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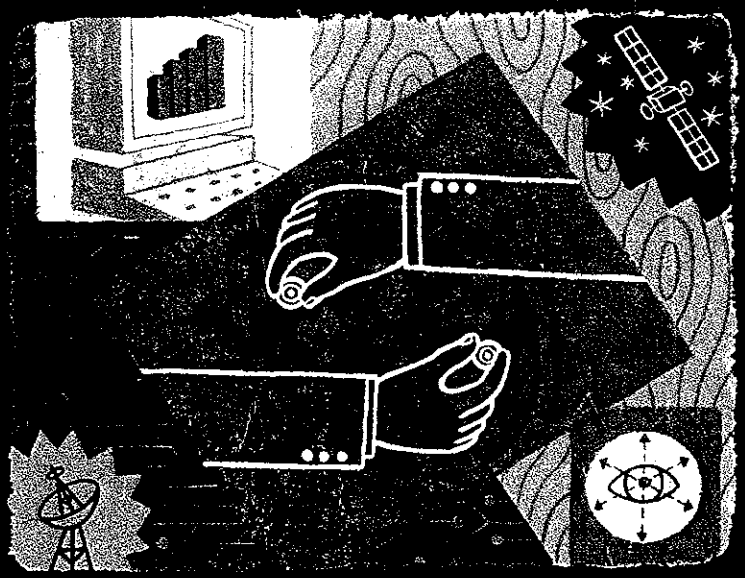
INTELLECTUAL PROPERTY AND



INFORMATION WEALTH

Issues and Practices in the Digital Age

VOLUME FOUR
INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY

EDITED BY PETER K. YU

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INTELLECTUAL PROPERTY AND INFORMATION WEALTH

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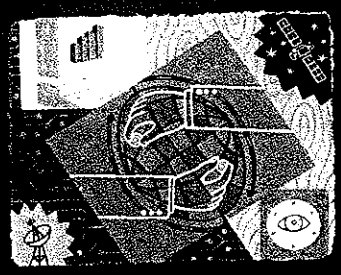
Four Volumes



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In today's knowledge-based economy, intellectual property protection has taken on fundamentally new proportions, with profound implications for business, law, policy, and culture. Featuring insights from leading scholars and practitioners, *Intellectual Property and Information Wealth* brings new clarity to the issues, providing rigorous analysis, historical context, and emerging practical applications from the public, private, and non-profit sectors.

Volume 1 focuses on protections to novels, films, sound recordings, computer programs, and other creative products and covers such issues as authorship, duration of copyright, fair use of copyrighted materials, and the implications of the Internet and peer-to-peer file sharing.

Volume 2 explains the fundamental protections to inventors of devices, mechanical processes, chemical compounds, and other inventions and examines such issues as the scope and limits of patent protection, research exemptions and infringement, IP in the software and biotech industries, and trade secrets.

Volume 3 looks at the protections to distinctive symbols and signs, including brand names and unique product designs, and features chapters on consumer protection, trademark and the first amendment, brand licensing, publicity and cultural images, and domain names.

Volume 4 takes the discussion to the global level, addressing a wide range of issues, including not only enforcement of IP protections across borders, but also their implications for international trade and investment, economic development, national sovereignty, human rights, and public health.

PETER K. YU is Associate Professor of Law and Founding Director of the Intellectual Property and Communications Law Program at Michigan State University College of Law. He also holds appointments in the Asian Studies Center and the Department of Telecommunication, Information Studies and Media at Michigan State University. A leading expert in international intellectual property and communications law, he is the author or editor of several books, including *International Intellectual Property Law and Policy*, *The Marketplace of Ideas*, and *Russian Media Law and Policy in the Yeltsin Decade*.

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Doing Deals with Al Capone: Paying Protection Money for Intellectual Property in the Global Knowledge Economy

Peter Drahos

This chapter makes the assumption that there can be too much intellectual property. In other words, if states continue to increase and increase standards of intellectual property protection, at some point they will produce suboptimal outcomes for themselves. This assumption would have universal support among economists. It is explained schematically below.

The next section explains how the United States is globalizing and at the same time increasing standards of intellectual property protection. One clear effect of this is that the United States is gaining the possibility of increased economic rents from its intellectual property assets. However, setting higher standards of intellectual property is one thing and getting developing countries to comply with those standards is another. Section three then explains how the dispute resolution chapters of free trade agreements (FTAs) fit in with U.S. enforcement strategy on intellectual property.

The final section assumes, for the purposes of argument, that standards of intellectual property may be approaching suboptimal levels for the United States. This raises two important questions. Can we expect the United States to change its strategy on intellectual property? Can we expect that developing countries will stop signing FTAs with the United States that contain intellectual property chapters? The chapter offers reasons for why the answer to both these questions is likely to be no.

TOO MUCH INTELLECTUAL PROPERTY?

Economic theory suggests that a society that had no intellectual property protection at all would almost certainly not be allocating resources to invention and creation at an optimal level.[1] But equally, a society that went to extremes of protection would almost certainly incur costs that exceeded the benefits. Intellectual

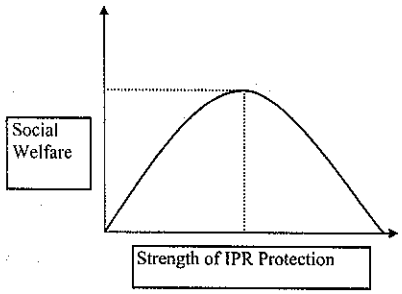

Figure 5.1 The Strength of Intellectual Property Standards and Social Welfare.

property rights permit owners to exclude people from the use of socially valuable information. At some point, maintaining this power of intellectual property owners becomes too costly in terms of social welfare. The rules of arithmetic, for instance, can be used and reused endlessly. The costs of excluding people from the use of these rules would be very high in economic terms and in terms of basic human freedoms. Figure 5.1 captures the idea that one can have too much intellectual property protection.

The claim that there is a level of intellectual property protection that produces an optimal outcome in terms of social welfare raises an important issue in the context of development. Are there different optimal points for countries at different stages of development? It is clear that imitative production and learning are important to developing countries. Multinationals operating in developing countries typically do so with higher levels of knowledge assets than domestic firms. There is scope for domestic firms to benefit from this positive externality. Whether domestic firms make productivity gains is profoundly affected by the property rules that govern imitative production. Imitative production and learning requires an appropriately designed set of intellectual property rights (e.g., rules that permit some degree of reverse engineering).

Imitative production typically requires less capital, a factor that is important in developing countries. If, following Coase, we think of property rights as a factor of production, it follows that those property rights should be designed in ways that match the comparative advantage that a country has in other factors of production.[3] This suggests that there will be real long-run costs for developing countries if they continue to participate in a global regime of intellectual property rights that continues to ratchet up standards of protection. Much the same conclusion follows from the theory of comparative capitalism.[4] This theory suggests that countries must choose their system for regulating intellectual property with an eye to how it will fit other crucial legal and industry policy institutions, from competition policy to labor market policy. Property and these other institutions

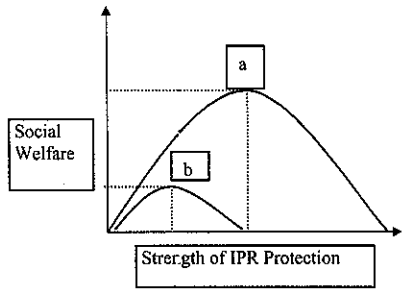

Figure 5.2 Different Optimal Points for Different Countries.

form an organic whole. Whether or not particular property rights contribute to the well-being of the whole is a matter of careful diagnosis. Crucially, just like a physician, countries must have the freedom to design the right treatment once the diagnosis has revealed the source of the problem. As Jeffrey Sachs says, development economics must strive to be more like clinical medicine in its approach to problems.[5] The idea that there are different optimal points of intellectual property protection for different countries is captured in Figure 5.2. Even if there are benefits for New Guinea in having a patent system (and this is an open question), an optimally designed patent system for New Guinea is likely to be very different from that for the United States. In Figure 5.2 Country b's optimal point of intellectual property protection is well and truly passed by the standards of protection required in order for Country a's optimal point to be reached.

This brief analysis of the economics of intellectual property in the context of economic development suggests that it would be prudent for states to retain design sovereignty over intellectual property rights. Moreover, given the differences of development among nations, one might expect to find a real diversity of standards of intellectual property protection. Yet, the one outstanding feature of intellectual property rights has been their relentless expansion in scope and strength in the second half of the twentieth century. Old forms of protection such as patent law and copyright have been expanded to accommodate new types of subject matter, such as business methods in the case of the former and computer software in the case of the latter. New types of protection have come into (e.g., protection for semiconductor chips, plant varieties, and databases), and at the international level there has been a steady growth in the number of international treaties. In the nineteenth century, two important multilateral agreements on intellectual property were negotiated by some states: the Berne Convention for the Protection of Literary and Artistic Works (1886) and the Paris Convention for the Protection of Industrial Property (1883). Today, the World Intellectual Property Organization administers some twenty-three treaties

on intellectual property. There are hundreds of agreements at the bilateral and regional levels that contain chapters on intellectual property. Most importantly, all the members of the World Trade Organization (WTO)—currently 149—have to comply with the standards of protection that are set down in the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS). The role that the WTO and TRIPS plays in the expansion of intellectual property rights is discussed in the next section.

THE GLOBAL INTELLECTUAL PROPERTY RATCHET

TRIPS was probably the most important agreement on intellectual property in the twentieth century, because it connected intellectual property standards to the tools of trade enforcement.[6] It was the most important so far as pharmaceutical multinationals were concerned, because it meant that countries like India, which had major generic producers, had to grant patents on pharmaceutical compounds as a matter of domestic law.[7] The elaborate ironwork of all patenting strategies for blockbuster drugs rests on key patents that protect the compound. Without such patents, generic companies may compete and the price of the compound inevitably declines.[8]

During the 1980s, the United States had set the scene for TRIPS through a series of strategic bilateral negotiations on intellectual property with countries like South Korea and Brazil. An incentive that was held out to developing countries for the successful negotiation of TRIPS was that the United States would desist from using its trade enforcement tools to obtain the standards that it wanted.[9]

After TRIPS was concluded, the United States actually intensified the level of its bilateral activity. It used its trade enforcement tools under its Trade Act of 1974 to review the intellectual property standards of more and more countries, and it concluded many more bilateral agreements related to intellectual property than it had in the 1980s.[10] In effect, it had created, without anybody really noticing, a global regulatory ratchet for intellectual property. The United States was the principal architect of this ratchet, with the European Union also making use of it to a lesser extent.[11]

In short, this ratcheting process is dependent on

(a) process of forum shifting—a strategy in which the United States and the European Union shift the standard-setting agenda from fora where they are encountering difficulties to those fora where they are likely to succeed;
(b) coordinated bilateral and multilateral strategies for intellectual property; and
(c) the entrenchment in agreements on intellectual property of a principle of a minimum-but-not-maximum standard of protection.

Forum shifting in international regulation is made up of three basic strategies—moving an agenda from one organization to another, leaving an

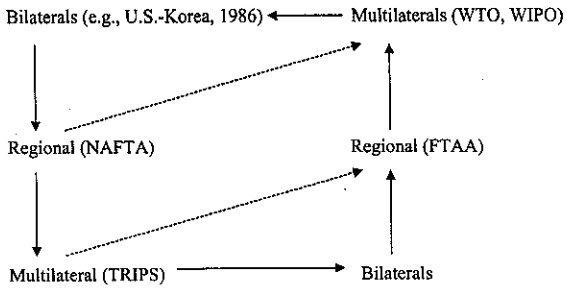

Figure 5.3 The Global Intellectual Property Ratchet.

organization, and pursuing agendas simultaneously in more than one organization.[12] The basic reason for forum shifting is that it increases the forum shifter's chances of victory. The rules and modes of operation of each international organization constitute the payoffs that a state might expect to receive if it plays in that particular forum. Forum shifting is a way of constituting a new game. Facing defeat or a suboptimal result in one forum, a state may gain a better result by shifting its agenda to a new forum. In their study of global business regulation, John Braithwaite and I found that forum shifting had become important after the Second World War and that the United States was the main state to make use of it.[13]

The principle of minimum-but-not-maximum protection plays a vital role in the regulatory ratchet. Each bilateral or multilateral agreement dealing with intellectual property contains a provision to the effect that a party to such an agreement may implement more extensive protection than is required under the agreement or that the agreement does not derogate from other agreements providing even more favorable treatment.[14] This means that each subsequent bilateral or multilateral agreement can establish a higher standard. The ratchet, therefore, can only travel in the direction of stronger standards.

The global ratchet for intellectual property consists of waves of bilaterals (beginning in the 1980s) followed by occasional multilateral standard-setting exercises (see Figure 5.3). Each wave of bilaterals or multilateral treaty never derogates from existing standards and very often sets new ones.

The dash arrows indicate that the United States has the capacity and resources to pursue negotiations in different fora at the same time. Where the United States and the European Union are at any given moment in the cycle of ratcheting is determined essentially by how much effective resistance they are meeting in terms of their negotiating objectives. The bilateralism that preceded TRIPS and that laid the foundation for TRIPS was triggered by the resistance that the United States encountered on its intellectual property agenda at the GATT.[15] Presently, it is clear that the United States is in a bilateral phase. The Ministerial Declaration that launched the Doha round of multilateral trade negotiations in 2001

contained only a modest work program in relation to TRIPS, with geographical indications being the principal item listed for negotiation.[16] Bilaterally, however, the United States has been busily negotiating FTAs with countries such as Jordan, Chile, Singapore, and Australia. These countries are strategically important regional models. As Liew Woon Yin observes of the U.S.-Singapore FTA, it "was intended to be used as a template for future Asian FTAs with the United States."[17]

It is the United States, which stands to gain the most from trade in intellectual property-based assets, that is driving the global regulatory ratchet for intellectual property protection. Other FTAs that do not have the United States as a party contain much more modest chapters on intellectual property, because the parties are net intellectual property importers and have little to gain from raising the current international standards of protection. The FTA between Australia and Thailand, for example, contains a mere five articles on intellectual property.[18] It simply commits the two parties to TRIPS standards. Similarly, the Singapore-Australia FTA intellectual property chapter contains a modest seven articles.[19]

The focus on FTAs at this time can also be explained in terms of the effective resistance that the United States has been encountering at the TRIPS Council over the last several years.[20] The TRIPS Council was the venue in which African states in June 2001 launched an initiative aimed at examining the role of intellectual property rights in access to medicines. The end of 2001 saw WTO members agree to the Declaration on the TRIPS Agreement and Public Health, a declaration that the U.S. pharmaceutical industry counted as a blow against its interests and that it did its best to downplay.[21] Similarly, the review of Article 27(3)(b) of TRIPS that was started in 1999 has not run the way that the United States would have liked. In essence, the United States wants to bring TRIPS into line with what is its own domestic position: "virtually anything is patentable."[22] Instead, what eventuated during the course of the review was a very wide-ranging dialogue in the TRIPS Council that raised many issues about patents, including the need to better integrate the provisions of TRIPS with a regulatory approach toward biodiversity that states had agreed to in the context of the Convention on Biological Diversity.[23] Developing countries were able to resist U.S. proposals in the context of the TRIPS Council because outside of the Council they were being given assistance by civil society actors.[24] These actors were helping to provide technical expertise and, through global campaigning, proved highly effective at raising questions about the origins of TRIPS and its moral legitimacy. It was to the advantage of both civil society and developing countries that the TRIPS Council was one highly visible forum in which they could concentrate their resources. The response of the United States has been to focus on FTAs. In the FTAs that it has recently concluded, it has sought and in many cases obtained standards of intellectual property from the relevant state that bring that state closer to the U.S. domestic position.[25] These FTAs also increase the enforcement obligations of the United States, something that is discussed in more detail in the next section.

THE IMPORTANCE OF BILATERAL DISPUTE RESOLUTION FORA IN THE RATCHET

One of the features of the FTAs that the United States has signed is that the dispute settlement chapters contain choice-of-forum provisions that give the complaining state choice of forum in those cases where the state complained against has breached an obligation under more than one trade agreement and both states are parties to the relevant trade agreements.[26] The capacity of a strong state to choose, as it were, its legal battleground has important implications for weaker states, especially in those cases where the stronger state shifts the contest out of the multilateral setting of the WTO. One standard argument in favor of the WTO, recently repeated in a report on the future of the WTO, is that "no group has a greater interest [in the success of the WTO] than the weak and the poor."[27] If the United States and the European Union together create a bilateral network of trade rules dotted with enforcement mechanisms, then both will have increased their options for managing disputes with their various trading partners. It is true that all states that participate in this bilateral network will, as a matter of formal equality, increase their forum-shifting opportunities. However, as a matter of substantive equality, only a few states will have the capacity to exploit these opportunities. Weaker states will not necessarily be made better off in a world of bilateralized and enforceable trade rules. We shall see a little later that the highly organized intellectual property lobby groups in the United States have more incentive to use or threaten the use of the dispute resolution mechanisms in FTAs to enforce the intellectual property chapters of these agreements.

The proliferation of FTAs coupled with the high membership of the WTO may result in a situation where a state breaches an obligation that it has under more than one agreement. For example, the intellectual property chapters of U.S. FTAs are picking up some of the language of TRIPS, and so, in effect, states are agreeing to obligations they have already agreed to in the WTO context.[28] Instances of "double breach" in these U.S. FTAs are governed by a choice-of-forum provision.[29] In the words of the U.S.-Australia FTA, "the complaining party may select the forum in which to settle the dispute," and "the forum selected shall be used to the exclusion of others." The exclusion of other fora is contingent upon the complaining party requesting a panel, so presumably fora may be used in parallel until that event. This approach to choice of forum is not the only one that states might choose. An example of a different approach is to be found in Article 23.4(c) of the European Union–Chile FTA. Under this Article, a party that seeks redress for breach of an obligation that is also a breach of a WTO obligation "shall have recourse" to the WTO (unless both parties otherwise agree).[30] Importantly, under this approach, the WTO's Dispute Settlement Understanding (DSU) is made the first port of call and the complaining state cannot unilaterally decide to shift the dispute outside of the DSU.

There are incentives for some of the private arms of the public-private partnerships that drive U.S. trade litigation to lobby for a trade action to be brought under a FTA, rather than in the WTO.[31] To begin with, there will be cases

where the relevant FTA sets a standard that is not to be found in TRIPS (such as an extension of the copyright term, or an obligation on a drug registration authority to check for the existence of patents in relation to a drug registration application by a generic company), and so dispute resolution under the FTA will be the only option. There will be other situations in which a state that is a party to the TRIPS agreement and a FTA with the United States may breach an obligation that is common to both agreements. Which forum the United States decides to settle a dispute in will be affected by a variety of factors, but it is worth noting that U.S. FTAs on intellectual property contain more precisely articulated standards on some topics, whereas the TRIPS standard is somewhat vaguer and more open-ended. By way of example, Article 39(3) of TRIPS, which deals with the protection of data that are submitted by a pharmaceutical company to a drug registration authority for the purposes of obtaining marketing approval, does not specify a period of protection for those data. Subsequent U.S. FTAs have set a minimum standard of five years of protection.[32] In any dispute over the period of data protection, it would work to the advantage of the United States to have a specific standard to point to in the relevant FTA, rather than attempt the more difficult task of arguing that a specific term of protection had to be read into the TRIPS standard. Moreover, any dispute in TRIPS that related to public health and patents and that affected developing countries would be guaranteed to attract a large number of third parties. Certainly, developing country leaders such as Brazil and India would reserve third-party rights, and so probably would African countries that have become very active in the TRIPS Council on intellectual property rights and access to medicines issues.[33] Such a trade dispute would rapidly escalate into a complex coalitional confrontation, a coalitional confrontation that would contain the energetic hands of civil society groups to assist developing countries. For such reasons, FTA dispute resolution processes may well prove to be a more suitable forum in the eyes of the United States for settling disputes over intellectual property.

It is also worth noting that one option for a losing state under recent U.S. FTAs is the payment of a monetary assessment, a fine in other words. The possibility of obtaining a fine may have some influence on the preferences of U.S. intellectual property industries when it comes to choice of forum. Intellectual property lobby groups, such as the International Intellectual Property Alliance, have become adept at quantifying the size of their losses when it comes to matters of intellectual property infringement.[34] One practical concern for these groups is that litigation in the WTO, even if successful, does not require "that the sanctioning government provide help to the complaining private actors."[35] However, under the U.S.-Australia FTA, for example, there is nothing that would prevent the U.S. government, if it were successful in a dispute and Australia elected to pay a monetary assessment, from channeling some or all of this money back to the companies that claim to have been most damaged by the relevant measures. States may in certain cases prefer, for reasons of domestic politics, to buy their way out of their obligations, rather than change an infringing measure. If

Australia lost a trade case with the United States over its Pharmaceutical Benefits Scheme, for instance, it would be difficult for any Australian government to be seen to be introducing measures that went in the direction of increasing the price of medicines.[36] At least in some cases, members of the U.S. intellectual property industry might take the pragmatic view that the possibility of obtaining a monetary assessment that went some way to matching their lost royalties or sales was sufficient inducement for them to support bringing an action under a FTA.

Summing up, we can see that in the case of intellectual property there are incentives for both the U.S. government and U.S. companies to use the dispute settlement chapters of FTAs, rather than the WTO's DSU. There is one basic but important fact about obtaining higher standards from developing countries. If the United States does nothing to enforce these higher standards, then the potential economic rents that it has secured will be lost. As Michael Ranger has noted, creating the legal obligation to pay the United States billions in intellectual property revenue is not the same as collecting.[37] In much the same way that the United States has projected invincibility on the negotiation of these higher standards, it must also project the image of the relentless enforcer of these standards. At least in some cases, FTAs may be a better forum for the United States in which to settle a dispute over intellectual property rights.

CONCLUSIONS ABOUT THE FUTURE OF GLOBAL IP LAWMAKING

We saw from our discussion above that there are different optimal points for states when it comes to setting standards of intellectual property protection. This claim is true for developed countries as much as it is true for developing countries. Australia is the world's fifteenth largest economy, but its optimal mix of standards of intellectual property protection is lower than that of the United States. Prior to the FTA with the United States, it had been recognized for a long time in Australian policy circles that, from an economic point of view, Australia should only do what was minimally necessary when it came to complying with international standards of intellectual property protection.[38] In fact, one interesting possibility is that the United States itself may have pushed its own domestic standards past the optimal point of protection. There is, for example, a robust debate in the United States about the operation of its patent system with no shortage of proposals for reform. A recent report of the National Research Council, for example, noted that it was unclear to what extent the drive toward stronger patent protection created benefits beyond the narrow sector of pharmaceuticals and chemicals.[39]

If within the United States, there are growing doubts about the wisdom of continuing to ratchet up domestic standards of intellectual property protection, one might be tempted to conclude that the United States internationally will become more subdued in its demands for stronger and stronger protection. This is one possible scenario.

There is, however, another possible scenario in which the United States continues to promote high standards internationally while reforming its own system domestically to achieve a more optimal mix of standards from the point of view of innovation. In other words, the United States will play by one set of rules domestically and another different set internationally.

There are two basic strategies that the United States could follow to achieve this objective and more or less remain within its international obligations. The first rests on the fact that the FTAs that the United States signs are based on the principle of a minimum-but-not-maximum standard of protection. Under a FTA a state can if it so chooses move to higher standards of protection than are required under the agreement, and moreover it can do so unilaterally. So, for example, a state could move to a thirty-year patent term while the United States retained a term of twenty years. Likewise, a state could remove or reduce its capacity to issue government use licenses for patents while the United States retained its own capacity to do so. The United States could in its trade negotiations with other states continue to pressure them to move toward higher standards while not moving in this direction itself. Why states might agree to move in this direction is something we consider at the end of this section.

The second strategy the United States might use to drive up standards internationally while playing by different domestic rules is based on its domestic institutional capacities to lower the costs of high standard intellectual property protection. Countries like the United States that have had long historical experience with intellectual property have allowed stronger standards of intellectual property to emerge while at the same time developing other regulatory means by which to regulate the potentially high costs of these stronger standards. The most obvious examples of this are licensing systems that do not require the permission of the patent owner such as nonvoluntary licenses of right, compulsory licenses, and government use licenses. The legal detail of these systems varies from country to country, but the crucial point for present purposes is that licensing systems can be devised to offset the cost problems that high standards of intellectual property create.[40] Another example of an institution that regulates the cost of intellectual property is competition law (antitrust) through doctrines such as the essential facilities doctrine, abuse of market power, or the control of mergers.[41] Contract law, as the example of Free Software Foundation demonstrates, can also be used to entrench an access regime to intellectual property, thereby limiting its costs. Finally, the litigation market is itself a regulatory institution, and one that is especially important in the United States when it comes to regulating the costs of intellectual property.

The United States has the world's largest and richest market in high technologies. Companies wishing access to this market have every incentive to contest strong intellectual property standards that bar or limit access. More importantly, many of these companies also have the means to contest intellectual property rights in the courts. It is plausible therefore to claim that over time the litigation

market in the United States for intellectual property rights would evolve in the direction of efficient standards.

The United States is rich in range and experience when it comes to cost-regulating institutions for intellectual property. F.M. Scherer has noted that the United States has led the world in terms of the use of compulsory licenses as part of antitrust law.[42] Aside from its large litigation market, the United States also has social movements such as the Free Software Foundation and the Creative Commons that have devised innovative legal strategies for dealing with the costs of intellectual property. Returning to our argument we can see that it is an entirely plausible strategy for the United States to use the trade regime to ratchet up globally standards of intellectual property, on the basis of the assumption that it has a range of domestic regulatory institutions at its disposal to contain the costs of these higher standards.

This strategy is not the outcome of planning by the United States Trade Representative, but rather the product of the interest group politics and lobbying that lies behind U.S. trade policy. For example, second- and third-generation software companies have every reason to contest Microsoft's use of copyright and patents to prevent competition in various software markets in the United States (as well as in Europe). They have comparatively little incentive to contest markets in countries like Vietnam and Laos. Microsoft, because it has a global standard in its operating system, fights globally for the protection of that standard. So it lobbies the USTR to ensure that countries like Vietnam and Laos enact strong copyright laws and enforce them. It is a similar story for pharmaceuticals. U.S. generic companies have every incentive to contest patent standards in the U.S. market because it is the richest market. U.S. generic companies do not much care about the pharmaceutical markets in Vietnam and Laos, because they cannot compete with cheaper generic companies from India and China. When the U.S. trade representatives negotiate intellectual property rights with a Vietnam or Laos, the phone calls they take come from those companies that have global standards and products to defend using intellectual property rights. U.S. negotiators can be responsive to those calls and push for those higher standards in trade negotiations with developing countries, knowing that, back in the U.S. market, there are many ways in which U.S. companies can fight the costs of higher standard intellectual property rights. There are also incentives of a deeply personal kind for U.S. negotiators to be responsive to the demands of multinational owners of intellectual property. If those negotiators commit to the cause of higher and higher intellectual property rights, they increase their chances of walking through the revolving door into a highly paid lobbying job with one of those companies.

When developing country negotiators sit across the table from U.S. trade negotiators, they find those negotiators insisting that stronger U.S. intellectual property standards have benefited the U.S. economy and will similarly benefit the developing country economies. This is a clever partial truth. In a high technology economy like the United States, strong intellectual property rights play a role in

signaling to venture capital markets. But at the same time, high technology markets in innovation could not work without investment in public goods and without institutions that regulated the costs of those strong intellectual property standards.

Most developing countries do not have the institutional capacity to regulate the costs of strong intellectual property rights in the way that the United States is able to do so. Typically these countries lack experience in issuing compulsory licenses, do not have a tradition of competition law, lack strong litigation markets, and have low levels of local legal expertise in intellectual property. Indonesia, for example, has about forty patent attorneys, only ten of whom have a viable patent practice.[43] This leads into the second issue that we raised at the beginning of the chapter. Can we expect developing countries to stop signing FTAs with the United States that impose on them obligations to enact in domestic law higher and higher intellectual property standards?

One obvious reply to this question is that developing countries will continue to sign such FTAs with the United States so long as they calculate that a FTA with the United States will confer an overall benefit on them. In other words, developing countries will be prepared to take losses on intellectual property in order to make gains in other areas such as agriculture. This raises a complex empirical issue, which is beyond the scope of this chapter to answer, as to whether in fact developing countries are actually making gains in FTAs. There is evidence to suggest that superior bargaining power is at work in shaping North-South FTAs in favor of the larger Northern country.[44] Moreover, there is a more or less overwhelming argument that developing countries would do better to pursue agricultural liberalization in the WTO.[45] FTAs are delivering little in terms of agricultural liberalization. It is not obvious that developing countries are making great negotiating gains in other sectors to justify the concessions they are making in intellectual property to the United States. Of course, it may be that developing countries are making these concessions in intellectual property on the assumption that their patchy domestic enforcement of intellectual property rights will reduce the economic losses of these concessions.

There may also be running in the background a non-economic calculation that helps to explain the actions of developing countries. In some realist approaches to international relations, the desire for security is thought to explain the motivation and conduct of states.[46] In a world where there is one great power, smaller states might seek trade agreements with that power, calculating that the deepening of economic relations with that power will also help to improve their security. On this line of argument, FTAs are part of a broader defensive strategy by smaller states. Smaller states know that the United States by virtue of its superior bargaining power will dictate tough terms, but motivated by concerns of security they reason that it is better to have a bad deal with the United States than to have no deal at all. The bad deal becomes the price of a relationship that is important in the broader context of security interests. Robert Keohane's image of the "Al Capone alliance" may also be relevant here. In this type of alliance

"remaining a faithful ally protects one not against the mythical outside threat but rather against the great power ally itself, just as, by paying 'protection money' to Capone's gang in Chicago, businessmen protected themselves not against other gangs but against Capone's own thugs."[47]

It is clear that post-9/11 U.S. trade policy has become much more integrated into an overall strategy on security. Thirteen days after 9/11, the USTR Robert Zoellick gave a speech in which he quoted with approval a statement by Congressman John Tanner: "America's place in the world is going to be determined by trade alliances in the next ten years in combination with the military alliances that have determined our place in the past."[48] It is also clear that, for some countries, at least the boundaries between security and commercial interests have become blurred, with the result that the benefits of FTAs with the United States are no longer just being calculated in terms of the dollars and cents of trade flows. The Final Report of the Select Committee on the Free Trade Agreement between Australia and the United States draws attention to the importance of the FTA in the context of broader security alliance between the Unites States and Australia.[49] In interviews I conducted at the Ministry of Economic Development in New Zealand in April 2005, officials were asked whether New Zealand would welcome a FTA with the United States. The answer was a very definite yes even though "the US has very little to offer the NZ" in economic terms. For New Zealand, concluding a FTA with the United States "has become a holy grail for both sides of politics" and would be "coming in from the cold for New Zealand." The reference to "coming in from the cold" relates to the fact that the United States in 1986 withdrew from its security obligations toward New Zealand under the Australia, New Zealand, United States Security Treaty, because of New Zealand's policy of not allowing visits by ships carrying nuclear weapons.

The idea of the Al Capone alliance in international relations helps to make sense of a puzzling phenomenon surrounding some FTA negotiations between two intellectual property importers. We saw earlier that, when Thailand and Australia negotiated a FTA, they simply agreed to follow TRIPS standards. This is precisely the agreement one would have expected from two intellectual property importers: do the international minimum on intellectual property, but no more. Fieldwork interviews I carried out in the Asia Pacific region in 2005 have found results that appear to contradict what one might predict to be the case on a priori grounds. New Zealand in its FTA negotiations with Singapore and Chile received demands for higher standards of intellectual property, demands that it successfully resisted.[50] Australia is seeking from Malaysia intellectual property standards beyond those required by TRIPS.[51] This surprised Malaysian negotiators who were hoping for an approach on intellectual property that was modeled on the Australia-Thailand FTA. It has also been reported recently that Australia, in its FTA negotiations with China, has tabled a draft text on intellectual property that goes well beyond TRIPS. The text has had "a sobering influence" and has "set the Chinese side back a bit," according to David Livingstone, the Australian IP negotiator.[52]

Three states, Australia, Singapore, and Chile, having signed FTAs with the world's last remaining superpower, appear to have become proselytes of U.S. intellectual property standards in their trade negotiations with third parties. Their conversion may have everything to do with the Al Capone factor. It is better, for example, for Australia to be seen to be responsive to U.S. pressure to push for high intellectual property standards in their negotiations with third parties than to risk offending those U.S. officials who are urging Australia to do this pushing. If Australia tries and fails with Malaysia or China, then nothing is lost in terms of the relationship with the United States. In the unlikely event that Australia succeeds with China on intellectual property, Australia will have conferred a great benefit on the United States via the TRIPS MFN clause. Either way, once security enters the calculations of states, the option of pleasing power looks like the right one, just as it did for many businessmen in Chicago in the 1920s.

Summarizing, we can see that states are likely to continue to agree to the United States' terms when it comes to intellectual property rights in FTAs because they believe (1) they will make compensating gains in other parts of the agreement, (2) they can reduce the economic loss of these higher standards by adopting a go-slow approach on enforcement, or (3) that the mere fact of the agreement provides a relationship gain of some kind, especially in the context of securing. The United States has every incentive to continue to pursue its agenda on intellectual property by means of FTAs. There is little prospect of it gaining higher standards in the WTO. The dispute resolution chapters of FTAs offer it a simpler environment, compared with the complex coalitional politics of WTO dispute resolution, in which to pursue enforcement of these standards. The United States can also control the potentially damaging effects of excessive intellectual property protection on its domestic economy by relying on other regulatory institutions such as litigation markets, contract law, and antitrust. By obtaining higher standards (and eventual compliance with those standards), the United States would be increasing the economic rent it obtains for its intellectual property assets from developing countries. Moreover, the United States would take the view that these higher economic rents are fair compensation for allowing developing countries greater access to its markets. No doubt this is a view of fairness that developing countries would contest.

The upshot of our analysis is that the United States will, for the foreseeable future, continue to lead the world into an era of higher and higher standards of intellectual property and that many states will on the basis of self-interested calculations follow it. As individuals in large developing countries grow wealthier, one would expect that there would be considerable interest in the purchase of U.S. companies rich in intellectual property assets. In globalized markets where companies can be bought and sold, a larger and larger percentage of the rents that flow from U.S. intellectual property assets will end up in foreign pockets. The fact that some individuals will massively benefit from monopoly privileges in intangibles does not change the fact that eventually all countries will end up at their optimal point of protection. One suspects that many, if not most, already are.

NOTES

1. William M. Landes & Richard A Posner, The Economic Structure of Intellectual Property Law (2003).
2. Holger Görg & Eric Strobl, *Multinational Companies and Productivity Spillovers: A Meta Analysis*, 111 Econ. J. F723 (2001).
3. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).
4. Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in Varieties of Capitalism 1 (Peter A. Hall & David Soskice eds., 2001).
5. Jeffrey D. Sachs, The End of Poverty 75 (2005).
6. It was as Jerome Reichman observes "a revolution in international intellectual property law." See J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 Case W. Res. J. Int'l L. 441, 442 (2000). The history of TRIPS has been well documented. See Peter Drahos with John Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? (2002); Duncan Matthews, Globalising Intellectual Property Rights (2002); Michael P. Ryan, Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property (1998); Susan K. Sell, Private Power, Public Law: The Globalization of Intellectual Property Rights (2003).
7. See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].
8. For a discussion of the price effects of generic competition, see Fed. Trade Comm'n, Generic Drug Entry Prior to Patent Expiration: An FTC Study 9 (2002).
9. See, for example, the statement by a member of the office of the USTR Emory Simon in *Remarks of Mr. Emory Simon*, 22 Vand. J. Transnat'l L. 367, 370 (1989).
10. See Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J. World Intell. Prop. 791 (2001).
11. John Braithwaite & Peter Drahos, Global Business Regulation 566 (2000).
12. For a detailed explanation of this strategy and some examples, see *id.* ch. 24.
13. *Id.* at 564–565.
14. See, e.g., North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, art. 1702, 32 I.L.M. 289 (1992); TRIPS, *supra* note 7, art. 1(1); United States–Australia Free Trade Agreement, U.S.-Austl., art. 17.1.5, May 18, 2004, available at http://www.ustr.gov/ [hereinafter U.S.–Australia FTA]; United States–Jordan Free Trade Agreement, U.S.-Jordan, art. 4.1, Oct. 24, 2000, available at http://www.ustr.gov/.
15. Drahos with Braithwaite, *supra* note 6, at 134.
16. See World Trade Org. [WTO], Doha Ministerial Declaration of 14 November 2001 ¶¶17–18, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).
17. Liew Woon Yin, *Intellectual Property Rights*, in The United States Singapore Free Trade Agreement: Highlights and Insights 123, 126 (Tommy Koh & Chang Li Lin eds., 2004).
18. See Chapter 13 of the Thailand–Australia Free Trade Agreement.
19. See Chapter 13 of Singapore–Australia Free Trade Agreement.
20. Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 J. World Intell. Prop. 765, 780–783 (2002).
21. See Susan K. Sell, *TRIPS and the Access to Medicines Campaign*, 20 Wisc. Int'l L.J. 481, 518–519 (2002).

22. See *Hughes Aircraft Co. v. United States*, 148 F.3d 1384, 1385 (Fed. Cir. 1998).

23. For an analysis of the responses to TRIPS by NGOs and developing states, see Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 Yale Int'l L.J. 1 (2004); see also Boniface Guwa Chidyausiku, *Article 27.3(b) of the TRIPS Agreement: The Review Process and Developments at National and Regional Levels*, in Trading in Knowledge 101 (Christoph Bellmann, Graham Dutfield & Ricardo Melendez-Ortiz eds., 2003).

24. See Sell, *TRIPS and the Access to Medicines Campaign*, *supra* note 21, at 481; Ruth Mayne, *The Global Campaign on Patents and Access to Medicines: An Oxfam Perspective*, in Global Intellectual Property Rights: Knowledge Access and Development 244 (Peter Drahos & Ruth Mayne eds., 2002).

25. Under the Bipartisan Trade Promotion Authority Act of 2002, the Congress has stated that one overall negotiating objective for the United States is to obtain in bilateral and multilateral agreements provisions that "reflect a standard of protection similar to that found in United States law." 19 U.S.C. § 3802 (2004).

26. See Central America–Dominican Republic Free Trade Agreement, May 28, 2004, art. 20.3, available at http://www.ustr.gov/; U.S.–Australia FTA, *supra* note 14, art. 21.4; United States–Bahrain Free Trade Agreement, Sept. 14, 2004, U.S.-Bahrain, art. 19.4, available at http://www.ustr.gov/; United States–Chile Free Trade Agreement, U.S.-Chile, art. 22.3, June 6, 2003, available at http://www.ustr.gov/ [hereinafter U.S.–Chile FTA]; United States–Morocco Free Trade Agreement, June 15, 2004, U.S.-Morocco, art. 20.4, available at http://www.ustr.gov/; United States–Singapore Free Trade Agreement, U.S.-Sing., art. 20.4.3, May 6, 2003, available at http://www.ustr.gov/.

27. See WTO, The Future of the WTO: Report by the Consultative Board to the Director-General Supachai Panitchpakdi ¶53 (2004).

28. For an example of this, compare U.S.–Australia FTA, *supra* note 14, art. 17.9.1 with TRIPS, *supra* note 7, art. 27(1). Both deal with patentable subject matter.

29. See, e.g., U.S.–Australia FTA, *supra* note 14, art. 21.4; U.S.–Chile FTA, *supra* note 26, art. 22.3.

30. See chapter III, article 4(c) of the European Union–Chile FTA.

31. On the way these partnerships work, see Gregory C. Shaffer, Defending Interests: Public-Private Partnerships in WTO Litigation (2003).

32. *See, e.g.*, U.S.–Australia FTA, *supra* note 14, art. 17.10.1(a). For a full comparison of TRIPS and FTAs on data exclusivity, see Carlos M. Correa, *Protecting Test Data for Pharmaceutical and Agrochemical Products under Free Trade Agreements*, in Negotiating Health: Intellectual Property and Access to Medicines 81 (Pedro Roffe, Geoff Tansey & David Vivas Eugui eds., 2006).

33. For a detailed analysis of the role of developing countries in the recent negotiations in the TRIPS Council over public health and intellectual property, see Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 Am. J. Int'l L. 317 (2005).

34. The methodology that the International Intellectual Property Alliance uses to estimate the size of trade losses due to piracy is described in http:www.iipa.com/pdf/2005spec301methodology.pdf.

35. Steve Charnovitz, *Should the Teeth Be Pulled? An Analysis of WTO Sanctions*, in The Political Economy of International Trade Law 602, 620 (Daniel L.M. Kennedy & James D. Southwick eds., 2002).

36. Annex 2C of the United States–Australia FTA deals with Australia's Pharmaceutical Benefits Scheme, which lies right at the heart of Australia's national medicines policy. See Peter Drahos, Buddhima Lokuge, Tom Faunce, Martyn Goddard & David Henry, *Pharmaceuticals, Intellectual Property and Free Trade: The Case of the U.S.-Australia Free Trade Agreement*, 22 Prometheus 243, 244 (2004).

37. J. Michael Finger, *The Doha Agenda and Development: A View from the Uruguay Round* 13 (Asian Development Bank, ERD Working Paper Series No. 21, Sept. 2002).

38. Peter Drahos, *Thinking Strategically About Intellectual Property Rights*, 21 Telecomm. Pol'y 201 (1997).

39. A Patent System for the 21st Century 2 (Stephen A. Merrill, Richard C. Levin & Mark B. Myers eds., 2001).

40. For an excellent discussion of this, see James Love, Remuneration Guidelines for Non-voluntary Use of a Patent on Medical Technologies, Health Economics and Drugs WHO, TCM Series No. 18, 2005).

41. The interface between competition law and intellectual property is jurisprudentially complex and really requires a tradition of competition law to develop in a country. See the collection of chapters in Section 2 on the role of competition law in *International Trade in Goods and Transfer of Technology* (Keith E. Maskus & Jerome H. Reichman eds., 2005).

42. See Love, *supra* note 40 (citing F.M. Scherer).

43. Interview with Directorate General of Intellectual Property Rights, Jakarta, Indonesia (Jan. 24, 2006).

44. On this point, see Caroline Freund, World Bank, Reciprocity in Free Trade Agreements (2003), http://www.sice.oas.org/geograph/mktacc/freund.pdf.

45. Arvind Panagariya, *Liberalizing Agriculture*, Foreign Aff., Dec. 2005, at 56.

46. Jack Donnelly, Realism and International Relations 63–64 (2000).

47. Robert Keohane, *Lilliputians' Dilemma: Small States in International Politics*, Int'l Org. 291, 302 (1969).

48. Robert B. Zoellick, U.S. Trade Representative, *American Trade Leadership: What's at Stake*, Remarks at the Institute for International Economics in Washington, D.C. 13 (April 24, 2001), available at http://www.iie.com/publications/papers/zoellick1001.pdf.

49. See Senate Select Committee on the Australia–US Free Trade Agreement, Final Report on the Free Trade Agreement between Australia and the United States of America ¶¶1.24–126 (2004), available at http://www.aph.gov.au/Senate/committee/freetrade_ctte/report/final/index.htm; see also Ann Capling, All the Way with the USA: Australia, the US and Free Trade ch. 3 (2005).

50. Interview in the Ministry of Economic Development, New Zealand (Apr. 2005).

51. Interview with Malaysian official (Aug. 2005).

52. Reported in Australian Services Roundtable Newsletter, June 2006, at 3.

their by-products and derivatives, for scientific, commercial, and other purposes), available at http://www.elaw.org/resources/printable.asp?id=257.

42. John Eberlee, *Assessing the Benefits of Bioprospecting in Latin America*, Int'l Dev. Res. Centre Rep., Jan. 21, 2000, http://network.idrc.ca/ev.php?ID=5571&ID2=DO_TOPIC.

43. See Costa Rica Biodiversity Law, Law No. 7788 (1998), *translated at* http://www.lclark.edu/org/ielp/costaricaeng.html (last visited Sept. 2, 2004).

44. See Org. of African Unity, African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000), available at http://www.opbw.org/nat_imp/model_laws/oau-model-law.pdf. The OAU amended this model to its current form in Algiers in 2000. See IGC, *Proposal Presented by the African Group to the First Meeting of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO Doc. No. WIPO/GRTKF/IC/1/10 (May 1, 2001).

45. See, e.g., Mike Wood, *Are National Park Resources for Sale?: Edmonds Institute v. Babbitt*, 21 Pub. Land & Resources L. Rev. 201, 202 (2000) (discussing a court decision upholding an agreement between National Park Service and biotechnology company granting the company the right to bioprospect microbial organisms in Yellowstone in exchange for a share of profits (citing *Edmonds Inst. v. Babbitt*, 93 F. Supp. 2d 63 (D.D.C. 2000)).

46. For a poignant discussion of the effect of economic and cultural inequality among persons within a property commons, see Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 Va. L. Rev. 421 (1992).

47. Cori Hayden, When Nature Goes Public: The Making and Unmaking of Bioprospecting in Mexico 4, 85–122 (2003) (questioning legitimacy of Mexican public universities and research institutes acting as "brokers" for national and indigenous resources).

48. *Indigenous Knowledge and Intellectual Property Rights*, IK Notes, Apr. 2000, at 2, http://www.worldbank.org/afr/ik/iknt19.pdf. This would necessitate a method to apportion the benefits among legitimate claimants.

49. Sean D. Murphy, *Biotechnology and International Law*, 42 Harv. Int'l. L.J. 47, 115 (2001) (describing 1995 executive order issued by Filipino president as an attempt to impose technology transfer mandates); see also David S. Tilford, *Saving the Blueprints: The International Legal Regime for Plant Resources*, 30 Case W. Res. J Int'l. L. 373, 437 (1998) (describing coalition of Central American states seeking to condition access to genetic resources on technology transfers and training).

50. Council of Scientific & Indus. Research, Patestate News & Notes, http://www.patestate.com (last visited Sept. 2, 2004).

About the Editor and the Contributors

Peter K. Yu is Associate Professor of Law and the founding director of the nationally ranked Intellectual Property & Communications Law Program at Michigan State University College of Law. He holds appointments in the Asian Studies Center and the Department of Telecommunication, Information Studies, and Media at Michigan State University. He is also a research fellow of the Center for Studies of Intellectual Property Rights at Zhongnan University of Economics and Law in Wuhan, China, and a member of the affiliated faculty of the Working Group on Property, Citizenship, and Social Entrepreneurism at Syracuse University College of Law.

Born and raised in Hong Kong, Professor Yu is a leading expert in international intellectual property and communications law. He also writes and lectures extensively on international trade, international and comparative law, and the transition of the legal systems in China and Hong Kong. An author or editor of three books, Professor Yu has spoken at events organized by the ITU, UNCTAD, WIPO, and the U.S. and Hong Kong governments and at leading research institutions from around the world. His lectures and presentations have spanned more than ten countries on four continents, and he is a frequent commentator in the national and international media. His publications are available on his Web site at http://www.peteryu.com.

Anupam Chander is Professor of Law at the University of California, Davis. He clerked for Chief Judge Jon O. Newman of the Second Circuit Court of Appeals and Judge William A. Norris of the Ninth Circuit Court of Appeals, and practiced law in New York and Hong Kong with Cleary, Gottlieb, Steen & Hamilton, representing foreign sovereigns in international financial transactions. He has also been a visiting professor at Stanford and Cornell Universities. His recent

publications include "Everyone's a Superhero" (*California Law Review*, 2007), "Homeward Bound" (*NYU Law Review*, 2006), "Globalization and Distrust" (*Yale Law Journal*, 2005), "The Romance of the Public Domain" (*California Law Review*, 2004), "Minorities, Shareholder and Otherwise" (*Yale Law Journal*, 2003), "The New, New Property" (*Texas Law Review*, 2003), "Whose Republic?" (*University of Chicago Law Review*, 2002), and "Diaspora Bonds" (*N.Y.U. L. Rev.*, 2001).

Daniel Chow is the Robert J. Nordstrom/Porter Wright Morris & Arthur Designated Professor of Law at the Ohio State University College of Law. He specializes in international trade law, international business transactions, international intellectual property, and legal issues concerning China. He is the author of numerous books and articles, including two casebooks: *International Business Transactions: Problems, Cases, and Materials* (Aspen, 2005) and *International Intellectual Property: Problems, Cases, and Materials* (West, 2006). He is also the author of the popular book *The Legal System of the People's Republic in a Nutshell* (West, 2003) and *Foreign Investment and Protection of Intellectual Property in China* (Kluwer, 2002).

Graeme B. Dinwoodie is Professor of Law, Associate Dean, and Director of the Program in Intellectual Property Law at Chicago-Kent College of Law. He also holds a Chair in Intellectual Property Law at Queen Mary College, University of London. He teaches and writes in intellectual property law, with an emphasis on the international and comparative aspects of the discipline. He is the author of the casebooks *Trademarks and Unfair Competition: Law and Policy* (with Janis), *International Intellectual Property Law and Policy* (with Hennessey and Perlmutter), and *International and Comparative Patent Law* (with Hennessey and Perlmutter). Professor Dinwoodie's articles on various aspects of intellectual property law have appeared in several leading law reviews. He is a member of the American Law Institute.

Peter Drahos is Professor in Law in the Regulatory Institutions Network at the Australian National University. He holds degrees in law, politics, and philosophy and is admitted as a barrister and solicitor. He has published widely in law and social science journals on a variety of topics. His publications include *A Philosophy of Intellectual Property*, *Global Business Regulation* (with John Braithwaite), *Information Feudalism: Who Controls the Knowledge Economy?* (with John Braithwaite), and *Global Intellectual Property Rights: Knowledge, Access and Development* (with Ruth Mayne). *Global Business Regulation* won the Hart Socio-Legal Studies Book Prize for 2000, the American Sociological Association's Prize in the Sociology of Law 2002, and the Grawemeyer Award in Ideas Improving World Order, 2004.

Graham Dutfield is Herchel Smith Senior Research Fellow at the School of Law, Queen Mary College, University of London. He has authored several books: *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (with Posey), *Intellectual Property Rights, Trade and Biodiversity*, *Intellectual Property Rights and the Life Science Industries: A Twentieth Century History*, and *Intellectual Property, Biogenetic Resources and Traditional Knowledge*. A textbook on global intellectual property law and policy (with Suthersanen) will be published in 2007.

James Thuo Gathii is the Governor George E. Pataki Professor of International Commercial Law at Albany Law School in New York. His research is in the areas of international intellectual property and trade law, particularly as they relate to the third world. His articles have been published in the *Michigan* and the *University of Illinois Law Reviews*; the *Harvard*, *George Washington*, *Georgia* and *Florida International Law Journals*; and the *European* and *Leiden Journals of International Law*. His publications include "Third World Perspectives on Global Pharmaceutical Access," in Michael Santoro and Thomas Gorrie (eds.), *Ethics and the Pharmaceutical Industry* (Cambridge University Press, 2005).

Paul Edward Geller, an attorney practicing in Los Angeles, is the general editor of the treatise *International Copyright Law and Practice*, which is published by LexisNexis and updated annually. He serves as expert counsel in litigation, media transactions, and strategic planning, both with regard to domestic and international copyright and with regard to related treaties and conflicts of laws. He speaks and contributes articles to journals worldwide, most recently giving and publishing the ATRIP Keynote Address, "Dissolving Intellectual Property." He has taught international intellectual property at the University of Southern California Law School and domestic intellectual property at Stanford Law School.

Daniel J. Gervais is the Vice-Dean (Research) and Osler Professor of Intellectual Property and Technology Law at the Faculty of Law of the University of Ottawa (Common Law Section). Prior to his teaching career, Professor Gervais was successively Legal Officer at the GATT; Head of Section at the World Intellectual Property Organization (WIPO); and Vice President, International of Copyright Clearance Center, Inc. (CCC). He also served as consultant to the Organization for Economic Co-operation and Development (OECD). Dr. Gervais is the author of a book on the history and interpretation of the TRIPS Agreement (2nd edition, Sweet & Maxwell, 2003), *Collective Management of Copyright and Related Rights* (Kluwer Law, 2006), and *Intellectual Property: The Law in Canada* (Carswell, 2005; coauthored with Dr. Elizabeth Judge). He is also the general editor of the well-known *Journal of World Intellectual Property*.

Shubha Ghosh is Professor of Law at the Southern Methodist University (SMU) Dedman School of Law in Dallas, Texas, where he teaches courses in intellectual property, antitrust, torts, and business enterprise. He was Professor of Law at State University of New York at Buffalo Law School before joining SMU. He has coauthored *Intellectual Property in Business Organizations* for LexisNexis and *Intellectual Property: Private Rights, The Public Interest, and the Regulation of Creative Activity* for Thomson-West. His scholarship has appeared in the *Berkeley*

Technology Law Journal, *Harvard Journal of Law and Technology*, *Tulane Law Review*, *Case Western Reserve Law Review*, *Oregon Law Review*, *San Diego Law Review*, *Buffalo Law Review*, and *International Review of Law and Economics*, among other publications.

Debora J. Halbert is Associate Professor of Political Science and Chair of the Department of History and Political Science at Otterbein College in Westerville, Ohio. In addition to numerous articles on intellectual property and technology, she is the author of two books. The first, *Intellectual Property in the Information Age: The Politics of Expanding Property Rights* (Quorum, 1999), traces the expansion of copyright in the information age. Her second book, *Resisting Intellectual Property* (Routledge, 2005), maps the growing resistance to the expanding nature of copyright and patent law.

Jacqueline D. Lipton is a faculty member, co-director of the Center for Law, Technology and the Arts, and associate director of the Frederick K Cox International Law Center at Case School of Law in Cleveland, Ohio. She joined the faculty in 2001, having previously held positions in prominent law schools in the United Kingdom and Australia. Her writing and teaching are focused in the areas of commercial law, cyberlaw, and intellectual property law with a comparative/international focus. She has authored numerous law review articles in these areas, including recent publications in the *Harvard Journal of Law and Technology*, *Berkeley Technology Law Journal*, *Washington and Lee Law Review*, *Washington University Law Review*, *Hastings Law Journal*, and *Wake Forest Law Review*. She is the coauthor of the second edition of *Cyberspace Law: Cases and Materials* (Aspen, 2006), with Professor Raymond Shih Ray Ku. She also authored *Security Over Intangible Property* (Thomson, 2000), the first text devoted solely to the issue of securitization of intangible property, including intellectual property. Prior to her academic work, Professor Lipton held positions in several leading Australian commercial law firms, as well as serving as in-house counsel for a major Australian bank.

Keith E. Maskus is Stanford Calderwood Professor of Economics at the University of Colorado, Boulder. He has been a lead economist in the Development Research Group at the World Bank. He is also a research fellow at the Institute for International Economics, a fellow at the Kiel Institute for World Economics, and an adjunct professor at the University of Adelaide. He has been a visiting senior economist at the U.S. Department of State and a visiting professor at the University of Bocconi in Milan and at CES-ifo Institute at the University of Munich. He also serves as consultant for the World Bank, the United Nations Conference on Trade and Development, the World Health Organization, and the World Intellectual Property Organization. His current research focuses on the international economic aspects of protecting intellectual property rights. He is the coeditor of *International Public Goods and the Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge University Press, 2005) and

author of *Intellectual Property Rights in the Global Economy* (Institute for International Economics, 2000). He has written extensively about various aspects of international trade, including empirical testing of trade models and determinants of foreign direct investment. His current research focuses on the international economic aspects of protecting intellectual property rights.

Srividhya Ragavan is Associate Professor of Law at the University of Oklahoma Law Center. Ragavan's scholarship concerns the interplay between international trade law and intellectual property issues. Her work emphasizes issues that developing nations face as a result of embracing the trade regime. Her publications have explored diverse topics such as traditional knowledge, pharmaceutical patenting, and agricultural subsidies. Ragavan is also a visiting faculty of the intellectual property program at the National Academy for Legal Scholarship and Research in Hyderabad, India. Prior to joining the University of Oklahoma, Ragavan taught at the National Law School of India in Bangalore.

Dwijen Rangnekar is Associate Professor at the Law School at the University of Warwick and the Research Councils UK Senior Fellow at the Centre for the Study of Globalization and Regionalization at the University of Warwick. He has been researching and writing about geographical indications for some time, most notably background papers for the United Nations Conference for Trade and Development. Prior to joining the University of Warwick in 2003, he was Senior Research Fellow at University College London. He is currently working on a monograph on the economics and politics of plant breeders' rights.

Angela R. Riley is Associate Professor of Law at Southwestern Law School in Los Angeles, California. She teaches and writes extensively in the areas of cultural property and indigenous peoples' rights. She is a member of the Citizen Potawatomi Nation and also serves as a Justice for the Citizen Potawatomi Nation Supreme Court. Her most recent article, "Sovereignty and Illiberalism," will be published by the *California Law Review* in the spring of 2007.

Madhavi Sunder is Professor of Law at the University of California, Davis, School of Law, where she teaches and writes in the area of law and culture, globalization, women's human rights, and intellectual property. Professor Sunder was awarded a prestigious Carnegie Corporation Scholarship in 2006 to support her writing of a book on women reformers in the Muslim world, entitled *The New Enlightenment: How Muslim Women Are Bringing Religion Out of the Dark Ages*. She is a member of the editorial board of the open-access, peer-reviewed online journal *Copyright*, and an associate editor of the *International Journal of Cultural Property* and the *Muslim World Journal of Human Rights*. Sunder clerked for Judge Harry Pregerson of the Ninth Circuit Court of Appeals and practiced law in New York City with the firm of Cleary, Gottlieb, Steen & Hamilton. Her recent publications include "IP3" (*Stanford Law Review*, 2006), "The Invention of Traditional Knowledge" (*Duke Journal of Law & Contemporary Problems*, forthcoming, 2007), "The Romance of the Public Domain" (*California*

Law Review, 2004), "Piercing the Veil" (*Yale Law Journal*, 2003), and "Cultural Dissent" (*Stanford Law Review*, 2001). She has authored numerous comments and chapters in books, and she is the editor of *Gender and Feminist Theory in Law and Society* (2006).

Timothy P. Trainer is the founder and president of the Global Intellectual Property Strategy Center, P.C. (GIPSC), based in Washington, D.C. He represents clients in IP matters and provides advice to clients regarding enforcement strategies abroad. Since establishing GIPSC in 2005, Mr. Trainer has been engaged on numerous occasions to conduct IP enforcement training workshops and seminars abroad for foreign government officials and business representatives. Prior to GIPSC, he was president of the International AntiCounterfeiting Coalition and practiced law in the Washington, D.C., office of Arter and Hadden. His intellectual property experience also includes several years in the Intellectual Property Rights Branch, U.S. Customs Service, and in the Office of Legislative and International Affairs, U.S. Patent and Trademark Office. He is also an adjunct law professor at American University's Washington College of Law and is on Thomas Cooley Law School's Intellectual Property L.L.M. Advisory Board. His publications include numerous articles and books. His most recent work is in coauthoring the book *Protecting Intellectual Property Rights Across Borders*, published by Thomson-West.

David Vivas Eugui is programme manager on intellectual property and sustainable development at ICTSD. Formerly, he was senior attorney at the Center for International Environmental Law (CIEL); attaché for legal affairs at the Mission of Venezuela to the WTO and other international organizations; attorney at the Venezuelan Institute of Foreign Trade; and consultant and writer for the WTO, UNCTAD, South Centre, CAF, Andean Community Secretariat, AITIC, EPO, QUNO, Rockefeller Foundation, Venezuelan Ministry of Science and Technology and the CONICIT. Mr. Vivas participated as an arbitrator in the US–EU dispute on U.S. Section 110(5) of the U.S. Copyright Act under the WTO in 2001.

Johanna von Braun is currently enrolled as a research student at the Centre for Commercial Law Studies at Queen Mary, University of London. Before coming to London in 2006 she worked in the Programme on IPRs at the International Centre for Trade and Sustainable Development. Additional previous work experiences include ActionAid Brasil, the Columbia Earth Institute, and Transparency International.

Silke von Lewinski is head of the international and European copyright law department at the Max Planck Institute for Intellectual Property, Munich, and adjunct professor at Franklin Pierce Law Center. She has frequently served as an expert consulting for the European Commission, for example, on the EC Rental Rights Directive and at the WIPO Diplomatic Conference 1996.

She has been the chief legal expert consulting the governments of Eastern and Central European and former Soviet and later Asian countries on their copyright legislation in the framework of the EC's TA programs. She has been visiting professor and scholar at many universities in Europe, Canada, the United States, and Australia, including Columbia University, Melbourne University, Paris I and XI. Her book publications include a comparative thesis on public lending rights, *The EC Directive on Rental and Lending Rights and on Piracy* (Munich, 1990); *The WIPO Treaties 1996* (coauthor J. Reinbothe); *Europäisches Urheberrecht* ("European Copyright Law," coauthors, Walter et al.); and she edited *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (2004).