
Private Power, Public Law
**The Globalization of Intellectual
Property Rights**

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1 Introduction

In 1990 an American-based private business association used its power not only to reject, but to actively shape, the legislation of a foreign, sovereign government. Up until 1991 Chile, like many developing countries, refused to grant patent protection for pharmaceutical products. This refusal was an effort to keep the prices of necessary medicines affordable by placing public health considerations above property rights concerns. In the late 1980s Chile faced increasing pressure from the US-based Pharmaceutical Manufacturers of America (PMA) to revise its laws to extend patent protection to pharmaceutical products. The PMA sought a law providing for monopoly pricing protection for twenty-five years, potentially placing necessary medicines out of reach for the average Chilean. In 1990 the Chilean government proposed a revised patent law, which the PMA rejected as inadequate. In response, the Chileans went back to the drawing board. Chile finally came up with a law providing patent protection for pharmaceutical products for a fifteen-year period. The PMA declared that it was satisfied. The PMA's role in this matter was intriguing. Where did this power come from? How had this situation come to pass?

The Chilean incident foreshadowed a related and even more dramatic event – the adoption of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) administered by the World Trade Organization (WTO). TRIPS ushered in a full-blown, enforceable global intellectual property (IP) regime that reaches deep into the domestic regulatory environment of states. The central player in this drama was an even smaller group, the *ad hoc* US-based twelve member Intellectual Property Committee (IPC).

Consisting of twelve chief executive officers (representing pharmaceutical, entertainment, and software industries), the Intellectual

Property Committee¹ successfully developed international support for strengthening the global protection of intellectual property (patents, copyrights, trademarks, and trade secrets). The IPC, joined by its counterparts in Europe and Japan, crafted a proposal based on industrialized countries' existing laws and presented it to the General Agreement on Tariffs and Trade (GATT) Secretariat in 1988 (The Intellectual Property Committee, Keidanren, and UNICE, 1988). By 1994, only a few years later, the IPC achieved its goal in the Agreement on Trade-Related Aspects of Intellectual Property Rights of the Uruguay Round. In doing so, the IPC offered important lessons about the increasing role of private power in international politics. Industry revealed its power to identify and define a trade problem, devise a solution, and reduce it to a concrete proposal that could be sold to governments. These private sector actors succeeded in getting most of what they wanted from a global IP agreement, which now has the status of public international law. How and why did a group of private sector actors succeed in establishing a high-protectionist global IP agreement? And why did these actors fail to achieve the same results in parallel issue areas? How, in other words, do agents and structures interact to produce particular outcomes, what explains variation, and what explains change over time?

Analytic perspectives

This project has been through many changes over the years. In presenting pieces of it over time in various venues I realized I needed to write a book about it, because the pieces alone were misleading. In this section I discuss some different perspectives that offer insights into the globalization of IP rights. I cannot treat each of the alternative perspectives fully (each would need a chapter-length treatment). The following portrayals are meant only to provide the context for my synthetic approach and highlight why I have developed the perspective I employ in the rest of the book.

On one level, TRIPS is a “can do” story about twelve men (the members of the IPC) who made IP rules that now bind most of the globe. However, the “can do” story with which I began, of twelve incredibly efficacious individuals, was compelling only in the absence of historical context. It begged the larger question of how these particular individuals

¹ In 1986 the members of the IPC were: Bristol-Myers; CBS; Du Pont; General Electric; General Motors; Hewlett-Packard; IBM; Johnson & Johnson; Merck; Monsanto; and Pfizer.

became so powerful at this particular point in time. Were there larger forces at play that propelled them toward the forefront of global business regulation? Yes, certainly. Changes in global capitalism and technology facilitated their triumph. Intellectual property had become a highly valued resource and the comparative advantage of technological leaders. On another level, it is a structural story about the inexorable march of globalization and the power of the transnational capitalist class. The story became a kind of ideological and analytic Rorschach test. Free marketeers loved this tale of the triumph of business interests and the “constructive” collaboration between business and government. Gramscians and Marxists also responded positively in so far as it confirmed their world views.

Structural conditions loomed large in establishing the conditions for the IPC’s success. To what extent did structural change determine the outcome? Was the IPC’s triumph inevitable, or was it historically conditioned? Did everything that preceded its success point to this outcome? No, historical context did not point in only one direction. While structural factors overshadowed the efforts of these individuals, it did not determine them. Entrepreneurship and agency still counted for something in this tale. This was even more clearly the case when contrasted with parallel efforts in other issue areas such as investment and services.

A macro-level structural account of the making of global IP rules could focus on the inexorable march of globalization – either materially or culturally defined (Wallerstein, 1974; Thomas, Meyer, Ramirez, and Boli, 1987). Like a tidal wave, global capitalism/Western culture was reaching into every global nook and cranny eradicating difference, making the world ever safer for global capital/Western culture. In the material account, the process was eliminating obstacles to international commerce under the economic might and ideological orthodoxy of the transnational capitalist class. Global IP rules were just the latest triumph, neither the first nor the last. One hardly needs agency to account for the fact that the economically most powerful transnational actors acted in concert with the economically and politically most powerful states to devise global rules to benefit them all (and at the expense of most others). But this perspective cannot account for variation in outcomes, or the uneven triumph of the transnational capitalist class.² Its triumph has in fact, been patchy and uneven (as examined in greater detail in

² Neo-Gramscian scholarship has grappled with this problem by providing more nuanced discussions of factions of capital. Bieler distinguishes between “short-term thinking” finance capital versus “long-term thinking” manufacturing interests, and the privileged

Chapter 7) – undeniable in intellectual property and financial services, but questionable in, for example, foreign direct investment. Located in the same changing structure of global capitalism, including many of the same players, and engaged in the very same set of trade negotiations (the Uruguay Round), US-based private sector activists were supremely successful in both intellectual property and financial services. But the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Investment Measures (TRIMS) proved to be disappointing for the private sector activists. For example, the fact that the global pharmaceutical firm, Pfizer Inc., was a key player in spearheading both the TRIPS and the TRIMS efforts demonstrates that power and resources alone do not determine outcomes.

One needs an account about agency to capture the politics behind these divergent outcomes. In the successful cases, private sector activists organized themselves into streamlined *ad hoc* lobbying groups – the IPC and the Financial Leaders Group (FLG) – bypassing their traditional industry associations. This organizational form may have contributed to their success. Focusing on agency permits one to analyze the efforts and strategies of those who sought new rules and how, in particular, they were able to exploit the context-dependent preoccupations of their governments. The activities of agents help to explain the timing and the particulars of the desired agreement. I argue that the entrepreneurial way in which agents linked intellectual property and trade fundamentally shaped the substance of the ultimate global property rules. What if the twelve individuals had never mobilized to press for stronger global rules? What kind of IP rights regime would we see today?

While structural explanations alone are found wanting, so too are agent-centric explanations. For example, a micro-level agent-centric account of the making of global IP rules could be rooted in rational choice and liberal pluralism. Such an account takes us a good distance in explaining how these twelve individuals overcame their collective action problems in order to present a united front and collaborate in their quest for global rules that would benefit them. Functional versions of this could emphasize the actors' desire to reduce transactions costs by switching from cumbersome *ad hoc* bilateral negotiations to binding

role of state institutions linked to global markets versus institutions focused on “national” problems (2000: 26, 13). Levy and Egan have highlighted the difference between regulatory and market-enabling institutions and subsequent variability of transnational capital's authority (2000). The initial turn toward Gramsci was in part inspired by scholars' frustration with the limits of Wallerstein's analysis (Murphy, 1998).

global rules. Understanding the micro foundations of state behavior and the domestic sources of state interests is a worthy enterprise. However, ahistorical “strict” rational choice perspectives neglect the broader context and structures within which interaction takes place. This can lead analysts to overemphasize the efficacy of the agents and the voluntarism possible in the situation. Recent advances in liberal theorizing have endeavored to incorporate more contextual variables to correct for some of these shortcomings (Moravcsik, 1997). Unit-level constructivist analyses have explicitly incorporated non-material factors and have situated advocacy in a wider and more contingent context (Klotz, 1995; Litfin, 1999; Price, 1998). Nonetheless, while more sensitive to context, these perspectives tend to underplay power considerations. Preferences and norms are crucial, but are not the whole story.

“Bottom-up” analyses need to be situated in time and space, and to be understood as embedded in deeper structures that determine who gets to play the “game” in the first place. Structure exerts a significant causal force that is ignored or remains outside the purview of these theories. Structure helps to identify the significant agents in any particular context and also shapes preferences. Structural factors also alert us to whose preferences are likely to matter, not just in the domestic context, but in the international arena as well. Focusing on asymmetrical power capabilities of states helps to explain effects abroad as well as negotiated outcomes. Institutional change in the American state had larger effects than similar changes in other states; US institutions became vehicles for economic coercion and the exercise of preponderant power to force changes abroad. Neither the economic power of private actors nor their activities would have made much difference had they been based in Burma. Analyzing either the micro level or macro level alone renders an incomplete picture.

Looking to history, it is important to appreciate that things have not always been as they are today. IP rights used to be considered “grants of privilege” that were explicitly recognized as exceptions to the rules against monopolies (Sell and May, 2001). To consider these to be privileges underscores their temporary and unstable nature. The sovereign may grant privileges but is in no way obligated to do so. Shifting to the term “rights” suggests that it is the sovereign’s duty to uphold them. The difference is not merely semantic. The way that issues are framed can make a great deal of difference in terms of what is and is not considered legitimate. For much of the twentieth century patents were perceived as “monopolies” in American jurisprudence. Anti-trust (anti-monopoly)

legislation checked the power of patent holders in important ways. The framing of intellectual property as being “pro-free trade” would not have been persuasive during earlier eras in which IP protection was seen, at best, as a necessary evil and at odds with free trade (Machlup and Penrose, 1950). It is only recently that the courts have ceased referring to patents as monopolies, and that anti-trust legislation has been relaxed. Tracking these variable conceptions and corresponding institutional manifestations allows us to examine the relationships between normative and institutional change. When and why did intellectual property catapult to the top tier of the United States’ trade agenda? Had the two issues always been linked? Had IP protection always been so revered? How has the United States treated domestic intellectual property rights? Why did “it” decide to globalize its own perspective?

These sets of considerations led me into the tense and central spaces between agents and structures, the micro level and the macro level. Both micro-level (agents) and macro-level (structures) explanations are persuasive. Both capture important aspects of the story. Yet neither ultimately is compelling because each misses something quite important. In this case, institutions are the critical link between the micro level and the macro level. By institutions I mean legal norms, the legislative, executive, and judicial branches of the US government, and international organizations (e.g., the WTO). All these institutions are dynamic. They both act and are acted upon. They both constitute and are constituted by agents. They constitute and are constituted by structures. This dynamic process of mutual constitution is driving global business regulation in intellectual property rights.

It is necessary to examine the links and mechanisms connecting agents and structures. In this respect I examine concrete institutions such as the US judiciary, the legislature, the executive branch (e.g., USTR), and the WTO as targets of human agency, “without at the same time severing these institutions from their wider social context” (Germain, 1997: 176). The way that structural changes acted upon institutions is an important component of the explanation. How were American state institutions changing in response to larger structural forces? American policy-makers had not always defined IP protection as being in the national interest. What was different now and why? How, for example, did the American focus on economic competitiveness³ manifest itself in judicial

³ The “competition state” is derived from structural explanations of globalization. See, e.g., Philip Cerny, 1994.

interpretations of IP rights and competition? How, in turn, did changing judicial conceptions of property rights facilitate the actions of agents seeking to strengthen global IP protection? How did the institutions of the state come to be persuaded that such global rules were worth pursuing? What access did the state provide for these individuals to press their case? Did it provide equal access for alternative views?

In a nutshell, this book argues that the global regulation of IP rights is a product of structured agency. Agents are embedded in structures that make their actions possible. Institutions mediate between structures and agents in two directions. Structures alter institutions, and create new agents. In turn, agents alter institutions, and create new structures. Different combinations of elements can lead to vastly different outcomes.

The remainder of this chapter provides an overview of TRIPS. It then offers a historical perspective on TRIPS and highlights some of its controversial features. The chapter goes on to indicate how TRIPS is embedded in broader trends in the global political economy. Next, it presents a discussion of structures, agents, and institutions to introduce the analytic framework. Finally, it provides a road map for the rest of the book.

An introduction to TRIPS

The Uruguay Round of the GATT negotiations ushered in a new era in multilateral trade policy by dramatically expanding the scope of disciplines covered, and strengthening the dispute resolution mechanisms. GATT's success in cutting tariffs and reducing border impediments over successive negotiating rounds has led negotiators to address inside-the-border, or structural, impediments and non-tariff measures that undermine free trade. These new issues, such as investment, trade in services, and the protection of IP rights, implicate domestic regulatory policy, fundamentally challenging states' policymaking discretion. The Uruguay Round was unusual in so far as this agenda of new issues was driven almost entirely by the private sector, particularly by activist elements of the US business community.

TRIPS is a dramatic expansion of the rights of IP owners and a significant instance of the exercise of private power. The approach embodied in the TRIPS Agreement, extending property rights and requiring high levels of protection, represents a significant victory for US private sector activists from knowledge-based industries. In the TRIPS case, private actors worked together, exercised their authority and achieved a result

that effectively narrows the options open to sovereign states and firms, and extends the opportunities of those firms that succeeded in gaining multilateral support for a tough global IP instrument. State-centric accounts of the Uruguay Round are at best incomplete, and at worst misleading, as they obscure the driving forces behind the TRIPS Agreement. The TRIPS process was far more complex than a state-centric account would lead us to believe. In the TRIPS case, private actors pursued their interests through multiple channels and struck bargains with multiple actors: domestic interindustry counterparts, domestic governments, foreign governments, foreign private sector counterparts, domestic and foreign industry associations, and international organizations. They vigorously pursued their IP objectives at all possible levels and in multiple venues, successfully redefining intellectual property as a trade issue. However, it was not merely their relative economic power that led to their ultimate success, but their command of IP expertise, their ideas, their information, and their framing skills (translating complex issues into political discourse).

Not all ideas are equally privileged in political life; therefore how one defines "interests" is central to understanding which sets of ideas affect policy. Furthermore, it is important to identify *who* is defining them. By promoting their particular vision as a solution to pressing US trade problems, the IP activists captured the imagination of policymakers and persuaded them to adopt their private interests as US national interests. Additionally, their initiative in producing concrete negotiating proposals significantly strengthened their hand.

TRIPS is part of the multilateral trade agreements that were made binding on members in the Final Act of the Uruguay Round. Adhering to the TRIPS Agreement is obligatory for all states that wish to join the WTO, and is part of the common institutional framework established under the WTO. The Agreement covers all IP rights, patents, trademarks, copyrights, trade secrets, including relatively new rights such as semiconductor chip rights. It incorporates the Berne Convention for copyright norms, and adds additional copyright protection for computer software, databases, and sound recordings. TRIPS adopts a patent law minimum well above the previous standards of the 1883 Paris Convention, extending both subject matter covered and term of protection. Patent rights are extended to virtually all subject matter (with the exception of plants and animals other than micro-organisms), including pharmaceutical products, chemicals, pesticides, and plant varieties, and are to be granted for twenty years from the date the application is

filed. Under TRIPS, semiconductor chips and the “mask works” (or the layout designs of integrated circuits) which are “fixed” in the chips are protected under a *sui generis* (special or more specific) system. States are required to provide adequate and effective enforcement mechanisms both internally and at the border. The Agreement makes the WTO’s dispute settlement mechanism available to address conflicts arising under TRIPS, and significantly provides for the possibility of cross-sectoral retaliation for states that fail to abide by WTO’s Dispute Settlement Body’s (DSB) rulings. Infractions in intellectual property can lead to sanctions on goods. The WTO is empowered to monitor compliance to ensure that defendants carry out their obligations within a reasonable time period. If the defendants fail to comply, the WTO will authorize the complainant to impose retaliatory trade sanctions if requested to do so.⁴

This far-reaching agreement has important implications for innovation, research and development, economic development, the future location of industry, and the global division of labor. Indeed, the dramatic expansion of the scope of IP rights embodied in TRIPS reduces the options available to future industrializers by effectively blocking the route that earlier industrializers followed. It raises the price of information and technology by extending the monopoly privileges of rights-holders, and requires states to play a much greater role in defending them. The industrialized countries built much of their economic prowess by appropriating others’ intellectual property; with TRIPS, this option is foreclosed for later industrializers. The agreement codifies the increasing commodification of what was once the public domain, “making it unavailable to future creators” (Aoki, 1996: 1336). States and firms whose comparative advantage lies in imitation stand to lose under the new regime.

Since the vast majority of developing countries consume rather than produce intellectual property, and import rather than export intellectual property, one may wonder why they signed on to TRIPS. As will be discussed in more detail in later chapters, they did not fully realize the impact of TRIPS at the time of the negotiations. They were subjected to pronounced economic coercion leading up to and during the negotiations. Furthermore, they assented to an IP agreement in exchange for the Organization of Economic Cooperation and Development (OECD) commitments to expand market access for developing countries’ agricultural and textile exports.

⁴ For a useful guide to the TRIPS provisions, see M. Blakeney (1996), *Trade-Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement* (London: Sweet and Maxwell).

The long-term redistributive implications of TRIPS are not yet fully understood. The short-term impact of stronger intellectual property protection undoubtedly will be a significant transfer of resources from developing country consumers and firms to industrialized country firms (Rodrik, 1994: 449). While some analysts have concluded that the United States and its firms whose comparative advantage lies in innovation and intellectual property will receive “significant benefits from [the] TRIPS Agreement” (Doane, 1994: 494), others are not so sanguine (Reichman, 1993; Foray, 1995).

TRIPS increases the range of regulatory standards that states are obliged to implement; specifies in greater detail what those standards must be; requires states to implement those standards; mandates and institutionalizes greater substantive convergence of national IP systems; and ties the principle of national treatment to a higher set of standards for intellectual property (Drahos, 1997: 202–203). Overall, TRIPS has “added solidly to the property power around the world of corporations with high technology resources” (Arup, 1998: 376).

TRIPS in historical perspective

The TRIPS Agreement introduces a new era in the evolution of IP rights by effectively globalizing IP protection. The history of IP protection can be divided into three broad phases: national, international, and global (Drahos, 1997). Until the end of the nineteenth century, IP protection covering patents and copyrights was strictly a national matter. States passed laws of their own design; the protection that these laws provided did not extend beyond national borders. The expansion of international commerce increasingly strained this national patchwork of IP protection, and, by the early 1800s, a number of European governments had negotiated a network of bilateral copyright agreements. In the early nineteenth century British authors and publishers complained of widespread “piracy” of British books abroad. Reprinting books was perfectly legal in many other countries; in fact, the reprinting of texts by popular British authors such as Charles Dickens was a thriving industry in America. The British book trade recognized that this practice was reducing potential profits and eliminating major export markets for legitimate British editions (Feather, 1994: 154). There was a growing demand for codification in an international treaty. States with copyright laws sought international regulation of the book trade to protect copyrighted works beyond their territorial borders.

Similarly, inventors who sought protection of their inventions within foreign countries raised concerns over patents. In the 1870s, the Austro-Hungarian empire sought to host in Vienna international exhibitions of inventions. Foreigners were reluctant to participate because they feared their ideas would be stolen. German and American inventors were particularly concerned, as they were widely recognized to be among the most innovative (Murphy, 1994: 93). Therefore, in 1873 the empire adopted a temporary law providing protection for foreigners in order to encourage foreign inventors' participation in the international exhibitions; this protection was to last through the duration of the exhibition. A number of European countries already had domestic patent systems, and met in Vienna in 1873 to discuss prospects for an international agreement to protect patents. They convened several follow-up Congresses in 1878 and 1880; the latter Congress adopted a draft convention which became the basis for the 1883 Paris Convention (WIPO, 1988: 49–50). As in the case of copyright, the overriding objective was to devise a system in which states would recognize and protect the rights of foreign artists and inventors within states' own domestic borders (Gana, 1995: 137).

States responded to the increasingly strained patchwork of national legislation by adopting two international IP conventions: the Paris Convention for the Protection of Industrial Property (covering patents, trademarks, and industrial designs) in 1883, and the Berne Convention of 1886 (for copyright). The underlying principles of these international agreements were non-discrimination, national treatment, and the right of priority. Non-discrimination provides that there should be no barriers to entry of the foreign author or inventor in a member state's national market. National treatment means that once an inventor or author has entered a member state's market that person should be treated no differently than nationals. The right of priority protects the rights holder from unauthorized use of the copyrighted or patented work. Under this system, states were free to pass legislation of their own design but were obligated to extend their legislative protection to foreigners of member states.

In the international era the territorial basis of IP rights was preserved, albeit extended beyond jurisdictional confines through the "contractual device of treaty-making" (Drahos, 1997: 202). Unlike the TRIPS Agreement, these Conventions neither created new substantive law nor imposed new laws on member states; rather, they reflected a consensus among member states that was legitimated by domestic laws already in place (Gana, 1995: 138).

This system permitted wide variation in the scope and duration of protection. For example, many countries denied patent protection for pharmaceutical products in order to contain the cost of necessary medicines. This was perfectly acceptable under the terms of the Paris Convention. Indeed, before TRIPS, practices that US stakeholders decried as “piracy” were often lawful economic activities under various national legal systems and existing international IP agreements. States had considerable autonomy to craft laws that reflected their levels of economic development and comparative advantages in either innovation or imitation. Thus, the “old system” recognized inherent variations in the development levels of different countries.

By contrast, the global approach enshrined in the TRIPS Agreement is a much less flexible regime for IP protection. It promotes universality in IP rights protection. Behavior that once was legal is now illegal. TRIPS requires states to adopt both civil and *criminal* penalties for IP rights infringement. The Paris Convention made no mention of what items must be protected or the duration of protection to be offered. The TRIPS Agreement specifies obligations regarding the scope, subject matter, and duration of IP protection. Under the new global regime, states are required to extend patentability to “virtually all fields of technology recognized in developed patent systems”; to extend patent protection for a uniform term of twenty years; and to secure “legal recognition of the patentee’s exclusive right to import the relevant products” (Reichman, 1993: 182). These new regulations reach “deep into national territories in requiring respect for intellectual property from products destined for domestic markets such as pharmaceuticals, processes internal to production such as chemicals, and practices in local agriculture, medicine and education which were outside of market relations” (Arup, 1998: 374). With respect to copyrights, states are now obligated to comply with the standards embodied in the Berne Convention (as revised in 1971). Additional obligations include extending copyright protection to computer programs and compilations of data, and providing rental rights to holders of copyrighted computer programs (Reichman, 1993: 216). Furthermore, for the first time the multilateral IP regime incorporates enforcement mechanisms. In short, the global era is marked by a sharp reduction in the scope of state autonomy for determining appropriate levels of intellectual property protection at home (Aoki, 1996: 1343).

In light of the historical background of IP protection, TRIPS is striking on many levels. First, the US-based proposal to globalize a commitment to stronger IP protection was surprising, given the fact that

domestic US enforcement of IP rights was relatively lax until about 1982 (Whipple, 1987). In a very short time period, the US changed its domestic approach to intellectual property, then sought to globalize this commitment by incorporating intellectual property into 1984 and 1988 amendments to its domestic trade laws. The United States employed a coercive trade-based strategy, threatening trade sanctions and the denial of trade benefits for countries whose IP regimes were deemed unacceptably weak. This redefinition of US interest requires an explanation. Second, TRIPS closely mirrors the expressed wishes of the twelve chief executive officers of US-based multinational corporations who spearheaded the effort. The stated rationale for this IP agreement – that it will promote economic development worldwide – has virtually no empirical support. Third, it is based on a controversial conception of intellectual property that privileges protection over diffusion (i.e., private rights over public goods). Indeed, both economists and legal scholars have argued that this conception could have deleterious effects on global welfare (Ordoover, 1991; David, 1993; Deardorff, 1990; Frischtak, 1993; Maskus, 1991; Primo Braga, 1989; Litman, 1989; Boyle, 1992; Silverstein, 1994). Fourth, it largely advances a “one size fits all” approach to intellectual property, which many analysts have roundly condemned (Aoki, 1996; Dhar and Rao, 1995; Thurow, 1997; Oddi, 1987; Scotchmer, 1991; Trebilcock and Howse, 1995). The notion that one set of uniform standards is appropriate for all countries and all industries defies both economic analysis and historical experience (Reichman, 1993: 173–174; Alford, 1994). Fifth, in two departures from GATT precedent, the TRIPS Agreement applies to the rights of *private individuals* rather than to goods (Reiterer, OECD, 1994), and does not merely circumscribe the range of acceptable policies governments may practice, but “obliges governments to take positive action to protect intellectual property rights” (Hoekman and Kosteci, 1995: 156).

In so far as IP rights confer monopoly privileges, there is a natural tension between competition (or anti-trust) policy and IP rights. Intellectual property rights confer exclusive rights. As Cornish suggests, “exclusive rights to prevent other people from doing things are at least monopolistic in a legal sense, if not necessarily in an economic one” (Cornish, 1993: 47). Intellectual property rights *per se* do not constitute monopoly power and ultimately the market determines their value. However, IP rights raise the problem of monopoly power in so far as they constitute “a form of monopoly rent to the innovator” (Trebilcock and Howse, 1995: 249); rights-holders have the opportunity to raise prices and reduce output.

Furthermore, rights-holders have the power to withhold their inventions by refusing to license them. Watt, the British innovator and creator of the steam engine, was awarded a patent for his invention in 1769. In 1775, Parliament renewed his patent for an additional twenty-five years during which time Watt refused to license his invention. According to one observer, by doing so “he held back the development of the metalworking industry for over a generation. Had his monopoly expired in 1783, England would have had railways much sooner” (Renouard, 1987).⁵

The economic rationale for IP rights is that “unless invention or creation is compensated at its full social value there will be sub-optimal incentives to undertake it” (Trebilcock and Howse, 1995: 250). In the language of public goods, without compensation invention and creation will be underprovided and economic development will suffer. The so-called “free rider” problem lies at the heart of this perspective: individuals and firms will be unlikely to make costly investments in innovation or creation if imitators can reproduce these innovations or creations and “capture or appropriate at little or no cost a significant part of the economic returns of the investment in question” (Trebilcock and Howse, 1995: 250).

Much of the demand for first, international, and now global, IP protection arose from the complaints of inventors and creators over widespread free riding. Whether coming from British authors and booksellers in the nineteenth century, or American software, entertainment, and pharmaceutical concerns in the late twentieth century, the problem lies in the appropriability of the intellectual property. Recent changes in technology have exacerbated this appropriability problem, in so far as new technologies have made it vastly cheaper and easier for imitators to replicate expensively developed products and processes. For example, computer software, compact discs, and pharmaceuticals that are costly to develop are simple and relatively inexpensive to copy.

Yet policy must strike a balance between the private interests of IP owners, who seek adequate returns on their investments in knowledge-based products and processes, and the public interest in having access to the inventions and their benefits (Oddi, 1987: 837). Boyle presents

⁵ In contrast, Douglass North (1981: 162–166) argues that sustained innovation only began in earnest after the establishment of IP rights to raise the private return for innovation. He attributes the delay in the dissemination and fuller exploitation of Watt’s invention to the inadequate development of companion technologies, rather than to the power of withholding property and the social inefficiencies generated by such withholding.

the dilemma as follows: “Intellectual property rights . . . produce monopolies as well as incentives; they produce incentives because they are monopolies. If we undervalue the public domain, we will tend to give too many intellectual property rights, thus delivering a powerful anticompetitive, oligopolistic chunk of state-backed market power into the hands of the established players” (Boyle, 1996: 179). The merits of granting exclusive rights to IP owners have to be balanced against the economic effects of higher product costs and the potential “exclusion from the market of competitors who may be able to imitate or adapt the invention in such a way that its social value is increased” (Trebilcock and Howse, 1995: 250). Put simply, IP rights reflect an inherent tension between creation and diffusion. This tension poses the question whether intellectual property should be treated as “a public goods problem for which the remedy is commodification, or a monopoly of information problem for which the remedy is unfettered competition” (Boyle, 1992: 1450).

The TRIPS Agreement stands out in the broader context of the Uruguay Round of trade negotiations. One of the primary aims of the Round was to extend and institutionalize the broader global economic trend toward deregulation and trade liberalization. However, IP protection stands apart in so far as it “has become the strongest suit of internationally driven reregulation” (Arup, 1998: 367). By requiring states to regulate to provide a high substantive level of protection,

the Round was saying that intellectual property was pro-trade rather than a necessary evil which was to be tolerated because it promised its own benefits . . . Traders expressed their interest in obtaining *security* for their products and processes as much as freedom; they were not going to rely solely on economic advantages such as earlier innovation, superior quality, or cheaper prices.

(Arup, 1998: 374, emphasis added)

As Cornish suggests, “in a competitive market imitation is mostly to be reckoned virtuous, not sinful” (Cornish, 1993: 63). Yet the TRIPS Agreement, with its emphasis on providing security for rights-holders, renders many forms of imitation “sinful” – branding once legitimate entrepreneurs as “knowledge criminals”.⁶

Numerous analysts have suggested that this movement is quite at odds with a broad commitment to freeing global trade, and claim that it smacks of residual mercantilism (Reichman, 1993: 175; Porter, 1999).

⁶ I thank Chris May for this term.

The TRIPS Agreement reflected the assumption that “gains from unlicensed uses of foreign technologies in developing countries represent *illicit* losses to entrepreneurs in developed countries” (Reichman, 1993: 175; emphasis added). This assumption reflects a mercantilist perspective in so far as it undercuts a system based on norms of free competition based on superior product performance, lower prices, or more efficient production processes and represents a trade-off in favor of security for holders of licensing rights. “Weak intellectual property laws ensure access to markets for second comers who provide cheaper and better products through imitation and incremental innovation” (Reichman, 1993: 175); thus strengthening such laws can have anti-competitive effects.

Furthermore, as Borrus points out, “it is not obvious whether an economy derives greater long-term benefits from stricter IPR [intellectual property rights] protection that rewards innovation or from protecting less and choosing to favor the more rapid exploitation and use of technology” (1993: 367). Moreover, even the United States, the most ardent advocate of TRIPS may pay a significant economic price for the agreement. According to Reichman:

neither the developed countries as a group, nor the United States in particular, should expect to reap a painless bonanza from the TRIPS undertaking. Although some developed countries may benefit more than others, all will feel the social costs of strengthened protection for intellectual property rights pinching some sectors of their respective economies. (1993: 181)

Other analysts have suggested that the current state of IP regulation is woefully out of step with the economics of innovation (Scotchmer, 1991; Foray, 1995). Foray argues that in so far as “innovation is no longer driven by technological breakthroughs but by the routine exploitation of existing technologies” (Foray, 1995: 77, 112) property systems designed to protect and exclude (such as that embodied in TRIPS) have a chilling effect on innovation because they hinder vital diffusion of existing knowledge bases. To the extent that the nature of research and discovery is cumulative, and most innovators “stand on the shoulders of giants” (Scotchmer, 1991: 29), strong patent protection may result in socially inefficient monopoly pricing, and may provide deficient incentives for competitors to develop second-generation products (Scotchmer, 1991: 31, 34).

What is clear is that the balance struck in the TRIPS Agreement is one that redounds to the benefits of rights-holders at the possible expense

of the public weal. A former general counsel for the Office of the United States Trade Representative turned executive vice president of the Pharmaceutical Research and Manufacturers of America crisply stated that “in fact, the TRIPS Agreement establishes and protects the rights of innovators; it does not include a bill of rights for users of innovation” (Bello, 1997: 365). May (2000) also sees TRIPS as benefiting those who control intellectual property. Under TRIPS, IP owners have secured stronger and more concentrated rights.

A structural perspective: TRIPS in the global economy

The TRIPS case is embedded in a broader set of trends within the global political economy. This section discusses two important changes – the increasing mobility of capital and the ideological shift toward a radical free-market agenda. These two factors served to enhance the power of the particular actors and sectors that pushed for TRIPS. Economic and ideational changes also affected international organizations, such as the GATT and WIPO, in directions that favored advocates of TRIPS. In effect, these structural economic and ideational factors *created* new agents and delivered them to the forefront of global business regulation.

Since the early 1970s, the post-World War II commitment to an essentially Keynesian bargain combining social welfare policies and multilateralism has unraveled, and has been replaced by monetarist neoliberalism. Cox calls this “hyperliberalism,” which, he argues, is “the ideology of globalisation in its most extreme form” endorsing an almost Darwinian conception of global economic competition (Cox, 1993: 272). Perhaps the most important and emblematic manifestation of this is the globalization of the financial structure, including the international monetary system and the system of credit allocation (Strange, 1988: 88; Germain, 1997). Credit creation and allocation are central to all other economic activities; credit makes production, investment, and trade possible.

Strange locates the origins of the globalization of the financial structure in policies of the American state and its conscious choices (Strange, 2000: 85). The postwar Bretton Woods monetary system included fixed exchange rates and capital controls. The US dollar was fixed to the value of gold, which helped provide stability for postwar economic recovery and international commerce. However, the dollar-based system also included a huge outflow of US dollars via the Marshall Plan (\$18 billion),

and the US military buildup during the Korean and Vietnam Wars. At the same time, US-based corporations had expanded their direct foreign investment throughout the 1960s, further contributing to the outflow of dollars. Bankers followed corporations abroad and firms began to raise capital (dollars) abroad (Underhill, 2000a: 110). Britain, hoping to rejuvenate the City of London as a world financial center, permitted the growth of offshore banking. American corporations were thus able to expand the supply of dollars through the credit multiplier of bank lending; and these offshore capital markets were unregulated by US monetary or supervisory authorities (Underhill, 2000a: 110). This resulted in an oversupply of dollars. Meanwhile, US spending soared as President Johnson embarked upon his ambitious and expensive anti-poverty "Great Society" program in the late 1960s, as the Vietnam War was escalating. The oversupply of dollars, combined with US spending, sharply eroded confidence in the dollar's value. Between 1968 and 1971 currency speculators bet that the dollar could not be backed by gold. At this point, the United States had several choices. It could rein in its banks and corporations. It could cut military spending. It could cut domestic welfare spending. Or, it could sever the dollar's connection with gold and unilaterally abdicate its role as the pillar of the fixed system. In 1971 Nixon did exactly that and inaugurated a new era of the floating dollar. It was this latter choice, according to Strange, that unleashed an array of structural forces that have rendered the world economy more difficult for states to manage (Underhill, 2000b: 120). Thus international monetary governance shifted from the old system of state intervention to maintain stability toward a market-based system to promote efficiency.

As private firms, which had been borrowing freely in offshore capital markets, began to enjoy the "unrestricted transnational financial game" they increasingly lobbied their governments for financial deregulation (Underhill, 2000a: 111). This has led to the accelerated growth of the capital markets that originally had undercut the fixed rate system. States gradually removed capital controls (Goodman and Pauly, 2000); domestic financial deregulation and the cross-border integration of capital markets proceeded apace. This privatization has created "an explosion in the availability of private liquidity which governments are hard pressed to control" (Germain, 1997: 105).

Private banking and securities firms now enjoy more power relative to the state. But this has not necessarily led to the "retreat of the state" *per se*, but perhaps more accurately a "state-market condominium" defined as "a changing balance of public and private authority within the state,

hence a changing *form* of state embedded in structural market transformations" (Underhill, 2000b: 118, italics in original). In other words, "the private interests of the market are integrated into the state, asymmetrically and in accordance with their structural power and organizational capacity, through their close relationship to state institutions in the policy decision-making process and in the ongoing pattern of regulatory governance of market society" (Underhill, 2000b: 129).

Further, it is not *all* "private interests" that have been privileged by this confluence of events. Cox has posited a "hierarchy of capital" consisting of "(1) those who control the big corporations operating on a world scale, (2) those who control big nation-based enterprises and industrial groups, and (3) locally based petty capitalists" (Cox, 1987: 358). The more footloose, transnational capital of group (1) has benefited disproportionately. Germain suggests that transnational firms in knowledge-intensive sectors such as computers, software, and pharmaceuticals "have the resources, motivations and capabilities to roam the world searching for the kind of opportunities that promise lucrative rewards" (2000: 81). These privileged sectors participate in "globalized" markets in so far as "there are a small number of participants who know one another and operate across countries with a common conception of control" (Fligstein, 1996: 663). According to Fligstein, "conceptions of control are shared cognitive structures within and across organizations that have profound effects on organizational design and competition" (1996: 671). Strict IP laws reflect one conception of controlling competition (Fligstein, 1996: 666). The TRIPS advocates represented these privileged sectors and sought to globalize their preferred conception of control.

These changes in the economy have been accompanied by important changes in prominent economic ideas. By the mid-1970s neo-classical economics was resurgent in both academic and policy circles (Eisner, 1991). As Bieler points out, "a neo-liberal, monetarist policy replaced Keynesianism from the mid-1970s onwards, when it had become clear that the latter's expansionary response to the economic crisis of the early 1970s had failed" (Bieler, 2000: 22). The Reagan and Thatcher revolutions in the United States and the United Kingdom embraced an anti-Keynesian approach to economic policy. Both leaders implemented a radical free market agenda that favored finance capital and other mobile factors of production (Baker, 2000: 364). This new approach was "not just a change of policies but a conscious effort to change ideas and expectations about the appropriate role of government, the importance of private enterprise, and the virtues of markets" (Gill and Law, 1993: 101).

The ideology of neo-classical economic liberalism spread throughout the globe in the 1980s and came to predominate in major international organizations (Biersteker, 1992; Gill, 2000: 55).

In the early and mid-1980s the GATT Secretariat in Geneva was preoccupied with becoming relevant to the “North” again. At the outset of the Uruguay Round, GATT civil servants responsible for the negotiations expressed fear that if they could not serve an OECD agenda GATT would be through as an organization.⁷ They bemoaned the fact that in the early 1980s North–South issues had dominated GATT’s agenda out of all proportion to developing countries’ role in world trade. They perceived the Uruguay Round as their last chance; they did not want GATT to suffer the fate of UNCTAD and “wither on the vine” as irrelevant. The Reagan administration’s fairly open contempt for the United Nations system as irrelevant and wrong-headed increased pressure on the GATT Secretariat to prove its worthiness (Murphy, 1994: 257–259). Added to this was the fact that OECD governments increasingly bypassed multilateral organizations with Group of Seven (G7) summitry and bilateral negotiations. While the GATT Secretariat was small, and its functions largely administrative, the Secretariat’s preoccupation with renewed relevance signaled unqualified endorsement of whatever agenda the OECD favored for the upcoming round. The GATT as an institution thus evolved along neo-liberal lines, changing from “a passive caretaker of a multilateral legal instrument to an international body committed to the promotion of exports” (Stanback, 1989: 921 at note 16).

In the 1970s the World Intellectual Property Organization (WIPO) enjoyed a reputation as a fairly balanced agency that weighed the interests of both OECD and developing countries. These days, many regard it as little more than a tool for promoting the interests of the proponents of the most protectionist IP norms. It has come to reflect the interests of the favored factions of capital highlighted by Cox and Germain, and indeed its biggest source of income is its Patent Cooperation Treaty service (PCT). The PCT “vastly enhances the efficiency of the search and registration aspects of the worldwide patent decision and information process” (Doern, 1999: 44). Businesses have increased their use of WIPO’s PCT service dramatically since the late 1980s, and now provide 85 percent of WIPO’s operating budget. The “large chemical and pharmaceutical firms (US, European, and Japanese) have by far the biggest stake in an efficient, effective patent system . . . and banks and financial

⁷ Author’s interview with GATT Secretariat personnel, Geneva, July 21 1986.