IP and Development- A Road Map for Developing Countries in the 21st Century

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By Rami Olwan* and Professor Brian Fitzgerald**

Introduction

The value of an intellectual property (IP) regime to a developing country (or for that matter a developed country) is the subject of increasing debate. On one side IP evangelists argue that IP laws can stimulate untold innovation and provide a foundation for economic progress. On the other side IP sceptics or abolitionists question whether IP laws really incentivise innovation or simply represent an unforeseen burden on social and economic development. The reality for many countries is that while theoretical debates are important they do not provide immediate solutions. For this reason, we want to put the polarising debates to one side and focus on how developing countries can utilise and sensitize IP to their development needs. In order to do this in the following pages, we outline current thoughts on development theory, how it informs IP law and practice and then produce same practical suggestions about ways in which developing countries can grow and implement IP regimes that are more supportive of their needs.¹

1) The Meaning of Development and Developing Countries

“Development” is a contested term between scholars, organizations and development experts in developed and developing countries. Nevertheless, it is one of the most important challenges facing the international community, and has been widely acknowledged in many

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¹ Professor Madhavi Sunder has suggested that:

> Intellectual property is essential to development, not just in the narrow sense of efficiency, but in this broader view of expanding capability for central freedoms. Surely, copyright and patents determine our access to basic needs, from educational material to lifesaving medicines. What is less obvious is that failure to be recognised as an author or inventor may impede one’s access to these essential life goods by diminishing one’s material wealth and the capability for living a full life. Stated differently, the implications in intellectual property rights go well beyond incentives for innovation: these rights are related to questions of cultural relations, social development, and GDP growth.


Professor James Boyle explains that:

> Intellectual property laws are the legal sinews of the information age; they affect everything from the availability and price of AIDS drugs, to the patterns of international development, to the communications architecture of the internet.

international conventions and forums. It is understood to mean improving the lives of people socially and economically. It encapsulates the improvement of individuals’ lives through providing greater education, skills development, income and employment.

There is no single international definition of what is meant by the term “developing countries”. The UN organizations divide developing countries into several groups of countries based on their income, education, healthcare and life expectancy. The following criteria have been used to determine if a country is a developing country:

- small Gross National Product (GNP) relative to the major players in the trade arena;
- limited domestic resources;
- exports are concentrated in terms of products and trading partners;
- high average trade barriers; and
- economic and political dependence on industrial countries.

Within the term of “developing countries”, one might also distinguish between “Least Developing Countries” (LDCs) and “emerging economies” or “newly industrialized countries”. According to the United Nations Conference on Trade and Development

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3 The World Bank classifies countries, according to their gross national income (GNI) per capita, into the following categories of countries:
   - low income ($995 or less);
   - lower middle income ($996 - $3,945);
   - upper middle ($3,946 - $12,195); and
   - high income ($12,196 or more)


5 The UN uses the following three criteria for the identification of LDCs:
   1. a low-income estimate of the gross national income (GNI) per capita;
   2. a weak human assets as measured through a composite of Human Assets Index; and
   3. a high degree of economic vulnerability as measured through a composite Economic Vulnerability Index.


6 “Emerging economies” can be defined as “countries that are restructuring their economies along market-oriented lines and [that] offer a wealth of opportunities in trade, technology transfers, and foreign direct investment”. These countries can also be called Newly Industrialized Countries (NICs). According to the World Bank, the five biggest emerging markets are China, India, Indonesia, Brazil and Russia.

(UNCTAD), there are currently 33 countries in Africa, 14 in Asia, one in Latin America and the Caribbean that are considered as LDCs.  

It is worth mentioning that the concept of developing countries is highly controversial, Shamnd Basheer and Annalisa Primi argue that there is a need to move away from an antiquated developed-versus-developing-countries classification and differentiate developing countries according to their technological and innovative proficiencies. The problem with such a proposal is the difficulty in agreeing on the criteria used to assess and classify countries according to their technological or innovative capabilities.

2) The Correlation between IP and Development

There are theories on development formulated particularly in the 1960s suggesting that a system of IP protection is a necessary part of the evolution of states from being “under-developed” to becoming “developed”. Over time, European countries have required that many of their colonies in Asia, Africa and Latin America adopt IP laws to help them in their social and economic development.

Scholars working in the field of IP have different views on the effect of development within the context of IP. Some agree that development could be achieved through the introduction of IP systems in developing countries whilst others are doubtful whether such systems would be sufficient to support development.

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It is argued that IP systems will not bring social and economic development of developing countries without the support of proper development policies. In pursuing economic development, developing countries must address a range of activities including efficient and effective government, coherent economic policies, political stability, human capital, technical infrastructure and the rule of law.\(^\text{13}\)

It is important for the drafters of IP laws in developing countries to increase their understanding as to how IP can affect their economies and how to connect it with the economic realities of their countries. While IP may bring Foreign Direct Investment (FDI), technology transfer, domestic innovation, and Research and Development (R&D) to developing countries, economic development will not occur simply through the introduction of IP laws. Policy makers in developing countries need to consider broader development initiatives in the structuring of their IP system. To this end, every provision that is introduced into the IP law should be studied and examined as a part of the broader development plan for that country.\(^\text{14}\)

In 2004, Brazil and Argentina presented a comprehensive proposal on behalf of developing countries to establish the Development Agenda in the World Intellectual Property Organisation (WIPO). They put forward a view that IP laws in their current form are not helping those countries in their development, as is constantly being suggested by developed countries, and that there is a need to rethink the international IP system and the work of WIPO.\(^\text{15}\) In 2007, WIPO member States made a historic decision for the benefit of


\(^\text{15}\) The Development Agenda proposal presented to WIPO noted: “[t]he need to integrate the “development dimension” into the policy-making on intellectual property protection and called for, among other things, the establishment of a new subsidiary body within WIPO to examine technology transfer; a new treaty to promote
developing countries, to establish a WIPO Development Agenda to ensure that IP rights are not considered in isolation, but within a broader picture of economic, social and public interests. WIPO approved the Development Agenda and established a Committee on Development and Intellectual Property (CDIP) to manage its implementation.

As a consequence, research on IP and development has gained renewed momentum. Many scholars and international organizations are critical of the failure of the international IP system to assist developing countries and argue that it needs to be changed to meet the development ambitions and objectives of these countries.

Arguably, we have reached a critical point in history where the credibility of the international IP system is being seriously challenged. This has provided a window of opportunity for developing countries to advocate for a more accountable, transparent and human IP system.


The World Health Organization (WHO) has also launched its own development agenda with the intergovernmental Working Group on Public Health, Innovation and IP (IGWG), which is tasked with preparing a ‘global strategy and plan of action’, aimed at ‘[s]ecuring an enhanced and sustainable basis for needs-driven, essential health research and development relevant to diseases that disproportionately affect developing countries’. Jack Lerner, ‘Intellectual Property and Development at WHO and WIPO’ (2008) 34 American Journal of Law and Medicine 296.


17 See the WIPO Development Agenda: [http://www.wipo.int/ip-development/en/agenda/].


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3) The practical Measures that should be taken by Developing Countries to maximise their Benefits of IP Systems

In pursuing any plan for development, developing countries need to be aware of how they can tailor their IP system to their needs. In the following pages, we suggest some practical measures that we consider developing countries should explore with the aim of getting better return from their IP system.

A) Educate Policymakers and the Public on IP and Development Issues

It is critically important to educate policy makers and those involved in the drafting of IP laws in developing countries on IP and its relationship to development theory.\(^{20}\) IP can no longer be seen as a tool that is used for the sole benefit of inventors and intellectual creators, but rather it is important for many people in developing countries, as it impacts on their lives in a wide range of issues including education, innovation, creativity and health.\(^{21}\)

It is important to undertake studies to evaluate the economic and cultural impacts of industries that rely on IP, in developing countries. Such studies should help understand the needs of various sectors of the economy and how they can be encouraged by IP systems. These studies would aid the drafting of appropriate IP laws which correspond with the economic and cultural needs of developing countries.

As well IP government organizations (such as copyright and patent offices) in developing countries need to be structured in a way to meet the needs of those countries and to help in their development. These government organizations should not only work (or be seen to be working) to promote the IP rights of foreign corporations or to increase their portfolio of IP registrations, but should also work closely with local inventors and creators, especially those who are keen to protect local culture and indigenous knowledge. This will require them to educate the public on how to use IP for the benefit of the domestic economy. They should also advise governments on the proper policies that need to be implemented in order to gain maximum benefits under the international IP systems.

\(^{20}\) The following is a primary reading list:
- Ha Joon Chang, *Kicking Away the Ladder-Development Strategy in Historical Perspective* (Anthem, 2003); and

Developing countries should also spread awareness among IP offices, IP scholars, international organizations and others in developing countries, of the importance of the WIPO Development Agenda and the implications that it might have on the practice of IP in those countries and beyond.

Finally, it is also important to teach people in developing countries about IP from the perspective of development. This means that IP scholars in those countries should teach IP to students in a balanced way that takes into consideration the needs of businesses as well as consumers and the general public. IP scholars in developing countries should also make sure that appropriate educational materials reflecting this approach are made available for the benefit of the students and the greater community.

B) Revise IP Laws and Adopt a Pro Development Perspective

As suggested before, most developing countries already have IP laws and are not in a position to repeal those laws. However, developing countries need to re-examine these IP laws to ensure that such laws are in fact of assistance to them and are not impeding their social and economic development. Such IP laws need to be structured in a way that is ‘pro-development’, by understanding the circumstances for each developing country, its international obligations and its local needs, and by structuring an IP system that correlates with those needs and obligations and which assists in its development. IP laws will also need to be amended from time to time to adapt to the changing needs of each developing country as it grows.

It is argued that it is important to move beyond the view that only owner centric IP laws are essential for developing countries. This could happen by adopting a more balanced view of IP that does not favour only IP owners, but also gives an equal importance to users and the public. Instead of drafting “stronger IP laws”, it is more important to have appropriate laws that correspond with the needs of both IP owners and their community. Furthermore, IP laws should be structured in a way that supports public policy objectives such as those relating to the transfer of technology, public health and the environment.

IP laws should not be looked upon as an end in itself, but as one of a range of possible tools that developing countries can use to promote innovation, creativity, technological capacity


and development. It is also important to recognise IP not only from an economic perspective, but also from a cultural perspective. This requires developing countries to design IP systems that not only promote economic development, but which also promote local culture and boost local innovation.

The internet is a powerful tool and a source of opportunities that should be used by developing countries to further their development. Accordingly, it is important to make sure that IP laws in developing countries are structured in a way that does not unreasonably interfere with their citizens’ usage of the internet, and to ensure that such usage contributes to their country’s social and economic development. IP laws in developing countries therefore need to facilitate access to knowledge and allow citizens to develop their educational capabilities.

Finally, it is critical to acknowledge the importance of having liberal and generous limitations and exceptions in the IP laws of developing countries, as they are an essential part of achieving a balance between private and public rights. There are many flexibilities set out in international IP agreements, including the TRIPS Agreement that could be used to the advantage of developing countries.

C) Consider Seriously Alternative Approaches to IP Management

25 For example in the field of copyright law, it is important to permit proper limitations and exceptions for students officially enrolled in courses, regardless of their physical location, and to clarify library limitations and exceptions to cover electronic use of a work in order to permit effective research, gathering and organizing information. Adequate limitations and exceptions for libraries, archives and museums (including provisions for accessing and providing information; digitization; preservation and digital creation (including migration to new technologies as they change)) should be included in the copyright laws of developing countries. See Ida Madieha bt. Abdul Ghani Azmi, ‘Institutional Repositories in Malaysia: the Copyright Issues’ (2009) 17(3) International Journal of Law and Information Technology 273-274.  
26 Lea Shaver (ed), Access to Knowledge in Brazil (Bloomsbury, 2010) 68.

The Gowers Review of Intellectual Property was concerned that “the limitations in developing countries are too narrow and this may result in stunning new creators from generating and producing new works”. The Gowers Review of Intellectual Property (November 2006) <http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf>.  

Professor Margret Chon argues also that:

There is a lot of “room for manoeuvre” both for intellectual property protection in the form of copyright, on the one hand, and for limitations and exceptions to copyright in order to access knowledge goods for essential education, on the other.


27 A study conducted by the organization, Consumers International, has found that a number of developing countries and emerging economies including Cambodia, China, Indonesia, Malaysia, Mongolia, and the Philippines have not benefited from the flexibilities available under international copyright conventions. See Consumers International, The CI Study on Copyright and Access to Knowledge (2006) <http://www.consumersinternational.org/media/303356/copyright%20and%20access%20to%20knowledge%20full%20report%20.pdf>.
Some observers think that IP laws are overly restrictive when applied in the internet context. They argue that we should be looking for ways to reduce impediments to the use and reproduction of information over internet networks. This approach has not yet been fully explored in many developing countries by academics and researchers interested in IP. It is important to consider alternative approaches to managing IP including free and open source software (FOSS) and open content licensing. These alternatives could be helpful in assisting social and economic development in developing countries.

It is submitted that developing countries generally should commit resources towards launching a public awareness campaign to educate people on how best they (particularly students, teachers, archivists, academics and librarians) can access and capitalize on copyrighted materials, which they are legally entitled to access freely.

It is imperative for developing countries to understand and know how to use open code and content licensing systems (voluntary mechanisms) such as Free and Open Source Software (FOSS) and Creative Commons (CC).

According to Professor Steven Weber from California University, Berkerly, FOSS could be an important tool in helping developing countries in their social and economic development, especially when it has been localised for the benefit of the people working in the government, business and education sectors.

CC is also helpful for enabling developing countries to increase access to educational materials and research. It allows researchers in developing countries to legitimately access scientific and educational materials through CC licensed materials from researchers and

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28 Jonathan Zittrain, Alternatives to Intellectual Property

29 Consumers International, above n 27.

30 As Professor Steven Weber has noted that:

Of course information technology and open source in particular is not a silver bullet for longstanding development issues; nothing is. But the transformative potential of computing does create new opportunities to make progress on development problems that have been intransigent.

The advantages of adopting FOSS in developing countries are not only economic. As Professor Steven Weber has noted:

The potential leverage on development comes not from software itself, but from the broad organizational changes that the open source process, as a way of making software, will drive. FOSS should not be used to make up for lack of sufficient legal and economic infrastructure, or replace institutions by installing internet connections. But there are interesting possibilities for building systems of distributed innovation within emerging developing countries and emerging economies that lead to autonomous innovation. This could have a significant impact on development prospects.

public institutions in the developed world. This does not solve all access to knowledge (A2K) problems in developing countries, but can help these countries to access works available under permissive licences.

CC can be used by internet users, bloggers and others for encouraging wider debates and spurring innovation, remixing culture and development through the internet. There are a large number of digital works that are licensed under CC copyright licensing systems including materials available through Flickr, Massachusetts Institute of Technology Open Courseware (MIT Open Courseware), Public Library of Science, Wikipedia and Aljazeera.

Scholars, researchers and government officials in developing countries should also be encouraged to explore the use of CC in “licensing out” their work to the general public especially when it is publicly funded. This would allow others to access their work and build on it.

The Department of Labor and Education in the US announced on 20 January 2011 that the Obama administration had granted $2 billion to create Open Education Resource (OER) materials, to provide community colleges and other eligible institutions of higher education with funds to expand and improve their ability to deliver education and career training programs. All the resources created using these funds must be released under the CC Attribution 3.0 license (CC BY). This particular license will allow subsequent users to copy, distribute, transmit and adapt the copyrighted work, provided that attribution is given to the author.

31 On 26 April 2010, CC submitted the following statement to WIPO Committee on Development and Intellectual Property (CDIP 5) in Geneva:

We also strongly believe that Creative Commons offers developing countries opportunities to legitimately access scientific and educational materials released under a Creative Commons licence by researchers and public institutions in the developed world, something that is already taking place. We are aware that this does not solve digital divide access issues, but we believe that making the works available under permissive licences is a step in the right direction.

Tecnolama, CC Statement at WIPO CDIP <http://www.technollama.co.uk/creative-commons-statement-at-wipo-cdip>.

36 See the White House <http://www.whitehouse.gov>.
37 Timothy Vollmer, New federal education fund makes available $2 billion to create OER resources in community Colleges, Creative Commons (20 January 2011). <https://creativecommons.org/weblog/entry/26100>.
D) Other Suggested Practical Measures

Developing countries need to be open about their development plans and should express their views and engage widely with their citizens, especially in relation to IP and development. It is also important for developing countries to work closely with international organizations working in the field of IP and development. These include Consumers International,\(^{38}\) working in the field of access to knowledge; Knowledge Ecology International,\(^{39}\) working in the field of IP and health; CopySouth\(^{40}\) working in the field of copyright; South Centre,\(^{41}\) working in global trade for development, and innovation and access to knowledge; and EIFL\(^{42}\) working for public access and libraries. Developing countries should follow the work of these international organizations and solicit their opinions in relation to IP in their jurisdictions. They should also be regular participants in any of the events and conferences that these organizations hold in the future.

It is important for any developing country that is considering entering into an FTA with the US, EU or any developed country, to prepare its own strategy to deal with the consequences of signing that FTA. Any developing country that is considering entering an FTA should ask itself a number of questions. What are the social, economic, and cultural implications of signing the FTA? Does signing the FTA serve or impede social and economic development?

IP provisions should be considered to be an important part of any FTA that is signed by any developing country because those provisions can have a major effect on the law and practice of law in the developing country. It is important to study carefully the legal, health, educational, social and cultural implications of the IP provisions that are to be introduced in the FTA. If the FTA puts more IP obligations on the developing country than are required in the international IP treaties that it has actually signed, it should seriously consider not introducing such provisions or at least negotiate less restrictive provisions that do not go beyond its international obligations.

Government institutions in the various developing countries should work together much more closely, especially in terms of sharing their experiences on how best to run their offices. Developing countries which are proximate to each other could develop mechanisms that allow them to achieve that coordination. For example, in relation to Traditional Knowledge

\(^{38}\) Consumers International \(<http://www.consumersinternational.org/>\).

\(^{39}\) Knowledge Ecology International \(<http://keionline.org/>\).

\(^{40}\) CopySouth \(<http://www.copysouth.org/portal/>\).

\(^{41}\) South Centre \(<http://www.southcentre.org>\).

\(^{42}\) EIFL \(<http://www.eifl.net>\)
(TK), a number of developing countries could work together to establish a TK database that would allow them to share their registration information. Developing countries also need to work with international organizations (WIPO) and even with developed countries which offer various programs that could enhance the experience of their IP offices.\textsuperscript{43}

To guarantee against the misuse of the IP system by any powerful corporation or owner, and to make sure it used for the benefit of the citizens and the economy, it is important for developing countries to put in place strong competition laws that support the proper use of the IP system. The competition laws should be carefully drafted to ensure that they are aligned with the country’s economic circumstances and the requirements of local industry.\textsuperscript{44}

IP laws should not simply be transposed from laws introduced in another country, even where that other country is also a developing country. The legislation should be drafted specifically for the particular developing country and should take into account the country’s stage of economic development, including the extent of knowledge of IP law and its application. The laws should also be reviewed on a regular basis and revised as necessary to ensure that they meet the country’s changing economic and industrial needs. A committee of legal experts and economists should be established to meet regularly to discuss the effects of competition laws on the development of the economy and to make sure that the laws are amended when required.\textsuperscript{45}

Developing countries need to study closely the 45 recommendations adopted by the WIPO member states that were made by the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA). The recommendations provide an opportunity for developing countries to further develop their IP policies and practices.\textsuperscript{46}

\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid.
\textsuperscript{46} For example if developing countries took the recommendations of WIPO’s PCDA such as recommendations 35 and 37 (IP evaluation studies) and recommendations 14 and 17 (flexibilities) and used them for their own advantage it could assist those countries in their social and economic development. Recommendation 35 and 37 of the PCDA provide that:

\textit{35) To request WIPO to undertake, upon request of Member States, new studies to assess the economic, social and cultural impact of the use of intellectual property systems in these States.}
\textit{37) Upon request and as directed by Member States, WIPO may conduct studies on the protection of intellectual property, to identify the possible links and impacts between intellectual property and development.}

Recommendations 14 and 17 of the PCDA provide as follows:

\textit{14) Within the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on the implementation and operation of the rights and obligations and the understanding and use of flexibilities contained in the TRIPS Agreement.}
Conclusion

Some of the examples of IP laws in developing countries leave a lot to be desired. If IP is a reality of daily life, developing countries need to manage it and consider how it fits with other elements needed for their development. This will require developing countries to consider their IP systems as a part of their visions for development.

This article has suggested various practical measures and recommendations that developing countries could implement to ensure IP systems work in their best interests.

17) In its activities, including norm-setting, WIPO should take into account the flexibilities in international intellectual property agreements, especially those which are of interest to developing countries and LDCs.