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DENSITY & CONFLICT IN INTERNATIONAL INTELLECTUAL PROPERTY LAW

by

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Density & Conflict in International Intellectual Property Law

Kal Raustiala[1]

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One of the signal features of contemporary world politics is that intellectual property rights are increasingly an arena for global cooperation and conflict. The proper role, scope, and stringency of international intellectual property (IP) rules are highly contested questions, questions that more and more arouse both passions and interests. Once limited to a set of relatively anemic treaties that lacked an effective means of international enforcement, international IP law has, in the last decade, been transformed by the arrival of a dense array of new institutions and agreements. This dense array of institutions has in turn transformed both the substance and the process of international IP lawmaking.[2]

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[1] Professor, UCLA Law School and UCLA International Institute. I thank Larry Helfer and Tim Wu for comments on this article.

[2] *See* Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 Int'l Org. 277 (2004); Laurence Helfer, *Regime Shifting: The TRIPS Agreement and the New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004); Laurence Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, 36 CASE W. RES. J. INT'L L. 123 (2003); Graeme Dinwoodie & Rochelle C. Dreyfus, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 CASE W. RES. J. INT'L L. 95 (2004); PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2003); SUSAN SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY (2003); INTELLECTUAL PROPERTY: TRADE, COMPETITION, AND SUSTAINABLE DEVELOPMENT (Thomas Cottier & Petros C. Mavroids eds., 2002); KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (Inst. for Int'l Econ. 2000).

The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights,[3] commonly known as TRIPs, is the centerpiece of this recent wave of new institutions. TRIPs ushered in an era of powerful global IP law, and along with the various subsequent TRIPs-plus agreements--which strengthen protection even further—TRIPs has, in the eyes of many, only solidified the importance of considering the social justice aspects of international IP rights.[4] International IP law seeks to mediate often divergent national policies toward innovation and creativity, which in turn reflect divergent underlying value frameworks. Nations unhappy with the existing international rules can opt out of the system and maintain their own idiosyncratic national rules. But such autarkic behavior comes at a cost. Indeed, exclusion from the international institutions that govern IP—most notably by far, the WTO--is so costly that few states chose to remain outside the framework. Since nearly every state is compelled to participate in global rulemaking in this area, and since nations differ substantially on what rules they prefer, the result is high levels of debate and conflict—and, as discussed further below, increasingly creative rulemaking strategies.

Laurence Helfer's contribution to this symposium, *Toward a Human Rights Framework for Intellectual Property*, illustrates in detail an important aspect of the evolution of international IP law. Helfer's specific focus is the intersection of human rights and IP law. His core claim is that human rights agreements and human rights treaty bodies increasingly engage with questions of IP, and IP institutions and agreements increasingly use human rights language and rhetoric. Moreover, due to rising political resistance to forward movement within both the World Trade Organization and the World Intellectual Property Organization, or WIPO, "both opponents and proponents of intellectual property rights have sought out greener pastures."[5] Via this quest they have brought new institutions and actors into the arena of IP. For example, he describes both the activities of the International Covenant on Economic, Social, and Cultural Rights Committee with regard to IP rights, and the creation of new international treaties that conjoin IP and human rights concerns, such as the UNESCO

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[3] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, ANNEX 1C, LEGAL INSTRUMENTS--RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81 (1994).

[4] "TRIPs-plus" refers to international agreements, often bilateral, that provide for intellectual property protection that goes beyond the TRIPs minimum standards level.

[5] Laurence Helfer, *Toward the Development of Intellectual Property Protection Through the Sustainable Development Paradigm*, 40 U.C. Davis L. Rev. (forthcoming 2007). [p. 2 at this Symposium]

cultural diversity treaty, the WIPO Access to Knowledge Treaty, and the World Health Organization's medical research treaty. In these new treaties, Helfer notes, human rights concepts and principles are increasingly central. Yet, he argues, we lack a well-defined framework for understanding and evaluating the ongoing marriage of IP and human rights. Such a framework is absolutely necessary because the international IP system "is on the brink of a deepening crisis," with "acrimonious and unresolved clashes over substantive rules and values, competition among international institutions for policy dominance, and a proliferation of fragmented and incoherent treaty obligations and binding norms."[6]

Some may question how severe the crisis in international IP lawmaking actually is. But there is no question that the underlying phenomena Helfer identifies--an increasingly dense system of international institutions, and rising competition and conflict among differing rules and institutions--exist and are growing in importance. In this regard *Toward a Human Rights Framework* raises important positive and normative points, which I will take up in turn in this short article. Part I considers the positive claim that the processes by which IP law is made are shifting. I concur with this assessment, and indeed expand upon it by situating the claim within broader trends in international law and politics. Part II then turns to normative questions, and briefly queries whether the marriage of human rights and IP is bound to be a happy one. In particular, I question whether the infusion of human rights concepts and rhetoric will serve, on balance, to make international IP rights more socially just, or just more powerful.

I. The New Nature of International Law-Making

Toward a Human Rights Framework amply illustrates a point that transcends the particular topics of human rights and IP law: the nature of international lawmaking is undergoing an important evolution. One of the most interesting but often overlooked features of the international system is its rising institutional density. International institutions, by which I mean formal organizations such as the United Nations and the North Atlantic Treaty Organization, as well as more informal cooperative structures such as the Paris Club of creditor nations, have existed for a long time. But they have grown tremendously in

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[6] *Id.* at 1.

number and importance since the end of the Second World War.[7] As the number of institutions within the international system grows—and with new international agreements, new organizations, and new actors[8] increasingly engaged in varied aspects of global governance--it is inevitable that some of these agreements, organizations, and actors will overlap and even conflict with one another. One of the most salient examples of the last decade is the trade-environment interface. The issue of how free trade rules, such as the World Trade Organization's restrictions on national policies, fit with or undermine the rules contained in multilateral environmental agreements has been discussed and debated extensively.[9] But there are many other examples of such clashes and conflicts over overlapping areas of international law.

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[7] On international organizations generally see JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005); Michael Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 Int'l Org. 861 (1999); John Meyer et al., *The Structuring of a World Environmental Regime*, 1870-1990, 51 Int'l Org. 623 (1997). On other forms of international institutions see ANNE-MARIE SLAUGHTER, A New World Order (2004); Kal Raustiala, The Architecture of International Cooperation, Va. J Intl L (2002); INTERNATIONAL INSTITUTIONS: AN INTERNATIONAL ORGANIZATION READER (Lisa Martin and Beth Simmons eds. 2001); TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS (George A. Bermann et al. eds., 2000); GLOBAL GOVERNANCE: DRAWING INSIGHTS FROM THE ENVIRONMENTAL EXPERIENCE (Oran R. Young ed., 1997).

[8] In particular, non-state actors are extremely active in world politics today. *See* Thomas Risse, *Transnational Actors and World Politics, in* THE HANDBOOK OF INTERNATIONAL RELATIONS (Simmons et al., 2002); P.J. Simmons, *Learning to Live with NGOs*, 87 FOREIGN POL'Y, Fall 1998, at 82-96; Kal Raustiala, *States, NGOs, and International Environmental Institutions*, INT'L STUDIES Q. (1997); NGOS, THE UN, AND GLOBAL GOVERNANCE (Thomas Weiss and Leon Gordenker, eds., 1996); Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-making Institutions*, 18 WASH.Q. 45 (1994); Lester M. Salamon, *The Rise of the Non-profit Sector*, 73 FOREIGN AFF. 4, 109 (1994); *Benedict Kingsbury, Whose International Law? Sovereignty and Non-state Groups*, 68 AM. L. SOC'Y INT'L L. PROC. 1 (1994).

[9] The literature is voluminous. *See* TRADE AND ENVIRONMENT: LAW AND POLICY (Chris World, et al. eds., 2005); GREENING NAFTA (John Knox & David Markell eds., 2003); STEVE CHARNOVITZ, TRADE LAW AND GLOBAL GOVERNANCE (2002); ORAN YOUNG, THE INSTITUTIONAL DIMENSIONS OF ENVIRONMENTAL CHANGE: FIT, INTERPLAY, AND SCALE (2002); THE GREENING OF TRADE LAW (Richard Steinberg ed., 2001); DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1998). The WTO's general influence on other regimes is discussed in TRADE AND HEALTH IN THE WORLD TRADE ORGANIZATION (George Bermann & Petros Mavroidis eds., 2006); Claire Kelly, *Power, Linkage, and Accomodation: The WTO As an Actor and Its Influence On Other Actors and Regimes*, 24 BERKELEY J. INT'L L. 79 (2006); Andrew Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L. J. 303 (2004); David Leebron, *Linkages*, 96 AM. J. INT'L L. 5 (2002); ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION (2000).

As Professor Helfer's article shows, international IP law is not immune to institutional density and overlap; in fact, it may be a leading edge of this phenomenon. Indeed, in an important sense there no longer is a clearly defined and circumscribed set of international IP rules. There is instead what David Victor and I have elsewhere called a "regime complex"[10] for international IP. *Regimes*, a term taken from international relations theory, refer to "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."[11] More concisely and narrowly, regimes have been defined as "institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues" in international relations.[12] At the core of most regimes is an international treaty. A *regime complex*, by contrast, is a collective of partially overlapping and even inconsistent regimes that are not hierarchically ordered, and which lack a centralized decisionmaker or adjudicator. Regime complexes may comprise many agreements and many institutions. In developing the concept of a regime complex, we studied the evolution of global rules over plant genetic resources, in which rules of common heritage and open access were, over the course of the 20th century, gradually transformed into rules of private and sovereign property rights over genetic resources, in both their natural and transformed state. The rules governing plant genetic resources were found in many documents and emanated from many institutions, but they shared a common subject. The idea of a regime complex is not unique to this issue, and is applicable much more widely. It has recently been applied by others to the broad area of international IP law itself.[13]

The existence of a regime complex in IP has important implications for world politics and for the development of legal rules. I will briefly highlight four such implications here: path dependence; forum-shopping; "strategic inconsistency;" and deferral of conflict resolution to ex post processes of rule implementation and interpretation.[14]

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[10] Raustiala and Victor, supra note 2.

[11] INTERNATIONAL REGIMES 2 (Stephen D. Krasner ed., 1983).. *See also* ROBERT KEOHANE, AFTER HEGEMONY (1984).

[12] ROBERT KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER 4 (1989). For a general overview of the regimes literature in international relations see THEORIES OF INTERNATIONAL REGIMES (Andreas Hasenclever et al. eds, 1997).

[13] *See, e.g.*, Symposium, *The International Intellectual Property Regime Complex,* MICH. ST. L. REV. (forthcoming 2006).

[14] These implications are discussed at greater length in Raustiala and Victor, *supra* note 2.

In a regime complex, with its many overlapping rules and institutions, new international rules and institutions are rarely negotiated on a clean slate. As a result rulemakers are not able to choose any substantive legal rule(s) they might favor; frequently they are limited by the existing constellation of rules and, most importantly, the political interests these rules have engendered. The accreted legacy of prior political bargains acts as a constraint, in other words, on what can be achieved today.[15] As international rules and institutions multiply, this normative legacy, or overhang, grows. Sometimes the result of this variegated normative legacy is statis; sometimes it is the crafting of broad, seemingly-empty bargains. (The latter strategy is not always a bad one: often exogenous events and new politics can shift the political terrain and allow a problem to resolve itself autonomously.) In other cases broad and vague legal compromises simply act as placeholders that defer and push hard bargaining into the future. Either way, the increasing presence of density-driven path dependence is critical for understanding why international legal rules are crafted as they are, as well as understanding what rules are politically feasible.

A second important implication of the existence of a regime complex is intensified forum-shopping. A defining characteristic of a regime complex is the existence of multiple, overlapping regimes. Forum-shopping in this context is not primarily about litigation and venue, but instead about the institutional locus of rule-making. International actors, not only states but also firms and civil society groups, increasingly seek to use different forums to develop international IP rules.[16] These forums, with their differing rules of access, membership, and participation, empower and disempower distinct actors. The decentralized and nonhierarchical nature of the international legal system facilitates such forum shopping, in that differing rules can be developed and can co-exist as a practical matter even if they vary widely in substance. And as the number of available forums increases, so too does the number of relevant international agreements and their embedded substantive rules.

As substantive IP rules multiply, they increasingly conflict with and compete with one another. These conflicts are sometimes anticipated, and sometimes even desired. Hence

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[15] On path dependence generally see Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000); Oona Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 Iowa L. Rev. 601 (2001); Richard A. Posner, *Path-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV 573 (2000).

[16] See Raustiala and Victor, *supra* note 10; Laurence Helfer, *Regime Shifting, supra*; Laurence Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285 (1999).

a third implication of a regime complex involves deliberate efforts at rule change via competing agreements and conflicting rules. It is important to underscore that in many cases the rules created in different international forums are broadly compatible, in part because political interests ensure similarity, in part because international rules are often vague or ambiguous, and in part because government lawyers worry about inconsistency across agreements. But occasionally the legal rules created in different forums are not consistent. "Strategic inconsistency" occurs when actors deliberately seek to create inconsistency via a new rule crafted in another forum, in an effort to alter or put pressure on an earlier rule.[17] In so doing the new and inconsistent rule may create uncertainty about the status of the original rule and, perhaps, spur its renegotiation or adjudication.

The resulting conflicts between inconsistent international rules can sometimes be marked. Yet the international legal system lacks well-specified doctrines governing the resolution of such conflicts.[18] Some basic rules about the resolution of conflicts among international treaties do exist. One is the rule that later treaties supersede earlier ones.[19] Likewise, a more specialized agreement is said to trump a more general one (sometimes called the rule of *lex specialis*). But these doctrines are quite broad and, moreover, their application in particular cases is often uncertain. Many conflicts among treaties are not adjudicated by international courts or bodies, but instead are hammered out politically in a more diplomatic processes and settings. In these arenas legal claims such as *lex specialis* may be suggestive, but they are hardly dispositive. Renegotiation or political resolution of a conflict is thus often more likely than adjudication.

Toward a Human Rights Framework offers various examples of actors pursuing strategic inconsistency as a means to spur change. These cases illustrate the use of strategic inconsistency by actors disadvantaged by TRIPs and TRIPS-plus accords. (TRIPs-plus accords could be understood as attempts to strategically-conflict with TRIPs in the other direction, toward more stringent rules, but for the fact that TRIPs was expressly negotiated

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[17] For further discussion of the concept, and for examples, see Raustiala and Victor, *supra* note 2.
[18] For a general treatment with special attention to the WTO see JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW (2003); Joel Trachtman, *Conflict of Norms in Public International Law: How the WTO Relates to Other Rules of International Law*, 98 AM. J. INT'L L. (2004); Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L. J. (1999).
[19] Vienna Convention on the Law of Treaties art. 30, May 23, 1968, 11 U.N.T.S. 331, discusses this notion in more detail.

as a floor--with "minimum standards"[20]--rather than as a ceiling). The lack of clarity over how to address legal conflicts and the incentives to seek out favorable forums within which actors can negotiate congenial rules leads not only to strategic inconsistency, but also to elaborate drafting tricks such as so-called "savings clauses." These clauses, common in many multilateral agreements today, purport to insulate a prior rule from change by a later one. In practice, they often simply sow confusion.

Fourth and finally, though the traditional model of regime development is a top-down one, in which governments craft new legal rules ex ante through formal negotiations, a regime complex tends to shift jurisgenerative activity to the ex post arenas of implementation and interpretation. In a regime complex negotiators often adopt quite general and broad rules, sometimes because it is hard to reconcile rules in competing agreements and sometimes due to the sheer complexity of a given issue. The implementation process is then used to experiment with and sort out the possible conflicts or problems. Politically, deferral of a problem is often much preferred to a solution, since a solution typically means that someone identifiable wins and someone identifiable loses. But deferral is not only a political stratagem. For complicated policy problems, such as the intermixing of human rights and IP rules, the strategy of crafting a broad set of rules that are then refined over time via the implementation process can also yield normatively better and more grounded outcomes.[21]

The central point of this discussion is that rising institutional density has changed the way international law is made. This is nowhere more true than in international IP law. Treaty negotiations do not occur on a blank slate; there is an ever more complicated set of background rules, some more germane, some less, that constrain and tilt the bargaining among states. New actors are increasingly entering the system, and these actors forum-shop, seek to create conflict, and pursue strategic inconsistency as a way to push back against prior and more powerful interests. As a result of these varied changes it is difficult for lawyers or social scientists to understand the content and evolution of international legal rules by looking at a given institution or agreement in isolation, or formalistically. Thus as the density of international institutionalization grows, being an expert on TRIPS or the Madrid

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[20] TRIPs, *supra* note 2, art. X

[21] For examples see Raustiala and Victor, *supra* note 10, at 303-05.

Agreement[22] becomes relatively less useful, and understanding how the broader IP regime complex operates becomes relatively more useful. One must understand the regime complex to understand fully any particular regime.

Consequently, existing theories of international law need to take greater and more direct account of how this new terrain of lawmaking affects substantive rules, as well as the processes by which those rules emerge. Substance and process are linked--though how closely they are linked, and it what precise ways, is not yet clear. Hence it is centrally important that we try to understand the empirics of this mode of rule development. *Toward a Human Rights Approach* helpfully gives us a detailed and concise look at one significant slice of the new world of international IP lawmaking. Certainly more work of this sort is needed.

II. Is a Human Rights Approach to Intellectual Property Desirable?

In addition to its contributions to the positive literature on international legal theory, *Towards a Human Rights Approach* raises some intriguing normative issues. I will just touch briefly on them here. I am saying nothing novel in the context of a symposium on "Social Justice and Intellectual Property" by declaring that in the United States, and elsewhere, there is significant debate over the appropriate scope and strength of IP rules. IP rights have plainly become stronger in recent decades. (The most straightforward example is probably the ever-extending length of the copyright term). It seems fair to say that many if not most academic commentators believe that as a general matter IP rules have become overly protective, and that the vitality of the public domain has suffered as a result.[23] The expansion of IP rights in the United States is certainly noteworthy, whether the domain is patent,[24] trademark,[25] or copyright,[26] and this expansion may be reducing, rather than expanding, the extent of innovation and creativity.[27]

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22 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, Apr. 14, 1891, 818 U.N.T.S. 163 [hereinafter Madrid Agreement]..

23 Lawrence Lessig and Jamie Boyle have probably been the most prominent advocates for this view. See LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001); LAWRENCE LESSIG, FREE CULTURE (2004); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS (1994).

24 ADAM B. JAFFE & JOSH LERNER, INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT (2004).

Yet the expansion of IP rules at the international level is even more profound than the expansion domestically. This is in large part due to the advent of TRIPs, which required major, in some cases revolutionary, changes in the legal systems of many states. In my view TRIPs was and remains an inappropriate and unfortunate addition to the World Trade Organization's agreements.[28] TRIPs forces high protection IP rules upon developing countries that neither need nor desire them.[29] It creates rigidities that restrain swift and effective responses to public health crises.[30] And it has little demonstrable impact on trade liberalization, the raison d'etre of the World Trade Organization.

Against this backdrop of expansive and growing propertization I find the increasing attention to IP rights by human rights bodies that *Towards a Human Rights Framework* describes to be promising in many respects but troubling in some others. The intersection of the two fields is unquestionably important, and there is no doubt that there are significant human rights implications to many IP issues--most notably, with regard to patent protection and infectious diseases, such as the HIV-Aids pandemic.[31] But there is a downside to the embrace of IP by human rights advocates and entities. Such attention is likely to further entrench some dangerous ideas about property: in particular, that property rights as human

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[25] Mark. A. Lemley, The *Modern Lanham Act and the Death of Common Sense,* 108 YALE L. J. 1687 (1999).

[26] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[27] *See* Michael Heller and Arti Rai, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998); Keith Maskus & Jerome Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods, in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 6-7 (Keith E. Maskus & Jerome H. Reichman eds., 2005); Michele Boldrin & David Levine, *The Case Against Intellectual Property*, 92 AM. ECON. REV. PAPERS AND PROC. 209 (2002). For a look at a large industry that thrives without IP protection, see Kal Raustiala & Christopher Sprigman, *The Piracy Paradox*, 92 VA. L. REV. (forthcoming, Dec. 2006)

[28] A position also espoused by some eminent free traders. See, e.g., JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 182-85 (2004) (decrying the addition of TRIPs in the WTO and criticizing the notion that IP rights are trade-related or good for developing countries).

[29] See generally Maskus & Reichman, *Supra* note 27, at 6-7. "Forces" is not quite correct, because states may chose to remain outside the WTO, and therefore outside the TRIPs framework. But the costs of doing so are so large that few states can afford to pay the price.

[30] Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 2 (2005); Susan Sell, *Trade Issues and HIV/AIDS*, 17 EMORY INT'L L. REV. 933 (2003).

[31] Peter K. Yu, *The International Enclosure Movement*, 82 INDIANA L.J. (forthcoming 2007); Abbott, *supra* note 30, at 2; Sell, *supra* note 30, at 933.

rights ought to be inviolable and ought to receive extremely solicitous attention from the international community.

Just as the popularization of the term "intellectual property"[32] probably helped raise the salience of the underlying rights of patent, copyright, trademark, and the like--and likely enhanced political support for government intervention to protect these rights, by tapping into the strong respect for property rights present in many parts of the world--the introduction of human rights language to the policy debate over IP may have a similar strengthening influence. *Towards a Human Rights Framework* acknowledges this risk, noting that "without greater normative clarity" about IP rights, "such 'rights talk' risks creating a legal environment in which every claim (and therefore no claim) enjoys the distinctive protections that attach to 'rights.'"[33] This effect may be magnified by the promulgation and elaboration of new, or at least less well-established, IP rights in international law.

Indeed, we currently observe a proliferation of attempts to expand IP rights today, and in some cases to entrench or create new IP rights. One such effort involves indigenous peoples and what is often called traditional knowledge.[34] WIPO, for example, has facilitated a long-running series of negotiations over the protection of traditional knowledge, genetic resources, and folklore. Similar negotiations have taken or are taking place under the auspices of the Convention on Biological Diversity,[35] the International Labor Organization,[36] the UN Food and Agriculture Organization,[37] and many other international forums. In the most recent WIPO meeting on the subject, in April 2006, many countries reiterated calls for

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[32] Mark Lemley argues that "only recently has the term 'intellectual property' come into vogue." While the origins are older, he cites the influence of WIPO, created in 1967, as a primary driver of its widespread use. Lemley, *Property, Intellectual Property, and Free Riding,* 83 TEX. L. REV. 1031, 1033 (2005).

[33] Helfer, *supra* note 5, at 4.

[34] See Srividhya Ragavan, *Protection of Traditional Knowledge,* 2 MINN. INTELL. PROP. REV. 1, 4 (2001); Graham Dutfield, TRIPS-RELATED ASPECTS OF TRADITIONAL KNOWLEDGE, 33 CASE W. RES.J.INT'L L. 233 (2001); Madhavi Sunder, *The Invention of Traditional Knowledge* (U.C. Davis Legal Stud. Res., Res. Paper No. 75, 2006), *available at* http://ssrn.com/abstract=890657.

[35] The Convention contains language about the protection of genetic resources and on access to the benefits derived from these resources. See generally Raustiala & Victor, *supra* note 10; Sabrina Safrin, *Hyperownership in a Time of Biotechnological Promise,* 98 AM. J. INT'L L. 4, 641 (2004).

[36] International Labor Organization, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989. 28 I.L.M. 1382.

[37] Food and Agriculture Organization, International Treaty on Plant Genetic Resources for Food and Agriculture, Nov. 3, 2001, http://www.fao.org/ag/cgrfa/itpgr.htm (last visited June 27, 2006).

a legally-binding international agreement on the protection of traditional knowledge.[38] These efforts reflect the fact that many perceive unfairness in a system in which refined products based on traditional knowledge and genetic resources are often protected via international IP law, but the underlying traditional knowledge and resources are not. And there are complex issues of spirituality and cultural survival at stake in the use of traditional knowledge and folklore by others.[39]

Yet the proper solution to these problems is not to simply to use international law to create more property—however typical that reaction might be.[40] In practice propertization will serve to wall off still more from the public domain, draining still further an already reduced global commons.[41] Advocates for the legal protection of traditional knowledge counter that the collective wisdom and folklore encompassed by the term traditional knowledge should never have been considered within the public domain in the first place, as the indigenous groups that possess and created traditional knowledge consider it to be theirs to control and use. While compelling in some respects, these arguments fail to recognize a fundamental distinction between local rules and international rules. No one advocates forcing new rules of IP upon indigenous tribes themselves; they are free, subject to national law, to devise whatever rules about traditional knowledge that best fit their needs and preferences. Rather, the tribes and their advocates are seeking new *international* IP rules to protect traditional knowledge. As noted earlier, international rules necessarily reflect compromises among diverse societies, albeit compromises that often are wildly uneven. Once the question becomes "what international IP rules relating to traditional knowledge ought to exist?", convincing arguments in favor of new or expanded property rights must appeal to the bedrock principles that generally undergird property rights at the international

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[38] *WIPO Committee on Traditional Knowledge, Genetic Resources Suspends Discourse Until December*, 10 BRIDGES WKLY. TRADE NEWS DIG., May 3, 2006, http://www.ictsd.org/weekly/06-05-03/story5.htm (last vistied June 27, 2006).

[39] MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2003); Angela Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175 (2000); VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS (Stephen Brush and Doreen Stabinksy eds, 1996); Dutfield, *supra* note 34.

[40] *See* Sabrina Safrin, *Chain Reaction: How Property Begets Property*, Intellectual Property Scholars Conference, Boalt Hall L. School (forthcoming, August 2006).

[41] *See, e.g.*, James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROB. 33 (2003); *cf.* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004).

level. Or they must compellingly propose new fundamental principles. Simply declaring that traditional knowledge is being pirated or stolen, or that certain groups are harmed by the lack of protection, begs the question. And on a more practical level, the creation of legally-protected property rights may not only reduce the public domain; such rules may produce negative effects on indigenous communities themselves. As Keith Maskus and Jerome Reichman have argued, legal protection of traditional knowledge may "make innovation and creativity more difficult in the very countries that are the richest suppliers of traditional knowledge."[42] While we cannot know for sure whether this is true, the rush to create stronger property rights ought to consider these sorts of questions.

Traditional knowledge is hardly the only area in which new international-protected IP rights have been proposed: there are efforts underway today to negotiate new international rules on broadcast rights, audiovisual performances, and patents,[43] as well as efforts to further protect through international law the signifiers known as "geographic indications." Geographic indications well illustrate the pitfalls of the incompletely-scrutinized production of IP rules. Geographic indications are indications of source that are akin to trademarks, but pertain to regions rather than producers. These regions can be vast, ranging from small farming areas to entire countries. Geographic indications themselves range from the familiar "champagne" to the much less familiar "turron de alicante."[44] Nearly all pertain to agricultural products, among the most economically-protected sectors in the world.

IP rights often reflect rent-seeking efforts by producers, who try to use the lawmaking process to leverage their political strength in an effort to segment and protect markets against increasing competition.[45] This rent-seeking behavior is especially transparent in the case of geographic indications.[46] Geographic indications are currently protected by

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[42] Maskus & Reichman, *supra* note 27, at 30.
[43] Helfer argues these efforts are currently stymied. Helfer, *supra* note 5, at 2.
[44] A kind of Spanish nougat candy.
[45] As Maskus and Reichman argue, "[T]he progressive re-regulation of world markets for knowledge goods is not driven by a broad consensus of economic agents in the developed world. Rather, pressure to elevate IP norms are exerted by powerful private interests whose lobbying activities hold sway in legislative and regulatory initiatives in rich countries and international forums." Maskus & Reichman, *supra* note 27, at 7.
[46] An analysis of the merits of geographic indications is contained in Kal Raustiala & Stephen R. Munzer, *The Global Conflict Over Geographic Indications*, 2006 (unpublished research paper, UCLA) (on file with author)*; see also* Tomer Broude, *Taking "Trade and Culture" Seriously:*

TRIPs due to their great economic and political importance in Europe. The existing TRIPs standard for geographic indications for products *other than* wine and spirits is a reasonable one—essentially, no misleading uses of geographic place-names. One cannot deceive consumers about the source of the product. Yet today Europe is spearheading political efforts aimed at expanding the ambit of the wine and spirits standard. The higher wine and spirits standard bans even non-misleading uses of a place-name, such as "Port-style wine from California," "Australian Champagne," or "Danish Feta Cheese."[47] The European Union wants to extend this stricter standard to other agricultural products, such as cheeses and traditional meats.

Although its current limitation to certain alcoholic beverages is certainly somewhat arbitrary, the solution is not to take a bad rule and apply it to more widely. In addition to unjustifiably carving yet more out of the public domain, a chief effect of expanding the wine and spirits standard will be to reduce consumer welfare by sowing greater confusion in the marketplace. The non-wine and spirits standard clearly serves to protect against consumer confusion and reduce search costs, much like trademark law does. But there is little confusion in the phrase "Port-style wine from California," and other plausible rationales for such strong IP protection—whether drawn from Lockean labor desert theory, continental moral rights traditions, or utilitarian analysis—are not especially robust.[48] And eliminating the right to use the phrase "Port-style" will raise, not lower, consumer search costs. Producers in California and other regions will have to say something like "Fortified wine," which encompasses not only Port but a host of other beverages, such as Sherry and Madeira.

At the same time that new or non-standard rights are undergoing more active debate globally, established IP rights are becoming ever stronger and ever more creatively protected, both at the domestic and the international levels. Given this backdrop of accelerating propertization, any merging of human rights and IP law must take political reality into account. While well-intentioned, human rights rhetoric may well aid, rather than hinder, all these efforts at enclosure, in the process exacerbating an already troubling erosion of the

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Geographic Indications and Cultural Protection in WTO Law (Hebrew U. of Jerusalem, 2005), *available at* http://ssrn.com/abstract=714981.

[47] On the latter example see the recent European Court of Justice decision in Joined Cases C-465 & 466/02, F.R.G. & Den. v. Comm'n of the Eur. Cmty.,2005 E.C.R. I-0000. This ruling bars other EU producers from using the word 'feta,' despite the fact that feta is not a place in Greece, or anywhere else for that matter. 'Feta' is a Greek word roughly translatable as 'slice.'

[48] See Raustiala & Munzer, *supra* note 46, for an elaboration.

public domain. This is not to imply that there is little that is positive in the expanding marriage of human rights and IP. As noted above, there are significant efforts to use human rights instruments and concepts to roll-back some of the more egregious elements of TRIPs. The WHO draft Medical Research and Development Treaty, for instance, requires states to create certain exceptions to patent rights for medical research purposes, a potentially salutary provision (though it is too soon to say, as the treaty remains unfinished). And the proposed WIPO Access to Knowledge treaty similarly promotes open source models of innovation and creativity, and aims to restrict some of the more expansive property rights claims in the areas of patent and copyright.

But current international rulemaking efforts go beyond this useful correctives to seek to restrain the free use of expressions and inventions. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, for instance, hands a useful tool to states that prefer to protect local producers of cultural products against foreign ones. It declares that states have the sovereign right to "adopt measures and policies to protect and promote the diversity of cultural expressions within their territory."[49] In spelling out the varied regulatory measures and other measures that states can take in this regard, which include special protections for domestic producers, the treaty legitimizes the economic protection and subsidization of certain producers of cultural property over others. I share the concerns of proponents of the UNESCO agreement about the possible erosion of local, traditional practices and cultural expressions. And most of the treaty is either benign or ambiguous. Yet we must tread carefully in seeking to use law to protect culture against influences from abroad. In many respects the world gains enormously from the relatively free movement of cultural genres and expressions around the globe. One need not accept strong claims about the desirability of creolization and hybridity, whether from progressive cosmopolitans or from libertarians,[50] to recognize that much can be lost by agreements like the UNESCO accord, which will inevitably be used in an effort to protect politically-well-connected producers and deny individuals access to the full scope of human creative endeavor.

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[49] UNESCO, Convention on the Protection and Diversity of Cultural Expressions art. 2, 5, Oct. 20, 2005, http:// unesdoc.unesco.org/images/0014/001429/142919e.pdf (last visited June 27, 2006).

[50] *See, e.g.*, KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (2006); TYLER COWEN, CREATIVE DESTRUCTION (2002).

At this juncture it is difficult to say what the overall effects of these varied legislative efforts will be. More significant than any specific agreement or text are the possible political effects of incorporating the human rights paradigm into IP law. The international propertization movement may continue, and even strengthen, without the addition of human rights concepts and rhetoric. And the addition of human rights concepts and interests into the IP debate has undoubtedly yielded salutary benefits. But the risk is that the language and politics of human rights, as it filters into the language and politics of IP rights, will make it harder for governments to resist the siren songs of those seeking ever more powerful legal entitlements. It remains to be seen whether the marriage of human rights and IP will make international IP rights more socially just, or just more powerful.

III. Conclusion

The increasing intersection of IP and human rights appears inevitable, and it will alter the shape and the trajectory of new legal rules in both camps. To understand the future of both IP and human rights law we must think systematically about how the rising density of the international system affects the processes of rulemaking. At the same time we must be cautious about the ways these two areas of international law, both of which are increasingly central to world politics, interact and overlap. Given the pernicious effects of overly-robust IP protection on many individuals and societies around the world, this combination may produce many beneficial effects. But it is not likely to be entirely laudatory. *Toward a Human Rights Framework*, by beginning to systematically analyze these positive and normative questions, takes an important step toward improving our understanding of this new dimension of global lawmaking.