements in fostering innovation and creativity in the information economy, adding new layers of intellectual property protection to the digital environment would obstruct the free flow of information and scuttle efforts to set up new arrangements for promoting innovation and creativity, through initiatives such as the ‘Creative Commons’. The ongoing controversy surrounding the use of technological protection measures in the digital environment is also of great concern.

The provisions of any treaties in this field must be balanced and clearly take on board the interests of consumers and the public at large. It is important to safeguard the exceptions and limitations existing in the domestic laws of Member States.

In order to tap into the development potential offered by the digital environment, it is important to bear in mind the relevance of open access models for the promotion of innovation and creativity. In this regard, WIPO should consider undertaking activities with a view to exploring the promise held by open collaborative projects to develop public goods, as exemplified by the Human Genome Project and Open Source Software.

Finally, the potential development implications of several of the provisions of the proposed Treaty on the Protection of Broadcasting Organizations that the Standing Committee on Copyright and Related Rights is currently discussing should be examined taking into consideration the interests of consumers and of the public at large.

The development dimension and the transfer of technology

The transfer of technology has been identified as an objective that intellectual property protection should be supportive of and not run counter to, as stated in Articles 7 and 8 of the TRIPS Agreement. Yet, many of the developing countries and LDCs that have taken up higher IP obligations in recent years simply lack the necessary infrastructure and institutional capacity to absorb such technology.

Even in developing countries that may have a degree of absorptive technological capacity, higher standards of intellectual property protection have failed to foster the transfer of technology through foreign direct investment and licensing. In effect, corrective measures are needed to address the inability of existing IP agreements and treaties to promote a real transfer of technology to developing countries and LDCs.

In this regard, a new subsidiary body within WIPO could be established to look at what measures within the IP system could be undertaken to ensure an effective transfer of technology to developing countries, similarly to what has already been done in other fora such as the WTO and the UNCTAD. Among these measures, we note with particular interest the idea of establishing an international regime that would promote access by the developing countries to the results of publicly funded research in the developed countries. Such a regime could take the form of a Treaty on Access to Knowledge and Technology. It is also important that clear provisions on transfer of technology be included in the treaties currently under negotiation in WIPO.

The development dimension and intellectual property enforcement

Intellectual property enforcement should also be approached in the context of broader societal interests and development-related concerns, in accordance with Article 7 of TRIPS. The

rights of countries to implement their international obligations in accordance with their own legal systems and practice, as clearly foreseen by Article 1.1 of TRIPS, should be safeguarded.

In setting up the Advisory Committee on Enforcement (ACE) in 2002, the WIPO General Assembly clearly rejected a “TRIPS-plus” approach to enforcement matters, by deliberately deciding to exclude all norm-setting activities from the Committee’s mandate. In undertaking any future work under its mandate, the ACE should be guided by a balanced approach to intellectual property enforcement. The ACE cannot approach the issue of enforcement exclusively from the perspective of right holders, nor have its discussions focus narrowly on curbing the infringement of IP rights. Such discussions are important, but the ACE must also give consideration to how best to ensure the enforcement of all TRIPS-related provisions, including those that would impute obligations to right holders as well.

Particular attention should be paid to the need to ensure that enforcement procedures are fair and equitable and do not lend themselves to abusive practices by right holders that may unduly restrain legitimate competition. In this regard, we note that Article 8 of TRIPS states that corrective measures may be necessary to curb practices that may adversely affect trade and the international transfer of technology. One should also bear in mind the related provision of Article 40 of TRIPS, which addresses anti-competitive practices in contractual licenses. All of these provisions of the TRIPS Agreement should be adequately brought into WIPO’s framework.

Promoting “development oriented” technical cooperation and assistance

WIPO is the main multilateral provider of technical assistance in the field of intellectual property. By virtue of the 1995 agreement with the WTO, it plays an important role in providing developing countries with technical assistance to

implement the TRIPS agreement. As a United Nations specialized agency, WIPO has an obligation to ensure that its technical cooperation activities are geared towards implementing all relevant UN development objectives, which are not limited to economic development alone. These activities should also be fully consistent with the requirements of UN operational activities in this field - they must be, in particular, neutral, impartial and demand-driven.

Programs for technical cooperation in IP related matters should be considerably expanded and qualitatively improved. This is important to ensure that in all countries the costs of IP protection do not outweigh the benefits thereof. In this regard, national regimes set up to implement international obligations should be administratively sustainable and not overburden scarce national resources that may be more productively employed in other areas. Moreover, technical cooperation should contribute to ensuring that the social costs of IP protection are kept at a minimum.

WIPO’s legislative assistance should ensure that national laws on intellectual property are tailored to meet each country’s level of development and are fully responsive to the specific needs and problems of individual societies. It also must be directed towards assisting developing countries to make full use of the flexibilities in existing intellectual property agreements, in particular to promote important public policy objectives.

A member-driven organization open to addressing the concerns of all stakeholders

A balanced system of intellectual property protection should service the interests of all sectors of society. Given the broad public policy implications of intellectual property, it is crucial to involve a commensurately broad range of stakeholders in the discussions on intellectual property, both at the national

and international levels, including in all norm-setting activity.

Currently, in WIPO, the term NGO is used to describe both public interest NGOs and user organizations. This creates confusion and does not seem consistent with existing UN practice, as implemented in most of the UN specialized agencies. It is thus necessary, in WIPO, to take appropriate measures to distinguish between user organizations representing the interests of IP right holders and NGOs representing the public interest.

Subsequently, WIPO should foster the active participation of public interest non-governmental organizations in its subsidiary bodies to ensure that in IP norm-setting a proper balance is struck between the producers and users of technological knowledge, in a manner that fully services the public interest.

Conclusion

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.

ISSUES AND MEASURES TO BE CONSIDERED

Without prejudice to further initiatives, the following proposals, *inter alia*, could be considered by the General Assembly for the implementation of the suggested "WIPO Development Agenda".

(1) Adoption of a high-level declaration on intellectual property and development

The Declaration could be adopted by the General Assembly itself or by a specially convened international conference on intellectual property and development.

The Declaration should address the development concerns that have been raised by WIPO Member States and the international community at large.

(2) Amendments to the WIPO Convention

In order to ensure that development concerns are fully brought into WIPO activities, the Member States may consider the possibility of amending the Convention Establishing the World Intellectual Property Organization (1967). The amendment would explicitly incorporate the development dimension into WIPO's objectives and functions. Since Article 4 ("Functions") of the WIPO Convention relates its Article 3 ("Objectives"), paragraph (i) of Article 3 of the WIPO Convention could be amended to read as follows:

"(i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization, *fully taking into account the development needs of its Member States, particularly developing countries and least-developed countries*".

(3) Treaties under negotiation

Treaties under negotiation in WIPO, such as the SPLT, should include provisions on the transfer of technology, on anticompetitive practices as well as on the safeguarding of public interest flexibilities. Moreover, those treaties should include specific clauses on principles and objectives. The language provided in Articles 7 and 8 of the TRIPS Agreement is an adequate starting point, taking into account, however, that WIPO treaties do not expressly deal with "trade-related issues".

(4) Technical cooperation

We urge the Program and Budget Committee, in its next sessions, to establish consistent pluriannual programs

and plans for cooperation between WIPO and developing countries aiming at strengthening national intellectual property offices, so that they may effectively become an acting element in national development policy. Those programs should be guided, moreover, by the principles and objectives set out in Section VIII above.

(5) Intellectual property and transfer of technology

We propose the creation of a Standing Committee on Intellectual Property and the Transfer of Technology, for the consideration of measures to ensure an effective transfer of technology to developing countries and LDCs.

(6) Joint WIPO-WTO-UNCTAD international seminar on intellectual property and development

WIPO could jointly organize an international seminar with the WTO and UNCTAD on intellectual property and development, with the active participation of all relevant stakeholders, including public interest NGOs, civil society and academia.

(7) Participation of civil society

WIPO must take the appropriate measures to ensure the wide participation of civil society in WIPO's activities, changing WIPO's terminology with regard to NGOs.

(8) Working Group on the Development Agenda

Without prejudice to the previous proposals, a Working Group on the Development Agenda could be established to further discuss the implementation of the Development Agenda and work programmes for the Organization on this matter, reporting to the 41st Series of Meetings of the Assemblies of the Member States of WIPO.

Editorial: Intellectual Property Negotiations in WIPO: TRIPs-Plus and Development-lite

Chandrakant Patel

The current session of the General Assembly of the World Intellectual Property Organization (WIPO) in Geneva (September 27-October 5) has before it a proposal jointly submitted by Argentina and Brazil (see above) for the establishment of a "Development Agenda" for WIPO. The proposal states that the WIPO-centered norm-setting exercises in the area of intellectual property would require developing countries agree to IP protection standards that largely exceed existing obligations under WTO's TRIPS Agreement. Of particular concerns is the US, EU, Japan initiated draft Substantive Patent Law Treaty's (SPLT) objective to raise protection standards even further and progressively work towards a high standard, single global patent protection regime.

The proposal by Argentina and Brazil aims at the adoption of a Declaration on IP and Development, amendments to the WIPO Convention to make this possible, and to include provisions in treaties currently under negotiations on transfer of technology, on technical cooperation, on greater participation of the civil society in WIPOs deliberations and negotiations. This proposal encapsulates the widely expressed concerns of developing countries and the civil society that the emerging system of IP protection will further curtail their policy space in dealing with development challenges in a wide range of areas and policies: protection of indigenous resources, access to medicines, education, transfer of knowledge and technology and protection of genetic resources and bio-diversity. In a world increasingly driven by knowledge and skills, the gap between developed and developing countries is likely to widen further if the current efforts to use fora such as WIPO to evolve more stringent and corporate-driven IPR system succeed.

- Just as developed countries are actively promoting fora such as WIPO and regional trade agreements (the US-SACU Free Trade Agreement negotiations being a case in point) to evolve a more stringent patent system, the challenge for developing countries has been one of limiting and, where possible, reversing the shift of IP matters from WIPO to WTO. Whilst the US, EU and Japan view the panoply of organizations dealing with IP matters (these include WTO, FAO, WHO, Convention on Bio-diversity/UNEP and UPOV) as an interlinked and seamless continuum, developing countries have, so far, been preoccupied with damage limitation deriving from the IP Agreement in the WTO. It is in this context that the Argentine and Brazilian proposal provide an opportunity to sharply define and evolve a common strategy of placing development at the centre of the on-going IP related negotiations.
- Pre-Uruguay Round, WIPO was the central global forum for negotiations, standard setting and repository of IP matters and treaties. Notwithstanding the IP Agreement in WTO, WIPO continues to remain the key forum for dealing with IP matters. Its mandate embraces, among other matters, Paris Convention for the Protection of Industrial Property, Berne Convention for the Protection of Literary and Artistic Works, the Brussels Convention Dealing with Programme Carrying signals Transmitted by Satellites, the Trademark Law Treaty, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. It is also currently dealing with, in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.
- Against this background, it is perhaps not surprising that WIPO, despite its legal status as a specialized agency of the United Nations, has fashioned its

mandate in a highly selective and restricted manner, dealing almost exclusively with intellectual property matters. In the process, it has succeeded in creating a culture of protecting and expanding monopoly privileges of powerful commercial interests. Promoting development, transfer of technology and a balanced set of rights and obligations between producers and consumers of knowledge and innovation have become entirely subsidiary to narrower objective of protecting, promoting and harmonizing higher standards of IP protection.

- African and other developing countries and civil society in our region should support the proposal by Argentina and Brazil; to be sure, the proposal is a first effort and will be the subject of amendments and additions by other developing countries. For Africa, issues of access to medicines, significantly greater flexibilities in the application of IP regimes, protection of bio-diversity and traditional knowledge are key issues and should be more explicitly reflected in the proposal. But having said this, the proposal provides a major opportunity to re-orient WIPO's work and to evolve a negotiating strategy and framework for dealing with IP negotiations in other fora, including regional free trade agreements.
- The protection of indigenous knowledge is central to the notion of what is in the public domain and what is protected as intellectual property. The protection of classical intellectual property is maximized while indigenous knowledge is relegated to the absolute minimalist level. Songs and movies are enjoying greater protection while indigenous knowledge is capable of protection only under a sui generis system, under the TRIPs agreement. Sui generic systems refer to independent legal systems for the recognition of certain types of intellectual property rights. African countries have not

implemented sui generis systems for the protection of indigenous knowledge and contribute the biopiracy of resources belonging to our communities. African countries should implement the OAU model law so that indigenous people can benefit from their resources.

- As noted by Professor Boyle, IP policy and rights, in tandem with the exponential expansion in the breadth, scope, conditions and terms of IP protection, are in the throes of a maximalist “rights-culture” that conflates promotion of IP with promotion of innovation. This assumption is palpably false and warrants vigorous challenge. The guiding frame of reference in this respect must be that it is not rights that generate progress and innovation but an appropriate balance between rights and the public domain: this balance moreover is context dependent and cannot be subject to a “one size fits all” ideology.
- Reform of WIPO to embrace development as a key goal in its operations should be the first objective; likewise, increasing the participation of the civil society and of developing countries in its deliberations must increase in order to

neutralize the dominance of developed countries and their corporations in its agenda setting, negotiations and operations. A standstill on the assumption of newer and additional IP obligations should be a first objective.

- In addition, a country has a right “to implement their international obligations in accordance with their own legal systems and practice... 1.1 TRIPs”. In legal terms, where there are grey areas in the law, and there are many, countries can implement policies that are more distributive and developmental. For instance the legal meaning of “novelty” and the difference between “invention” and “discovery” are grey areas that provide a wide range of latitude for protection and for non-protection of rights. Simply put, what is a patent in one country need not be a patent in another country and that would still be legal. These grey area flexibilities should not be lost in WIPO negotiations.

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