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## The genie in the information bottle

The heavily criticized US domestic law on the protection of intellectual property was based on the 1996 World Intellectual Property Organization treaties: a clear example of how IP policy laundering avoids democratic process. Now the US smuggles its own maximalist protection standards into trade agreements with developing nations, whose economies do not benefit from protectionist IP laws. These standards undermine even the narrow concessions the TRIPS agreement affords to developing nations, particularly in the pharmaceuticals sector. But resistance is gathering: in autumn 2005, an alliance of developing nations led by Brazil and Argentina challenged the WIPO's mandate and produced a so-called "development agenda"; and public interest organizations have drafted The Access to Knowledge Treaty (A2K), which sets maximum levels of protection to guarantee public interests.

The spring of 1996 fairly teemed with a sense of limitless opportunity. Economic growth spurred domestic prosperity. Major international stock markets inched ever skywards in the midst of a spectacular bull market. The Internet had bloomed in the public consciousness with promises of unfettered information access and an egalitarian sense of democratic renewal. But not all shared this sense of opportunity. In Washington DC and Hollywood, policy makers and industry lobbyists viewed the emergence of the Internet with trepidation. For content distributors and information brokers, the promise of informational freedom carries the threat of commercial irrelevancy. How could the US content industry profit in a world where information wanted to be free and the Internet's open architecture guaranteed that freedom? Vested interests turned their attention to putting the information genie back into the distribution bottle.

The technological challenges of globalized digital networks prompted the first-term Clinton administration to appoint a National Information Infrastructure task force with an Intellectual Property Working Group. The working group, dominated by interests intent on servicing the needs of the US content industry, issued a White Paper calling for "clarifications" to existing intellectual property laws to accommodate the challenges of the Internet. In fact, the White Paper recommended a slate of amendments to copyright laws that, if enacted, would have altered radically the law's balance between the interests of users and citizens, creators and copyright holders.

In September 1996, both introduced legislation based on the chambers of commerce recommendations. All appeared to be on track. But then the bills hit an unexpected snag: public institutions and public interest advocates opposed the bills on numerous grounds. They were said to be unbalanced, a scarcely disguised giveaway to the copyright industry and a statutory override of public rights of access to, and use of copyright-protected expression. Support for the

bills wavered. It became apparent that the Clinton administration's copyright proposals bore greater significance than the White Paper let on.

In the ordinary course, domestic opposition to controversial legislation is a good thing. Public participation in the law-making process is ordinarily considered an important check and balance in a functional and accountable democracy. In the ordinary course, controversial draft legislation would be referred to a committee for public consultation and considered analysis. In the ordinary course, legislation subjected to such dialogue and emerging from such scrutiny would — in theory at least — better account for the interests of all affected parties, and so better serve the public interest. And so it should be with intellectual property bills as well.

But for the Clinton administration's White Paper proposals, the rigours of the US legislative process were not to be. Instead, the administration sang from the song-sheet it had used to great success in the Uruguay Round of the GATT (General Agreement on Tariffs and Trade). Those deliberations had produced an Agreement on Trade-Related Aspects of Intellectual Property (the TRIPS Agreement) that ratcheted skywards global requirements for minimum levels of protection afforded to intellectual property rights in World Trade Organization member states. So, instead of the meeting rooms of Capitol Hill, the Clinton administration turned to picturesque Geneva, home of WIPO, the World Intellectual Property Organization, a UN agency trusted with responsibility for overseeing global minimum levels of protection for intellectual property rights. In the dark days of December 1996, far from the obstacles presented by democratically accountable domestic legislatures, national representatives pounded out the terms for two treaties to address the ills of the Internet.

The WIPO Internet Treaties, comprising the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, achieved much of what the Clinton administration had sought and failed to achieve with its domestic digital copyright proposals. Accordingly, the congressional end-run could be described as a success. But it could not be described as an unqualified success: the Geneva manoeuvre was not without its casualties. Public interest organizations and public institutions had also learned from tactics employed in the Uruguay Round and, fearing a repeat, followed the money to Geneva. Out-resourced and lacking standing before WIPO, these groups nonetheless lobbied WIPO member states tirelessly to apprise them of the stakes. Ultimately, those advocating on behalf of the public won two important concessions in Geneva. First, WIPO agreed to shelve a controversial draft treaty for the creation of a *sui generis* right of protection for databases. Second, WIPO member states dropped treaties from a proposal to require states to treat as a reproduction the browsing of content in a digital environment.

Citing its international intellectual property obligations under the WIPO Internet Treaties as requiring domestic reform of the US Copyright Act, the Clinton administration signed the Digital Millennium Copyright Act (DMCA) into law in 1998. The DMCA passed the House by an oral vote only, obscuring representatives' voting record on the bill.

The DMCA has proved controversial, to say the least. Critics call the law unbalanced, since it favours the copyright industry at the expense of users' interests in access to, and dissemination of content. More troublingly, critics allege the law places essential security research at risk of liability, and that it supports anti-competitive practices. Today, more than eight years after the

passage of the WIPO Internet Treaties, we are still debating whether the rights and liabilities these treaties created are even necessary for rights-holders to exploit their assets, and whether these rights harm more than help. But my point here is not to debate the merits of expanded IP rights generally; rather, it is to identify the harms IP policy laundering inflicts on the democratic process. One might fairly conclude that the first victims of US intellectual property policy laundering have been Americans.

Domestically, developed nations support strong intellectual property laws to back domestic commercial interests. That support might derive from a genuine belief in the necessity of laws to address issues facing the industry or, more cynically, from promises to commercial interests that back a particular political candidate or party. Internationally, support for strong intellectual property laws can have the pleasing effect of benefiting particular interests under the rubric of improving the balance of trade. The US, in particular, labours under a significant trade deficit. Intellectual property is one of the few black-ink entries on its trade ledger. US administrations of both political stripes have pursued international strategies to reinforce those positive flows.

The 1996 WIPO Internet Treaties illustrate the cardinal virtues of policy laundering. First, by pushing a controversial legislative agenda offshore, the Clinton administration circumvented insurmountable domestic opposition. Second, WIPO's international character allowed a relatively small number of nations who favour maximalist intellectual property laws to craft a new "standard" for intellectual property protection. The standard set, the task then becomes to convince other nations — by carrot or by stick — to sign on to the new "standard".

That task defines the difference between the two primary venues for intellectual property policy laundering. WIPO is the first of these venues, and the multilateral international conventions it administers are its vehicles. WIPO treaties tend to be voluntary instruments. No state is obliged to sign and ratify the treaty except, perhaps, by moral suasion. International suasion's moral force lacks a certain persuasive punch when employed in support of fundamentally protectionist regimes such as the WIPO Internet Treaties. WIPO treaties carry certain economic overtones that tend to lack the moral force of, say, the International Convention on the Rights of the Child. Indeed, US administrations have found it difficult to persuade even its Western trading partners lacking extensive IP exports voluntarily to assume the heightened IP protections demanded by the WIPO Internet Treaties. Consider the case of Australia.

Australia is not a signatory to the WIPO Internet Treaties. Nonetheless, as a developed nation, it undertook to revise its intellectual property laws to accommodate US and European pressures to "modernize" its laws in a digital age. Australia's implementation of the WIPO Internet Treaties rights in 2000 could be described as moderate, and certainly fell far short of the US DMCA model. Around the world, IP maximalists were not amused. Accordingly, US interests turned to a second venue for IP policy laundering: the trade agreement.

The American–Australian Free Trade Agreement of 2004 included within its intellectual property chapter requirements for what could be described as WIPO-plus minimum levels of protection. With the stroke of a pen, the trade agreement cast aside carefully crafted Australian digital copyright laws that had sought to balance stakeholders' interests and implement a level of

protection tailored to Australia's needs. The US had exported the DMCA.

This pattern is being repeated in bilateral and multilateral trade agreements around the world. The US is currently negotiating a trade agreement with Ecuador, Columbia, and Peru — the Andean Free Trade Agreement — in which it is using the threat of expiration of a preferential tariff for key agricultural exports of the South American nations. US negotiators have identified the intellectual property chapter as one of the untouchable chapters of the trade agreement, although the South American negotiators continue to resist aggressive demands for tough anti-circumvention laws and Internet Service Provider liability rules favourable to the US content industry.

Trade agreements offer benefits to policy launderers that are unavailable through international treaties. First, trade agreements touch upon many different areas of intellectual property at once. A single trade agreement can establish minimum levels of protection for famous trademarks, require the adoption of controversial anti-circumvention laws for copyrighted material, and require patent protection for genetically modified life forms. Treaties tend to deal with a single subject at a time — copyright, patents, or trademarks — and often only aspects of the subject. Second, trade agreements are by nature private negotiations. The parties to the negotiations control the agenda and exclude third parties from the table. It is extremely difficult for public interest groups and other interested parties to influence the proceedings. Trade negotiations allow for little third-party input beyond picketing. International treaties, in contrast, are by nature multilateral instruments. The multiplicity of voices allows for a greater range of input and can frustrate IP maximalists from dominating the agenda. Moreover, third parties may have greater influence on an international convention by influencing delegates of individual states who do have seats at the table. WIPO actually accredits civil society organizations allowing official input into WIPO proceedings. In the past, these accredited organizations have been dominated by maximalist organizations, such as international content industry associations.

The choice of policy-laundering venue is not necessarily an either/or proposition. Developed nations favouring heightened protections for intellectual property often employ the treaty and trade agreement in a kind of policy-laundering two-step. First, developed nations negotiate the terms of a treaty. Second, those same nations enter into bilateral trade agreements with less-developed nations, bartering increased access to the developed nations' markets for primary resources and manufactured goods in return for the less-developed nation ratifying the treaty and overhauling its IP laws. In fact, the two venues work harmoniously: it is only through the conclusion of bilateral trade agreements requiring treaty ratification that controversial IP treaties accumulate sufficient signatories to enter into force.

Developed nations use sophisticated techniques to ground protection for intellectual property in trade agreements. Trade agreements have historically specified minimum protection levels within the terms of the agreement or, by reference, incorporated international treaty provisions root and stem. Recently, developed nations have begun to employ investment theories to place IP under the shelter of investment protection provisions. For example, in a May 2005 Analytical Note on "Intellectual Property in investment agreements: the TRIPS-plus implications for developing countries", the South Centre identified an increasing trend to enhance protection afforded IP in investment agreements through inclusion of "intellectual property", "intangible property", "licences", and similar terms within the definition of "investment"; and to

define investment "return" to include IP "royalty payments". In this way, developed nations deploy investment agreements to enhance IP protection beyond the levels identified in the TRIPS Agreement, and often in a manner calculated to undermine the narrow exceptions the TRIPS Agreement affords developing nations.

Policy laundering circumvents democratic law-making institutions. This mischief works additional harms in the context of intellectual property regimes. Maximalist intellectual property regimes might arguably work for the economies of developed nations with mature IP-intensive industries (discounting the harms inflicted on the nations' own population). However, less-developed nations with undeveloped technology sectors do not benefit under highly protectionist IP regimes. Patent monopolies, in particular, impede new industries from finding equal footing with those based in developed countries. Looser intellectual property rules tend to support competition in the provision of IP-related goods. International agreements increasingly restrict the availability of compulsory licensing regimes, long relied upon by developing nations to establish their own domestic industries. Intellectual property laws, designed to encourage development of inventions and the arts, might serve to undermine such development when exported to less-developed nations. The US is often pointed to as the prime example of the benefits of loose intellectual property laws. The early US publishing industry prospered under laws that only grudgingly bestowed copyright on foreign publishers. The effect was to provide the US publishing industry with a steady supply of royalty-free books and to supply the reading public with a competitive market for the provision of books. It was only in 1986 that the US converted to the cause of international copyright, signing on to the Berne Convention for the Protection of Literary and Artistic Works.

The attack on compulsory licences for pharmaceutical patents poses particular challenges to less-developed nations. A compulsory licence grants a licensee the right to use intellectual property on reasonable and non-discriminatory terms on payment of a licence fee set by an independent body. Compulsory licensing of patented drugs offers two benefits: it stimulates domestic pharmaceutical industries and introduces competition into the domestic market, placing downward pressures on drug pricing. Drug companies generally price medicines by market. Monopoly pricing on patented medicines, along with prohibitions on the importation of grey-market pharmaceuticals, can place these medicines out of reach of all but the most affluent citizens. Compulsory licensing addresses this by improving the accessibility of medicines while striving to compensate innovators fairly. US trade representatives continue to target drug policies outside the realm of the compulsory licence. Recent trade agreements, including the multilateral Central American Free Trade Agreement between the US and Costa Rica, El Salvador, Guatemala, the Dominican Republic, Honduras, and Nicaragua, and US bilateral agreements with Singapore, Chile, and Jordan, protect clinical data supplied to regulators by brand-name pharmaceuticals for approval. Equivalent generic drug manufacturers have to conduct extensive clinical trials to generate and submit the same data for approval, or wait for the term of data protection to expire. The effect is to extend artificially the term of protection patented medicines enjoy to the detriment of public health.

Perhaps one of the more pernicious harms of the laundering of IP policies stems from the lack of consensus around the merit of expanded IP rights. This criticism applies to all forms of IP. Consider the patenting of higher life forms. Many question the morality of granting property rights in life. Nonetheless, the

US has described the obligation to extend patent rights to higher life forms as a non-negotiable aspect of the Andean Free Trade Agreement. The US is also using trade negotiations to pressure the Andean nations to improve access to markets for genetically modified agricultural products. Studies suggest that the South American nations' agricultural sectors will be hardest hit by the social and economic displacement that implementation of the FTA will cause.

Expansive protection of "famous" trademarks is also a controversial subject, with negative implications for free speech. US trade representatives are starting to insist on domestic domain name laws that provide enhanced protection to famous trademarks. Such provisions do not account for the use of brand names for consumer information or protest websites. Cultural protections also fall under the target of US trade negotiators. The US is actively incorporating the WIPO Internet Treaties into its bilateral and multilateral trade agreements despite the deep divide, even within the US, over the merits of the new rights those treaties contain.

Developing nations are becoming increasingly sophisticated negotiators in multilateral trade forums. Events at WIPO reflect this change. In the autumn of 2005, a loose alliance of developing nations, led by Brazil and Argentina, raised concerns over the role of WIPO in the evolution of international intellectual property rules. If WIPO is mandated to establish minimum global levels of intellectual property protection, why was it overseeing treaties that constantly raised minimum levels beyond the maximum levels offered even in developed countries? WIPO is a UN organization, yet where does WIPO fulfil the traditional UN role of addressing developing world challenges? Following these objections, the dissenters proposed a new development agenda for WIPO focusing on technology transfer and public health protections for developing nations.

Growing out of the development agenda, public interest organizations from around the world gathered to pen a draft Access to Knowledge (A2K) treaty. The genesis of the A2K movement lies in a reaction to WIPO's constant tinkering with minimum levels of IP protection. Observers suggested that if WIPO could set minimum levels of protection that benefit primarily private interests, why not establish maximum levels of protection to guarantee certain public benefits? Why not guarantee generic drug manufacturers' rights of access to public data on drug effectiveness? Why not enshrine obligations of non-discrimination in the acquisition of open, and closed, source software? Why not agree on a common minimum content to fair dealing and use rights to copyrighted content? In early 2005, participants prepared the draft treaty addressing these and many more IP-related issues.

The developed world's response to these initiatives has been predictable. The WIPO development agenda has been greeted with cautious acceptance, and with the more or less open strategy of de-fanging it from within. It is perhaps too early in the evolution of the A2K treaty to foresee its ultimate treatment by developed nations. To date, developed nations have treated the initiative with indifference. The fates of the development agenda and the A2K treaty lie in the extent to which developing nations embrace their causes, and how far they resist trade pressures to abandon the approach and return to the "TRIPS-plus" fold.

The global shift towards the expansion of intellectual property rights through policy laundering has only slowly generated reaction, but global movements such as the WIPO development agenda and the A2K treaty suggest that a

reaction is materializing. Scholars and activists have begun to explore the limits of intellectual property rights, suggesting that extreme IP protections have over-reached their inherent limits and now breach fundamental human rights such as freedom of expression. But theory is plainly not enough. Concerned citizens of developed nations need to join their voices to those of public interest organizations and citizens of developing nations to lobby for just trade policies. Domestic media must take an interest in international developments, both trade arrangements and their human and economic consequences. This is not necessarily a hopeless aspiration since developed nations launder their domestic IP policies through the same mechanisms used to target trade partners. Intellectual property policy laundering is a phenomenon that shows no sign of slowing. Only public scrutiny will return its costs to its champions.

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