Brooklyn Journal of International Law

Volume 32 | Issue 2 Article 7

2007

World Wide Web: Using Internet Governance Structures to Address Intellectual Property and International Development

Kristin Delaney

WORLD WIDE WEB: USING INTERNET GOVERNANCE STRUCTURES TO ADDRESS INTELLECTUAL PROPERTY AND INTERNATIONAL DEVELOPMENT

I. INTRODUCTION

Each year, shortages of flu vaccines cause panic and controversy over the U.S. patent system. Global demand for such drugs as Tamiflu far exceeds the production levels needed to satisfy that demand.[1] Populations of developing nations are ravaged with AIDS and without the ability to pay for appropriate drugs, even when the drugs are available in remote and rural regions.[2] However, with the development of the Internet, organizations are using mobile vans to bring life-saving health care information, including Internet sources when possible, to those remote areas or underserved populations.[3] The glaring lack of access to information, however, plays out around the world in many sectors—education, arts, and science to name a few. Frustration is mounting and voices are begging to be heard. To paraphrase a common argument in the debate over intellectual property regulation, information wants to be shared.[4]

United Nations agencies are currently working on issues surrounding the Internet and global development—bringing the global community online to serve larger development goals, such as providing medicine to AIDS-ravished nations, making pre-natal and other healthcare information available via mobile Internet vans, and bringing literacy to children in impoverished villages. Two such agencies are the Working Group for

---

1. *See* David Brown, *Run on Drug for Avian Flu has Physicians Worried*, WASH. POST, Oct. 22, 2005, at A1 [hereinafter Avian Flu article].

2. Ellen Hoen, Rachel M. Cohen & Kate Evans, *MSF-USA: HIV/AIDS—Briefing Note*, DOCTORS WITHOUT BORDERS, Dec. 10, 2005, http://www.doctorswithoutborders.org/news/hiv-aids/briefing_doc_12-10-2005.cfm [hereinafter AIDS article].

3. *See Detroit Seniors Get the Gift They REALLY Want: Personalized Education and Enrollment Assistance with Medicare Prescription Drug Benefit*, DRUG NEWSWIRE, Dec. 21, 2005, *available at* http://www.drugnewswire.com/1467; *see also* Geeta Nanda, Kimberly Switlick & Elizabeth Lule, *World Bank Discussion Paper: Accelerating Progress towards Achieving the MDG to Improve Maternal Health* (Apr. 2005), http://siteresources.worldbank.org/HEALTHNUTRITIONANDPOPULATION/Resources/281627-1095698140167/NandaAcceleratingProgresswithCover.pdf.

4. "Information wants to be free" is a mantra used by scholars arguing for a regime focused on the preservation of the public domain and fair use provisions in the world of intellectual property. R. Polk Wagner, *Information Wants to be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003) [hereinafter Wagner I].

Internet Governance and the World Intellectual Property Organization. Separately, these organizations are bringing issues of technology and global infrastructure to the fore of the debate on international development objectives. Together, this Note will argue, these groups could better address these objectives and make real progress in the developing world.

In July 2005, the Working Group for Internet Governance (WGIG), under the auspices of the United Nations and the World Summit on the Information Society (WSIS), issued a report on the future of Internet governance.[5] The WGIG has identified important public policy issues and overarching framework elements vital to the future of a global perspective for the Internet.[6] The WGIG report focused on the need for a global forum for discussion and negotiation between all nations with an emphasis on the inclusion of the developing world.[7] Meanwhile, the World Intellectual Property Organization (WIPO) and the "Access to Knowledge" movement[8] are advocating a treaty which would address the technological advances required to promote access to information and educational resources traditionally protected as intellectual property of more developed nations.[9]

Generally, WGIG and WIPO occupy mutually exclusive spheres of influence, though there is significant overlap between intellectual property issues and Internet governance. Lawrence Lessig,[10] a preeminent Internet law scholar, expressed this conundrum in his work *Free Culture.* Lessig served as a keynote speaker during a preparatory conference for the

---

5. U.N. WORKING GROUP ON INTERNET GOVERNANCE [WGIG], REPORT OF THE WORKING GROUP ON INTERNET GOVERNANCE, *available at* http://www.wgig.org/docs/WGIGREPORT.pdf [hereinafter WGIG REPORT].

6. *Id.* at 5–8.

7. *Id*. at 10–12.

8. Participants in this movement include Doctors without Borders, Electronic Frontier Foundation, and other international organizations and individuals. *See* discussion *infra* text accompanying notes 168–73.

9. *See* Press Release, World Intellectual Property Organization, Member States Agree to Further Examine Proposal on Development, U.N. Doc. WIPO/PR/2004/396 (Oct. 4, 2004).

10. Lawrence Lessig is a Professor of Law at Stanford Law School and founder of the law school's Center for Internet and Society. Lessig has authored several books on Internet and the law including *Free Culture*, *The Future of Ideas*, and *Code And Other Laws of Cyberspace*. He is also the founder of the Creative Commons project (http://www.creativecommons.org) and is involved with several other Internet and law-related organizations. More information on Lessig and his work is available at his website, http://www.lessig.org.

WSIS in 2003.[11] In an interview before the address, Lessig focused on the balance between intellectual property protections and access needed in the burgeoning Information Society.[12] This statement was met with great consternation—the president of WSIS responded that intellectual property "questions were the exclusive domain of [the World Intellectual Property Organization]" and not the WSIS.[13] However, this response highlighted for Lessig the need to consider the importance of intellectual property in an "information society"—for, as he argues, conversations about the information society cannot occur without addressing the balance between the holders of intellectual property rights and those who would benefit from the protected information.[14] Without the widespread sharing of knowledge, society instead becomes divided into the informed and those struggling to grasp hold of information.

In this ignored zone of overlap, developing nations and the developed world (particularly the United States)[15] are caught in a power struggle on these very issues—the struggle between control and information sharing.[16] Since the United States is the current overseer of Internet governance through the Internet Corporation for Assigned Names and Numbers (ICANN),[17] the United States has expressed significant concern over the possibility of internationalizing control of the Internet.[18] The officials remarked that the Internet structure is complex and should remain within

---

11. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 263–65 (2004) [hereinafter LESSIG, FREE CULTURE].

12. *Id.* at 263.

13. *Id.*

14. *Id.*

15. For the purposes of this Note, "developed nations" will refer primarily to the United States as a major holder of intellectual property and a major player in the United Nations and ICANN. "Developing nations" will generally refer to those nations who are struggling for greater access to information on the global playing field. Brazil and Argentina have led a coalition of nations to achieve balance in the global intellectual property realm and will be counted among "developing nations" within this context.

16. *See* Stage Set for Global Face-Off on Internet Governance, http://www.ip-watch.org/weblog/index.php?p=78&res=1024_ff&print=0 (July 14, 2005 17:15 EST); *see also U.S. Urges WSIS to Preserve Web Structure, Foster "Enabling Environment" for Internet*, WASH. INTERNET DAILY, Aug. 17, 2005; *U.S. Internet Policy Experts Press U.S. Government to "Internationalize" Internet Administration*, BUS. WIRE, July 29, 2005; *Eminent Domain; Internet Politics*, ECONOMIST, July 9, 2005; IP Watch, U.S., Brazil Duel on WIPO Development, http://www.ip-watch.org/weblog/index.php?p=81&res=1024_ff&print=0 (July 21, 2005 13:27 EST) [hereinafter IP Watch Articles].

17. ICANN is an international non-profit organization which oversees the technical aspects of the Internet, with oversight by the U.S. Department of Commerce. ICANN will be discussed more thoroughly later in the Note.

18. IP Watch Articles, *supra* note 16.

the control of ICANN and the United States so that the Internet "remains stable and secure."[19] They further asserted that the United States would make no changes to disrupt the "effective and efficient" administration of the DNS system.[20] Of course, these reactions to any possibility of change in control do not address the criticisms of ICANN as ineffective and inefficient. These criticisms will be addressed later in this Note.

This conflict between the United States and those who would internationalize control over the Internet mirrors the struggle over WIPO's development agenda which has been negotiated between the United States and a coalition of developing nations.[21] Brazil, Argentina, and several other nations presented a proposal in line with the "Access to Knowledge" movement,[22] encouraging the World Intellectual Property Organization to take active steps to consider the needs of developing nations in its policies and regulations.[23] Because these developing nations are concerned with global sharing of knowledge and much of the protected material is generated and owned in the United States,[24] any search for the common ground seems to be lost in the struggle. Argentina and Brazil's proposal seeks moderation in intellectual property in order to further development goals, however the counter proposal by the United States blindly affirms the status quo without true consideration of the Argentina-Brazil proposal. Any chance at achieving goals collectively, addressing the needs of both sides of the debate, disappears without a more collective approach. The United States and developing nations have seen similar conflicts throughout recent history in intellectual property treaty negotiations.[25]

This Note will explore the proper balance between protection of intellectual property rights and global information sharing, specifically protecting copyright while promoting education and Internet-based archive

---

19. "Domain Names: United States Principles on the Internet's Domain Names and Addressing System," http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples_06302005.htm (last visited Mar. 23, 2007).

20. *Id.*

21. *See* IP Watch Articles, *supra* note 16.

22. The Access to Knowledge movement was created by numerous groups and individuals outside of the traditional WIPO process to encourage greater consideration of development goals in its intellectual property regulation practices. *See* discussion *infra* text accompanying notes 169–84.

23. IP Watch Articles, *supra* note 16.

24. *Id.*

25. Previous draft treaties presented before WIPO created conflict between the United States' desire for "fortified copyright in cyberspace" and the developing nations who want greater access to information. Many nations rejected the proposals in past votes. *See* JESSICA LITMAN, DIGITAL COPYRIGHT 128–29 (2001).

and library systems. It will argue, using key tenets of the WGIG and WIPO proposals, that there is a common ground on the issues which will satisfy the shared goal of education and access to knowledge in developing countries while addressing the intellectual property protection concerns of the United States.

This Note proceeds in four parts. Part II will examine the current status of Internet governance by ICANN and the U.S. Department of Commerce. It will then address the WGIG proposals and the problems of Internet governance with respect to intellectual property issues. Part III will introduce the current state of global intellectual property regulation, with the World Intellectual Property Organization at the forefront, as well as global efforts to include development goals in IP discussions. Part IV will evaluate theoretical and practical perspectives including existing technologies designed to balance access and control of protected works. In conclusion, this Note will propose using these technologies to create a middle ground—a balance of intellectual property rights and access, using the Internet as a tool for the calculated spread of information instead of viewing it as a lawless frontier.

II. CURRENT STATUS OF INTERNET GOVERNANCE: ICANN AND WGIG

A. International Corporation for Assigning Names and Numbers (ICANN)

The technical aspects of the Internet, including domain name regulation, are currently governed by ICANN.[26] ICANN is a non-profit organization, created by the U.S. Department of Commerce (DOC),[27] which ultimately organizes and maintains order on the Internet.[28] The Memo-

26. *See* ICANN FAQs, http://www.icann.org/faq/ ("ICANN's role is very limited, and it is not responsible for many issues associated with the Internet, such as financial transactions, Internet content control, spam (unsolicited commercial email), Internet gambling, or data protection and privacy.") (last visited Mar. 23, 2007); *see also* Susan P. Crawford, *The ICANN Experiment*, 12 CARDOZO J. INT'L & COMP. L. 409, 409 (2004) (discussing ICANN as "a narrowly confined technical coordinator whose legitimacy depends on its staying within this role" as one possible, if flawed, model for examining the organization).

27. *See* ICANN Fact Sheet, http://www.icann.org/general/fact-sheet.html (last visited Mar. 23, 2007).

28. ICANN handles "Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions." Welcome to ICANN FAQ, http://www.icann.org/new.html (last visited Mar. 23, 2007). These technical aspects of the Internet are crucial stepping stones to accessing the Internet. Through

randum of Understanding which established the organization included the DOC's intent to transfer control of domain name management from the United States to the "global community."[29] The board and staff are comprised of individuals from many nations; meetings are open to public participation by "all who have an interest in global Internet policy."[30] ICANN also consists of several advisory committees such as the Governmental Advisory Council and the At-Large Advisory Committee.[31] Supporting organizations, such as the independent domain name registry offices, also advise ICANN on an international scale. [32]

ICANN was established in response to a 1998 White Paper issued by the Clinton Administration to move control of the domain name system into the private sector from ICANN's predecessor organization Internet Assigned Numbers Authority (IANA).[33] The White Paper called for the creation of a policy-making domain name group in the private sector.[34] The controlling principles of this group would be "stability, competition, private bottom-up coordination, and representation."[35]

Since its establishment, there has been some disagreement over the effectiveness of ICANN and how successfully it has achieved the goals set out at its inception. In 2002, ICANN's President issued a proposal to "fix" what was "broken" about ICANN in its present state.[36] Primarily, the proposal was concerned with reforming ICANN's structure, addressing transparency and accountability issues, and streamlining the deci-

---

these protocols and management systems, ICANN is able to control how content is organized and accessed across the globe.

29. *See* ICANN Fact Sheet, *supra* note 27.

30. *Id.*

31. *Id.*

32. *Id.*

33. IANA was established to govern Internet development under direct contract from the U.S. Government. In the 1998 White Paper, the Clinton Administration noted that in acting as a government contractor, IANA "describes a function more than an entity" and recommended a formal incorporated structure. IANA has been subsumed by ICANN and remains descriptive of a central ICANN function: the assignment of names and numbers on the Internet. U.S. DEP'T OF COMMERCE, WHITE PAPER ON MANAGEMENT OF INTERNET NAMES AND ADDRESSES, No. 980212036-8146-02 (June 5, 1998), *available at* http://www.ntia.doc.gov./ntiahome/domainname/6_5_98dns.htm.

34. *Id.*

35. *See* Crawford, *supra* note 26, at 412.

36. ICANN President Stuart Lynn issued this proposal in order to address a number of criticisms which had been made both within and without the ICANN system. *Id*. at 415; *see also* Stuart Lynn, *A Proposal for Reform of ICANN*, Feb. 2, 2002, http://www.icann.org/general/lynn-reform-proposal-24-feb-02.htm [hereinafter ICANN Proposal]; Mark Ward, *Wanted: New Plan to Run the Net*, BBC NEWS ONLINE, Mar. 30, 2002, http://news.bbc.co.uk/1/hi/sci/tech/1898639.stm.

sion-making processes.[37] The proposal also questioned the ability of ICANN to address problems and policy outside of the narrow scope of the domain name system—"how to reflect public interest concerns such as fair competition, privacy, intellectual property, and diversity?"[38] In addressing this issue, the proposal acknowledged the rigidity of the structure of the ICANN system as well as the strength of ICANN's power in controlling the Internet by asking, "If not ICANN . . . then who would perform these policy functions?"[39] Under the original structure of ICANN, little guidance was given for representing the public interest in Internet policy development.

Just how far ICANN is able to go in regulating the Internet or how far the world wants ICANN to go is unclear as its mission simply states that it will "[c]oordinate policy development reasonably and appropriately related to [its] technical functions."[40] With such a general statement, the boundaries of ICANN's mission are murky at best. Global intellectual property issues generally are considered to be in the jurisdiction of the World Intellectual Property Organization of the United Nations, although ICANN's control has extended to cover some intellectual property issues. [41] However, these policy issues surrounding Internet governance fall squarely between the established organization structures of WGIG and WIPO.

The current structure does allow for government input on issues of public policy through the Government Advisory Council (GAC) of

---

37. ICANN Proposal, *supra* note 36.

38. Crawford, *supra* note 26, at 421.

39. *See Testimony of M. Stuart Lynn, Before the Subcomm. on Science, Technology, and Space of S. Commerce, Science, and Transportation Comm.* (June 12, 2002), *available at* http://www.icann.org/correspondence/lynn-testimony-12jun02.htm.

40. There is also some question as to how much power ICANN actually has to effect broad policy decisions due to its structure and, one could argue, because of the much narrower functions which the 1998 White Paper outlined—(1) to set policy for and direct the allocation of IP number blocks; (2) to oversee the operation of the Internet root server system; (3) to oversee policy for determining the circumstances under which new top level domains would be added to the root system; and (4) to coordinate the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet. *See* Crawford, *supra* note 26, at 420–24, 429.

41. WIPO is concerned with "developing a balanced and accessible international intellectual property . . . system." Icann.org, What is WIPO?, http://www.wipo.int/about-wipo/en/what_is_wipo.html (last visited Apr. 4, 2007). ICANN, on the other hand, covers more Internet specific intellectual property issues. *See, e.g.*, Crawford, *supra* note 26, at 411 (discussing ICANN's role in issues of trademark and Cybersquatting.)

ICANN.[42] The GAC is an entity comprised of representatives from national governments, multinational governmental organizations, and public authorities.[43] Membership is voluntary and the GAC itself admits that global representation is not yet fully achieved, as nations are still not as yet represented.[44] Furthermore, though the council serves as a forum to advise ICANN, it has no legal authority and no decision-making power, leaving the findings and recommendations of the GAC without bite. [45]

The ICANN system, including the GAC, however, has been further criticized as merely an instrument of American control because of its inadequate representation of developing nations.[46] For example, ICANN has been criticized for its "perceived bias toward insiders and large corporations,"[47] as well as for its myriad deficiencies in the current state of ICANN, including lack of meaningful outsider participation, complex structures, and a lack of openness about procedures.[48] Specifically, the ICANN board, as a corporate governance entity, makes decisions about the Internet, but there is no true mechanism to represent the Internet "citizenry" analogous to a government structure.[49] There can be no real outside participation because there is no actual representation of ICANN's constituency.[50] These problems highlight some of the criticisms of this system of Internet governance—ICANN is both too narrow and too complex to continue to the serve the Internet community in its current capacity.

B. New Directions: WGIG and U.N. Proposals on Internet Governance

How the Internet should be governed and by whom are important questions which incite a broad spectrum of responses. On one end, there is a school which argues that the Internet grew up out of a collective spirit

---

42. *See* The Internet Domain Name System and the Governmental Advisory Committee (GAC) of ICANN (Oct. 1, 2001), http://www.icann.org/committees/gac/outreach-en-01oct01.htm.

43. This group meets three to four times a year to discuss its agenda. Meetings Schedule for GAC, http://gac.icann.org/web/meetings/index.shtml (last visited Mar. 23, 2007); *see also* GAC Operating Principles, http://gac.icann.org/web/docs/index.shtml (last visited Mar. 23, 2007).

44. *See* Message from the Chairman, http://gac.icann.org/web/index.shtml (last visited Mar. 23, 2007).

45. GAC Operating Principles, *supra* note 43.

46. John Palfrey, *The End of the Experiment: How ICANN's Foray into Global Internet Democracy Failed*, 17 HARV. J. L. & TECH. 409, 420, 436, n.137 (2004).

47. Crawford, *supra* note 26, at 419.

48. *See* Palfrey, *supra* note 46, at 413.

49. *See* Crawford, *supra* note 26, at 422–24.

50. *Id.*

which defies governments, nations, and affiliations and therefore should stay that way.[51] On the other end, ICANN and other organizations have been structured to give the Internet just that—structure and the resultant governance.[52]

Pioneers of the Internet argue that because the Internet developed organically without a governing body that it should be allowed to continue that way.[53] One important reason for this unregulated vision of the Internet is the lack of consent by Internet users to be governed by any government or other regulating body.[54] Academics have addressed the development of norms in this early Internet society—created as needed within smaller anonymous communities.[55] Instead of creating overarching and overreaching rules, these advocates would keep the Internet generally unregulated, allowing groups of users to come up with their own rules or norms as situations arise.[56] Such groups might be members of a chat forum, online gamers, or other online communities. With this model, consent to the rules comes with membership in the group and autonomy is preserved.

On the other hand, scholars have also argued that regulation is necessary in order to serve the greater public interest. One scholar examined post-Soviet Eastern European development to demonstrate the need for some structured regulation.[57] Where establishment of rules and norms are left to happenstance, certain sectors of society will not be developed.[58] In the situation of the Internet, much of the clamor for strict intellectual property regulation comes from the American movie and music industries[59]—an area where protections for intellectual property rights have not developed in the absence of a governance body.

---

51. Barlow Declaration of Independence, *available at* http://www.eff.org/Misc/Publications/John_Perry_Barlow/barlow_0296.declaration.txt [hereinafter Declaration of Independence]; *see also* Paulina Borsook, *How Anarchy Works*, WIRED, Oct. 1995, *available at* http://www.wired.com/wired/archive/3.10/ietf.html. For further development of this concept and competing theories, see LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) [hereinafter LESSIG, CODE].

52. *See generally* Palfrey, *supra* note 46; *see also* Crawford, *supra* note 26.

53. Declaration of Independence, *supra* note 51.

54. *Id.*

55. For an example of norm development in a small online community, see LESSIG, CODE, *supra* note 51, at 142–43.

56. Declaration of Independence, *supra* note 51.

57. LESSIG, CODE, *supra* note 51, at 3–6.

58. *Id.*

59. *See, e.g.*, Recording Industry of America, http://www.riaa.com/issues/piracy/default.asp (last visited Feb. 23, 2007); MPA Anti-Piracy, http://www.mpaa.org/anti-piracy (last visited Mar. 23, 2007).

In a move to globalize the debate and solidify the definition of "Internet governance," the World Summit on Information Society (WSIS) was organized by the United Nations.[60] The U.N. convened the summit both to develop a global vision and common understanding of the information society and to outline a strategic plan of action for development.[61] Furthermore, the summit was to define an agenda detailing future objectives and how to achieve those objectives with resource mobilization.[62] Attendees included representatives from U.N. agencies, member states, and individuals from the private sector and civil society.[63] Ultimately, a Declaration of Principles and Plan of Action solidified the organization's commitment to "build a people-centred, inclusive and development-oriented Information Society, where everyone can create, access, utilize, and share information and knowledge, enabling individuals, communities, and peoples to achieve their full potential in promoting sustainable development and improving their quality of life . . ." in accordance with the U.N. charter.[64]

Some of the objectives identified at the close of the summit included connecting all "schools, villages, Governments and hospitals" to the Internet and each other "by 2015."[65] Internet governance was also identified as a major long-term target for discussion and future action.[66] The summit also specifically addressed the importance of intellectual property issues in global development of the information society:

---

60. The WSIS meeting was held on December 10, 2003 in Geneva. WGIG REPORT, *supra* note 5, at 3.

61. Press Release, International Telecommunications Union, World Summit on Information Society Set to Take Place Under ITU's Leadership (July 28, 2000), *available at* http://www.itu.int/newsarchive/press_releases/2000/16.html.

62. *Id.*

63. *Id.*

64. World Summit on the Information Society, Geneva-Palexpo, 10-12 December 2003, *Report of the Geneva Phase of the World Summit on the Information Society*, U.N. Doc. WSIS-03/Geneva/9(Rev.1)-E (Feb. 18, 2004); *see also* World Summit on the Information Society, Geneva-Palexpo, 10-12 December 2003, *Declaration of Principles*, U.N. Doc. WSIS-03/GENEVA/DOC/0004 (Dec. 12, 2003), *available at* http://www.itu.int/wsis/docs/geneva/official/dop.html; World Summit on the Information Society, Geneva-Palexpo, 10-12 December 2003, *Plan of Action*, Document WSIS-03/GENEVA/DOC/5-E (Dec. 12, 2003), *available at* http://www.itu.int/wsis/docs/geneva/official/poa.html.

65. *Building Bridges Virtually*, UN CHRONICLE ONLINE EDITION, Apr. 2003, *available at* http://www.un.org/Pubs/chronicle/2003/issue4/0403p29.asp.

66. Press Release, World Summit on the Information Society, Global Information Society Spurs Solidarity, Alliances, but Hard Work, Action Ahead (Dec. 12, 2003), *available at* http://www.itu.int/wsis/geneva/newsroom/press_releases/wsisclosing.html.

> On the areas of intellectual property rights and the need for enabling environments, universal access policies, and multilingual, diverse and culturally appropriate content to speed ICT adoption and use—particularly in the world's most underserved economies—government-level commitment to follow a set of common values and principles has been attained.[67]

In response to the first phase of the WSIS summit, the Secretary-General established the Working Group on Internet Governance (WGIG) to address a number of Internet-related issues.[68] The committee mandate recognized that the Internet is a "central element of the infrastructure of the emerging information society."[69] In order to represent the breadths of this society, forty members were drawn from "[g]overnments, private sector and civil society, who all participated on an equal footing and in their personal capacity."[70]

The members of the WGIG convened regularly to discuss the objectives articulated by the WSIS Declaration of Principles and the WSIS Plan of Action.[71] These two documents chiefly charge the WSIS and, as its action arm, the WGIG, to promote active and global government participation, encourage infrastructure and global information sharing.[72] Of particular interest are action items emphasizing the importance of getting valuable information to remote societies and institutions, therefore requiring an inquiry into the proper balance of intellectual property regulation. These action items include fighting illiteracy through development of inexpensive computer interfaces and access to information as well as developing policies which would enable libraries, archives, and cultural institutions to function fully in the Information Society.[73]

Furthermore, the Plan of Action presents a number of provisions to level the playing field such as encouraging traditional media—books, newspapers, television—to take advantage of new technology and better Internet connectivity to spread cultural information to (and from) rural areas and connecting schools, libraries, and hospitals to the Internet and to each other for further information exchange.[74] In addition to these policy actions, WGIG was also specifically charged with developing a

---

67. *Id.*

68. WGIG REPORT, *supra* note 5, at 3.

69. *Id.* at 3.

70. *Id.*

71. The committee met four times in 2004 and 2005. *Id.*

72. Declaration of Principles, *supra* note 62, at §§ 26, 29, 30; Plan of Action, *supra* note 62, at §§ 9(g), 23(b).

73. *Id.*

74. Plan of Action, *supra* note 62, at § 6(e).

working definition of Internet governance, identifying the relevant public policy issues and examining as well as defining the roles of society's layers with relation to Internet governance.[75]

Of primary importance was the establishment of a practical, yet inclusive definition for a "shared view of Internet governance."[76] The definition was required to be "*adequate, generalizable, descriptive, concise* and *process-oriented.*"[77] The group analyzed governance mechanisms already in place as well as definitions proposed by various parties to the development process.[78] The current consensus is that "Internet governance is the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet."[79] WGIG emphasized that this definition was purposefully inclusive of each constituency in the "mechanisms of Internet governance" though the interests of each group may overlap or diverge.[80]

Using this definition of Internet governance as a common starting point is an important first step in forging further consensus on regulation of the Internet. The characterization of governance is indeed "adequate" and "generalizable" including government, private, and civil sectors with broad strokes. The definition, however, in being so inclusive, also leaves considerable space for determining what "shared principles" or "evolution and use of the Internet" will come to mean. At the same time, these terms also ensure that Internet governance on the global scale will not be limited to the technical aspects of regulation as with ICANN. By discussing principles, norms, and programs to shape the Internet, the WGIG explicitly carved out an important niche for policy development in tandem with governance structures and rules.

The WGIG identified a number of policy issues as important to the development of the Internet generally and to the overarching goal of leveling the playing ground between developing and developed nations.[81] WGIG identified four main areas of "potentially relevant" Internet governance policy—infrastructure and resources, Internet use (including

---

75. WGIG REPORT, *supra* note 5, at 3. ("Governments, existing international organizations and other forums, as well as the private sector and civil society in both developing and developed countries.").

76. *Id.* at 4.

77. *Id.* (emphasis in original).

78. *Id.* at 5.

79. *Id.*

80. *Id.*

81. WGIG REPORT, *supra* note 5.

spam, security and cyber crime), issues of wider impact with existing organizations (including intellectual property rights), and developmental issues (including capacity building).[82] Here WGIG immediately recognizes WIPO as the existing organization to deal with intellectual property rights; however global information sharing, essential at least to WGIG's development objectives, relies heavily on the balance of information protections. Despite the importance of integrating these objectives at the outset, the spheres of influence are kept separate.

Within these individual areas, WGIG expressed strong interest in making global participation more meaningful, including increasing access to the Internet internationally.[83] Some important mechanisms for achieving this goal are distribution of costs for interconnection to ensure that remote nations are able to access the Internet, creating a "global mechanism" for representing the needs of developing nations, and the promotion of "multilingualism" in the technology as well as Internet content.[84] WGIG's emphasis on these issues, however, does not mean that they are entirely new to the governance discussion. Recently, ICANN has helped encourage multilingual content by creating the .cat domain for Catalan language web content[85] as well as by adopting guidelines for International Domain Names which enables even broader international web content to grow.[86] WGIG has, with its report, laid a foundation for improving upon the original goals of the private international organization structure established with ICANN.

To promote these policies, WGIG presented four proposals for the future of Internet governance to be discussed and further developed in anticipation of the final WSIS meeting in Tunisia in November 2005.[87] Each of the four models was concerned with increasing participation and access to the process through internationalization.[88] The most significant mechanism, present in each model, was a public forum to ensure that policy discussions, as well as oversight of the governance process generally, would be truly global.[89] WGIG details these elements with an em-

---

82. *Id.* at 7.

83. *See id.* at 6–7.

84. *Id.*

85. Marina Zaliznyak, *ICANN Approves the .cat (Catalan) Domain. What's Next?*, MULTILINGUAL SEARCH, Sept. 16, 2005, http://www.multilingual-search.com/icann-approves-the-cat-catalan-domains-what%E2%80%99s-next/16/09/2005/en/.

86. ICANN Fact Sheet, *supra* note 27.

87. *See* WGIG REPORT, *supra* note 5, at 13–16.

88. Heinrich-Boll Foundation, *WSIS Report on Internet Governance Released* (July 18, 2005), http://worldsummit2003.de/en/web/762.htm; *see also* WGIG REPORT, *supra* note 5, at 16.

89. WGIG REPORT, *supra* note 5, at 11–12.

phasis on consensus-building and using the future Internet governance structure to promote a cooperative collective system of governance.[90]

The first model would bring ICANN under the U.N.'s auspices to create a "Global Internet Council" where governments would take the lead in a multilateral governance structure.[91] The second model would keep ICANN intact, giving its Governmental Advisory Council increased importance, and removing ICANN from U.S. control.[92] This model includes no particular oversight organization.[93] In its third model, WGIG proposes the creation of an "International Internet Council" where governments would again take a leading role.[94] This council would take over the functions of the GAC and the role of the U.S. government—creating a host country agreement for ICANN so that unilateral control by the incorporation nation is avoided completely.[95] Finally, WGIG proposed a fourth model which combines three layers of governance—a "Global Internet Policy Council" made up of government representatives and "responsible for international Internet-related policy issues," an intergovernmental version of ICANN to be known as World ICANN or WICANN, and a Global Internet Governance Forum to specifically fulfill the role of the vital world forum.[96] Though each of these proposals addresses the problems of the ICANN system differently, widespread international participation in the future of the Internet is common to each proposal.

Though the creation of the global policy forum was a central element of each proposal, WGIG was quite vague about which policy questions would be addressed, but some policy recommendations were made.[97] Apart from practical funding considerations, the task-oriented recommendations fall within four public policy areas.[98] Specifically, WGIG makes recommendations for security concerns, freedom of expression, meaningful global participation, and consumer rights.[99] The report does acknowledge that some of these issues have a wider impact and scope than simply Internet governance.[100] Notably, the report refers to intellectual property rights as the main example of such a category in an earlier

90. *Id.* at 12.
91. *Id.* at 13.
92. *Id.* at 14.
93. *Id.*
94. WGIG REPORT, *supra* note 5, at 14.
95. *Id*.
96. *Id.* at 15–16.
97. *Id*. at 16–19.
98. *Id*.
99. *Id.*
100. WGIG REPORT, *supra* note 5, at 16–19.

section.[101] This reference makes the absence of any policy recommendations about intellectual property regulation quite glaring.

In its earlier reference to intellectual property rights, the WGIG report defers to the intellectual property oversight organization. [102] This reservation of policy neglects WGIG's direct charge to address the policies of information, including use of the Internet for libraries, archives, and other cultural information (among other realms with significant intellectual property elements and ramifications). These two elements—Internet governance and intellectual property—walk hand in hand and any organization addressing the Information Society must also address these intellectual property issues. The WSIS officials however insist that this is to be left for WIPO to address.[103]

In November 2005, WSIS reconvened in Tunisia to discuss the proposals and decided to leave the current system of Internet governance through ICANN intact and under U.S. control.[104] However, the summit did reaffirm its commitment to increasing international government participation in Internet governance through the creation of the Internet Governance Forum.[105] This forum will handle "cross-cutting international" public policy issues relating to Internet governance.[106] This can be seen as a critical first step towards integrating the isolated spheres of intellectual property and Internet mechanisms.[107] Through this forum, problems will be identified and recommendations will be made to appropriate governments; however this organization has been given no oversight and no real "teeth" in enforcement or implementation.

The summit also issued the "Tunis Commitment" which stated the agency's commitment to its original goals (reaffirming the Declaration of Principles and Plan of Action created in Geneva). Notably, this statement of commitment directed discussions to include the ways in which Information and Communication Technologies (ICTs) can aid in addressing

---

101. *Id.*

102. Plan of Action, *supra* note 64.

103. *See* LESSIG, FREE CULTURE, *supra* note 11, at 263.

104. World Summit on Information Society, Tunis Agenda, (Nov. 18, 2005), para. 72, *available at* http://www.itu.int/wsis/docs2/tunis/off/6rev1.pdf

105. *Id*.

106. *Id.*

107. Press Release, World Summit on the Information Society, World Summit on the Information Society Hailed as a Resounding Success (Nov. 18, 2005), *available at* http://www.itu.int/wsis/newsroom/press_releases/wsis/2005/18nov.html [hereinafter WSIS Press Release].

development goals.[108] Particularly, the statement included a commitment to "developing countries, countries with economies in transition, Least Developed Nations," and other groups of developing countries.[109] This statement marks an important commitment to the spread of information to developing nations; however, there is still a significant need to coordinate these efforts with the recognized authority on protection/access to information, the World Intellectual Property Organization.

In order to establish concrete goals for the future, WSIS has created Action Lines with dedicated moderators to address the issues presented in the Plan of Action.[110] In early 2006, the moderators of these committees met to start the process, including the launching of the Golden Book—a database tracking the initiatives of WSIS participants around the globe.[111] Various projects are being undertaken at the national and international level by private, government, and non-governmental organizations in addition to the actions being taken in the Action Item Committees established by WSIS.[112]

One specific committee, the WSIS Action Line C3 "Access to Information and Knowledge" Committee, met in October 2006 to bring committee members together, set Action Line C3 specific goals, and establish working methods to achieve these goals.[113] The committee established seven areas of concern, including increasing public access to information, libraries and archives generally, as well as research and development in the information sector.[114] Once these areas were identified, the

---

108. World Summit on the Information Society, Tunis 2005, *Tunis Commitment*, U.N. Doc. WSIS-05/TUNIS/DOC/7-E (Nov. 18, 2005), *available at* http://www.itu.int/wsis/docs2/tunis/off/7.pdf

109. *Id.* para. 21.

110. WSIS Press Release, *supra* note 107.

111. World Summit on the Information Society, Golden Book: Stakeholder Commitments and Initiatives, http://www.itu.int/wsis/goldenbook/publication.html (last visited Mar. 23, 2007).

112. Examples of ongoing projects include a Chinese initiative to bring telephone access to nearly 70,000 villages currently without connections, an Egyptian project to digitize a million books and place them in a searchable internet library, and efforts across the African continent to create greater connection and communication technologies. WORLD SUMMIT ON THE INFORMATION SOCIETY, PRESENTATION: THE GOLDEN BOOK, WSIS STOCKTAKING, ICT SUCCESS STORIES, Feb. 24, 2006, http://www.itu.int/wsis/goldenbook/Publication/GB-Final.pdf.

113. WORLD SUMMIT ON THE INFORMATION SOCIETY, FACILITATION MEETING ON WSIS ACTION LINE C3 "ACCESS TO INFORMATION AND KNOWLEDGE" SUMMARY REPORT, Jan. 10, 2007, http://portal.unesco.org/ci/en/ev.php-URL_ID=23803&URL_DO=DO_TOPIC&URL_SECTION=201.html.

114. *Id.*

committee also established objectives for each sub-topic to further guide future discussion and action.[115]

This committee is an important step towards increased accessibility of information throughout the world. While one speaker at the meeting addressed the complexities of information sharing, noting that technology can be used to both encourage and prevent sharing,[116] it is unclear how this committee will resolve Internet governance and intellectual property issues.

III. GLOBAL INTELLECTUAL PROPERTY REGULATION: WIPO AND ACCESS TO KNOWLEDGE

A. World Intellectual Property Organization

Regulation of intellectual property, on the global scale, is apparently within the exclusive jurisdiction of the World Intellectual Property Organization (WIPO). WIPO is a special agency of the United Nations created to specifically deal with global regulation of intellectual property in the realms of science and the arts.[117] The organization administers more than twenty international treaties.[118]

Currently, WIPO is working on a "Digital Agenda" over the upcoming years to address technological developments and intellectual property.[119] This "Digital Agenda," however, seems to be charged with exactly the same tasks and policy considerations as WSIS and its WGIG.[120] WIPO's agenda consists of a work program dedicated to the integration of developing countries in making policy and to expansion of access to information.[121]

The WIPO Digital Agenda, approved in 1999, is set up to deal mainly with the coordination of intellectual property offices in member countries.[122] Specifically, WIPONet, a system created by the organization, links these offices to provide a secure space for communication, resources for greater Internet connectivity (including remote access to WIPO meetings), and resources for establishing a presence on the

---

115. *Id.*

116. *Id.* para. 6; *see also* Part IV *infra.*

117. World Intellectual Property Organization, About WIPO, http://www.wipo.int/about-wipo/en/ (last visited Apr. 5, 2007).

118. *Id.*

119. World Intellectual Property Organization, Digital Agenda, http://www.wipo.int/copyright/en/digital_agenda.htm (last visited Mar. 23, 2007).

120. *See id.*

121. *See id.*

122. *See id.*

web.[123] This system functions, in a way, like ICANN: focusing on infrastructure and technical aspects of intellectual property, without providing a forum to address policy issues resulting from changing technology.

In addition to WIPO's own Digital Agenda, Brazil and Argentina drafted a formal proposal, in August 2004, to create a WIPO Development Agenda.[124] Building on a number of previous technology and development initiatives including the WSIS and WGIG principles,[125] the proposal centers on "knowledge gap" between wealthy and poor nations. The proposal particularly notes the stringent protections on intellectual property in wealthy nations leading to the inability to share knowledge vital to the development process in poorer countries.[126] Argentina and Brazil urged WIPO to make global development an integral concept in its ongoing activities and policies with a member-driven approach.[127]

Primarily, the Argentina/Brazil proposal stresses the importance of creating a balance in intellectual property policy by recognizing the vital importance of the public interest side of information and innovation as well as structuring digital policies to value open source models of information sharing.[128] In addition, enforcement mechanisms are worked into the balance—the coalition proposes that enforcement be made "fair and

---

123. R.A. Mashelkar, *The Role of WIPONET in the Development and Transfer of Technology and Its Contribution to the Modernization of Intellectual Property Services*, 19 INFO. TODAY & TOMORROW 1, 1–6, 30 (2000).

124. Initially, the proposal was presented to the Secretariat of the General Assembly. The proposal was, then, distributed to the General Assembly for review and discussion at its Thirty First Session in Geneva on September 27 through October 5, 2004. Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, World Intellectual Property Organization [WIPO], WIPO Doc. WO/GA/31/11 (Aug. 27, 2004), *available at* http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf [hereinafter Argentina/Brazil Proposal].

125. The proposal builds upon the:

> United Nations . . . Millennium Development Goals . . . [t]he Programme of Action for the Least Developed Nations for the Decade 2001–2010, the Monterrey Consensus, the Johannesburg Declaration on Sustainable Development and the Plan of Implementation agreed at the World Summit on Sustainable Development, the Declaration of Principles and the Plan of Action of the first phase of the World Summit on the Information Society, and most recently, the Sao Paolo Consensus adopted at UNCTAD XI. . . .

Id. at Annex 1.

126. *See generally id.* Examples of this include medicine for impoverished nations suffering from the AIDS epidemic, books and literacy materials for children where there are no resources for libraries, and archival mechanisms for dying cultures in rural communities.

127. Argentina/Brazil Proposal, *supra* note 124, at Annex 1–2, 5.

128. *Id.* at Annex 2–3, 5.

equitable" to take into consideration the developing nation status and its effect on future technologies and innovations.[129]

Apart from these broad policy issues, the proposal also includes specific task items to be considered by WIPO.[130] These task items include enforcement and legitimizing mechanisms, such as a "High-Level Declaration" to address development concerns of the world community, amendments to the WIPO Convention to "specifically include" the development concerns into the objectives and functions of the Organization, and the establishment of a Working Group on the Development Agenda.[131] The proposal's suggested language for the WIPO Convention adds "fully taking into account the development needs of its Member States, particularly developing countries and least-developed countries" under the "Objectives" section of the Convention.[132] This addition would quell much of the debate over whether or not addressing development goals is within the purview of WIPO.

In October 2004, a meeting was convened to discuss the Brazil-Argentina Proposal with the other member states.[133] At this conference, WIPO agreed to consider the Development Agenda and to consider the broader impact of intellectual property on the global community.[134] The Assembly decided to convene Inter-sessional Intergovernmental meetings to examine the proposals and any to be made by other member states.[135] Discussion was also to be undertaken immediately with other intergovernmental organizations and agencies both within the United Nations and without, including the WTO.[136] Notably, the WIPO decision referenced the "internationally agreed development goals" which were the cornerstone of the Argentina-Brazil proposal.[137]

The United States countered the Brazil/Argentina Proposal by affirming WIPO's current commitment to development (by connecting nations)

---

129. *Id.* at Annex 4.

130. *Id*. at Appendix.

131. The proposal also addresses the inclusion of provisions in present and future treaties relating to the development agenda, specific transfer of technology committees, participation by non-governmental organizations and civil society, and joint efforts with other international organizations such as the WTO and UNCATD. *Id.* at Appendix.

132. Argentina/Brazil Proposal, *supra* note 124, at Appendix.

133. *Id.*

134. Electronic Frontier Foundation, The WIPO Development Agenda and Why You Should Care About It, Electronic Frontier Foundation, http://www.eff.org/IP/WIPO/dev_agenda/ (last visited Mar. 23, 2007).

135. General Assembly Decision on a Development Agenda (Oct. 4, 2004), *available at* http://www.cptech.org/ip/wipo/wipo10042004.html.

136. *Id.*

137. *Id.*

and dismissing intellectual property as one small part of the "necessary infrastructure" required for the "journey from developing to developed" nation status.[138] In fact, the United States refers to the agreements creating WIPO and argues that since WIPO was created "subject to the competence and responsibilities of the United Nations" and other agencies, WIPO is not the appropriate place to handle development issues.[139]

Instead of committing to balance, the U.S. proposal touts the importance of intellectual property protection and instead proposes the creation of a database, using existing WIPO technology, to match up needs and resources amongst member nations.[140] Ultimately, the United States' stated goal for this approach is to coordinate development efforts,[141] instead of creating an open environment for development to occur organically. Participation in this database appears to be voluntary. Furthermore, as the United States would have it, the program would be entirely market-driven.[142] This approach is distinctly different than the member-driven Argentina-Brazil Proposal, and to this author, seems to be only a slight modification of the current situation with developing nations at the mercy of developed nations' willingness to share information.

This conflict of views between Brazil and the United States is not a new one. The United States has threatened sanctions against Brazil to coerce a promise for greater protection of American intellectual property.[143] Brazil is also kept on a "priority watch list" for intellectual property violations.[144] These threats are a very real consequence of the conflict between the United States and other nations. Brazil has also threatened to lessen protection for copyrighted materials in the United States in

---

138. Proposal by the United States of America for the Establishment of a Partnership Program in WIPO, WIPO Inter-Sessional Intergovernmental Doc. IIM/1/2 (Apr. 11–13, 2005), *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_2.doc [hereinafter US Proposal] (citation omitted).

139. *Id.* at Annex 2–3.

140. *Id.* at Annex 3–4.

141. *Id.*

142. *Id.* at Annex 7.

143. *US Group Wants Sanctions Against Brazil for Patent Violation*, BRAZZIL MAG., May 13, 2005, *available at* http://www.brazzilmag.com/content/view/2429/41/.

144. Brazil is on the priority watch list for intellectual property violations maintained by the Office of the United States Trade Representative. The Office recognizes that progress is being made, however the report expresses concerns about the lack of protections for American intellectual property in some areas. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2006 SPECIAL 301 REPORT, *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf.

response to American policies on Brazilian cotton farming.[145] While intellectual property should be properly protected, these power struggles between nations (between development and regulation) should be addressed on a global scale through a supra-governmental structure which specializes in the issues fueling the conflict—Internet governance *and* intellectual property.

In a move that seems to echo the U.S. position in this conflict, Mexico also submitted a proposal urging against any substantive change in the current WIPO agenda/structure.[146] This proposal was far less elaborate than the American proposal; though it similarly emphasized the use of WIPONet to help nations. By focusing on this structure, however, these two proposals emphasize the importance of protection of IP, not sharing or balance. Increased protection of IP is beneficial to the wealthy nations—those that own intellectual property—and not beneficial to struggling developing nations who would benefit from a freer flow of information. Finally, the U.K. submission was not a proposal per se, but rather was a strategy paper, asserting no need for a change to the status quo.[147]

Of course, one major issue with using the strictly structured system of proposals and meetings to address issues in a rapidly developing field is the actual speed with which these large, broad organizations can move in order to react and function with that change. Fortunately, there exists a group of individuals, non-governmental organizations, and other entities from outside of these organizations urging change and directing the policy conversations. In May 2005, experts from nations around the world gathered together to come up with a Draft Access to Knowledge Treaty.[148] This treaty included the Geneva Declaration on the Future of the World Intellectual Property Organization, which serves as the statement of U.N.-outsider support for a new WIPO treaty addressing the

---

145. *Brazil Threatens to Suspend U.S. Movie and Software Rights*, BRAZZIL MAG., June 12, 2005, *available at* http://www.brazzilmag.com/content/view/2772/54/.

146. *See generally* Proposal by Mexico on Intellectual Property and Development, WIPO Inter-Sessional Intergovernmental Doc. IIM/1/3, (Apr. 11–13, 2005); *Governments Meet to Discuss WIPO Development Agenda*, BRIDGES WKLY. TRADE NEWS DIG., Vol. 9, No. 12 Main Page, Apr. 13, 2005, *available at* http://www.ictsd.org/weekly/05-04-13/story1.htm [hereinafter *Governments Meet*].

147. *Governments Meet*, *supra* note 146.

148. Representatives from the United States, Serbia, South Africa, United Kingdom, the Netherlands, Spain, Greece, Italy, Germany, Malaysia, France, India, Canada, Korea, Brazil, Chile, and others were present for the workshop which resulted in the draft treaty language. Indicare, Access to Knowledge: Make It Happen, www.indicare.org/tiki-read_article.php?articleId=102; s*ee also* Draft Treaty on Access to Knowledge, May 9, 2005, *available at* http://www.cptech.org/ip/wipo/a2k.pdf.

place of development goals in its future policy determinations.[149] Hundreds of scientists, academics, representatives from non-profit organizations, and others began to sign the Declaration.[150] The preamble of this document pledges WIPO to the goals of greater access to knowledge in both the arts and sciences.[151] Many of the observations and policy items mirror the concerns of the Brazil-Argentina Coalition.

In September 2005, WIPO held further meetings on development issues in Geneva. Though several developed nations including the United States, Japan, and the United Kingdom balked, the "vast majority" of nations continued to push to keep the development agenda at the fore of WIPO's ongoing agenda.[152] This commitment was further solidified at WIPO's meetings a month later.[153] In October 2005, the development agenda survived efforts to have it re-directed to an inactive WIPO committee by the United States, Japan, and several E.U. states.[154] Throughout 2006, little progress was made in WIPO, but it is crucial that the debate continue.

Despite the strides made by developing nations in keeping their concerns on the table, a clear struggle still exists between developing and developed nations on intellectual property issues. This struggle also arises where Internet governance issues are at stake. Nevertheless, with a strong commitment to address this struggle by both WGIG and WIPO, there is hope for compromise, to find a common ground.

IV. INTELLECTUAL PROPERTY AND INTERNET GOVERNANCE: PROMOTING ACCESS THROUGH INFRASTRUCTURE

A. Theoretical Perspectives on Intellectual Property Regimes

In the ongoing debate over the future of technology and intellectual property, scholars and experts usually fall into one of two camps. On the one hand, there is the "commons" view which suggests that the Internet

149. Geneva Declaration on the Future of the World Intellectual Property Organization (Mar. 4, 2005), *available at* http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf.

150. Signatories are from such organizations as Doctors Without Borders, Electronic Frontier Foundation, American Library Association, numerous universities as well as engineers, software programmers, and Nobel prize winners to reference a few. *Id.*

151. *Id.*

152. "Blogging WIPO's Main Event" Posted by Ren Bucholz at 3:49 PM on Sept. 29, 2005 (Electronic Frontier Foundation), *available at* http://www.eff.org/deeplinks/archives/2005_09.php.

153. "Wrapping up WIPO" Posted by Ren Bucholz at 10:24 PM on Oct. 12, 2005 (Electronic Frontier Foundation), *available at* http://www.eff.org/deeplinks/archives/2005_10.php.

154. *Id.*

should be an "information commons" because "information wants to be free." [155] Frequently, this argument is described as advocating the preservation of "the public domain, arguing for the public's right to speak and express views freely by not expanding copyright for digital works."[156] One contentious argument in the commons theory is that stringent copyright protection is a deterrent to the creativity and innovation which might result from more liberal regulations allowing for derivative uses.[157]

In the conflict between the United States and the developing world, it is this "commons" view taken to its theoretical extreme that has the United States, as a protector of the IP rights-holder, up in arms. The motion picture and recording industries in the United States have mounted a crusade against illegal downloading of music and movies.[158] By making electronic versions of copyright-protected materials available to the world in the name of development, these lucrative industries fear losing control over American-produced movies and music to piracy by foreign nations.[159] Furthermore, American drug companies control a vast number of the patented medicines needed to combat epidemics as serious and widespread as AIDS as well as those as tentative and threatening as the South Asian bird flu.[160] The United States and the pharmaceutical industry have argued extensively that patent protection on these vital medicines is required to allow companies to recoup the costs of intensive research and development of these life-saving drugs.[161]

Again, taking this "commons" regime to its theoretical extreme, the United States will be expending large amounts of money on development of drugs, entertainment, and intellectual discourse. The incentives to drug companies, artists, and other companies will be whittled away to nothing

---

155. Philip J. Weiser, *The Internet Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534, 536, 569 (2003) (citing LESSIG, CODE, *supra* note 51, at 6–8); *see also* Sonia K. Katyal, *Ending the Revolution*, 80 TEX. L. REV. 1465, 1471 (2002).

156. Jisuk Woo, *Redefining "Transformative Use" of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment*, 27 HASTINGS COMM. & ENT. L.J. 51, 52 (2004) (citing Julie Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management in Cyberspace,"* 28 CONN. L. REV. 981 (1996)).

157. LESSIG, FREE CULTURE, *supra* note 11, at 184–88; s*ee also* SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2001).

158. RIAA and MPAA statements, *supra* note 59.

159. *See id.*

160. *See* AIDS Article, *supra* note 2; *see also* Avian Flu Article, *supra* note 1.

161. The balance between the patent protection and the incentives to drug companies to commit significant funds to research and development is a more nuanced concept than there is room for here in this Note.

as the value of these creations is squandered by piracy abroad. The detractors of the "commons" view argue that lack of protection is the true deterrent to innovation and creativity as the general public takes advantage of the free information and provides no financial return to the original author/producer.

This competing view, sometimes called a "proprietary" model, for intellectual property rests on strong, complete protection of intellectual property with all control over the work given to the rights-holder.[162] Here, monopolies over technological innovations have been considered "not only acceptable, but necessary" to ensure the development of newer technological innovations.[163] Protection of innovations allows for full financial return on the intensive research and development that goes into these protected products (such as software and medicine).[164] This represents a long-standing theory that "without an appropriate incentive, inventors will not create new innovations."[165]

This proprietary model has been criticized on precisely this theory. While the information monopoly does protect innovations and inventors, the potential for corporate monopolies can result in injury to the consumer.[166] Some of the negative fallout from such a proprietary model is reflected in the medical patent crises over AIDS and Asiatic bird flu.[167] Pharmaceutical companies expend considerable amounts of research time and money into discovering and producing medicines to treat these epidemics (or potential epidemics). However, because of the monopoly afforded these companies during the medicine's infancy, innovative treatments are unavailable to populations in poor nations or those without healthcare coverage in wealthy nations.

Some academics have gone so far as to suggest that control will lead to greater availability of "open" information and so arguing that the goals of the "commons" advocates will actually be better served by a more perfect regime of control and protection for intellectual property.[168] In fact, this argument presumes access to information since it relies on the tenet that ideas, on which new ideas will build, still leak out into the

---

162. Weiser, *supra* note 155.

163. *Id.* at 577 (citing Richard R. Nelson & Sidney G. Winter, *The Schumpterian Tradeoff Revisited*, 72 AM. ECON. R. 114, 144 (1982)).

164. *Id.* at 576.

165. *Id.* at 578.

166. *Id.* at 581 (citations omitted).

167. *See* text accompanying notes 1 and 2.

168. Wagner I, *supra* note 4, at 1000 (arguing that "because even perfectly controlled works nonetheless transfer significant information into the public domain . . . additional control likely to stimulate additional works").

world from strictly protected works.[169] While this may be a valid argument, the main focus of the WGIG and Access to Knowledge discussions has been working within the intellectual property regime to make sure that information (in its protected form) is distributed to rural and remote regions of the world. Only then can there be a truly level playing field for global innovation and education.

Ultimately, these views conflict over one significant use of information—fair use. Fair use is a general exception to intellectual property protection which allows for the public to create derivative works, building on the ideas of inventors in order to create newer innovations and continue the production cycle.[170] Supporters of the "information commons" are in favor of wide exceptions for fair use, thereby valuing the right of the public to benefit from the work of others in creating new innovations.[171] On the other hand, supporters of the "proprietary" model have even gone so far as to suggest that "fair use" is not reasonable in any incarnation. However, some preservation of fair use is arguably an important component of encouraging further innovations across the board. [172] It is within these two extremes that the balance of intellectual property rights and freedoms is most needed.[173]

Each of these possibilities represents extreme, but possible, regimes of intellectual property protection (or lack thereof). However, the future of the Internet and intellectual property need not be black and white.[174] This Note proposes using Internet governance structures (within the purview of the WGIG) to create mechanisms to achieve a balance between the protection of IP rights-holders and the information interests of the developing world.

---

169. *Id.*

170. For more information, see MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.05 (2006).

171. *See, e.g.*, LESSIG, FREE CULTURE, *supra* note 11, at 145.

172. *See* R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV. 423, 433 (2005) [hereinafter Wagner II].

173. Phillip Weiser's "Competitive Platforms" model suggests another approach dealing specifically with software. While this is outside of the focus of this Note, there are scholars who are addressing the failings of a purely "commons" approach or a purely "proprietary" approach in content-specific ways. *See generally* Weiser, *supra* note 155.

174. Scholars have also suggested other "third way" approaches to the problem of the Internet and intellectual property, though often focusing on a particular subset of IP rights. *Id.*

B. Practical Perspectives: Digital Rights Management

Scholars, such as Lawrence Lessig, have argued that the Internet is actually regulated by several factors[175]—norms,[176] market,[177] government,[178] and code. "The code, or the software that makes cyberspace as it is, constitutes a set of constraints on how one can behave in cyberspace. The substance of these constraints vary, but they are experienced as conditions on one's access to cyberspace."[179] It is through code, the software or technology behind the transfer of electronic information, that the balance between IP rights-holders and the developing world may be achieved.[180]

A growing tech industry is developing software which is directly designed to control the user's access to information and cyberspace. [181] Digital rights management (DRM) products, such as e-book software,[182] broadcasting V-chips,[183] and others[184] are being developed in the private

175. LESSIG, CODE, *supra* note 51, at 86.

176. *Id.*

177. *Id*; *see also* Weiser, *supra* note 155, at 543–44.

178. A very real example of the government regulating the Internet is ICANN as established by the U.S. Department of Commerce or the UN as a supra-governmental agency discussing Internet regulations through the WGIG.

179. Lawrence Lessig, *The Constitution of Code: Limitations on Choice-Based Critiques of Cyberspace Regulation*, 5 COMMLAW CONSPECTUS 181, 183 (1997).

180. The implementation of this code may require the support or influence of the other three factors. This Note suggests that the WGIG and WIPO have joint jurisdiction over the problems of intellectual property and the Internet and it is here that government structures (as well as norms and market forces) will play a role in the implementation of Internet governance structures to achieve balance in global intellectual property regulation.

181. For a more detailed discussion of the technology required for DRM systems, see John M. Williamson, *Rights Management in Digital Media Content: Case for FCC Intervention in the Standardization Process*, 3 J. TELECOMM. & HIGH TECH. L. 309, 324–6 (2005).

182. One example of current reading software is Adobe's e-book reader. While this software currently exists, the software does not always enable the same uses as a "real-world" or hard copy book. Sharing or reading aloud are sometimes restricted by the author. For example, the e-book version of the popular children's book *Alice in Wonderland* includes a restriction against "reading aloud." While this would seem a preposterous restriction on a "real-world" book, this restriction protects unauthorized recordings to be made and distributed for readers with special needs. *See* LESSIG, FREE CULTURE, *supra* note 11, at 152–53. Under the WIPO development agenda, uses such as making books available to readers with special needs would be allowed in order to further the resources available to the needy in developing nations. *See* Argentina/Brazil Proposal, *supra* note 124.

183. These broadcasting tools are examples of digital rights management which allow parents to control what television material their children are able to see (V-chip) or to monitor what people are viewing and recording—limiting the uses of broadcasted mate-

sector and seem to be the future of control (and access) on the Internet.[185] These "technological enforcement measures" may also be useful for the copyright holder because they would "lower enforcement costs over time."[186] Essentially, DRM can help to protect works from infringing uses, but can also be used to help preserve the "fair use" of these works. Clear preservation of the fair use exception is vital to allow libraries, hospitals, and other institutions to be able to receive and disseminate important information to global citizens in remote countries.

Digital rights management, however, is not, in its current state, a perfect solution to the problems addressed in this Note. Scholars have suggested that there are serious questions about expectations of privacy in this new world of digital access controls.[187] Because these technologies collect information about the uses of materials and report that information to the owners of the work, there is a potential for the collection of personal information about the user which could contribute to the growing fears about identity theft.[188] As a solution, anonymity of the *user* must be programmed (or encoded) into access controls while collecting information about the *uses* of information.[189]

Critics of DRM systems have also found that "almost all DRM solutions are themselves vulnerable to countermeasures (information about which is easily disseminated)."[190] An example of this circumvention of DRM techniques is DeCSS, a program which was created by reverse engineering to "descramble" code on DVDs which restricted use of the discs to only those DVD players which could "descramble" the code. [191] By descrambling this code on their own, users were able to copy and distribute the content of the DVD freely.[192]

---

rial by the viewer. *See* Williamson, *supra* note 181, at 364–71; *see also* Wendy J. Seltzer, *The Broadcast Flag: It's Not Just TV*, 57 FED. COMM. L.J. 209 (2005).

184. *See, e.g.*, Brian Leubitz, *Digital Millenium? Technological Protections for Copyright on the Internet*, 11 TEX. INTELL. PROP. L.J. 417 (2003) (proposing a model where Internet Service Providers would collect royalty fees on downloaded music files).

185. The government not only has the capacity to oversee the developments of a DRM system for intellectual property management, but it has been argued that the government is in the best position to regulate the use of information in this manner. *See generally* Williamson, *supra* note 181, at 312, 351–77.

186. Wagner I, *supra* note 4, at 1012.

187. *See generally* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996); Julie E. Cohen, *DRM and Privacy*, 18 BERKLEY TECH. L.J. 575 (2003).

188. *Id.*

189. *Id.*

190. Wagner I, *supra* note 4, at 1016.

191. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 437–38 (2d Cir. 2001).

192. *Id.*

At least in the United States, these concerns have been addressed by the legislature. The Digital Millennium Copyright Act was passed in 1999 in order to, inter alia, prevent the circumvention of anti-copying devices protecting intellectual property.[193] This law does provide some exceptions for "fair use" of copyrighted material by libraries, law enforcement, and schools.[194] However, there are still concerns that this law goes too far in protecting copyrights.[195] In fact, some have argued that "fair use" should never be an excuse for circumventing a digital protection, leaving those who would fairly access the information without recourse.[196] Even on this front, technology must also be used to promote a balance of rights between copyright holders and the consuming public.

Because information is valuable on the world market, other scholars have argued that the market should be regulated to make sure that these digital protections are effective.[197] In order to address problems of anti-circumvention, scholars have suggested implementing legal bans on all products which would enable illegal uses or distribution of protected works.[198] Because intellectual property is a global issue, this is a perfect example of where WIPO and WGIG need to come together to work on implementing regulations on both the Internet and intellectual property to ensure that rights are protected across the globe.

These issues collectively highlight the need for WIPO and WGIG to come together and work on policies and regulations on a global scale. Not only is the backing of the technology industry required to ensure compliance across the board (and to combat the temptation/capacity for illegal uses), but an international effort is required to ensure the protections of both copyright holders and the fair-using public consumers of information and technology.

For the most part, access to information in the developing world has distinct benefits. Sharing knowledge and copyrighted works will improve education across the globe. Some access structure for medical patents will make medicine available to sick and dying global citizens. However,

---

193. Digital Millenium Copyright Act, 17 U.S.C. § 1201 (1999).

194. *Id.*

195. *See, e.g.*, Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKLEY TECH. L.J. 519 (1999).

196. *Id.* at 539 (citing U.S. DEP'T OF COMMERCE INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995)).

197. *See* Williamson, *supra* note 181, at 357–59; *see also* LITMAN, *supra* note 25, at 151–52 (explaining that industry-wide commitment to a standard is a necessary element of that standard's success.)

198. Williamson, *supra* note 181, at 358.

this sharing of information will also benefit rights holders. For instance, one scholar has argued that a greater release of information can be used to increase the market for related products.[199] When students in a school in a Zimbabwean village access a digital library, a previously untapped market learns about authors and thinkers in other parts of the world. As remote nations become bigger world players in commerce, markets will open up for the protected works—books, medicines, movies, scientific articles.

Creative Commons[200] is one example of an organization which is opening up the opportunities both for copyright holders and the fair-using public. Creative Commons has developed an alternate licensing structure for copyrighted materials which allows the author to explicitly preserve fair uses such as innovations and derivative works (or even free distribution) in a flexible structure observing both protections and freedoms.[201] Creative Commons is quickly catching on amongst creators and authors, bringing more recognition and opening markets for those who are opting for these licenses.[202]

With proper use of DRM, there is hope to achieve the sort of balance that would benefit both the protection concerns of the United States and the free spread of information in the developing world.[203] WGIG, as the future of global Internet governance and the United Nations, is in a strong position to address these governance mechanisms in order to address the WIPO development agenda and satisfy the worries of the U.S. proprietary regime.

---

199. *See* Wagner I, *supra* note 4.

200. Creative Commons Project, http://www.creativecommons.org (last visited Apr. 7, 2007).

201. Wagner I, *supra* note 4 at 1032–33 ("Creative Commons seeks to assist owners in crafting 'deeds' to their works by drafting copyright licenses generally granting public access, but tailoring them to the particulars of the situation. Such efforts demonstrate the benefits that come with granting creators broad, flexible rights to control the uses of their inventions.").

202. One example of such success is posted on the Creative Commons website. Pamela Jones, the founder of Groklaw, conducts complicated legal research and posts articles on her website. These articles are mostly licensed under Creative Commons and so the content has been mirrored at websites across the world. *See* Groklaw's Pamela Jones, http://creativecommons.org/text/groklaw (last visited Apr. 4, 2007).

203. Williamson, *supra* note 181, at 323–24. ("In many senses, DRM schemes serve to enforce and protect the rights of all parties involved.") (citations omitted); *see also* Joan Feigenbaum et al., *Privacy Engineering for Digital Rights Management Systems*, in SECURITY AND PRIVACY IN DIGITAL RIGHTS MANAGEMENT 76 (Tomas Sander ed. 2001).

C. Digital Archives—The Future Is Here

While DRM is perfected, global archives are popping up everywhere. Implementing these digital access mechanisms will mean that as remote countries become connected to the Internet, they will have access to a wealth of information as providers begin voluntarily making information available online.[204] One example is the BBC's recent decision to release news clips in an archival format, specifically for re-mixers and to encourage innovations with their own copyrighted material.[205] Though the uses of these clips are limited to non-commercial uses, there is a clear delineation of the permissions to use the information to create at will outside of the commercial spectrum. This archive is already being used to foster creativity in the school settings in London through the London Children's Film Festival.[206] Children are able to download copies of the 1902 film *The Little Match Seller* and create their own original scores to be submitted for the festival.[207]

A more controversial example of the use of digital technology for archiving is the Google library archive project.[208] Google has joined with national libraries to begin digitizing works which are in the public domain (where copyrights have expired) as well as books that are not yet in the public domain. Herein lies the controversy. Lawsuits have been filed over making these works alleging that this copying is "stealing" or piracy of books.[209]

Assessing Google's activity and those by other companies is a difficult, but illustrative, example of the clash between traditional materials pro-

---

204. A whole host of publishers and other companies have made strides in the past few months to start digitizing books to take advantage of new technologies. These publishers are using the digital copies to maximize the exposure that their works get when users search for titles. Users will get to see digital excerpts from the books which will, hopefully, grab the interest of the reader. *See* Press Release, HarperCollins Publishers, HarperCollins Publishers Selects Newsstand, Inc. to Develop Global Digital Warehouse (Apr. 10, 2006), *available at* http://www.harpercollins.com/footer/release.aspx?id=445&b=&year=2006.

205. BBC Opens TV Archive to Re-mixers, BBC NEWS ONLINE, September 8, 2005, http://news.bbc.co.uk/2/hi/entertainment/4225914.stm.

206. Creative Archive License Group, Schools to Score BFI Creative Archive Film, http://creativearchive.bbc.co.uk/news/archives/2005/10/schools_to_scor_1.html (last visited Apr. 4, 2007).

207. *Id.*

208. Press Release, Google, Google Checks Out Library Books (Dec. 14, 2004), *available at* http://www.google.com/press/pressrel/print_library.html.

209. Alorie Gilbert, *Publishers Sue Google over Book Search Project*, C/NET NEWS.COM, Oct. 19, 2005, http://news.com.com/2102-1030_3-5902115.html.

tected by traditional IP laws and the new digital world. No one would begrudge a small library in Nepal collecting public domain works to bring literacy to a village. However, the digitization makes the work far more susceptible to illegal copying—as the "proprietary model" supporters would argue. Instead, a digital archive is bringing resources of the developed world to remote developing nations on the same terms—a library which is instantly available as Internet infrastructure is laid down. It is through the development of digital rights management technology that this digital library could be accessed by readers in the hypothetical library in Nepal without violating the rights of the copyright holders.

WSIS has taken an important step towards resolution of these issues in its Action Line committee addressing access to information. The Golden Book shows other examples of global actors taking the problem into their own hands.[210] The intellectual property concerns, nevertheless, are not being integrated into the process. By using these Internet governance mechanisms already in place and working within the structures established by the U.N. agencies in question—WGIG and WIPO—the rights of the accessing public and the copyright holders will both be protected in line with the "fair use" protections provided in traditional (and developing) intellectual property law.[211]

V. CONCLUSION

The reality of working with behemoth government agencies is that government is slow and making changes at the global level is part of a painstaking process. This is increasingly impractical in a world where technology is developing faster everyday. Effective, efficient action is required with as much cooperation on the broad scale as possible in order to develop solutions that are practical and withstand the test of time, and protect and preserve rights across the board.

Global development depends on the application of technology solutions, such as DRM and public Internet archives, to age-old intellectual property conflicts. The flexibility of the Internet and its increasing availability around the world enables fast-paced answers to information problems. Implementing these solutions, as this Note has argued, will benefit developing nations by increasing access to information. Developed nations, and all intellectual property holders, will also benefit as the market for that information expands to encompass the entire globe. By bringing

---

210. *See* note 112 and accompanying text.

211. Timothy Wu, *Copyright's Communication Policy*, 103 MICH. L. REV. 278, 360 (2004) (noting that DMCA section 1201 contains "particularized and confusing exceptions for certain types of users" including libraries).

together the Internet governance policies developing in WSIS and WGIG, and the growing focus on development and intellectual property regulation in WIPO, the proper balance between information sharing across the globe and the protection of intellectual property rights-holders can be achieved.

Kristin Delaney[*]

* B.A. Dartmouth College; J.D. Brooklyn Law School (expected 2007). I would like to thank the following people: The staff of the *Brooklyn Journal of International Law* for their assistance in the preparation of this Note, Austin Wheeler for his constant encouragement during the writing of this Note, and my family and friends for their support throughout my education.