New Trends in International Law

Festschrift in Honour of Judge Hisashi Owada

Edited by

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CHAPTER 22

The State of Intellectual Property and International Law

Frederick M. Abbott

1 Intellectual Property and International Law

Intellectual property protection was the subject of numerous bilateral agreements in the late 1700s and early 1800s, particularly embodying efforts to control "piracy" of works of authorship.[1] The first "multilateral" agreements on the protection of intellectual property were concluded in 1880s. That is, the Paris Convention for the Protection of Industrial Property of 1883,[2] and the Berne Convention for the Protection of Literary and Artistic Works of 1886.[3] Each of these agreements had the objective of establishing an international legal environment in which the interests of innovators and creators in their works would be protected against appropriation by "foreign" actors, and in that sense to reduce economic and political friction among nations that arose from alleged inattention to the property rights of their nationals.[4]

The international legal system regulating intellectual property is fragmented, though that characteristic may not distinguish it from other international law subject matter. Treaties are a principal source of international law, and the World Intellectual Property Organization (WIPO) and its 26 multilateral treaties are a center of rulemaking.[5] Within the WIPO treaty system

1 Sam Ricketson, *The Birth of the Berne Union*, in *The Centenary of the Berne Convention*. 1987, Centre for Commercial Law Studies, Queen Mary College: Kluwer London.

2 Paris Convention for the Protection of Industrial Property, 1883, Available from: https://www.wipo.int/wipolex/en/text/287556.

3 Berne Convention for the Protection of Literary and Artistic Works, 1886, Available from: https://www.wipo.int/treaties/en/ip/berne/.

4 For an overview of the policies underlying the international intellectual property system, see generally Frederick M. Abbott, Thomas Cotter and Francis Gurry, *International Intellectual Property in an Integrated World Economy*. 4th ed. Aspen Casebook Series. 2019: Wolters Kluwer.

5 *The World Intellectual Property Organization* (*WIPO*). Available from: https://www.wipo.int/about-wipo/en/. Information regarding the current status of membership in each of the WIPO-administered agreements can be found at the "Contracting parties" link associated with each agreement.

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there is a modest percentage of agreements to which there are more than 100 member-state parties. The most widely subscribed to agreements are the Paris and Berne Conventions, each with about 180 members. The WIPO Copyright Treaty (WCT) and the Performances and Phonograms Treaty (WPPT) each have about 115 members, the Rome Convention dealing with performances and broadcasts about 100 members, as with the Marrakesh Treaty for the Visually Impaired. The remainder of the substantive treaties have substantially fewer members, generally less than 50. In addition to the substantive treaties, much of the work of WIPO involves management of IP, including the widely used Patent Cooperation Treaty (PCT), with more than 155 members, and the Madrid Protocol with about 115 members. The Nice Agreement on trademark classification has over 90 members. The PCT and Madrid Protocol (and related Madrid Agreement) provide platforms that allow filing of patent applications and securing trademark registrations in a way that facilitates cross-border business. Revenues from these agreements substantially fund WIPO, and this largely self-funding characteristic distinguishes WIPO from most international organizations.

When the WTO TRIPS Agreement was negotiated and entered into force in 1995, this seemed to shift the center of gravity regarding international intellectual property regulation away from WIPO and into the trading arena.[6] The WTO has 164 members – including all the major economic powers – and the WTO system (with rare exception) does not allow its members to pick and choose among the responsibilities they accept. All members of the WTO are members of the TRIPS Agreement. In addition to important substantive rules, a key element of the TRIPS Agreement in comparison with the WIPO-administered agreements is that WTO dispute settlement and enforcement is available under the TRIPS Agreement. Thus, failure to comply with TRIPS Agreement rules can subject the noncompliant party to trade sanctions that may in effect compel compliance. Yet the WTO as a dispute settlement forum has some significant drawbacks, including for present purposes that the Appellate Body is no longer functioning. Putting that aside, the time from initiating a dispute to an adopted and implemented decision may entail a wait of 3 to 5 years (including the 15-month compliance period), which in IP terms is a long time. As WTO members are today considering revisions to the Dispute Settlement Understanding at

6 For a description and analysis of the WTO and its role in regulation of the international IP system, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), see Abbott, Cottier & Gurry, supra note [4], at e.g., 25–35.

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the WTO, one important agenda item involves streamlining the mechanism so that remedies may be obtained while still relevant to the underlying dispute.[7]

It is noteworthy that neither the TRIPS Agreement nor the WIPO-administered agreements purport to allocate the responsibilities of either organization as compared with the other in terms of administration and rule-making.[8] This was left as a matter for the international community to work out in practice. The TRIPS Agreement does incorporate various provisions of the WIPO-administered agreements, but that is a different matter. With that said, the Secretariats of WTO and WIPO enjoy a cooperative environment in the sense that they regularly co-host programs and training sessions. They are not functioning in clinical isolation.

One of the defining characteristics of the WIPO system of international agreements is the absence of internal dispute settlement mechanisms. The treaties generally provide that members may avail themselves of dispute settlement at the International Court of Justice. But no case has been initiated before the ICJ under one of the WIPO-administered agreements despite the long-standing possibility for doing so. One of the reasons postulated for this absence of activity had to do with the difficulty of enforcing an ICJ judgment. Since such judgments are generally enforced through persuasion rather than compulsion, it is not clear why IP-related judgments would be different than judgments addressing other subject matter. On the other hand, because it took the negotiations that culminated in the TRIPS Agreement to add important substantive rules governing areas such as patent subject matter, issues that need resolving may be more likely to arise in the WTO forum, or another trade-based forum, than under the WIPO-administered agreements.

The unwieldy consensus-based decision-making structure of the WTO has largely precluded "evolution" in the sphere of IP rules and regulations in that forum. There are two notable consequences. First was a transition away from the WTO as the new rule-making forum, and redirection toward preferential trade agreements (PTAs) (including bilateral agreements), also referred to as regional trade agreements (RTAs), with variations on those naming

7 "Members hope WTO dispute settlement reform text will 'change the incentives'," *World Trade Online*, Nov. 13, 2023, https://insidetrade.com/daily-news/members-hope-wto-dispute-settlement-reform-text-will-change-incentives.

8 Frederick M. Abbott, "Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance." *Journal of International Economic Law*, 2000 (3): p. 63–81, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=233213.

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conventions.[9] The period from 1995 until today has seen a proliferation of mini-lateral agreements that include detailed chapters on IP, with rules largely supplementing those found in the TRIPS Agreement.[10] This is not a phenomenon confined to high income country relations with lower income country trading partners. PTAs have become a ubiquitous feature of the international trading system, and IP rules are important parts of these arrangements even among developing countries.

A second consequence of the functional disabilities of the WTO has been a shift in the center of gravity back toward WIPO in terms of multilateral discussions of new IP rules. WIPO has an advantage over WTO in that decisions to convene diplomatic conventions and to adopt agreements do not need to be taken by consensus, even though the institution encourages consensus. It is possible to move forward in a particular area even if there are reluctant or dissenting voices.

Forums such as the World Health Organization (WHO) spend a good deal of time debating IP issues as they may affect public health. Even as this contribution is being written, a debate is taking place within WHO regarding whether it is an appropriate forum for discussion of IP rules.[11] Some governments have been arguing that IP should be discussed at WTO and not at the WHO. There is no obvious foundation for this argument about "silos" since the WTO was not "anointed" as the sole forum for discussion or rules about IP. For that matter, it is curious that those governments favoring the "IP-silo" approach did not identify WIPO as the preferred alternative forum.

In principle, a decision by WHO member states to adopt rules on IP, in a Pandemic Accord by way of illustration,[12] could raise the possibility of conflict between WHO rules and decisions, and WTO rules and decisions. For example, what might happen if WHO members adopted a treaty providing that

9 Data on the proliferation of regional trade agreements (RTAs) can be found at the WTO Regional Trade Agreements Database, as of November 29, 2023 showing 362 RTA's in force, https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (visited Nov. 29, 2023).

10 See, e.g., Frederick M. Abbott, "Intellectual Property Provisions of Bilateral and Regional Trade Agreements in Light of U.S. Federal Law, UNCTAD-ICTSD Project on IPRs and Sustainable Development," *Issue Paper* No. 12, Feb. 2006, https://unctad.org/system/files/official-document/ictsd2006ipd12_en.pdf.

11 Kerry Cullinan, "Intellectual Property Negotiations Belong at WTO, European Countries Tell Pandemic Accord Negotiations." *Health Policy Watch*, 2023.https://healthpolicy-watch.news/intellectual-property-negotiations-belong-at-wto-european-countries-tell-pandemic-accord-negotiations/.

12 See negotiating process and relevant documents of the Intergovernmental Negotiating Body established at the WHO, https://inb.who.int/ (visited Nov. 29, 2023).

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in the event of a public health emergency of international concern (PHEIC) (e.g., another pandemic), private rights in intellectual property would be automatically suspended in all WHO member states (which encompasses almost everyone). What if WTO members have not adopted the same rule? Would the Pandemic Accord-based suspension of IP rights override the rules of the TRIPS Agreement and preclude a cause of action through the WTO dispute settlement system? The "easiest answer" to this question would be provided by an express provision in the Pandemic Accord addressing the relationship to the WTO or other international institutions. If every WHO member acceding to the Pandemic Accord accepted that "defined relationship" in the treaty subsequent to the TRIPS Agreement, presumably the subsequent treaty would govern per the rules of the Vienna Convention on the Law of Treaties.[13] But what if members were unable to agree on a defined relationship? If IP rights were globally suspended under the Pandemic Accord, could a WTO member bring a claim in WTO dispute settlement that the rights of its IP owners were being violated by a member that took advantage of the suspension? This would seem a very difficult road if the government seeking to vindicate rights at the WTO had agreed in the later in time international agreement (i.e., the Pandemic Accord) to the suspension of IP rights. This issue would be much more complicated if the party seeking to vindicate rights at the WTO had not accepted the Pandemic Accord, such that one party would be relying on a treaty negotiated under the auspices of the WHO and the other party relying on pre-existing rights under the TRIPS Agreement. There are several solutions that could be considered, among them that the existence of a pandemic should in plausible scenarios provide a basis for taking advantage of a WTO exception, such as under Article 73 of the TRIPS Agreement addressing national security. It is worth noting that since the ~~all caps~~ TRIPS Agreement has in-built "flexibilities", it does not have a provision analogous to GATT Article XX that provides the safety valve for many disputes regarding trade in goods.

One important element that tends to get "lost" in discussions of IP in Geneva is that ultimately IP rights arise under national law (and under national constitutions), and implementation of treaty rules (with rare exception) must be undertaken in the national legal system. Assuming arguendo that a WHO Pandemic Accord were to contain a rule saying that in the event of a PHEIC IP rights would be suspended, and even if the Pandemic Accord were to be accepted among all WHO members, it would still be up to the national

13 See Article 30(3) of the Vienna Convention on the Law of Treaties, signed 23 May 1969, entered into force 27 January 1980, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

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constitution and national law whether private rights in IP would be suspended as a matter of domestic law.

The disparity between discussions taking place in Geneva and what goes on in national capitals may present greater obstacles to "progress" in addressing matters such as pandemic preparedness than disagreements among Geneva negotiators. Whether we are talking about the U.S. President and Congress or the European Council and Parliament, there will inevitably be industry pressure not to accept terms and conditions that may be perceived as against the national industrial policy interest. Progressive ideas in Geneva may be just that. Translating these into domestic law and policy around the world is another matter, and a proposed international agreement that is "overly ambitious" will almost certainly run into local political resistance.

The PTAs have their own dispute settlement arrangements, generally a type of arbitration conducted by arbitrators appointed for individual cases. And, like the WTO dispute settlement system, enforcement generally may take the form of trade sanctions of one type or another. Yet the creation of these self-standing dispute settlement mechanisms under PTAs has not led to a proliferation of judicial or quasi-judicial IP-related decisions interpreting and applying the terms of those agreements.

It is important to note that most of the PTAs negotiated up until the past five or six years incorporated investor to state dispute settlement (ISDS) mechanisms, such as permitting recourse to ICSID. But PTA governments became rather skeptical of these ISDS mechanisms because they were being used to challenge the role of national regulators and domestic courts in settling important questions of domestic law, and there has been a substantial push back against ISDS, including for example its substantial elimination under the United States-Mexico-Canada Agreement (USMCA).[14]

14 See, e.g., David A. Gantz, "The United States-Mexico-Canada Agreement: Settlement of Disputes," *Baker Institute Report*, May 2, 2019. The "breaking point" for Canada was a dispute initiated by the pharmaceutical company Eli Lilly claiming that certain decisions by Canada's federal patent courts involving the validity of Eli Lilly's patents violated the NAFTA, a claim which knowledgeable experts considered to have no chance of success. Eli Lilly's decision to pursue the case against insurmountable legal obstacles resulted in a backlash. Eli Lilly's claim was decisively rejected by the ISDS panelists, but not until after the government of Canada had been forced to devote substantial resources to its defense. Canada recovered its legal fees. See Frederick M. Abbott, "The Evolution of Public Health Provisions in Preferential Trade and Investment Agreements of the United States," in *Current Alliances in International Intellectual Property Lawmaking: The Emergence and Impact of Mega-Regionals, Global Perspectives for the IP System*, eds. P. Roffe and X. Seuba, CEIPI-ICTSD, Issue No. 4, 2017, pp. 45–63, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032085.

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2 Intellectual Property and Great Power Conflict

In the economic sphere, substantial concerns were raised by developing countries in the 1960s regarding the world technological balance, with efforts by the Group of 77 and others in the 1970s and 1980s to create a New International Economic Order (NIEO) that would result in a re-balancing of technology-based wealth. That effort confronted an opposing force of higher income countries equally concerned with preserving technological advantage and securing returns on investment in that technology. Out of this conflict emerged negotiations at what was to become the WTO, and the conclusion of TRIPS Agreement. From the outset, the TRIPS Agreement embroiled governments and companies in conflict, including as it related to IP surrounding public health goods. Yet the real test of the TRIPS Agreement and its role in international relations began with the accession of China to the WTO in 2001, and with the agreement by China to implement and follow its rules.[15]

Although China has a long history as a developer of new technologies, the idea of intellectual property as part of private ownership rights was abandoned during the early decades under Chinese Communist Party rule, and as of the late 1980s when China signaled an interest in opening its economy it confronted the task of building an internal intellectual property infrastructure. Conflict between China and the United States regarding China's recognition of IP rights resulted in the conclusion of two bilateral agreements in the early 1990s, in broad terms with China agreeing to substantive, administrative and enforcement mechanism reforms.

China's economic transition from largely agrarian and basic industry to an advanced technological power was accomplished in only a few decades. And, China's early success was predicated on inward technology transfers from high income countries, notably from Europe, Japan and the United States. In some cases, the transfer of technology was undertaken through "voluntary" decisions of foreign investors establishing local subsidiaries, frequently with partners owned by Chinese nationals. In other cases, the transfer of technology was the result of "misappropriation" in a traditional sense; that is, local enterprises within China making use of foreign-owned intellectual property without authorization by the IP owner. Both routes of technology transfer came to be points of conflict with HIC governments. The misappropriation, such as by

15 See generally regarding the evolution of the technology-oriented relationship between the China and the United States, Frederick M. Abbott, "Technology Governance in a Devolved Global Legal Order: Lessons from the China-USA Strategic Conflict," in *A New Global Economic Order*, pgs. 197–226, Chia-Jui Cheng ed. (Brill/Nijhoff Publishers 2022).

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making use of patented technology without permission of the owner, involved a relatively straightforward decision by Chinese authorities to laxly implement and enforce the requirements of the TRIPS Agreement and China's Protocol of Accession with the WTO. Only later did US and European authorities begin to focus on alleged force technology transfer through the imposition of requirements on foreign direct investors to enter into and transfer technology to joint venture partners. China recently undertook in a bilateral arrangement with the United States to eliminate the practice of expressly or informally requiring foreign investors to transfer technology to joint venture partners. The EU continues to pursue a cause of action at the WTO alleging that China is acting inconsistently with TRIPS Agreement and other WTO rules by conditioning foreign direct investment on agreement to transfer technology.

There are new sources of friction in the private IP enforcement arena, particularly concerning so-called "anti-suit injunctions".[16] This arises out of a series of cases in which judicial authorities, particularly those situated in China, have threatened to impose substantial fines if companies involved in litigation in China (typically involving the terms of technical standards licensing) initiate litigation in a foreign jurisdiction about the same matter. So, a Chinese court asked to determine a fair, reasonable and nondiscriminatory (FRAND) licensing term (e.g. royalty) seeks to preclude the same defendant (i.e. technical standards patent owner) from pursuing litigation regarding determination of a reasonable royalty in a foreign court. Chinese courts are not alone in issuing anti-suit injunctions, but have been the most active.

This is a new type of challenge for the international IP system. That is, the courts of one country effectively seek to prevent the courts of another country from hearing a case on the merits between the same litigants. That is, the courts of Country A attempting to prevent the holder of legal rights in Country B from exercising those rights in Country B on grounds that the holder is under the jurisdiction of the courts of Country A. Although there are court proceedings in which judicial orders go beyond national borders, such as competition/antitrust law remedies that are addressed to overseas behaviors, and there are court decisions that are directed towards settling multi-jurisdiction litigation, the anti-suit injunction has a unique character.

Looking at international intellectual property law through the lens of "great power conflict" between China and the United States, Europe and Japan, does not capture the interests of the large group of countries that are trying

16 Giuseppe Colangelo & Valerio Torti, "Anti-Suit Injunctions and Geopolitics in Transnational SEPs Litigation," *European Journal of Legal Studies*, 14(2), February 2023, 45–84, doi: 10.2924/EJLS.2022.019.

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to compete in the global economy, but that do not have the same economic and technological capacity. These other countries are asked to recognize the IP assets of the more economically powerful countries without directly benefiting in terms of improved access to technology by local firms. It is very difficult to break out of the "technology dependence" trap in which many countries find themselves.[17]

3 Intellectual Property and Public Health

3.1 *The HIV-AIDS Epidemic*

At the international level, the most intense debates on the role of IP law have involved the field of public health. Although it is generally accepted that patents, for example, may play a positive role in stimulating capital formation and investment in innovation, there is question whether patents extract a too high price in terms of limiting access to medicines and other health products, particularly (though not exclusively) in LMICs. These concerns were elevated at the height of the HIV-AIDS epidemic in the late 1990s, particularly in sub-Saharan Africa, and through the following decade before funding was provided to purchase medicines by US PEPFAR, the Global Fund and other mechanisms. The controversy resulted in a concerted push within the framework of the WTO for relaxation of patenting requirements, leading to adoption of the Doha Declaration on the TRIPS Agreement and Public Health, followed by an amendment extending authorization for compulsory licensing for exports in the form of Article 31*bis* of the TRIPS Agreement.[18] Suffice it to say the outcome of the controversy surrounding the HIV-AIDS epidemic did not fundamentally alter the international IP framework. The outcome involved the recognition of certain "flexibilities" that already had been incorporated in the TRIPS Agreement from 1995, with a few adjustments.

3.2 *Tobacco Control*

A subsequent public health and IP controversy concerned trademarks, and the question whether Australia's Tobacco Plain Packaging legislation constituted

17 Frederick M. Abbott, "Managed Trade and Technology Protectionism: A Formula for Perpetuating Inequality?," in *Intellectual Property, Innovation, and Global Inequality*, eds. Daniel Benoliel, Francis Gurry, Keun Lee and Peter Yu, (Cambridge Univ. Press, 2024).

18 Frederick M. Abbott, "The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health," *American Journal of International Law*, Vol. 99, pp. 317–58, 2005, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=763224.

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unjustified interference with the rights of trademark owners.[19] Of some interest from an international legal standpoint was that a Framework Convention on Tobacco Control (FCTC) and certain Protocols had been adopted under the auspices of the WHO, and those instruments promoted the adoption of plain packaging legislation. The Director General of WHO, Dr. Margaret Chan, considered tobacco control of the highest priority,[20] and WHO strongly supported Australia's position in WTO dispute settlement proceedings, which included an appeal decision from the Appellate Body supporting Australia. There were a few interesting international law interpretative issues. One concerned defining the status under WTO law of the Doha Declaration, which the panel of first instance at the WTO considered an "interpretation" of the TRIPS Agreement by WTO members. That view is supported by a substantial group of international legal scholars, this author included.[21] The Appellate Body declined to make a determination on the same issue on grounds that it was not necessary to decide the case. The other interesting issue involved whether the FCTC and its protocols constituted technical standards that would establish a presumption in favor of Australia's WTO-consistency under the Agreement on Technical Barriers to Trade. Here the panel, affirmed by the Appellate Body, decided against Australia on grounds that compliance with the plain packaging recommendation of the FCTC was not mandatory and thus it did not qualify as a technical regulation within the meaning of the TBT Agreement. This was an overly restrictive assessment of what constitutes a technical standard or regulation since it was recommended by treaty instruments, which seems to provide an adequate basis for regarding adoption of the standard as presumptively WTO-consistent. That issue was also not central to the AB's decision, and Australia did not pursue the issue on the appeal to the AB.

3.3 *The COVID-19 Pandemic*

Most recently, during the COVID-19 pandemic, controversy regarding the TRIPS Agreement was fairly intense as a group of developing countries and

19 "Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, AB-2018-4/AB-2018-6," *Reports of the Appellate Body*, WT/DS435/AB/R, WT/DS441/AB/R, 9 June 2020.

20 Dr Margaret Chan, "T*obacco is a Deadly Threat to Global Development*," *WHO Commentary*, May 30, 2017, https://www.who.int/news-room/commentaries/detail/tobacco-is-a-deadly-threat-to-global-development.

21 Frederick M. Abbott, "The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO," *Journal of International Economic Law*, Vol. 5, p. 469, 2002, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1493725.

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NGO supporters urged the WTO to waive the principal substantive TRIPS Agreement obligations to allow them to better address the pandemic.[22] This was a somewhat unusual affair from a policy standpoint since the TRIPS Agreement already provides flexibility to allow governments to override patents, and provides a security exception that permits WTO members to override TRIPS Agreement obligations during an emergency in international relations (Article 73).[23] Since WTO member governments would need to implement a waiver in national law, it is not apparent what it would have accomplished beyond the existing TRIPS Agreement flexibilities. Perhaps more important, the controversy was launched without identifying whether and to what extent patents and other IP rights might actually constitute a barrier to developing and manufacturing vaccines, therapeutics, diagnostics and other public health products, particularly within the timeframe needed to address the pandemic. A political compromise resulted in a form of waiver, more limited than that initially requested, to the satisfaction of virtually no one (other than, perhaps, the WTO Director General who could announce that the members had reached an "agreement").

The global response to the COVID-19 pandemic was "inequitable" in the sense that countries and their populations were supplied with vaccines in a sequence and in quantities that significantly preferred high and upper middle income countries to low and middle income countries. In the aftermath of the pandemic emergency, negotiations are ongoing at WHO regarding a potential Pandemic Accord and amendments to the International Health Regulations (2005) that would help prepare the world better for another pandemic, including by helping to address the inequity with respect to access to health products, such as by encouraging geographic distribution of production capacity.

Although it is doubtful that patents and other forms of IP inhibited the development, production and distribution of vaccines and other health products during the COVID-19 pandemic, this does not mean that there is no urgency in improving access to technology in LMICs to assist them in creating better medicines research and production capacity. This involves a substantially broader set of concerns than can be addressed through IP flexibilities. There is need for mechanisms that better promote transfers of technology from the

22 See generally, Frederick M. Abbott, "Intellectual Property and Technology Transfer for COVID-19 Vaccines: Assessment of the Record," *World Intellectual Property Organization,* 2023 (Geneva, Switzerland), https://www.wipo.int/publications/en/details.jsp?id=4684.

23 Frederick M. Abbott, "The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic," *Research Paper* 116, South Centre, Geneva (August 2020), https://www.southcentre.int/research-paper-116-august-2020/.

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more technologically advanced countries to the less technologically advanced. LMICs will not suddenly be able to invest the sums needed to develop new technological solutions to health issues as compared with enterprises and governments in high income countries.

4 Intellectual Property and Technological Evolution

Rules regarding assets such as land and structures built on it address a relatively stable subject matter. With limited exception, real property is a finite and well-defined feature of the earth. Rules regarding its ownership and use undergo gradual change. Similarly, personal property (or movable things that can be sold and/or transferred) may change in terms of characteristics – a horse drawn cart may become a diesel truck – but not so much that the legal regimes governing personal property often require substantial adaptation. Intellectual property (IP), by way of contrast, concerns subject matter that evolves in ways that not infrequently require legal systems to break from the past as new genies become difficult to fit into old bottles – phonograms becoming CDs that become MP3 files that turn into streaming services.[24] Today artificial intelligence, or thinking machines, challenge concepts of what constitutes an author or inventor, and whether humans should enjoy a specially reserved place in the creative pantheon protected by IP. Intellectual property law must continuously adapt to new things.[25]

AI has prospects for transforming all manner of activity. The use of AI has major implications for the IP-dependent industries, including the "creative content" media industries and the "innovative" industries, where in both cases AI can generate outputs and solve problems with substantial advantages over humans. At a basic level we have questions regarding whether AIs may constitute "inventors" or "authors" under patent and copyright law respectively. IP is not a necessary feature of AI. Much AI technology is in the public domain, or is licensed as "open source". Most existing intellectual property statutes were

24 John Perry Barlow, "The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age. (Everything You Know about Intellectual Property Is Wrong)," *Wired* 2.03, March 1, 1994.

25 See generally Ryan Abbott, "Artificial Intelligence and Intellectual Property: An Introduction," in *Research Handbook on Intellectual Property and Artificial Intelligence*, Edward Elgar (Ryan Abbott ed., 2022), and Ryan Abbott, *The Reasonable Robot: Artificial Intelligence and the Law*, Cambridge University Press (2020).

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not designed with the idea of an AI as the creator of the subject matter, and courts and legislatures are wrestling with whether and how statutes should be adapted. Although the subject matter is much discussed in international forums, there is not yet sufficient understanding of the implications of AI to suggest new international instruments regarding its governance.

But uses of AI certainly affect intellectual property right owners. Despite the seeming intelligence of programs such as ChatGPT, much of their output is based on pre-existing material "scraped" from the Internet and other digital sources, and much of that material is protected by copyright or other IP rights. In other words, ChatGPT may in a general sense be the greatest IP piracy machine ever created! And, assuming for the sake of argument that ChatGPT and its progeny are making unauthorized use of the work of third-party copyright owners, what will be a solution that will allow these intelligent machines to stay online? History suggests that ultimately there will be some form of large-scale arrangement in which the operators of programs like ChatGPT will contribute into funds from which royalties will be paid to copyright owners through some mechanism that can identify the extent of usage.

Technology plays a substantial role in the affairs of nations. Advances in the technology of weaponry have shaped the outcome of wars. Disparities in technological prowess allowed conquest by colonial powers.[26] The fact that an advantage in technology may give an advantage on the battlefield impels countries to engage in elaborate espionage efforts to uncover and secure the technical advances of potentially hostile powers. Although these advances in military technology are likely protected under national patent and trade secret laws, when dealing with military-security concerns the legal niceties of IP law are of marginal interest or concern. It is rather doubtful that perpetrators of military technology cybersecurity intrusion pause to consider whether the subjects of their action are protected by IP. Here the law has its limits. A country seeking to protect its military technology must protect it with technological security measures, if it can do so at all.

Advances in technology are fundamental to the progress of human civilization. Addressing the most urgent problems, such as mitigating climate change, depends on developing technological solutions. Intellectual property plays a role in technological advance by providing a mechanism that encourages aggregation of capital for investment in R&D, and by providing a mechanism

26 See, e.g., Jared Diamond, *Guns, Germs, and Steel* (W. W. Norton 1997).

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through which technology can be securely shared. But, as the preamble of the TRIPS Agreement observes, IP is generally the subject of "private" rights, and the management of IP is generally a matter of national civil laws. International law enters the picture "at the margin" by providing certain minimum standards and general rules of the road.

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