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智慧財產權—社會恐怖亦或正當保護：對當前智慧財產權的趨勢及其影響之省思與探討

Intellectual Property Rights - Social Terror or Justified Protection: a Critical Reflection on the Current Trend in Intellectual Property Rights Regimes and Its Implications*

Johannes Britz
美國威斯康辛大學密爾瓦基校區資訊研究學院教授暨院長
南非普利多利亞大學資訊科技學院客座教授
Professor and Dean, School of Information Studies
University of Wisconsin-Milwaukee, USA
Extra ordinary professor, School of IT, University of Pretoria, South Africa
E-mail: britz@sois.uwm.edu

林素聿 **Suyu Lin**
美國威斯康辛大學密爾瓦基校區資訊研究學院博士生
Ph.D. Student, School of Information Studies
University of Wisconsin-Milwaukee, USA
E-mail: suyulin@uwm.edu

【摘　要】

本文論述我們現今生活在一個新世紀，大環境首次出現一個資訊與知識的流通幾乎是零成本的數位時代。然而，資訊的取得和使用卻漸形困難，這主要是歸因於整個資訊產品與服務商品化的國際趨勢，以及伴隨而來愈來愈嚴苛的智慧財產權制度。這個發展將人們隔絕於重要資訊之外也從而剝奪了一項基本人權—資訊取得權。在本文中並論及經濟因素的重要性之於智慧財產權已遠大於道德與社會的因素，這使得智慧財產權系統中既有的雙重本質失衡，而有利於所有權/獨家的論據；以及在這個趨勢下對於資訊原創者、原住民族以及發展中國家的影響。

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【Abstract】

It is argued that we are living in an new era where the digital environment for the first time allows the creation of an information commons. The information and knowledge can be distributed to the largest number of people at nearly zero cost. However, access to and use of information has become increasingly difficult. This is mainly due to the international trend to commodify information products and services and the accompanied strengthening of intellectual property rights. This leads to the exclusion of people from accessing essential information, thereby denying them a fundamental human right – the right of accessing to information. In this puper shows that the economic argument on justifying intellectual property has become more important than the moral and social factors. This has brought an imbalance in the dual nature of intellectual property systems, favouring the ownership/exclusion argument. It is demonstrated how this shift has impacted on the original creators of information, indigenous peoples and developing countries.

關 鍵 詞：智慧財產權；資訊倫理；社會公平；資訊盜用
Keywords：Intellectual Property Rights; Information Ethics; Social Justice; Information Piracy

Introduction: the changing trend in intellectual property regimes

We are living in the so-called global information society where the digital environment for the first time allows a real opportunity to create an information commons where information products and services can be distributed to the largest number of people at a much lower marginal cost than ever (Anderson, 2006, Freedman, 2005). To put it in the words of Eben Morlen, professor of Law at Columbia University: "If you could make enough food to feed everyone on earth by baking one loaf of bread and press one button, what would be the moral case for denying anyone food?" (Cited by Becker, 2003:1). However, in the last couple of years the control of and distribution of information products and services in the global information marketplace has indeed become a moral case. Access to and use of information has become more difficult – not only because of social, political, economic and cultural reasons, such as language and high telecommunication costs, but also because of a stricter appli-

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cation of intellectual pro perty rights (IPR) legislation. By the same token IPR regimes are structured in such a manner that they generate more commercial revenue for those corporations that own and control information products and services. The original idea of IPR regimes, namely to achieve a balance between providing incentives for creators and owners of information and the same time the preserving of the information commons seems to be neglected.

The future of this new emerging global information society will indeed be shaped by how the conflict between those who see information as a commodity to be sold to consumers versus those who see information as a common good that must be freely available plays out (Becker, 2003). We also argue that this future should not only be shaped and determined by legal and economic arguments only. It is also a moral case underlying important ethical issues such as:

- The right of access to information and the preservation of the information commons;
- The right to communicate;
- The fundamental freedom of people, including the freedom of access to the knowledge and ideas of others as well as freedom of expression;
- The right of original creators and owners of information to a fair compensation for their work, as well as the rightful moral and legal protection thereof.

In this paper we will reflect critically on these trends in IPR and will attempt to demonstrate the impact of the shift towards the stricter control of information on creators of information products, indigenous people as well as on development. Our paper is structured in the following manner: First we will argue that IPR per se are not at stake. Our arguments are not based on the view that there should be an uncontrolled flow of free information in the marketplace and an unlimited "press of the copying button" regardless of IPR regimes. Our critical analyses are rather based on the moral premise that there should be a free and fair flow of information in the marketplace and that the information commons should be preserved. A "free and fair flow" of information does not necessarily imply a "flow of free information". In the second part we will identify the two main contributing factors that led to the stricter application of IPR regimes. These are the commoditisation of information and information piracy. The justifications for using these two reasons to exercise a stricter application of IPR regimes are put into question. Following from this we will address the impact that this shift towards stricter application of IPR has on the crea-

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tors of knowledge, on indigenous people as well as on development. In the process we will attempt to demonstrate how these changes bring about an imbalance in the dual nature of intellectual property favouring the economic benefit at the expense of the societal benefit thereby threatening the information commons and making it a case of moral concern.

Intellectual property rights per se not in question

In the investigation of the main reasons that cause the stricter enforcement of intellectual property systems it must be made clear that the recognition and application of intellectual property legislation per se is not put in question by us. Based on the Lockeian labour theory and the Hegelian personality theory it is argued that individuals have property rights and that this extends to intangible IPR (Geldenhuys, 1993). We furthermore argue that these rights need to be protected by governments by means of a constitution and appropriate legislation. Individuals who create information products also have the right to benefit, be it economically or otherwise, from their labor. Intellectual property, however, has unique dual properties namely the right to own (control) information products as well as the right of access to information. These dual properties are protected in the judicial notion of intellectual property.

As such, the moral, economic and social foundations of intellectual property are not in question. As Hamelink (1999: 158) correctly points out, intellectual property systems were originally developed to:

- protect the moral rights of authors (moral justification);
- recognise and protect the right of fair compensation for the creation and distribution of information products (economic justification) and
- enhance, to the benefit of the common good, the creation and accessibility of new knowledge (social justification).

It is the position of this paper that if these moral, economic and social rights are not protected sufficiently by, amongst others, effective legislation, it can lead to the inhibition of not only the creation of information products but also of creativity and it will furthermore put a constraint on the dissemination of information products in the marketplace. Intellectual property legislation, reflecting this dual nature, is therefore justified. It is based on and reflects two basic principles of justice. The first principle, which accommodates the right of access to information, can be formulated as "each according to his/her information needs". This principle emphasises the social understanding of a mini-

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mally decent life (Miller, 1999:213). It therefore justifies the right of access to information that is needed to fulfil the needs associated with a minimally decent life. It is important that needs should not be seen as a mere subset of desires or even greed. The second principle corresponds to the beli ef that authors, composers and other information creators and information distributors deserve to enjoy the benefits of their work. This is called the merit principle and allows unequal income and distribution of information products and services. Information creators' and information distributors' social and economic advantages depend in other words on their merit and how hard they have worked.

There are, however, two specific moral concerns regarding the current international trend in IPR regimes. The first and obvious concern, which has been touched on in the introduction, and which we will elaborate on in the next section of this paper, relates to the fact that a stricter application of IPR legislation will lead to the possible exclusion of people from access to essential information. By essential information is meant that information that is required to survive and develop. This includes information related to the basic minimum needs of people (Britz, 2004). This possible exclusion from essential information is in contrast to the social justification of IPR that society has a social right to access and use ideas to the benefit of the public good to enable a minimally decent life. According to Davis "copyright protection is justified by the public interest, the State imposes certain limitations thereto, again in the public interest" (1994:136). Drahos (1996: 171 – 193) correctly points out t hat information is in essence a primary good that is by its nature not scarce. As a matter of fact, it is the application of IPR that creates its scarcity in the market place. An imbalance in the societal information goals inherent in the original intellectual schema is therefore created and this is irreconcilable with the ethical principles underlying information ownership (Lipinski & Britz, 2000: 50).

The second moral concern is more fundamental and has bearing on the reasons behind the stricter application of intellectual property legislation. Later on in the paper we will argue that the commoditisations as well as the piracy of information products are the main contributing factors to the stricter application of IPR legislation. The question is, however: Are these reasons for the stricter application of IPR, which are mostly at the expense of the social benefit, morally and legally justifiable?

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The distorting trends in intellec-

tual property regimes

What then are these distorting trends in IPR and what are the reactions to these trends? In the following paragraphs we will summarize the main trends and provide an overview of some critical reactions to these trends (Britz et al., 2006).

- The rich nations, in particular the European Union (EU) and the USA, have taken the lead in the setting of international standards to ensure that IPR owners, which are mostly from the developed world, are protected worldwide. They have also succeeded in tying IPR to general trade agreements and established a framework for countries around the world to upgrade their IPR regimes in accordance with these international agreements (Chang, 2003).
- The two key instruments used to achieve this shift in IPR are the World Trade Organisation's (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) which was agreed upon in 1994, and the United Nations-based World Intellectual Property Organisation's (WIPO) Copyright Agreement (1996) (Von Hielmcrone, 2001; Harris, 1997; Thomas & Lee, 2002; Hess & Ostrom, 2007). As an implementation of these agreements the USA enacted the Digital Copyright Millennium Act (DMCA) in 1998 and it was followed in 2001 in Europe with the EU Copyright Directive.
- With these agreements the scope and duration of IPR has grown enormously. It covers IPR related to information on the Internet as well as digital rights management and the anti-circumvention laws, which enforce technical restrictions on accessing information on the Internet. The USA, as well as the EU, has also extended the post-mortem copyright from 50 to 70 years and by implication kept works such as Mickey Mouse, The Jazz Singer and Sherwood Anderson novels in private hands (Bollier, 2003:2; Kranich, 2007:89). As Anderson (2006) puts it: "What's good for Disney is not necessary what's good for America" (2006:167). The WIPO Copyright Treaty also included the protection of databases. According to the World Bank Legal Review (2003) the patent applications have also increased from 1.8 million in 1990 to 7.1 million in 1999. The TRIPS Agreement also allows for the patenting of life forms and pharmaceuticals and by implication the appropriation and commoditisation of indigenous knowledge (Thomas & Lee, 2002: 6-7).
- Major industries such as IBM, Microsoft and ALO-Time Warner backed these agreements (Thomas & Lee, 2002: 6-7).

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- IPR owners have a formidable set of tools at their disposal, in terms of both technology and legislation, to protect their rights worldwide. The infringement of IPR in the USA has now even become a criminal matter and it is possible for a person to end up in jail for infringing on IPR (Drahos, 2003:3).
- Publishers, in particular large scientific publishers, used technology as well as IPR legislation not only to create information monopolies, but also to increase the profit margins substantially – in some cases with more than 30% (Britz, et al., 2006; Sabbagh, 2004).

It seems indeed the case that those who have the power to distribute the "bread" – to use the metaphor of Morlen -- have decided not to "press the right button". This has led to severe criticism. Toner (2003:7) is particularly harsh in his criticism and refers to these trends as "social terror" and according to Drahos "…intellectual property begins to look like a game in which the rich have found ways to rob the poor" (2003:3). Bollier (2003:1) express his concern by stating that by taking information out of the public domain into the private zone we are moving towards a market closure excluding many people from access to essential information. The Copy Left movement refers to the current trend as the creation of a "permission culture" (Boynton, 2004). These sentiments were also echoed at the recent World Summits on the Information Society (WSIS Geneva 2003 and Tunis 2005), and many civil society groups strongly oppose the current trend in IP and even reject the term IPR because "…the only right s associated with information and knowledge are those of owners" (Siochrú, 2003:3). For Kranich (2007) these new trends in IPR created a 'walled garden' which in effect led to "…an increasing threat to democratic principles of informed citizens and academic principles of building on the shoulders of giants (2007:87).

The two main reasons for stricter application of IPR regimes

The commoditisation of information

The initial justification of intellectual property is based on the assumption that if individuals are allowed to control and/or own information it will enhance the production of socially useful forms of information (Palmer, 1997). Unfortunately, today, this right to control and own information superseded at the cost of the public access component. The tendency is to increasingly view information from an economic perspective benefiting those who own it. This is mainly due the change

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from information as a common good (benefiting society) to a commodity (Lyotard, 1984, Weiss & De Waart, 1998). Drahos (1996:203) correctly observes that this commoditisation of information is gaining not only juristic, but also ideological ascendancy.

The commoditisation of information is amongst others made possible by the shift from the economics of things to the economics of information (Evans & Wurster, 1997). In this new economics of information paradigm, information became unbundled from its traditional physical carriers. It can "travel by itself", become interlinked, and can be customised, changed, altered, copied and destroyed at essentially zero cost (Britz, et al., 2006). This made it possible for the marketplace to migrate from a production-based to an information-based economy. As such information has become a form of digital capital and a tradable commodity that means money and access to information equates access to economic activities, for example, buying airline tickets on the Internet. In the words of Harris: "…intellectual property is hot property…society now recognises that information is quickly becoming the basis for the new economy, and intellectual property is the new economy's strongest currency" (1997:4). Schiller and Schil ler (1982 & 1986) and Branscomb (1995) also draw the attention to the fact that information is increasingly being treated as a commodity, and its availability is mostly on condition that it is saleable in the marketplace.

In the same line of argument Hamelink (1999:161) as well as Nayyer (2002) and Kranich (2007) stated that IPRs are changing to increasingly protect the economic interest of multi-national corporations – forgetting the non-commercial side of intellectual property, as well as the economic interest of the individual creators of information products.

What causes concern here is not only that information has become a commodity, but also that the commoditisation of information puts essential information in the realm of profit-making whereby the market system, based on supply and demand becomes the determining factor of what is produced and distributed and to whose benefit (Hayek, 1976). Defined as private goods it furthermore tends to facilitate monopolistic practices. What makes this matter worse is the fact that information products and services can now be produced and distributed at much lower costs that in the past. The marginal cost of digital information products is essentially zero and allows a total new economic principle of selling more of less (Anderson, 2006). This puts the principle of merit in serious jeopardy. Merit, based on

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hard work and ability, is therefore no longer the criterion to justify unequal income in the information market place. It seems rather that the basis for distribution has shifted to a situation of purely supply and deman d, which is exploited by the big information role players at the expense of original creators, and users who need information to enable a decent livelihood.

Treating information in this manner upsets the balance between private ownership of intellectual property and the public benefit of the users. From a moral perspective one has to seriously question the stricter application of IPR legislation due to the neglect of merit as a basis of distribution, and the accompanying commoditisation of information. We argue that information and knowledge are part of the common heritage of humanity, and the exclusive right of a few members to own and control it at a minimum cost, must therefore be seen as a form of social injustice.

Information piracy

The second reason for the stricter application of IP relates to the growth of international intellectual property theft. The speed, ease and virtually zero cost of digital copying of text, sound and images has contributed largely to the nearly exponential growth of IP piracy. It is important to point out here that the very use of the word piracy is controversial. Gosh (2007), for example, criticises the general use of the word piracy. Piracy implies, according to him that copyright owners have an exclusive right to deny others access to their information products.

The entertainment and software industries are the primary targets of large-scale illegal copying (International Intellectual Property Alliance, 2003). The USA software industry, for example, has counted losses of between $10 and $14 billion annually and the total retail value of pirated software was an estimated $12.2 billion in 1999. One in every three copies of business software applications in the world are illegal copies (Oz, 2002). Another example of this trend is given by Miaorops (2000:C11) who reports that for every $3 worth of products (patented) exported out of the USA, American companies lose up to $1 to piracy. This explains, according to Miaorops (2000), why pharmaceutical companies in the US, in order to protect their intellectual property, are pressuring the USA administration to impose stronger intellectual property legislation.

As a multi-billion dollar international industry intellectual property theft is threatening the whole information-based industry in the Western world. The damage to this industry must be evaluated a-

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gainst the background that one third of the income of the G7 nations comes from information products and services (Gunrsey, 1995:5). In the USA the copyright industries accounted for 5.24% of the gross domestic product in 2002 – bigger than all other major industry sectors. The international loss to the USA economy due to copyright piracy was an estimated $20 - $22 billion globally (International Intellectual Property Alliance, 2003).

This justifies the call for a stricter application of IPR legislation by the International Intellectual Property Alliance (IIPA). According to Eric Smith, the president of the IIPA, the "… rapid growth of e-commerce and the Internet bring new opportunities and challenges, particular for these copyright industries whose products will increasingly be traded globally using the new distribution technology. Unless we safeguard the Internet from the scourge of intellectual property theft, the medium will never reach its full potential to contribute to global economic growth and cultural diversity through local creativity. We appreciate the efforts by the US government to secure ratification and full implementation of the WIPO Internet Treaties by all countries. Furthermore, governments must take actions to ensure that their enforcement regimes comply with their WTO TRIPS Agreement obligations and, use legitimate software in governmental offices." (IIPA, 2003:1).

How legitimate is the case for information piracy? At first glance it seems to be justified in those cases where the culprits are those who steal information to enrich themselves. In other words, when basic information needs are replaced by information greed and desires at the expense of those who create and distribute information. This argument is also used to justify the application and use of digital rights management (DRM) technologies to protect IPR from piracy. According to Beristain the "…biggest potential of this technology [DRM] is the capacity for the rights owner to manage distribution and to be able to collect royalty fees" (2003: 31). However, it is still an argument motivated by the ownership/economic interest underlying IPR and becomes less convincing in those cases where poor third world countries have to "steal" essential information to survive and develop because it is too expensive in the marketplace. Soichrú, for example, is of the opinion that the TRIPS Agreement just gave the IP industry a "…huge stick to wave at so-called "pirates", and introduced a single corporate -friendly regime in IPR" (2003:3). This is also the reason why many developing countries view the current IPR as unfair and justifies therefore becoming free riders in the informa-

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tion marketplace.

The implications of the shift

These changes in IPR regimes did not only affect the balance between the right to own versus the right to know. It also bears significant consequences for knowledge creators, indigenous people and development.

Creators of knowledge

The commercial trend to commodify information by transnational corporations also unrightfully deprives individual creators of their economic benefits. In many cases the original creators of knowledge (authors, composers etc) sign off their economic rights to publishing houses or related multi-national corporations. Suber (2007) pointed out that ever since the first scientific journals were founded in 1665 journals did not pay authors for their work. The implication is that these creators of knowledge do not gain any direct economic benefit from their labour. This does not only run contrary to merit as a principle of justice, but also to the original intention of IPR, which recognised and protected the right of fair compensation for the creators of information products.

One outcome of this trend is a growing perception by knowledge creators that IPR is unfair and an obstacle in the distribution of their work. This is specifically the case with scientific knowledge and is based on the long-standing tradition that scholars prefer to publish for impact and not for money. Scientists find that their rights are actually violated if access to their works are restricted by copyright legislation. They are not so much concerned with the (economic) rights that intellectual property rights bestow, as with the fact that people must have access to their work. Anderson (2006) points out that many authors and other content creators explicitly gave up their copyright protection, and thereby moving into the non-commercial zone. Authors want their works to be "noticed, read, taken up, build upon, applied and cited (Suber, 2007:175).

This contributed to initiatives such as the Creative Commons, Open Access Movement, and Open Archiving. All of these initiatives support the idea of allowing scholars and researchers to distribute their work more freely and without the unnecessary restrictions of IPR legislation. The Creative Commons is a non-profit organization and issues licences since 2002 allowing a much more flexible use of copyrighted works to be distributed in the information market place. The aim of Creative Commons is for example to: "… use private rights to create public goods: creative works set free for certain uses.

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Like the free software and open-source movements, our ends are cooperative and community-minded, but our means are voluntary and libertarian. We work to offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them — to declare "some rights reserved" (Creative Commons).

Indigenous peoples

The inclination to commercialise information and then protect the economic interest thereof by means of legislation furthermore affects indigenous peoples and their knowledge bases. The economic value of indigenous knowledge has been discovered and rediscovered by multi-national corporations and is not only collected at little or no cost, but is also commercially exploited in the marketplace. This is specifically true of the food and medicine domains which have been infiltrated by IPR, thereby threatening the control that indigenous people have over their indigenous knowledge and biodiversity. Trademarks and patents are mostly used to gain such control. In most instances this implies that indigenous peoples no longer have the ability to access the source of knowledge, be it fauna or flora (Dougherty 1998; Long 1998 and Plotkin 1988). Some other examples of these practices include the misuse of artefacts and icons of Native American Indians, the Maoris in New Zealand and the Aborigines in Australia (Lipinski & Britz, 2000).

However, in recent years there has been an increasing awareness of this exploitation of indigenous knowledge by means of wrong patenting and other forms of IPR applications. This has led to the recognition of the need for more effective protection of indigenous knowledge rights in this area. A number of new developments at the international and national levels include the following:

- Countries such as South Africa, Australia and India are revising their current IPR regimes to accommodate the protection and promotion of indigenous knowledge (Britz & Lor, 2003). India has also successfully contested the granting of non-traditional knowledge systems, which has led to the cancellation of the patents. Most of these were patented in the USA. It was however expensive and a lengthy process. As a response to such wrongful patenting, India created a traditional knowledge digital library making this knowledge public domain. This lead to WIPO's special union for the International Patent Classification (IPC) to investigate how wrong patenting can be prevented and to find ways to link or integrate traditional knowledge into the IPC (CSIR News, 2001).

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- WIPO is showing an increased interest in the protection of indigenous knowledge. Apart from fact-finding missions and the organising of round tables on indigenous traditional knowledge, an Intergovernmental Committee on Intellectual Property and Generic Resources, Traditional Knowledge and Folklore was established in 2000. The aim of this committee is specifically to investigate the international protection of indigenous knowledge (WIPO, 2003).
- Support for the international protection of indigenous knowledge has also come from the United Nations Conference on Trade and Development (UNCTAD) which held an Expert Meeting in October/November 2000 to discuss ways to protect indigenous knowledge and to prevent further improper appropriation of indigenous knowledge. According to UNCTAD the most promising option would be "…to bridge traditional collective rights with the more modern and western concept of intellectual property rights" (Capdevila, 2000).
- The Convention on Biological Diversity, which was agreed upon and signed by more than 150 nations at the Earth Summit (Rio de Janeiro, 1992), accepted and implemented a very important article on indigenous knowledge. Article 8 (j) states that these nations undertake to: "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices" Since the Eart h Summit 182 countries have ratified the agreement (Convention on Biological Diversity, Convention text, 2002).

Constraints on development

It would be unfair to both the WTO and WIPO to suggest that these two international organisations are not sensitive to the cause of the developing nations. Enough evidence suggests that both these bodies have the developing nations high on their agendas (WTO, 2003: 93-100; WIPO Press Release, 1998). For example, the WTO released a special declaration at the Doha Ministerial Conference (November 2001) that the TRIPS Agreement should not prevent member countries from taking certain measures to protect the health of their citizens. Some flexibilities

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were also built into the agreements, such as compulsory licensing (WTO, 2003: 82).

The WTO and WIPO are also committed to assisting developing nations to conform to the TRIPS and WIPO Agreements. In a joint press release, WIPO and WTO explain their role in assisting developing nations: "This process involves bringing their laws on copyright, patents, trademarks and other areas of intellectual property into line with the agreement, and providing for effective enforcement of these laws in order to deal with piracy, counterfeit goods and other forms of intellectual property infringements" (WIPO Press Release, 1998).

This process is, however, part of the problem for developing nations. According to research done by the South Centre these agreements are ultimately oriented to set up an international legal framework for a global IPR regime. This will further limit the policy space left in the hands of developing nations under the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) regarding IPR issues. The project of the South Centre was funded by the United Nations Developing Programme (UNDP) and had as its aim to monitor and analyse the work of the WTO from the developing nations' perspective (South Centre, 2002).

This has led to a proposal by Argentina and Brazil in 2004 for the establishment of a development agenda for WIPO. The proposal was presented to WIPO in August of 2004 and included amongst other the following:

- That the cost of IP should not outweigh the benefits of IP protection. This request was made specifically with the developing countries in mind.
- That the Millennium Development Goals, identified by the United Nations, be incorporated into all WIPO's activities.
- That technology transfer should be made easier for developing countries.
- That IP enforcement should be approached with more emphasis on developmental needs and societal benefits (WIPO, 2004).

Correa and Musungu (2002) therefore argue that both the WIPO and TRIPS Agreements did not help to advance developmental goals of the developing countries. They had rather strengthened the economic interest of powerful multinational corporations and the governments that represent them. Not only have developing countries to comply with these agreements, but the standards set in TRIPS and WIPO are far better suited to meet the needs of the developed nations. This limited developing nations in the development of their own policies regarding IPR. Drahos reflects the same sentiment in his evaluation of the TRIPS Agreement: "TRIPS was not the product of

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carefully co-ordinated economic analysis. Rather it was the manifestation of rent-seeking desires of those multi-nationals that saw opportunity for themselves in re-defining and globalising intellectual property rights" (1997: 201).

Also, in cases where a number of developing countries resisted to implement in full the TRIPS agreement with developed countries, the USA in particular, these countries merely introduced other measures to force the developing countries to increase their IPR standards. Such measures included the threat of economic sanctions, as well as the incorporation of additional IPR standards in regional and bilateral agreements. These are also known as TRIPS "plus" agreements and can result in the obligation on developing countries to introduce higher IPR standards at a faster pace than TRIPS requires (Deere, 2003).

This unwillingness of the developing world to adhere in full to international IPR regimes furthermore lead to the developed world's reluctance to invest and export its knowledge and information technologies (hardware and software) to those countries that does not protect its IPR (World Bank Legal Review, 2003). This has a severe effect, not only on development, but also on research in these countries. Part of the problem is that these companies simply do not trust their fellow human beings to obey international legislation protecting their intellectual property.

The point is: as regulators of educational resources, innovation and ideas IPR policies can make a substantial difference to development. But currently not enough is happening. Scientific journals are for example still too expensive for academic and scientific institutions in developing nations, and we strongly support Deere's (2003) suggestion that civil society groups and concerned developed countries should work together to advance a developmental-orientated perspective on IPR. It is worthwhile to quote the International Federation of Library Association and Institutions (IFLA) position these development "Without exceptions to enable libraries to serve their communities, the effects on people who cannot afford access to copyright protected works would be especially damaging. For many people in poor counties, books are a luxury and the payment of copyright royalty fees is out of the question. Quite simply, they would be denied access. This would widen the digital divide between developed and developing countries" (Stratton and Lor, 2005).

It is, however, encouraging that, as is the case with indigenous knowledge, there is a growing, but less co-ordinated, concern and initiatives regarding IPR and the cause of developing nations. One example is the Programme for the Enhancement of Research Information (PERI)

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of the International Network for the availability of Scientific Publications (INASP). This programme provides access to current awareness services and online journals at very affordable prices to developing nations (PERI, 2001). Educational institutions such as MIT have decided to post their course content for free on the Internet. According to Diamond (2003) this has made a huge impact on many poor people living in developing countries. A growing number of hospitals have also decided to share their medical knowledge for free with developing nations. One example is the world renowned St Jude Children's Hospital in Memphis (USA) where advanced telecommunication technologies are used to assist and train nurses in developing countries free o f charge (St. Jude Children's Hospital).

To sum up: It is clear that the stricter application of IPR legislation is based on the perspective that information is a commodity that can be bought, sold and stolen. As such it has some serious social, economic but also moral implications. Stricter IPR legislation is not only affecting the original creators of knowledge, but also puts a strain on developing nations and threatens indigenous peoples and their knowledge. It is clear that the free market system, with its main focus on the economic value of information to benefit a few, is not a fair tool to ensure the preservation of the information commons. The original idea of IPR, that the societal benefits ought to be implicit in the design of any intellectual property system, is being neglected at the expense of the economic argument. The information marketplace has become an exclusive "pay-for-information-place" and access to information is determined by predominant monetary considerations and not moral values.

Conclusion

In this paper it has been argued that we are living in an era where the digital environment for the first time allows the creation of an information commons where information and knowledge can be distributed to the largest number of people at about zero cost. However, access to and use of information has become increasingly difficult. This is mainly due to the international trend to commodify information and by implication to strengthen IPR to ensure the proper protection of this "valuable" commodity. One of the alarming implications of the trend is the exclusion of people from essential information, thereby denying them the basic human right of access to information. It is clear that the economic argument has become of more importance than the moral and social arguments. This has brought the dual nature of intellectual property

臺灣大學圖書館 期刊資料庫

systems (right to own and right of access) in an imbalance favouring the ownership/exclusion argument. The impact of this trend on the original creators of information, on indigeno us peoples and on development has been used to prove the moral wrongness of this direction in IPR.

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