

EXECUTIVE SUMMARY

The Way Forward for Intellectual Property Internationally

STEPHEN EZELL AND NIGEL CORY | APRIL 2019

INTRODUCTION

The global economy is becoming more innovation driven for developed and developing nations alike, powered by knowledge, creativity, and technology—each of which is fundamentally supported by intellectual property (IP) and intellectual property rights (IPR) protections. Yet over the past two decades, IP's role in the global economy has come under an increasingly active and coordinated attack by IPR opponents from a variety of academic institutions, multilateral agencies, nongovernmental organizations (NGOs), and developing nations and policymakers therein. However, despite IP's foundational role in enabling innovation and powering innovation-driven economies, the global debate surrounding it largely pivots around the positions taken by IPR opponents who favor weak or nonexistent protections and enforcement—and who work to portray IP as enabling monopolistic rents imposed by wealthy multinationals and rich nations.

Yet if the international community is going to maximize global innovation—something which is critical if we are to make faster progress on commonly shared global challenges such as climate change, disease prevention and treatment, and economic growth—we will need a stronger and more wide-ranging consensus on the importance of IP to every country throughout the world. To maximize the role IP will play in enabling innovation around the world, the countries that best recognize the essential link between the two—including the United States, Commonwealth nations, European Union members, Japan, and Korea—need to adopt and implement a new strategy to push back against IP opponents, make the case for the centrality of IP to global progress, and build out and strengthen the international framework of intellectual property rules, norms, and cooperation.

REPORT OVERVIEW

This report begins by establishing the essential link between IP and innovation (and trade and innovation), examining the scholarly literature documenting how robust IPRs benefit all nations (developed and developing alike), and explaining why robust IPRs are essential to maximizing the output of innovation globally, thus making IP a legitimate and fundamental component of trade agreements and global trade governance. It then conceptualizes and characterizes opponents' ideological opposition to robust intellectual property rights, catalogs the different types of groups and organizations opposed to IPR, and shows how the debate over IP played out in recent negotiations over the Trans-Pacific Partnership (TPP) trade agreement. The report concludes by providing policy recommendations to chart a new way forward for intellectual property internationally, including by:

- Reframing the debate to make the case that global trade is about maximizing worldwide innovation and that ensuring robust intellectual property protection is key to this;
- Directly rebutting the most egregious anti-intellectual property assertions of IP opponents;
- Implementing new strategies to advance a stronger global IPR regime, including an “all-points” strategy;
- Engaging more like-minded allies; and
- Proactively assisting developing nations with their efforts to become more innovation-driven economies, in part by increasing funding for targeted technical assistance and capacity building around IPR.

SUMMARY: IDEOLOGICAL GROUPINGS AND UNDERPINNINGS OF THE ANTI-IPR COALITION

This report identifies five major groupings of IP opponents. The first includes a broad range of academics, such as Jagdish Bhagwati, Larry Lessig, Paul Krugman, and Joseph Stiglitz in the United States, and Michael Geist, Richard Gold, and Ariel Katz in Canada. A second group consists of nongovernmental organizations such as the Center for International Governance Innovation, the Electronic Frontier Foundation, the Free Software Foundation, Knowledge Ecology International, Mediciens Sans Frontières, the Open Media Organization, Public Knowledge, and the South Centre, among others. A third group consists of international organizations, especially a wide variety of United Nations bodies such as the United Nations Conference on Trade and Development (UNCTAD), the United Nations Human Rights Council, UNITAID, and the UN High-level Panel on Access to Medicines. However, other international institutions, such as the World Bank, have issued reports skeptical of IP’s role in the global economy.¹ A fourth group includes national governments and their key agencies and policymakers, such as from India or South Africa, who seek to weaken IP norms globally. Finally, some government officials from developed nations, including from Australia’s Productivity Commission and the U.S. State Department, have argued for weakened IP provisions.

This report explains that a fundamental fault line in the debate over intellectual property pertains to the need to achieve a reasoned balance between access and exclusive rights. As IPRs allow rights-holders to prevent others from using their intellectual property without permission, for a limited period of time, IPRs involve an inescapable yet fundamental trade-off between short-term allocation efficiency (i.e., providing immediate, wide-ranging access to the IP) and long-term dynamic efficiency (i.e., incentives to invest in new innovations). We believe this trade-off should be decided in favor of dynamic efficiency.

Scholars and advocates supporting IP engage in vigorous debates over how to balance those rights and interests both in domestic law and in trade agreements, albeit based around a shared understanding that IP and its protection are critical. Their debate is essentially about where to draw certain lines, such as whether patents should be subject to a second review. However, the debate that prevails in many international forums is not focused on this nuanced balancing; rather, it is about advancing a wholesale diminution of intellectual property rights broadly, in many cases asserting that IP is antithetical to innovation and thus should be limited in general, and in trade agreements especially so.

Coupled with the fact that many developing nations provide a welcome audience for such views, IP opponents have been effective enough for a key framework condition for global innovation to now be threatened. Ideological opponents who reject IPRs make a number of specious arguments about how IP represents a tool to limit growth, especially in developing nations, and how nations' IP provisions should be viewed as a sovereign, "behind-the-border" issue not subject to trade agreements. They thus try to paint IP not just as irrelevant to trade, but as an infringement on a state's right to use intellectual property however it wishes (often to pursue state-led industrial policies or avoid paying foreign licensing fees). In other words, for them, global redistribution trumps global growth and innovation.

In considering the way forward for IP policy, it is therefore important to understand the ideology that shapes how IP opponents view the economy, what they consider important, and most importantly, what they believe to be correct versus misguided public policy, especially as it relates to providing access to innovations. This report rebuts three key claims asserted by IP opponents.

Claim: Intellectual property should be opposed due to its close connections to free trade, global economic integration, and large companies. Many opponents of robust IP protection share two major conceptions: a distrust of big business (such as via rhetorical attacks on "Big Pharma" and "Hollywood") and a skepticism for private markets. At the heart of this opposition lies the belief that intellectual property is simply a tool to protect "big business," which most IP skeptics inherently oppose. The views of individuals such as Joseph Stiglitz, Dean Baker, and Arjun Jayadev are indicative here.

Critics refuse to acknowledge the broader role robust IPRs play in employment and economic growth. For if they did, it would be much harder for them to prevail in the court of public opinion, as the issue could not be framed as big corporations versus the interests of poor nations. Furthermore, this framing shows how IP skeptics believe there is no overlap between company interests and worker interests. It is as if none of the revenues from the creation, delivery, and marketing of IP—whether it be for content (e.g., a movie, video game, or song) or inventions—go to the millions of workers directly and indirectly involved in the production of IPR-based goods and services. IPR opponents also argue that there is no overlap between companies' innovations and consumers' interests. Consumers have an interest not only in low prices (which in theory they could get if all IPR were abolished) but in the production of future intellectual property, including content, better medicines, and improved technologies generally. That is why IP opponents fight so hard to advance the narrative that content creation and inventions are not dependent on IPR. For them, consumers and workers can have it all: weak IP rights and the same or better intellectual property (and thus innovation) production. If only that were true.

Claim: Intellectual property undermines human rights, in part by limiting "human freedom," especially online. Many NGOs and related advocates oppose IPRs, as they consider them an attack on human rights, especially free speech and individuals' rights to participate in science and culture. There is an obvious need to ensure intellectual property laws balance protection, enforcement, and access, and consider different economic and societal interests. Yet the debate involving IP and human rights is often far removed from nuance and careful analysis; and is usually driven by inflamed passion and intentional misinformation. While there are many strands to this broad opposition, there are two notable flashpoints: enforcing copyright online and IP, and the international human rights debate. The Internet is one of the most important platforms for free speech and expression ever devised. Yet, indicative of the ideological divide, many proponents of weak or nonexistent intellectual property believe all information (copyright-protected or not) should be free, and governments should not only turn a blind eye to digital piracy, but actively tie the hands of companies seeking to limit digital piracy.² In terms of free speech, many

opponents see IP provisions as a constraint on the U.S. approach to fair use.³ Rather than seek to find an appropriate balance between IPR rights and free speech, which the United States has largely achieved, IP opponents seek wholesale diminution of IP protection. Some IP skeptics (such as the Electronic Frontier Foundation and some at the Cato Institute) even argue that intellectual property protection and enforcement impugns upon personal freedom. What right do others have to tell someone they cannot copy a piece of music or a blueprint of a product? Such proponents focus on maximizing self-interest and personal freedom, not the broader public interest of IP creation, something they deny exists.

Claim: Intellectual property harms innovation by limiting the diffusion of ideas and technologies. Given the central role played by technology and innovation, intellectual property represents a central point of contention in the debate about the best approach to spur economic development, especially in emerging economies. Proponents of weak IP protection and enforcement view theft of intellectual property as a shortcut to technological upgrading, economic restructuring, and even “greening” their economies. IPR opponents blame developed countries for the economic conditions of developing nations, arguing developed countries use IP as a form of “economic imperialism” that extracts “rents” from the South. This is a mainstay position for opponents who remain entrenched in a traditional “North vs. South” view of international relations. IPR opponents paint developing countries as the victim when arguing that developed countries should hand over IP, as they contend developing countries should have the freedom to exploit or undermine intellectual property, especially if it is to address key societal issues. They dismiss as inconsequential the harm this would do to rates of global innovation and content production.

This opposition reveals a central point that goes to the core of ideological opposition to IPRs: a disdain for the fact that firms, not governments, hold the private rights to the intellectual property embedded in most technology and content. That IP is held by private-sector enterprises and driven by market forces, rather than the state, means intellectual property represents a static cost to be minimized or avoided. This leads to a negative-sum view of IP and a singular, distorted focus of the distribution rather than production of IP and its forced re-distribution by the state.

SUMMARY: THE WAY AHEAD

A policy framework that prioritizes global innovation will require the world’s leading innovative countries to recognize that there are major problems with the current stalemate and outdated approach to IP at the international level. First, by not advocating that countries consider the global implications of their domestic innovation policies, too many countries have been allowed to enact mercantilist practices that detract from global innovation. Second, by not advocating for core principles and policies that support innovation at the global level, leading countries allow opponents of IP to undermine the already increasingly outdated and ineffective rules undergirding IP at the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO). Third, this complacency and policy stalemate has allowed IP skeptics to define and frame the debate—IP as a barrier to progress and welfare, short-term interests are paramount, IP is unfair—when in fact these arguments should be seen for what they are: anti-innovation, anti-growth, and anti-progress. If the world is going to maximize its potential for global innovation, it will need leading countries to recognize that new energy, new tactics, and a new strategy are needed to encourage more nations to do more contributing and less detracting from global innovation.⁴

The following summarizes the report's recommendations:

- 1) **Engage in a broader reframing of IP, trade, and innovation.** Reframing the intellectual property debate back toward a focus on innovation and content production would require significant shifts in international policymaking, including changes to how countries typically approach innovation, trade, and economic policy, and rebutting the notion of developing-country “victimhood.” Instead, supporters need to make a stronger case for how the skeptics’ preferred approach undermines global innovation and human welfare, and how the traditional “North vs. South” dichotomy used by opponents of IP is wrong and distracts from how all countries can contribute to greater levels of global innovation.
 - a. The starting point for maximizing global knowledge production is countries doing the right thing at home in terms of implementing the right policies in ways that maximize their innovation capacity, but without distorting global innovation. From this, policymakers need to elevate maximizing innovation policy on the global stage to a similar level, as trade currently holds when it comes to debates about how to optimize global economic growth and welfare.
 - b. The target audiences for renewed engagement on an updated framing of intellectual property, trade, and innovation are many and varied. The United States and likeminded countries should develop a tailored strategy to identify targeted stakeholders to engage in developing countries as part of its effort to reframe the debate around IP, trade, and innovation. Even within developing countries that have traditionally pushed for weak or no intellectual property protections, such as China, India, and South Africa, there are stakeholders—individual policymakers, academics, government agencies, trade associations, and research institutions—that recognize both the need to focus on innovation and that IP plays a key supporting role. Such individuals need to be identified and engaged.
- 2) **Develop an “all-points strategy” in which nations and their key innovation-supporting agencies and institutions actively advocate for IP and contest the activities of IP opponents on all fronts.** Identifying and engaging at each “point” requires a formal, coordinated whole-of-government approach for each country engaged in this agenda, wherein government agencies and officials are armed with the right talking points, background material, and direction. This type of internal coordination is common among many international issues but needs to be more seriously brought to bear in the context of IP. To be truly effective, engaged countries need to designate a senior lead officer and agency to drive a formal, coordinated strategy and message among the respective agencies responsible for domestic IP administration, commerce, trade, science and technology, and development. An all-points strategy is needed as the ideological battle over IP unfolds across an increasing number of fronts and international discussions on shared public policy concerns touch on IP.
- 3) **Expand “nonagreement” cooperation.** One way to change the framing around intellectual property would be for the United States and likeminded nations to tap into the growing number of countries—such as Costa Rica, Estonia, and Peru—that have made innovation a priority and are looking for policy ideas, including for IP. To achieve this, countries will need to develop a more comprehensive and proactive strategy to engage—whether individually or collectively—with these countries to harmonize existing procedures and processes and build institutional capacity to more effectively administer and enforce intellectual property rules. Two steps would be productive here:

- a. **Increase funding for targeted IP technical assistance and capacity building.** Leading innovative countries need to provide higher levels of targeted funding to help developing countries that are genuinely committed to improving their economies' ability to develop, use, and administer intellectual property. WIPO's technical assistance portfolio is a prime vehicle for renewed funding and activity given its work on patents, trademarks, industrial designs, geographic indications, and copyrights. In particular, more countries, including the United States, need to contribute more to WIPO's Funds-in-Trust (FIT) program.
- b. **Create a global program to support scientific research in developing countries.** A targeted program that supports scientific and engineering research activity in developing countries would offer a productive tool for policymakers to improve their domestic capacity to engage in innovative activity and develop and use intellectual property. An existing U.S. program—Established (previously Experimental) Program to Simulate Competitive Research (EPSCoR)—provides a model that relevant international institutions and leading donor countries (as well as private firms, potentially) could use in working together to support promising centers of research in the developing world, thereby improving their ability to compete for other research funds and conduct increasingly advanced research activities. A global EPSCoR-like program would demonstrate the international community's commitment to innovation research in less-developed nations. However, at the heart of such a program would be a demonstrated commitment to the protection of intellectual property.

CONCLUSION

Despite the protestations of opponents, intellectual property is foundational to innovation. If we want more innovation and creative content, the international community, including policymakers in developed and developing nations alike, need to recognize the role IP plays and begin developing new norms, standards, and protections—codified in trade agreements—that elevate IP's role. Just as post-World War II trade agreements aimed at facilitating access to foreign markets for physical goods in a deliberate effort to maximize the allocative efficiency gains from trade, so would the approach outlined in this report seek to do the same for services and knowledge-based goods industries, but with the aim of maximizing their dynamic efficiency (innovation and content creation) for the benefit of the world.

Moreover, as it relates to the traditional dichotomy still permeating ideological opposition to IP at the international level, it is not about “North vs. South” anymore, it is about whether one lives in a country whose policymakers understand that stronger IP rights are beneficial for innovation and economic growth. The smartest developing nations now recognize that robust IP rights and protections are key to catalyzing their growth potential—and it is time to empower those countries with a new narrative of the role of IP in driving global innovation.

The ideas outlined in this report make the case that the world's top nations need to lead this charge in shaping a new agenda for IP internationally, and explain how they can achieve this. At its heart, the strategy recognizes that top countries need to lead in order to break through the stalemate at the multilateral level, and to not allow opponents' ideological anchoring to hold back efforts to build an international framework for intellectual property that better supports global innovation.

ENDNOTES

1. The World Bank, *Global Economic Prospects and the Developing Countries 2002* (The World Bank, 2002).
2. Daniel Castro, Richard Bennett, and Scott Andes, "Steal These Policies: Strategies for Reducing Digital Piracy" (The Information Technology and Innovation Foundation, December, 2009), <http://www.itif.org/files/2009-digital-piracy.pdf>.
3. Michael Baak, "How the Trans-Pacific Partnership Jeopardizes Fair Use," *Public Knowledge*, September 24, 2015, <https://www.publicknowledge.org/news-blog/blogs/how-the-trans-pacific-partnershipjeopardizes-fair-use>.
4. Stephen J. Ezell, Adams B. Nager, and Robert D. Atkinson, "Contributors and Detractors: Ranking Countries' Impact on Global Innovation" (Information Technology and Innovation Foundation, January 2016), <http://www2.itif.org/2016-contributors-and-detractors.pdf>.