

# The Global Politics of Intellectual Property Rights in the New Millennium

Written by Christopher May

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CHRISTOPHER MAY, JUL 22 2009

For nearly two decades I have been researching and writing about the global political economy of intellectual property rights (IPRs). In that time, intellectual property has moved from the margins of contemporary global politics to become an issue that most, if not all commentators and analysts recognise as being an important subject of political contest and disagreement. Gone are the days when I was looked on as slightly mad for being interested in such a 'technical' subject. It is now generally recognised that the politics of IPRs is particularly fraught, with disputes about the fairness of recognising ownership rights over knowledge and information no longer being confined to technical/legal forums but spilling out into general discussions about global politics, and often becoming front page news. This is partly due to a number of technological and economic developments and partly due to a shift in global governance.

With the establishment of the World Trade Organisation in 1995, the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement became part of the 'single undertaking' that all members were required to accede to. However, unlike most of the rest of the WTO's legal instruments, which are concerned with the manner in which state's trading activities are controlled and regulated at the border, the TRIPs agreement required WTO members to establish domestic laws that produced specific legal effects as regards the 'owners' of IPRs (patents, copyrights, trademarks, and other intellectual properties). While the TRIPs agreement did not mandate how these laws should be framed they did require them to bring into existence certain rights and obligations. This has led to considerable resources and effort being put into programmes of capacity building and technical assistance, led by, but not exclusively delivered by the World Intellectual Property Organisation (WIPO). These programmes have sought to establish the western mind-set and legal processes of intellectual property as best practice around the world, although not always easily or completely. Indeed, laws cannot properly function without widespread social acceptance and the establishment of legitimacy, and this has become a major problem with intellectual property; its legitimacy as a legal form is increasingly questioned.

Promoting the norms of protecting IPRs has proved to be a difficult task. On one hand in fields as varied as access to the medicines needed to sustain the life of those who have AIDS or HIV, the control and sale of music as well educational publications, the control of the naming of foods and wine, the payment for the tools needed to access the Internet, and the use of genetically modified material (in industry and agriculture), the 'owners' of IPRs have sought to maintain and expand their rights to control, charge for use, and prevent unauthorised access to their properties. On the other hand, as the social costs of these prohibitions (until payment is received) have become increasingly obvious: people with AIDS die because drugs remain so expensive, although in the face of high profile campaigns in this area things have started to change; educators find they are unable to easily and cheaply access the latest information for students; the costs of some software products greatly constrains the advantages of the information age for the poor; and people across the world have started to understand why some goods seem so expensive despite their low material production costs.

One response to this programme of protection has been the expansion of (so-called) piracy by those who need to access knowledge and information, but who cannot afford it. The word 'piracy' is used by knowledge owners to try and draw a parallel with violent dispossession but this depiction is unjustified even if it has some political currency;

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most of those identified as 'pirates', whatever their morals seldom kill or use violence to obtain information and knowledge related products or services. We all know that the music industry has found that given the choice between paying for music or downloading it for free, many people prefer the latter, but on the other hand, the live music scene which provides direct payment from audiences to artists is flourishing. Some countries have sought legal ways of sidestepping the limitations on the production of needed drugs by using forms of compulsory licensing as another way of confronting the enforced scarcity that IPRs produce. Across the world faced with protecting the rights of holders of IPRs in the richest and most developed countries (mostly corporations who hold/own these rights) at the cost of the lives of their citizens, or at the very least at the cost of their ability to utilise information and knowledge resources to enrich and improve their lives, states and other organisations have questioned the claims put forward by the supporters of intellectual property.

The central claim made is that without the protection of the rights of creators, innovators and inventors, they would cease to provide the innovations required if the human race is to continue to prosper. It is only by constructing a scarcity (of use) for knowledge and information, by making it property, that proper and legitimate economic rewards can be established in a market society. The construction of scarcity certainly changes the character of information and knowledge, which has few if any costs of replication in its original state, but this scarcity is required if we are to ensure individuals and companies receive the support and incentives they need to continue to innovate in a society where the market is the key organisational device. This claim is the foundation for the TRIPs agreement and global governance of IPRs.

While in certain circumstances such a mechanism clearly produces a social benefit, since the first intellectual property statute was passed in Venice in the Fifteenth Century, legislators have always recognised that this change in the character of information and knowledge had social costs. Hence, IPRs have always been limited in duration and scope, to ensure that the new information and knowledge produced enters the public domain, once a reasonable return has been earned, and to ensure only *new* knowledge or information is protected. This balance, the key issue in the politics of intellectual property, was tipped largely in the favour of the owners of IPRs by the TRIPs agreement. At the time many argued this was a new standard from which owners could build further protection for their rights. However, it now seems that the TRIPs agreement rather than finally consolidating the expanded rights linked to IPRs, actually represented the high-water mark from which subsequent political pressure and contest has forced a partial retreat, and the beginning of a return to the sort of balance that has been achieved through most of the long, and at times contentious, history of protecting intellectual property.

This retreat has taken two principal forms: a regulatory response, and a technological/economic development. The former, perhaps most obviously, has prompted a major project at the WIPO to establish a Development Agenda for the organisation that will move many of its processes and practices away from an exclusive focus on rights-protection and towards a more balanced approach that give due weight to considerations of economic development. This process has been progressing for two years already and the WIPO is already starting slowly to re-orient itself. Likewise the TRIPs agreement itself is increasingly subject to pressure for amendment throughout the WTO, with its central logic of commodification increasingly questioned. But these political responses are complemented by the other principal development; starting in computer software but spreading across many sectors, this development stresses 'openness' as a response to attempts to control knowledge and information by making it intellectual property. This rejection of the logic of property can be found in the free and open source software movement, in the access to knowledge (A2K) campaign, in the rise to peer-to-peer knowledge networks, the open science movement, and corporations increasing interest in open models of innovation.

Intellectual property is by no means obsolete, and indeed in some case has considerable social utility, however what has changed since the dawn of the new millennium is the decline in the acceptance that there is no other way of dealing with knowledge efficiently in contemporary capitalist societies. The openness movement is not anti-capitalist but rather suggests that a capitalism designed and developed for the exchange of material goods does not necessarily provide a similar social benefit when introduced into the new information and knowledge practices that have developed in the last decades; in this sense it is differently capitalist. The TRIPs agreement and subsequent attempts to further expand the rights of IPRs' owners have served to demonstrate the social costs of such commodification, and as such have prompted social forces, and community practices to respond in the face of an

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over-reaching by one set of social interests. The new millennium's politics of IPRs will be a story of compromise and re-organisation, rather than as some feared two decades ago, a period of consolidation and expansion of the interests of a small IPR-owning elite. The TRIPs agreement was an anomaly and the relatively normal history of IPRs is returning.

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Christopher May, is Professor of Political Economy, and Associate Dean: External Relations and Enterprise in the Faculty of Arts and Social Sciences, Lancaster University, UK. His work on intellectual property rights has been widely cited and translated. He wrote the first ever independent study of the World Intellectual Property Organisation, collaborated with Susan Sell (George Washington University) on a history of IPRs and his frequently cited book *A Global Political Economy of IPRs: The New Enclosures* is now available in a second revised edition. Most recently he has completed his book on *The Rule of Law: The Common Sense of Global Politics* which will be published in 2014.