

INTELLECTUAL PROPERTY TRAINING AND EDUCATION FOR SOCIAL JUSTICE

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Introduction

Social justice issues have been present in the intellectual property debate for as long as intellectual property rights exist. Their longstanding presence is unsurprising considering that intellectual property rights have always been designed with authors, inventors, and other rights holders in mind. What is different today, however, is the increased public attention devoted to the protection and enforcement of intellectual property rights. Although this subject was once considered arcane, obscure, specialized, and highly technical,¹ the mass media, consumer advocates, user communities, and civil liberty groups have now actively participated in the intellectual property debate.

The past decade alone has seen a large and ever-growing number of public protests against the use of intellectual property rights to protect medicines, textbooks, seeds, and computer software.² Only two years ago, the signing of the secretly-negotiated Anti-Counterfeiting Trade Agreement (ACTA) brought hundreds of thousands of people into the streets in major European cities in the middle of winter.³ Across the Atlantic, individuals were equally concerned about the introduction of highly controversial copyright legislation, such as the PROTECT IP Act (PIPA) and the Stop Online Piracy Act (SOPA). These concerns eventually led to an unprecedented, massive service blackout launched by Wikipedia, Reddit, WordPress, and other internet companies in the run-up to the U.S. presidential election.⁴ If social justice issues rarely came up in the intellectual property debate a decade ago, these issues have now been heard loud and clear.

* Copyright © 2014 Peter K. Yu. Kern Family Chair in Intellectual Property Law and Director, Intellectual Property Law Center, Drake University Law School. This chapter draws on research from the author's earlier article in the *American University International Law Review* and a study he conducted for the World Intellectual Property Organization (WIPO) in his role as the rapporteur for the International Roundtable on WIPO Development Agenda for Academics, held for the English-speaking countries in Singapore in November 2011. The views expressed herein are strictly personal and should not be considered or interpreted as those of WIPO. The Author would like to thank Erin Cassidy and Lindsey Purdy for excellent research and editorial assistance.

¹ ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 1 (2006); SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 99 (2003); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 419 (2004).

² Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. POCKET PART 262, 263 (2008).

³ MONICA HORTEN, COPYRIGHT MASQUERADE: HOW CORPORATE LOBBYING THREATENS ONLINE FREEDOMS 107–14 (2013).

⁴ Peter K. Yu, *The Alphabet Soup of Transborder Intellectual Property Enforcement*, 60 DRAKE L. REV. DISCOURSE 16, 29 (2012).

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To a large extent, the emergent and increasingly robust micro-level debate parallels a longstanding and largely similar macro-level debate in the international arena. For several decades, developing countries, most notably Brazil and India, have voiced concerns about the imbalance in the international intellectual property system.⁵ Since entering into force in January 1995, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of the World Trade Organization (WTO) has imposed on these poor countries high international minimum standards that ignore their local needs, national interests, technological capabilities, institutional capacities, and public health conditions. Even worse, despite the developing countries' considerable struggle with problems posed by these unsuitable standards, developed countries continue to push aggressively for higher standards through TRIPS-plus bilateral, plurilateral, and regional trade agreements.

Frustrated by these developments, Brazil and Argentina advanced a proposal to establish a Development Agenda at the World Intellectual Property Organization (WIPO) in October 2004.⁶ After three years of deliberation and compromise, the Agenda and its 45 recommendations were finally adopted. Recommendation 1 specifically required the technical assistance provided by WIPO be “development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, . . . as well as the different levels of development of Member States.” That recommendation further stated that “design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific.” Underscoring the need for these initiatives, the Development Agenda formally announced WIPO's shift away from the simplistic “one size fits all”—or, more precisely, “super size fits all”⁷—approach that dominated intellectual property law and policy in the past few decades.⁸

The establishment of the WIPO Development Agenda is highly important from the standpoints of both development and social justice. Issues targeted by its recommendations ranged from transfer of technology to response to the digital divide, and from preservation of the public domain to protection of genetic resources, traditional knowledge, and traditional cultural expressions. More importantly for our purposes, the Development Agenda has provided a rare opportunity for us to rethink and redesign intellectual property training and educational programs.⁹ Such redesign is badly needed if we are to reorient intellectual property law and policy toward the goals and principles of social justice. The improvements provided by this redesign would also foster better responses to the needs, interests, and concerns of the weak, the vulnerable, the marginalized, and the otherwise disadvantaged in both developed and developing countries.

⁵ Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 505–07 (2009).

⁶ *Id.* at 515–16.

⁷ Shamnad Basheer & Annalisa Primi, *The WIPO Development Agenda: Factoring in the “Technologically Proficient” Developing Countries*, in IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION'S DEVELOPMENT AGENDA 100, 110 (Jeremy de Beer ed., 2009); James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 9, at 4; Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 WIPO J. 1, 9 (2009).

⁸ Jeremy de Beer & Chidi Oguamanam, *Intellectual Property Training and Education: A Development Perspective* 4 (ICTSD Programme on IPRs and Sustainable Development, Issue Paper No. 31, 2010); Ricardo Melendez-Ortiz, *Foreword* to de Beer & Oguamanam, *supra*, at vi, vi.

⁹ On teaching of individual intellectual property subjects, see TEACHING OF INTELLECTUAL PROPERTY: PRINCIPLES AND METHODS (Yo Takagi et al. eds., 2008) [hereinafter TEACHING OF INTELLECTUAL PROPERTY]; Symposium, *Teaching Intellectual Property Law*, 52 ST. LOUIS U. L.J. 715 (2008).

Commentators have widely documented the injustice found in the currently out-of-balance intellectual property system at both the domestic and international levels. However, few have focused on the need to revamp training and educational programs. A rare exception is a study entitled *Intellectual Property Training and Education: A Development Perspective*, conducted by Jeremy de Beer and Chidi Oguamanam and commissioned by the International Centre for Trade and Sustainable Development, a Geneva-based nongovernmental organization.¹⁰

In 2011, WIPO also conducted two International Roundtables on WIPO Development Agenda for Academics. The first one was held for English-speaking countries in Singapore, while the second was held for French-speaking countries in Beirut, Lebanon shortly after. Drawing on the insights and experiences provided by the English roundtable and a WIPO-commissioned study, this chapter discusses how intellectual property training and educational programs can be revamped to promote a “social justice” dimension of intellectual property policy and research.

This chapter begins by calling for an expansion of coverage in intellectual property training and educational programs. It further offers five sets of guidelines on efforts to redesign these programs. This chapter then calls for the programs to facilitate the development of a more diverse set of skills and perspectives. It reminds us that such development is especially needed in light of the rapid expansion of intellectual property rights and the growing inter- and multi-disciplinary nature of the intellectual property debate.

Although this chapter focuses primarily on the macro-level debate concerning developing countries, it complements other chapters in the volume that discuss the micro-level debate and the plight of marginalized communities in the developed world. Like developing countries, these communities face similar challenges posed by a lack of resources, expertise, leadership, negotiation sophistication, and bargaining power. Owing to inequitable rules and standards, many members of these communities also fail to benefit, or fully benefit, from their own creations and inventions. Because the needs and interests of the marginalized communities in the micro-level debate often align with those in the macro-level debate, what we learn from one debate could easily illuminate the other.

REDESIGNING TRAINING AND EDUCATIONAL PROGRAMS

Adopted at the 2007 WIPO General Assembly, the Development Agenda brought to the fore a new set of issues that can be incorporated into training and educational programs. These issues range from the use of flexibilities in international intellectual property agreements to the development of laws and policies to address the specific needs of developing countries. These specific needs include the access to essential medicines, educational materials, computer software, and information technology; the transfer of technology, the preservation of culture and the public domain, the promotion of biological diversity; and the protection of genetic resources, traditional knowledge, and traditional cultural expressions.

¹⁰ de Beer & Oguamanam, *supra* note 8.

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While incorporating these issues into the existing training and educational programs is both important and beneficial, such incorporation alone will not be sufficient. Instead, the existing programs need to be redesigned to strengthen the focus on intellectual property, development, and social justice. To help achieve this goal, this section outlines five areas that will be important in any program seeking to develop that particular focus. Because issues concerning developing countries tend to be ignored or get short shrift, this section will provide illustrations relating to these countries, even though the promotion of development and social justice is important to both the developed and developing worlds.

The Bottom

The Development Agenda states explicitly that technical-assistance programs have to be “development-oriented, demand-driven . . . and country specific.” Drawing its cue from this Agenda, this chapter refrains from a top-down approach that tries to determine what intellectual property issues will be important to promote development objectives. Instead, the chapter embraces a bottom-up approach using local needs, interests, conditions, and priorities as the starting point.

To date, many of the existing programs cover the fundamentals of the intellectual property system, which range from copyrights to trademarks and from patents to trade secrets. If international treaties are included, the programs tend to focus on key intellectual property conventions and agreements, such as the Paris Convention, the Berne Convention, the Madrid Agreement and Protocol, the Hague Agreement, the Lisbon Agreement, the Rome Convention, the Patent Cooperation Treaty, the TRIPS Agreement, and the WIPO Internet Treaties.¹¹

With respect to developing countries, however, it is worth questioning whether such an approach is ideal. For example, many of these countries are likely to receive substantial benefits from the protection of utility models, industrial designs, geographical indications, genetic resources, traditional knowledge, and traditional cultural expressions.¹² Indeed, the development of sub-patentable inventions has been historically demonstrated to be a successful tool for developing countries to catch up with their more developed counterparts—Japan being a very good example.¹³ Developing countries have also been quite successful in exploiting traditional medicines and practices¹⁴ and sequential and cumulative innovation (as opposed to path-breaking innovation enshrined in the existing international intellectual property system).¹⁵ Thus, it is important to ask not only what type of intellectual property rights training and educational programs should cover, but also what type of rights the participants of these programs would find the most useful.

¹¹ Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923, 926–27 (2008).

¹² Peter K. Yu, *Intellectual Property and Asian Values*, 16 MARQ. INTELL. PROP. L. REV. 329, 380–83, 389–92 (2012).

¹³ Hiroyuki Odagiri, Akira Goto & Atsushi Sunami, *IPR and the Catch-Up Process in Japan*, in INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP: AN INTERNATIONAL COMPARATIVE STUDY 95 (Hiroyuki Odagiri, Akira Goto, Atsushi Sunami & Richard R. Nelson eds., 2010) [hereinafter INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP].

¹⁴ Nitya Nanda & Ritu Lodha, *Making Essential Medicines Affordable to the Poor*, 20 WIS. INT’L L.J. 581, 586 (2002).

¹⁵ Odagiri, Goto & Sunami, *supra* note 13, at 126; Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115, 1124 (2009); Yu, *supra* note 12, at 389–92.

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Moreover, some important topical issues and problem areas warrant extended treatment. For example, given the widespread HIV/AIDS, tuberculosis, and malaria pandemics in sub-Saharan Africa,¹⁶ instructors for training and educational programs in the region likely will have to spend a tremendous amount of time covering issues concerning the relationship between the patent system and access to essential medicines.¹⁷ At times, it may also be useful to consider the special needs of local industries and policymakers—for example, which sectors are fast-growing in the country,¹⁸ and which issues are likely to be raised in bilateral, plurilateral, and regional negotiations?

In addition, it may be important to discuss issues concerning the establishment of intellectual property or technology transfer offices, especially under a constrained and when capacities are limited.¹⁹ It is also worth discussing the strengths and weaknesses of developing specialized courts in the intellectual property area.²⁰ Although commentators and economists have rightly noted the high costs of building infrastructure and establishing institutions, it is worth noting that low-cost, streamlined models exist for the development and operation of intellectual property offices.²¹ These offices, for example, can be funded by user fees or supported through outsourcing arrangements.²²

Thus, it is important for training and educational programs to identify the different institutional options available to the participants. The more affordable the acquisition of intellectual property rights is, the larger number of local people can benefit from the intellectual property system, and the more developing countries can harness that system to promote development objectives. A reduced operating budget will also help developing countries retain scarce economic and human resources for other competing public needs.²³

The Flip Side

Traditional intellectual property training and educational programs tend to focus on the rights recognized by international treaties and national laws. Limitations and exceptions, however, are not always emphasized. Equally ignored are the obligations of rights holders²⁴—for example, obligations in relation to anti-competitive practices. The omission of these two sets of issues is particularly disturbing. In the intellectual property system, limitations and exceptions

¹⁶ On access-to-medicines problems relating to HIV/AIDS, see THE GLOBAL GOVERNANCE OF HIV/AIDS: INTELLECTUAL PROPERTY AND ACCESS TO ESSENTIAL MEDICINES (Obijiofor Aginam, John Harrington & Peter K. Yu eds., 2013); THE POLITICAL ECONOMY OF HIV/AIDS IN DEVELOPING COUNTRIES: TRIPS, PUBLIC HEALTH SYSTEMS AND FREE ACCESS (Benjamin Coriat eds., 2008).

¹⁷ On the widespread access-to-medicines problems precipitated by the TRIPS Agreement, see NEGOTIATING HEALTH: INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES (Pedro Roffe, Geoff Tansey & David Vivas-Eugui eds., 2005) [hereinafter NEGOTIATING HEALTH]; Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 317 (2005); Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827 (2007).

¹⁸ UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 127 (2005); Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 25–27.

¹⁹ INTELLECTUAL PROPERTY MANAGEMENT IN HEALTH AND AGRICULTURAL INNOVATION: A HANDBOOK OF BEST PRACTICES 537–672 (Anatole Krattiger et al. eds., 2007) [hereinafter HANDBOOK OF BEST PRACTICES].

²⁰ JOHN T. CROSS, AMY LANDERS, MICHAEL MIRELES & PETER YU, GLOBAL ISSUES IN INTELLECTUAL PROPERTY LAW 40–46 (2010).

²¹ COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 145–46 (2002) [hereinafter IPR COMMISSION REPORT]; ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 181–85 (1990); Sean A. Pager, *Patents on a Shoestring: Making Patent Protection Work for Developing Countries*, 23 GA. ST. U. L. REV. 755 (2007).

²² Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 2 (2010).

²³ *Id.* at 3–4.

²⁴ Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1035–37 (2009).

are just as important as rights.²⁵ If the system is to function properly, rights should also be balanced by obligations.

Thus, development-friendly training and educational programs should not only focus on the justifications for and the nature and extent of the rights; they should also detail the available flexibilities within the intellectual property system as well as the policy options that take advantage of these flexibilities. In addition, these programs should provide a critical analysis of the strengths and weaknesses of the available policy options as well as an objective assessment of their costs and benefits. In determining these costs, it is important not to emphasize only economic costs but also social and cultural costs. For many developing countries, the negative social and cultural impacts of an out-of-balance intellectual property system are likely to be quite substantial.²⁶

For instance, for training and educational programs conducted in developing countries, it will be useful to

emphasize the eligibility requirements for the different forms of intellectual property rights; the non-protection of ideas, procedures, methods of operation, and mathematical concepts in copyright law; the availability of compulsory licensing of patented pharmaceuticals; unrestricted use of generic terms notwithstanding the protection of trademarks; the importance of technical and functional considerations in laws involving trade dresses and industrial designs; permissive limitations and exceptions under the three-step test; remedies for anticompetitive practices, abuse of rights and restraints on trade; and special exemptions that seek to respond to national exigencies.²⁷

More specifically in the area concerning public health exigencies, it will be useful to discuss not only the justifications for and the nature and extent of patent rights, but also compulsory licenses; parallel importation; government use provisions;²⁸ and the introduction of exceptions for research, early working, and the development of diagnostics.²⁹ It is also worthwhile to explore the anti-competitive effects of the patent system, an issue that has received longstanding attention from developing countries.³⁰

The Neighbors

Today, the discussion of intellectual property law and policy is no longer limited only to developments within the international intellectual property regime. Increasingly, the participants of training and educational programs need to learn about developments in other international

²⁵ JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 138 (1996).

²⁶ IPR COMMISSION REPORT, *supra* note 21, at 4; Yu, *supra* note 17, at 890.

²⁷ Yu, *supra* note 11, at 932–33.

²⁸ James Love, *Access to Medicine and Compliance with the WTO TRIPS Accord: Models for State Practice in Developing Countries*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT 74, 81–83 (Peter Drahos & Ruth Mayne eds., 2002).

²⁹ ELLEN F.M. 'T HOEN, THE GLOBAL POLITICS OF PHARMACEUTICAL MONOPOLY POWER: DRUG PATENTS, ACCESS, INNOVATION AND THE APPLICATION OF THE WTO DOHA DECLARATION ON TRIPS AND PUBLIC HEALTH 39–59 (2009); IPR COMMISSION REPORT, *supra* note 21, at 49–51; EDSON BEAS RODRIGUES JR., THE GENERAL EXCEPTION CLAUSES OF THE TRIPS AGREEMENT: PROMOTING SUSTAINABLE DEVELOPMENT 159–236 (2012).

³⁰ Peter K. Yu, *TRIPS and Its Achilles' Heel*, 18 J. INTEL. PROP. L. 479, 520–21 (2011).

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regimes, such as those governing public health, human rights, biological diversity, food and agriculture, and information and communications.³¹

To a great extent, the study of intellectual property requires an “intellectual property and . . .” approach that covers neighboring issues that lie outside the intellectual property area.³² Such a cross-cutting approach is particularly important in light of the continued forum-manipulative activities conducted by both developed and developing countries.³³ These efforts seek to move international discussions to fora that traditionally do not cover intellectual property.

Consider, for example, the protection of genetic resources, traditional knowledge, and traditional cultural expressions. Such protection is as much about intellectual property as it is about biological diversity. As a result of this overlap, the protection of these materials has implicated not only international intellectual property treaties, but also the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture (which was negotiated under the auspices of the U.N. Food and Agriculture Organization).

Even more complicated, because the protection has a close relationship with the protection of indigenous rights, one has to pay special attention to rights articulated in the Declaration on the Rights of Indigenous Peoples, the Convention on the Safeguarding of Intangible Cultural Heritage, and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. One also has to pay attention to the fact that indigenous peoples often do not have sufficient representation in the negotiation of many of the existing international treaties.³⁴

In addition, one needs to be mindful of the human rights interests protected under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. General Comment Nos. 17 and 21, the two interpretive comments authored by the Committee on Economic, Social and Cultural Rights, also provide important normative guidance on the development of intellectual property rights and the protection of genetic resources, traditional knowledge, and traditional cultural expressions.

Within the larger picture of intellectual property and development, it may even be useful to examine intellectual property issues in light of the U.N. Millennium Development Goals. These eight development goals are: (1) eradicate extreme poverty and hunger; (2) achieve universal primary education; (3) promote gender equality and empower women; (4) reduce child mortality; (5) improve maternal health; (6) combat HIV/AIDS, malaria, and other diseases; (7) ensure environmental sustainability; and (8) develop a global partnership for development.

³¹ Yu, *supra* note 5, at 522–40.

³² Yu, *supra* note 11, at 940.

³³ On these activities, see JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 564–71 (2000); Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE J. INT’L L.* 1 (2004).

³⁴ Rosemary J. Coombe, *The Recognition of Indigenous Peoples’ and Community Traditional Knowledge in International Law*, 14 *ST. THOMAS L. REV.* 275, 284–85 (2001); Tom Greaves, *IPR, A Current Survey*, in *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES, A SOURCEBOOK* 1, 14 (Tom Greaves ed., 1994); Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 *ARIZ. ST. L.J.* 483, 488 (1999).

Finally, because of the ever-expanding scope of intellectual property rights and the ability for these rights to spill over into other areas of international regulation, intellectual property training and educational programs should feature inter- and multi-disciplinary perspectives.³⁵ Many of the existing programs focus primarily on the legal aspects of intellectual property. However, it is increasingly important to consider other aspects of intellectual property, such as political, economic, social, and cultural. It is therefore no surprise that Recommendation 45 of the WIPO Development Agenda explicitly recognized “the context of broader societal interests and especially development-oriented concerns.”

If intellectual property is to become a catalyst for development, understanding how to exploit intellectual property rights (for example, through licensing models and business strategies) will be as important as understanding how to comply with laws and treaty obligations. Indeed, the more interdisciplinary the perspectives that participants can acquire from training and educational programs, the more likely they will be able to come up with strategies and solutions that are tailored to local needs, interests, conditions, and priorities.

Developing countries and commentators sympathetic to these countries have widely criticized the existing intellectual property system for its bias toward developed countries, which created this system more than a century ago. Unlike these standards, however, licensing models and business strategies can benefit any country that has valuable intellectual property assets. Thus, by developing a better and more sophisticated understanding of these models and strategies, participants from developing countries will be able to derive greater benefits from what Michael Finger and Philip Schuler described as “poor people’s knowledge.”³⁶ These countries will also be better prepared to take advantage of any future beneficial adjustments to the existing intellectual property standards.

The Elephants

Because of the significant power asymmetry between developed and developing countries, the weaker countries often have to take into consideration the policies and approaches adopted by more powerful countries. It is therefore important to identify the models practiced by developed and emerging countries and assess their strengths and weaknesses in light of specific local conditions.

In doing so, the participants of training and educational programs will be able to obtain information about what policy measures could help them catch up with countries in the developed world. The participants will also be able to better anticipate future changes in the international intellectual property regime, which are often fostered through norm-setting activities in the multilateral forum or through the establishment of bilateral, plurilateral, or regional trade agreements.

For participants from the developing world, it is important to understand not only the positions taken by the United States and the European Union, but also large developing countries,

³⁵ de Beer & Oguamanam, *supra* note 8, at 38; Yu, *supra* note 11, at 940.

³⁶ POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES (J. Michael Finger & Philip Schuler eds., 2004).

such as Brazil, China, and India.³⁷ The latter, especially China, have been increasingly active in Africa and Latin America. In the near future, their models will likely be quite influential in these continents.³⁸

Moreover, a better understanding of the different positions taken by powerful, developed countries and large developing countries may help increase the policy options available to participants from smaller developing countries. To begin with, the participants of training and educational programs can draw on lessons from developed and large developing countries to determine for themselves which model best suits their local conditions.

Although commentators tend to analyze intellectual property issues along the North-South divide, it is worth remembering that developed countries have significant disagreements among themselves. Consider the United States and the European Union, for example. Thus far, commentators have reported wide disagreements between these two trading powers over the treatment of moral rights and geographical indications. As shown by the recent ACTA negotiations, these two powers also strongly disagree over whether criminal measures should be extended to patent infringement.³⁹

As if those differences were not enough, the United States has embraced a broad fair-use privilege in its copyright law, leading to the emergence of a large number of innovative technology start-ups. Meanwhile, European policymakers and commentators continue to question whether such a broad interpretation of exceptions to copyright would satisfy the three-step test in the Berne Convention, the TRIPS Agreement, and the WIPO Internet Treaties.⁴⁰

More importantly for developing countries, identifying the divergent approaches that powerful, developed countries take and the tension resulting from such divergence will help them fight off foreign pressure. After all, it is much easier to reject standards that are still contested in the developed world than those that have already been harmonized among the major trading powers.

Understanding the differences among developed countries will therefore help the participants of training and educational programs avoid transplanting foreign models that are unsuitable to local conditions.⁴¹ Even better, such knowledge will help prevent developing countries from committing to conflicting obligations demanded by their more powerful trading partners through bilateral, plurilateral, or regional trade agreements.⁴²

The Visionary

Different countries have different historical traditions, political arrangements, social and economic priorities, cultural values, and legal philosophies. It is therefore no surprise that

³⁷ Peter K. Yu, *The Middle Intellectual Property Powers*, in LAW AND DEVELOPMENT IN MIDDLE-INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP 84 (Tom Ginsburg & Randall Peerenboom eds., 2014).

³⁸ Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 1020–22 (2011).

³⁹ Peter K. Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1, 11 (2011); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 984 (2011) [hereinafter Yu, *Six Secret Fears*].

⁴⁰ Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 115 (2000).

⁴¹ Yu, *Six Secret Fears*, *supra* note 39, at 1035–38.

⁴² Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 407 (2006).

countries also have very different intellectual property systems. Although the international intellectual property regime is built upon harmonized international minimum standards, these standards do not work well for every developing country. Nor do they reflect all the available policy options. As a result, it is important for the participants of training and educational programs to learn more about the different standards, policy options, and innovation models that are suitable to local conditions.

While the WIPO Development Agenda has repeatedly emphasized the need for country-specific, context-sensitive models, developing those models is not always easy.⁴³ Indeed, it can be rather difficult and costly to come up with new alternative models that differ significantly from those practiced in developed and large developing countries.⁴⁴ Thus, training and educational programs should use best efforts to provide information about these alternative models, with additional assessments on both the models' strengths and weaknesses.

In the area of access to essential medicines, for example, it is insufficient for training and educational programs to identify only exceptions and limitations (although such identification remains very important). These programs should also highlight the different non-property based models that can help promote creativity and innovation. Examples of these models are those relying on grants, subsidies, prizes, advance market commitments, reputation gains, open and collaborative models, patent pools, public-private partnerships, and equity-based systems built upon liability rules.⁴⁵

In addition, training and educational programs should inform the participants about the different ways of interpreting the standards laid down in international agreements. Because norms are usually political compromises struck by negotiating parties, they are often open to widely different interpretations. Notwithstanding these flexibilities, many developing countries unfortunately do not have the needed resources, capacity, and political clout to come up with alternative interpretations.⁴⁶ Training and educational programs should therefore provide this much-needed assistance.

A case in point is the international obligations concerning the enforcement of intellectual property rights. It is important to learn how to comply with these obligations, including the minimum standards, optional requirements, and best practices among developed countries. The programs should also cover alternative ways to conceptualize the existing enforcement obligations.⁴⁷ For example, how should the participants reconceptualize intellectual property enforcement? Should they take account of both rights and responsibilities? Should they focus on anti-competitive practices, abuse of rights, and restraints on trade? Are there other internationally acceptable enforcement measures not practiced by developed countries and major intellectual property exporting countries?

⁴³ Melendez-Ortiz, *supra* note 8, at vi.

⁴⁴ Peter K. Yu, *Intellectual Property Training and Education for Development*, 28 AM. U. INT'L L. REV. 311, 332 & n.92 (2012).

⁴⁵ Peter K. Yu, *Intellectual Property and Human Rights in the Nonmultilateral Era*, 64 FLA. L. REV. 1045, 1078 (2012).

⁴⁶ Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345, 386 (2008).

⁴⁷ Yu, *supra* note 22, at 17.

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Finally, if the intellectual property system is to promote development objectives, it needs to be viewed as a component of a larger innovation system.⁴⁸ The participants of training and educational programs need to understand the interplay between intellectual property rights and other complementary factors.

For instance, Keith Maskus identified several non-intellectual property factors that could play significant roles in attracting foreign direct investment: public and private investments in education and training; the removal of impediments to the acquisition of human capital; the development of national innovation systems that promote dynamic competition; support for basic research capabilities; the removal of disincentives for applied research and development and commercialization; the institution of incentive structures to stimulate local innovation; and efforts to take greater advantage of access to scientific and technical information existing online or elsewhere.⁴⁹

In the area of technology transfer, Professor Maskus further identified a wide variety of complementary factors: the movement of newly trained labor among enterprises; the laying out of patents; product innovation through the legitimate “inventing around” of patents and copyrights; the adoption of newer and more efficient specialized inputs to reduce production costs; the introduction of efficient and competitive international enterprises; increasing competition and rising demands for subcontracting; access to a wider variety of specialized products, inputs, and technologies; a deeper and better-trained skilled labor pool; and rising real wages.⁵⁰

In my earlier works, I also noted the importance of creating an enabling environment for effective intellectual property enforcement.⁵¹ Among the key preconditions for successful intellectual property law reforms are “a consciousness of legal rights, respect for the rule of law, an effective and independent judiciary, a well-functioning innovation and competition system, sufficiently-developed basic infrastructure, a critical mass of local stakeholders, and established business practices.”⁵²

Thus, successful training and educational programs should identify the role the intellectual property system will play in promoting creativity and innovation while fostering development. They should also provide knowledge about how the system interacts with other complementary factors, thereby allowing the participants to understand the full spectrum of policy options available for promoting development objectives.

⁴⁸ Daniel J. Gervais, *TRIPS and Development*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA* 3, 4 (Daniel J. Gervais ed., 2007) [hereinafter *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT*]; Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 15.

⁴⁹ Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT’L L. 109, 151 (1998).

⁵⁰ *Id.* at 146.

⁵¹ E.g., Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT*, *supra* note 48, at 213–16.

⁵² Yu, *supra* note 30, at 500.

Skills and Perspectives

In addition to imparting knowledge, values, and perspectives, a key goal of training and educational programs is to inculcate in the participants a set of specialized skills and analytical perspectives. The adoption of the WIPO Development Agenda requires us to rethink not only the contents delivered through these programs, but also the specialized skills and perspectives the programs seek to develop. This section focuses on five broadly defined sets of skills and perspectives, which will be useful for promoting a “social justice” dimension of intellectual property policy and research.

Negotiation Skills

Negotiation skills are of paramount importance whether one is a policymaker, a business executive, a patent attorney, a licensing officer, a technology transfer manager, or an owner of valuable intellectual property assets. At the macro level, government officials constantly have to negotiate with their foreign counterparts over what intellectual property standards their countries need to adopt. While the multilateral process allows developing countries to enhance bargaining power by building coalitions, these countries can become highly vulnerable in bilateral, plurilateral, and regional negotiations. The development of strong negotiation skills is therefore badly needed to overcome their lack of bargaining leverage in nonmultilateral discussions.

At the micro level, negotiation skills are also very important. In the area of protection for genetic resources, traditional knowledge, and traditional cultural expressions, for instance, informed consent and benefit-sharing obligations are often fulfilled through the establishment of material transfer agreements.⁵³ As important as these agreements are, they are likely to be of limited effectiveness if the relevant parties from developing countries do not have the requisite skills to negotiate for suitable arrangements.

Moreover, although litigation remains an important part of intellectual property law practice, most disputes are settled in courts and resolved through negotiations. Oftentimes, the negotiation of these settlements entails not only intellectual property lawyers but also non-law practitioners. These practitioners tend to have a deep understanding of the industry as well as the various competitive advantages, constraints, and challenges confronting the affected parties. It is therefore important for training and educational programs to help the participants develop strong negotiation skills.

Economic Analysis

Empirical research is one of the key focuses of the WIPO Development Agenda. One of the six “clusters” of recommendations, for example, focuses on assessment, evaluation, and impact studies. Impact assessments have indeed been widely embraced in the areas of human rights, public health, and biological diversity.⁵⁴ In addition, WIPO recently brought in Carsten Fink, an established expert in international economics, to serve as its first Chief Economist.

⁵³ Alan B. Bennett, Wendy D. Streitz & Rafael A. Gacel, *Specific Issues with Material Transfer Agreements*, in HANDBOOK OF BEST PRACTICES, *supra* note 19, at 697.

⁵⁴ Yu, *supra* note 45, at 1096–98.

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Since the establishment of the Economics and Statistics Division a few years ago, that division has put together a wide variety of seminars and publications, including most notably the *World Intellectual Property Report*.

Thus far, developing countries have a very limited pool of homegrown economists who can provide the needed assessment on the intellectual property system.⁵⁵ This assessment becomes even more complicated when it has to take account of such factors as trade flows, foreign direct investment, and diffusion of technology. Oftentimes, policymakers from developing countries have to rely on assistance from the outside or data supplied by industries or nongovernmental organizations.

Even if we ignore the widely documented flaws regarding industry data, data supplied by self-interested parties—whether industries or nongovernmental organizations—are hardly impartial.⁵⁶ As a result, it is important for training and educational programs to help facilitate independent economic research in the intellectual property area. At the very least, the programs should equip the participants with better analytical skills to judge for themselves the accuracy, relevance, and implications of the data supplied by third parties.

The ability to engage in economic analysis is equally important at the micro level. How well a business or licensing model will perform will ultimately depend on the economics within the relevant sector. Indeed, with the increasing roles intellectual property rights play in today's knowledge-based economy, it is no longer sufficient to study laws and policies alone. It is also important to better understand the economic implications of these laws and policies as well as those of the alternative policy options.

Business Insights

A successful intellectual property system depends on the existence of viable and sustainable business models that help facilitate the acquisition, exploitation, commercialization, management, and transfer of intellectual property rights. To a large extent, intellectual property laws can be viewed as business regulations that have significant impacts on competition, market structure, and consumer choices.⁵⁷

Thus far, training and educational programs have focused primarily on the compliance aspects of intellectual property protection. There is indeed a great need for programs identifying business models that work well for the unique conditions in developing countries. At the macro level, it would also be helpful to identify models that allow developing countries to pool together

⁵⁵ Keith E. Maskus, Sean M. Dougherty & Andrew Mertha, *Intellectual Property Rights and Economic Development in China*, in INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH 295, 311 (Carsten Fink & Keith E. Maskus eds., 2005).

⁵⁶ Yu, *supra* note 22, at 7–8.

⁵⁷ MICHAEL A. GOLLIN, DRIVING INNOVATION: INTELLECTUAL PROPERTY STRATEGIES FOR A DYNAMIC WORLD 23 (2008); Frederick M. Abbott, *The Cycle of Action and Reaction: Developments and Trends in Intellectual Property and Health*, in NEGOTIATING HEALTH, *supra* note 17, at 27, 36; Keith E. Maskus, *Teaching the Economics of Intellectual Property Rights in the Global Economy*, in TEACHING OF INTELLECTUAL PROPERTY, *supra* note 9, at 166.

limited resources to create economies of scale and scope and to provide a greater aggregate market.⁵⁸

Notwithstanding the importance of locating business models suitable to developing countries, few programs thus far have focused on identifying these models. The lack of such a focus is due in part to the fact that expert instructors for training and educational programs tend to originate from developed countries and multinational corporations. Such a lack can also be attributed to the limited research devoted to the area. It is therefore no surprise that Recommendation 26 of the WIPO Development Agenda “encourages Member States, especially developed countries, to urge their research and scientific institutions to enhance cooperation and exchange with research and development institutions in developing countries.”

Finally, as intellectual property rights continue to expand and diversify, it is important that the participants of training and educational programs better understand the different models that can be built upon existing rights. The more successfully local creators, inventors, and businesses use the intellectual property system to promote their interests, the more likely the system can be harnessed to promote the interests of developing countries. A greater stake in the system on the part of these countries would also generate benefits for developed countries and their supportive rights holders.⁵⁹

Historical Appreciation

History is important, not only because it tells us what happened in the past, but also because it provides important lessons and directions for the future. As philosopher George Santayana wrote, “Those who cannot remember the past are condemned to repeat it.”⁶⁰ Given the recurrence of intellectual property developments, including past efforts made by developing countries to recalibrate international intellectual property standards, it is particularly important for training and educational programs to help the participants understand past developments.

In fact, the establishment of the WIPO Development Agenda has demonstrated how important the past has been. In the 1960s, for instance, countries already pushed for the establishment of a development agenda. This “Old Development Agenda” eventually included the drafting of the Stockholm Protocol Regarding Developing Countries, the formation of WIPO as a U.N. specialized agency, the development of the draft International Code of Conduct on the Transfer of Technology under the auspices of the United Nations Conference on Trade and Development (UNCTAD), and negotiations concerning the revision of the Paris Convention.⁶¹ There are also remarkable similarities between the “common heritage of humankind” concept advanced at that time and the commons concept widely used today in the free software, open source, free culture, and access to knowledge movements.⁶²

While developing countries and their supporters have achieved only limited success in the Old Development Agenda, the existence of that Agenda has shown that the recent pro-

⁵⁸ Yu, *supra* note 17, at 882.

⁵⁹ Yu, *supra* note 30, at 523–24; Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 431–33 (2003).

⁶⁰ GEORGE SANTAYANA, *THE LIFE OF REASON: OR THE PHASES OF HUMAN PROGRESS* 232 (1932).

⁶¹ Yu, *supra* note 5, at 468–511.

⁶² *Id.* at 541–42.

development efforts are not entirely new. An important question for us therefore is: How different is the present Agenda from the old Agenda? After all, if the Agenda merely repeats its failed predecessor without making significant adjustments, how likely is it to succeed the second time?⁶³

In addition to studying past efforts developing countries have made, training and educational programs can make use of case studies on how a select group of countries successfully caught up with their more developed counterparts in terms of both economic and technological developments. For example, the United States, Japan, South Korea, and Singapore have all been developing countries, yet they are highly economically developed and technologically proficient today.⁶⁴ Following this trend, commentators have already begun studying the economic and technological transformation of the so-called BRICS countries (Brazil, Russia, India, China, and South Africa).⁶⁵

In *Intellectual Property Rights, Development, and Catch-up: An International Comparative Study*, for example, Hiroyuki Odagiri, Akira Goto, Atsushi Sunami, and Richard Nelson provided an important collection of studies on the catch-up processes that developed, emerging, and large developing countries have experienced.⁶⁶ Training and educational programs that provide a deeper understanding of these case studies are likely to be useful for policymakers from developing countries. These case studies will also be useful to authors, inventors, and businesses, most of whom rely on intellectual property rights to succeed.

Global Awareness

Global perspectives are particularly important to policymakers and industry leaders from developing countries. Without a doubt, international politics plays a rather important role in determining how countries negotiate at the international level and what intellectual property standards countries ultimately adopt. Indeed, a growing number of intellectual property scholars have emphasized the importance of studying trade geography, international relations, and global politics.

With the rapidly changing geopolitics and the arrival of new and emerging players in the international intellectual property regime,⁶⁷ it is no longer sufficient to have the simplistic view that the international intellectual property debate reflects a North-South divide. Today, there are many important and intriguing developments among developed countries, between developed and large developing countries, and between developed and developing countries. While developed and large developing countries have stood side by side on certain issues, they are bitter opponents concerning others.⁶⁸

⁶³ *Id.* at 543.

⁶⁴ Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525, 528–43 (2012).

⁶⁵ *E.g.*, JIM O'NEILL, THE GROWTH MAP: ECONOMIC OPPORTUNITY IN THE BRICS AND BEYOND 69–79 (2011).

⁶⁶ INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP, *supra* note 13.

⁶⁷ Yu, *supra* note 5, at 546–54; Peter K. Yu, *Virotech Patents, Viropiracy, and Viral Sovereignty*, 45 ARIZ. ST. L.J. 1563, 1645–54 (2013).

⁶⁸ Yu, *ACTA and Its Complex Politics*, *supra* note 39, at 13.

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At the global level, as opposed to the international level, there are also many interesting developments featuring non-state and sub-state actors.⁶⁹ The widely cited example of non-state arrangements concerns ICANN (Internet Corporation for Assigned Names and Numbers), which is a private not-for-profit U.S. corporation in California that is charged with coordinating the Internet domain name system.⁷⁰ Although ICANN is not a governmental agency, it has contractual obligations with the U.S. Department of Commerce.⁷¹

There are also important developments concerning a wide variety of non-state actors. These players include multinational corporations, political activists, consumer advocates, civil liberties groups, academics, media, and individual citizens. A better understanding of global developments therefore will provide not only a more complete picture of the ongoing development of the international intellectual property system, but also insights into where opportunities and challenges will lie for developing countries.

Inevitably, concerns will arise over whether a focus on geopolitical developments would politicize the materials for training and educational programs. However, it is fair to state that the omission of such an important set of issues will be a disservice to the participants of these programs. Indeed, given the contentious and polarized nature of the existing international intellectual property debate,⁷² it is virtually impossible to ignore the complex political dynamics in the international intellectual property system. Moreover, as Jeremy de Beer and Chidi Oguamanam observed, “That the topic is controversial and generates a wide array of differing perspectives should be a reason to engage it, not to shy away from it.”⁷³

To avoid politicizing training and educational programs, it will be helpful to focus these programs on identifying the various positions the different players have taken and explaining their concerns and strategies. It will also be useful to document the state of play in the larger international intellectual property regime. Such documentation would provide the participants with important information about available opportunities in the international intellectual property arena as well as those potential allies that can help them achieve their development objectives.

By being balanced, transparent, and inclusive, the programs will better equip the participants with the needed information concerning the complex politics within the international intellectual property system while avoiding further polarizing the debate. Such transparency and inclusiveness are indeed strongly supported by the WIPO Development Agenda, whose recommendations specifically mention the need for openness and transparency. Having balanced and transparent programs is also important because “even seemingly ‘technical’ training has embedded in it ideological views about the role of [intellectual property] in society.”⁷⁴

⁶⁹ *Id.* at 15; Yu, *supra* note 46, at 375.

⁷⁰ Yu, *supra* note 1, at 427.

⁷¹ MILTON L. MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE (2002); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000).

⁷² Yu, *supra* note 7, at 7–10.

⁷³ de Beer & Oguamanam, *supra* note 8, at 31.

⁷⁴ *Id.* at 9.

Conclusion

Redesigning intellectual property training and educational programs is important from the standpoints of both development and social justice. If we are to successfully reorient intellectual property law and policy toward the goals and principles of social justice, we need to go beyond discussion and analysis to think more about how intellectual property rights are taught in training and educational programs. After all, how these rights are exploited, protected, enforced, managed, interpreted, or even perceived could affect the overall fairness of the existing intellectual property system—domestic and international alike.

Although this chapter draws on experiences and insights from a WIPO-commissioned study that focused primarily on policy issues and macro-level developments, much of the discussion in the chapter informs the debate on intellectual property, development, and social justice. For example, a large part of this debate concerns developing countries—the marginalized community in the international intellectual property regime. Issues such as development, inclusion, access, empowerment, equality, fairness, and justice are also important to both the micro- and macro-level debates. Challenges confronting the weak, the vulnerable, the marginalized, and the otherwise disadvantaged also abound in both debates, even though direct counterparts to developed, emerging, and developing countries do not exist in the former debate.

Moreover, many of the developments brought about by the WIPO Development Agenda will benefit the marginalized communities in both debates. The recently-adopted Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, for instance, responds to the needs, interests, and concerns of both developing countries and the visually impaired in both developed and developing countries. Likewise, the marginalized communities in either debate remain highly alarmed by the over-enforcement, and at times abuse, of intellectual property rights.

Ultimately, different communities will need different training and educational programs. There is simply no universally effective approach to promoting development and social justice. What works well for one community may not work well for another. Thus, instead of using a top-down approach, trying to determine what intellectual property issues will be important to promote development and social justice, this chapter uses a bottom-up approach to identify options that can be used to redesign intellectual property training and educational programs. It is my hope that the provided discussion will not only make these programs more relevant and meaningful to marginalized communities, but will also provide a useful starting point for promoting a “social justice” dimension of intellectual property policy and research.