



Final Draft

**Deviant Globalization and the Rise of
Diverse Interests in the Multilateral
Protection of Intellectual Property in
DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES,
INTERESTS AND INTERSECTIONS (Cambridge University
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I. Introduction

The strong integrating movements of intellectual property multilateralism in the latter decades of the 20th century and the first decade of the 21st century have given way to a period of increasing dis-integration.¹ The period that saw the rise of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and diverse regional and multilateral treaties defining the boundaries of intellectual property rights in the digital universe² has been replaced by an era of “dis-integration” marked by a rise in multi-forum standard-making enterprises, many directed by non-governmental organizations (NGOs) and other previously unempowered actors who have found a voice through the greater

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¹ I use the accented term “dis-integration” to place the emphasis on the “dis” prefix to the critical “integration” term. Unlike the more common term “dis-in-tegration,” the previous multilateral activities of the periods of integration have not disappeared (or “disintegrated”). Instead, they have become less prevalent. Even in stages of dis-integration, integration, such as the recent negotiation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled is still possible, although often more difficult to achieve.

² See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS]; Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10–19; World Intellectual Property Organization [WIPO] Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203.







communicative abilities of the Internet and other digital mobilizing media.³ The larger array of civil society organizations seeking reduced intellectual property protection to promote greater access to information and sustainable development powering this new phase are representative of the multiplicity of interests that now form an integral part of multilateral intellectual property relations.

The major actors in earlier stages of multilateralism could be divided roughly into three groups: the creators of intellectual property, the distributors of intellectual-property-based goods and services, and the governments that largely represent the interests of the members of the first two groups. The combined forces of globalization and digitization not only ended the most recent phase of intense multilateral integration, but also brought into the process a multiplicity of previously under-represented interests that have altered the nature of intellectual property multilateralism today.

In particular, globalization has introduced the concerns of developing countries seeking to secure the comparative trade advantages promised under trade agreements negotiated during the last phase of integration – including, most significantly, TRIPS. These concerns were reflected by the growth of a vibrant group of civil society organizations that continues to represent the access and sustainable development concerns of developing countries. These new players in intellectual property multilateralism modeled an increasing recognition of the role that cultural and domestic institutions and interests play in the successful reformation of domestic intellectual property laws to meet perceived international standards and national domestic policies. For example, issues regarding the cultural distinctions between countries, such as Confucianism, have formed an increasing component in multilateralism.⁴ So too have demands for access to technology in order to support domestic development.

These demands were most clearly reflected in Articles 7 and 8 of TRIPS, which specifically balanced heightened protection for intellectual property rights against domestic needs in support of local development.⁵ Article 7 specifically recognized that

³ For more information on the present historic phase of “dis-integration,” see Doris Estelle Long, *Deviant Globalization: The Next Step in the Multilateral Protection of Intellectual Property*, 2 *NORDIC J. COM. L.* 1 (2012)[Long, *Deviant Globalization*].

⁴ See WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995); Peter K. Yu, *Intellectual Property and Asian Values*, 16 *MARQ. INTELL. PROP. L. REV.* 329 (2012).

⁵ See TRIPS arts. 7–8.





the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.⁶

Article 8 complemented this technology access and transfer obligation by recognizing the right of member states to “adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.”⁷

In its earlier stages, globalization was largely perceived as a homogenizing process that would lead to a single global culture, governed by a single harmonized legal standard.⁸ Time has proven that such “homogenization” was evanescent at best, if in fact it ever existed. But the *perception* of such homogenizing trends resulted in a strong backlash that emphasized local identities and culture. This backlash was most clearly manifested by the introduction of indigenous peoples’ interests into the multilateral process, most often through the issues of the protection of traditional knowledge.⁹

Digitization has similarly empowered the introduction of new interests into the multilateral process. While earlier multilateral processes largely featured the interests of authors and content providers in the area of international copyright, NGOs now actively represent the interests of end users, Internet service providers (ISPs), and other third-party intermediaries, such as cloud storage providers, in such proceedings. One clear indication of the power of such civil societies is the acceptance, and growth in number, of NGOs accredited as observers at the World Intellectual Property Organization (WIPO) proceedings. For the 1996 Diplomatic Conference that led to the adoption of the WIPO Copyright Treaty, some delegations included “Advisors” that were members of NGOs.¹⁰ For the Beijing Audio Visual Treaty¹¹ in June 2012, nine NGOs

⁶ TRIPS art. 7.

⁷ TRIPS art. 8.

⁸ Doris Estelle Long, “Globalization”: *A Future Trend or a Satisfying Mirage?*, 49 J. COPYRIGHT SOC’Y 313 (2001) [hereinafter Long, *Globalization*].

⁹ Doris Estelle Long, “Democratizing” *Globalization: Practicing the Policies of Cultural Inclusion*, 10 CARDOZO J. INT’L & COMP. L. 217 (2002) [hereinafter Long, *Democratizing*].

¹⁰ WIPO Copyright Treaty, *supra* note 2.

¹¹ Beijing Treaty on Audiovisual Performances, June 26, 2012, available at http://www.wipo.int/edocs/lexdocs/treaties/en/beijing/trt_beijing_001en.pdf (not yet entered into force).





were accredited as official observers,¹² while over forty-five NGOs participated in the process leading up to the signing of the treaty.¹³

This growing multiplicity of interests in the multilateral process not only impacts the substantive norms of new multilateral intellectual property treaties, but is also altering procedural norms for the enforcement of intellectual property rights. Such alteration includes the introduction of a new set of economic actors and their interests into the multilateral process: the participants and beneficiaries of what I call “deviant globalization.”

II. “Deviant Globalization” and the New Economic Interests of the “Informal” Economy

If globalization informed the interests of the earlier integratory phases of intellectual property multilateralism, its opposite – “deviant globalization” – will be informing present and future trends. Although the term “globalization” suffers from a surfeit of definitions, I am using it in this instance primarily to refer to the regulated markets that arose as a result of the cross-border integration of economic inputs, including, *inter alia*, capital, labor, production, and distribution from the 1970s forward.¹⁴ These markets are notable for their degree of interdependence and/or interrelatedness that increases transnational flows of goods, services, and information.¹⁵ Economic globalization in this sense includes both hard goods and digital markets, as well as their supporting manufacturing and distributing infrastructure. Undoubtedly the most notable multilateral instrument that arose from this phase of economic globalization was TRIPS.

“Deviant globalization,” by contrast, is often referred to as the “under-side” of globalization.¹⁶ A corollary market that often utilizes some of the same cross-border economic inputs as traditional globalization, deviant globalization lacks the benefits or limitations of the legal regulation that is the hallmark of the traditional global marketplace. Also referred to as the “informal” economy, the “black market,” the “underground”

¹² See WIPO, Second Report of the Credentials Committee, June 23, 2012, WIPO Doc. AVP/DC/15, at 2–3, available at http://www.wipo.int/edocs/mdocs/copyright/en/avp_dc/avp_dc_15.pdf.

¹³ See *New Treaty Strengthens Performers' Rights*, WIPO MAGAZINE, August 2012, available at http://www.wipo.int/wipo_magazine/en/2012/04/article_0001.html.

¹⁴ See Long, *Globalization*, *supra* note 8.

¹⁵ See Long, *Democratizing*, *supra* note 9.

¹⁶ Nils Gilman et al., *Introduction*, in *DEVIANT GLOBALIZATION: BLACK MARKET ECONOMY IN THE 21ST CENTURY* 3 (Nils Gilman et al. eds., 2011).





economy, or even “System D,”¹⁷ it offers those who are not participants in the traditional, regulated economy the opportunity to enjoy some of its same cross-border trade benefits, albeit under a system with its own rules and norms.

The informal market has existed as long as its regulated cousin. In fact, some scholars posit that it may actually have existed prior to any such regulations.¹⁸ One of the most notable examples today of deviant globalization is the digital marketplace for the unauthorized distribution of copyrighted works, exemplified by sites such as The Pirate Bay and KickassTorrents.com. In the hard goods world, the local “flea market” selling a variety of counterfeit and pirated goods may be the closest analogue. According to the 2013 Out-of-Cycle Review of Notorious Markets issued by the United States Trade Representative (USTR) in February 2014, “[w]ith respect to the distribution of counterfeit goods, physical markets remain the primary distribution channel worldwide.”¹⁹

Other notable informal markets include the *shanzhai* markets in China. *Shanzhai* goods have been described as “Chinese imitation and pirated brands and goods, particularly electronics.”²⁰ With their first major appearance in the cell phone market, *shanzhai* products “routinely imitate the looks of branded products.”²¹ The goods are often sold at extremely discounted rates because of efficient production systems and the absence of any design costs. *Shanzhai* has moved beyond a market phenomenon to a counterculture that celebrates “fake” goods. Its appeal has become so broad that it has even spread to the art market.²²

In connection with patented pharmaceuticals, informal markets distributing generic drugs into countries where the related patent has not expired, including online marketers, are increasing in significance. In fact, many countries including South Africa and India have revised their laws to expressly permit the sale of such generic drugs.²³

¹⁷ ROBERT NEUWIRTH, *STEALTH OF NATIONS: THE RISE OF THE INFORMAL ECONOMY* (2011).

¹⁸ *Id.* at 24.

¹⁹ OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, 2013 OUT OF CYCLE REVIEW OF NOTORIOUS MARKETS 12, Feb. 12, 2014, available at http://www.ustr.gov/sites/default/files/FINAL-PUBLISHED%202013_Notorious_Markets_List-02122014.pdf (last visited May 25, 2014).

²⁰ Haochen Sun, *Can Louis Vuitton Dance with Hip-hop? Rethinking the Idea of Social Justice in Intellectual Property Law*, 15 U. PA. J.L. & SOC. CHANGE 389 (2012).

²¹ *Id.* at 395.

²² Laura J. Murray et al., *PUTTING INTELLECTUAL PROPERTY IN ITS PLACE: RIGHTS, DISCOURSES, CREATIVE LABOR AND THE EVERYDAY* 158-66 (2014) (discussing the *shanzhai* equivalent in the art world – the Dafen market, which specializes in “fake” masterpieces).

²³ Angela J. Anderson, *Global Pharmaceutical Patent Law in Developing Countries – Amending TRIPS to Promote Access for All* 26 (bepress Legal Series Working Paper No. 1109, 2006), available at http://infojustice.org/download/gcongress/amending_trips/anderson%20article.pdf.





Organizations such as the World Bank and the Organisation for Economic Cooperation and Development (OECD) are studying the operations and effects of the informal economy because of its ability to provide economic opportunities for those who have been excluded from the traditional marketplace. In *Deviant Globalization: Black Market Economy in the 21st Century*,²⁴ Nils Gilman, Jesse Goldhammer, and Steven Weber describe the positive impacts of deviant globalization as follows:

For the global rich, deviant globalization meets a range of otherwise unfulfilled individual demands.... For the most part ... the global rich are not engaged in deviant globalization to increase their wealth. They have ample above-board opportunities to make money.

By contrast, the global poor have a different relationship to deviant globalization. For them it is ... a powerful engine of wealth creation.... [P]articipating in deviant globalization is often an individual's fastest ticket out of poverty and a way for an entire community to experience economic development.²⁵

The potential positive economic and developmental effects of deviant globalization do not exist in a vacuum. For every instance of an individual surviving by virtue of hard work and creative efforts in the informal market of deviant globalization, there are also those who are in virtual slavery to the organizations that control counterfeit distribution markets in which street vendors earn a subsistence wage, at best. In a seven-year observation of the pirate market in Florence, Italy, I have discovered that, while deviant globalization may provide economic benefits to some, it also presents serious human rights challenges when pirate markets are tied to immigration issues. Additional risks posed by the informal economy include the lack of a formal social security network so that the inability to work may translate into even greater poverty, a strong undercurrent of violence in some organizations, and the use of the income from such markets to fund organized crime and paramilitary operations.

Gilman et al. also acknowledge the “dark side” of deviant globalization for the poor, recognizing that deviant globalization not only often entails harrowing individual suffering, but may also provide money and power to self-dealing government officials, brutal warlords, and fanatical terrorists.²⁶ They use the impact of the illegal drug market in Mexico as an example of the duality of deviant globalization:

Meeting Western appetites for illicit drugs has generated vast fortunes south of the American border. This money pays for an army of employees that, by some estimates, numbers upward of half a million people, larger than the entire

²⁴ Gilman et al., *supra* note 16.

²⁵ *Id.* at 3–4.

²⁶ *Id.* at 4.





Mexican oil and gas industry. It pays for the development of rural Mexican towns and villages that, thanks to generous drug lords, now have everything from running water to computers and broadband Internet access. At the same time, however, the drug money also pays for the daily violence, assassinations, and mayhem that are crippling the Mexican state.²⁷

Yet while “abusive” or “immoral” aspects of this “underground” economy undoubtedly exist, the informal market, as a whole, is not necessarily criminal or even unsavory in nature. To the contrary, for example, with regard to infringing activities by the informal digital market for copyrighted works, countries such as the United States have extended a protective safety net to some participants in such markets. Certain Internet service providers (ISPs) and other qualifying third-party intermediaries between end users and copyright holders are provided safe harbors from liability.²⁸ I do not mean to suggest that such safe harbors should necessarily be extended to all providers of pirated or counterfeit goods. Merely that participation in an informal market does not, and should not, necessarily remove consideration of participants’ interests from playing a role in creating international norms governing intellectual property rights.

I have used the term “deviant globalization” to refer to the broader interests reflected by this underground (or informal) economy. This informal economy is not “deviant” in the sense of moral deviancy, or criminality. Instead, it is “deviant” because it *deviates* in significant ways from the regulated market that has been the focus of scholars, economists, and popular writers for the past several decades. This alternative non-traditional, underregulated market represents an entirely diverse new set of interests from those traditionally considered in connection with intellectual property protection. These interests, which have already formed part of the debate over the scope of intellectual property protection in the digital informal market, bring into consideration the norms of the underground economy to balance protection between intellectual property owners and those who seek access to the goods and services protected by such rights.

III. Recognizing the Interests of the Participants in the Informal Economy

From the markets operated by the inhabitants of the favelas of Brazil to the garbage pickers of Lagos; from the sellers of counterfeit purses in Italy to the bazaars of the Middle East, informal markets fulfill

²⁷ *Id.*

²⁸ See 17 U.S.C. § 512 (2010) (referred to as the “Digital Millennium Copyright Act”).





consumer needs unmet by the regulated marketplace. Although some of these needs may well be for illicit goods and services, others are filled by goods the government is unable or unwilling to provide. Thus, for example, in the underground market described by Robert Neuwirth in *Stealth of Nations*,²⁹ are individuals who sell legitimate products at discounted wholesale prices in the early morning markets; street vendors of legitimate, but cheaply priced, tourist souvenirs; and those who provide food and beverages to such vendors out of the backs of trucks and food carts. All of these vendors share common traits of selling goods below the prices of traditional brick-and-mortar sellers because they do not have to maintain permanent housings or pay taxes on their business earnings. Some of these sellers earn significant incomes that allow them to expand their businesses. All of them are earning monies that would not be available through the regulated market.³⁰ Similarly, garbage pickers in various countries locate recyclable materials and create an unregulated supply network for these goods that not only has potential environmental benefits, but also provides income to those at the lowest economic rungs of society.

These unregulated efforts highlight a critical element of deviant globalization – its innovative nature. Such innovation is amply demonstrated by the development of new technological models for distributing content in the informal markets of the Internet. From the early file trading software of Napster to websites such as The Pirate Bay that provide global digital access to streaming content, the unregulated economy of the Internet has been a hallmark of distributive innovation. Distributive innovation, however, is not limited to the technologically proficient. To the contrary, deviant globalization encourages innovation at all levels of the socioeconomic strata. Among the oil workers in Lagos, Nigeria, for example, there was an unfulfilled need for inexpensive, but safe, drinking water. Individuals began selling water in plastic bags to meet this need. This new business has proven so successful that some sellers have even developed names and symbols to mark their water as reliable.³¹

²⁹ See NEUWIRTH, *supra* note 17, at 1–16; OECD, *Competition Policy and the Informal Economy* (2009) (describing various ways in which the informal economy interacts with the formal economy, including as an alternative outlet for products of the formal sector).

³⁰ See NEUWIRTH, *supra* note 17 (describing diverse markets where the participants in the informal economy earn monies otherwise unavailable to them); MOISES NAÍM, *ILLCIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY* 109–30 (2005) (describing the incomes earned through trade in counterfeit and pirated goods). *But see* OECD, *supra* note 29, at 33–35 (contending that despite its size in developing countries, the informal economy harms competition because informal firms are less productive and unable to achieve economies of scale).

³¹ See NEUWIRTH, *supra* note 17, at 42–43.





With its emphasis on trade and innovation across socioeconomic levels and its focus on unmet consumer demands, deviant globalization brings the interests of otherwise underrepresented groups into intellectual property multilateralism. These groups, reflecting the operational principles of the informal marketplace, support relationships between compensation, access, and distributive innovation that are distinctly different from the traditional focus on strengthening the rights of intellectual property holders.³²

Although every informal market is different, there are four overarching operational principles of deviant globalization that most clearly impact present multilateral processes. These principles require a recalibration of current intellectual property norms. They are:

- A. fair compensation fuels the market;
- B. consumers matter;
- C. innovative business models deserve adequate breathing space to flourish; and
- D. markets necessarily require regulation.

A. Fair Compensation Fuels the Market

Fair compensation is the bedrock goal of a functioning informal market. The foundational principle of deviant globalization is filling market demand through *fair* prices for desired goods and services. The underground market is uniquely sensitive to competitive demands. Yet at the heart of the informal economy is compensation – or more specifically the financial and other rewards available for providing desired goods and services.

If the goal of deviant globalization is to fill market demand, then eliminating the availability of a demanded product becomes less desirable than assuring reasonable compensation to the intellectual property owner, so long as that product is not potentially harmful to the public. By placing the initial focus on fair compensation for both parties, deviant globalization changes the issue from one about compensated access to one about the nature of a *rational* compensation system. Thus, for example, debates over peer-to-peer (P2P) file trading or methods for dealing with so-called rogue websites such as The Pirate Bay, change from demands for greater

³² See *NORMS IN A WIRED WORLD* (Steven A. Hetcher ed., 2007) (analyzing the various roles of norms, including social norms, in setting rules of conduct on the Internet); Ned Snow, *Copytraps*, 84 *IND. L.J.* 285 (2009) (advocating for revisions to U.S. copyright law that more accurately reflect the social norms of end users).



enforcement to new methods that follow the money trail to rebalance the economic harms of piracy.

The most direct impact that the increasing role of the interests of participants in deviant globalization may have is on the issue of international product distribution, and, accordingly, on the issue of the exhaustion of intellectual property rights on an international scale.³³ Considering the issue of fair prices and fair trade, deviant globalization interests support a one-item-one-payment system where *international* exhaustion becomes the model for the international distribution of intellectual property-based goods. Limitations on such exhaustion would be premised primarily on the harm to the *consumer*. Thus, copyrighted goods would generally be subject to exhaustion. By contrast, trademarked goods might be excluded from such exhaustion, at least in instances where the same mark represents different consumer meanings or different goodwill. Because of the unique nature of patents that only exist in the event of a domestic grant, international exhaustion is arguably less applicable, except, for example, in cases where the same invention is protected under both countries' patents.

Deviant globalization will provide critical inputs on the question of intellectual property and "fair trade," particularly in connection with the issue of access to medicines and critical technologies at reasonable prices. The recent decision by the Controller of India's Patent Office in granting Natco Pharma Ltd. a compulsory license to sell Sorafenib – the generic version of the German-based Bayer AG's (Bayer) patented kidney and lung cancer drug Nexavar – reflects the interests of deviant globalization in fair prices for both consumers and intellectual property rights holders.³⁴ In support of his decision to grant a compulsory license to a local manufacturer, the Controller cited the high prices Bayer charged for the drug – US\$5,600 per month as opposed to Natco's claimed US\$177 per month – the small amounts of the product Bayer had imported to meet domestic needs, and Bayer's failure to manufacture the drug in India.

Under Indian law, following the flexibilities outlined in Article 31 of TRIPS, a compulsory license can be granted if the patent owner fails to make the drug available "on reasonable terms."³⁵ According to the Controller, these terms are not met "[i]f the drug is so highly

³³ On the principle of exhaustion of intellectual property rights, see generally Christopher Heath, *Parallel Imports and International Trade*, 28 INT'L REV. INDUS. PROP. & COPYRIGHT 623 (1997); Herman Cohen Jehoram, *Prohibition of Parallel Imports through Intellectual Property Rights*, 30 INT'L REV. INDUS. PROP. & COPYRIGHT 495 (1999).

³⁴ Natco v. Bayer, Compulsory License Application No. 1 of 2011 (Mar. 9, 2012), available at http://www.ipindia.nic.in/ipoNew/compulsory_License_12032012.pdf.

³⁵ *Id.* at 15.

priced that the ordinary public cannot afford it.”³⁶ In establishing lack of affordability, the Controller relied on the limited amount of the drug Bayer sold in light of anticipated need: “It stands to common logic that a patented article ... was not bought by the public due to only one reason, *i.e.*, its price was not reasonably affordable to them.”³⁷ Ultimately, the Controller granted Natco a non-exclusive license to manufacture and sell the drug in India for US\$177 per month in exchange for a 6 percent royalty.

What is most notable about this decision is the Controller’s grudging recognition that the fairness of the price charged was not solely a matter of price comparison between the generic manufacturer and the patent holder who had incurred substantial research and development costs. Although the Controller held that a “reasonably affordable price has to be construed *predominantly* with reference to the public,”³⁸ the term “predominant” is significant. It represents a partial acceptance of Bayer’s argument that reasonableness must be judged at least in part with a consideration of an inventor’s right to recoup its investment. Ultimately, the royalty the Controller established reflected this recoupment principle.³⁹ This recoupment right is reflected in Section 90 of the Indian Patents Act which required the Controller to consider “the expenditure incurred by the patentee in making the invention or in developing it and obtaining a patent and keeping it in force” as well as “other relevant factors.”⁴⁰ A lack of evidence from Bayer regarding actual development costs prevented the Controller from reaching a more accurate determination of the amount of recoupment required.

By combining the foundational principles of reasonable compensation for intellectual property owners with fair prices for consumers, the interests of deviant globalization help to recalibrate the balance between compensation and access. Perhaps most significantly, with its emphasis on global trade, increasingly, considerations of the appropriate return on investment under deviant globalization principles will most likely require consideration of the *global* sales history of the product. Once research and development costs have been recouped anywhere on the globe, the fair compensation principles of deviant globalization would reduce the price of the drug in all countries.

³⁶ *Id.* at 16.

³⁷ *Id.* at 36.

³⁸ *Id.* (emphasis added).

³⁹ *Id.* at 59.

⁴⁰ Patents Amendment Act, No. 38 of 2002, § 90(1)(i) INDIA CODE (2005), available at http://ipindia.nic.in/ipr/patent/patent_Act_1970_28012013_book.pdf.



B. Consumers Matter

For markets to flourish, consumers must have trust in the goods they buy. No one knowingly buys a counterfeit drug with the expectation that it will not work. Goods and services that physically harm people are not part of an effectively working marketplace. Thus, the woman who sells food to the workers in the informal market in Sao Paolo does not knowingly sell them contaminated food. Similarly, sellers of pirated videos in the indoor markets of Lima do not sell defective DVDs.

Considering that consumers' needs are a driving force of deviant globalization, intellectual property enforcement models change in the face of their interests. They become more focused on methods for dealing effectively with the unauthorized manufacture and distribution of physically harmful goods. Thus, counterfeit medicines, ingestible goods, cosmetics, automobile parts, and other products whose quality is critical to public health and safety will be the subject of strong sanctions that remove such goods from the marketplace. As a creature of cross-border trade, deviant globalization would demand a greater focus on international enforcement efforts. Customs standards would be revised to permit the seizure of harmful counterfeit goods in transit. Presently, TRIPS does not require in-transit enforcement measures. Even the Anti-Counterfeiting Trade Agreement (ACTA) only treats in-transit enforcement as an optional choice.⁴¹ By focusing on efforts to combat the illegal trade of physically harmful goods, I do not mean to ignore the economic harm that may be caused by the presence of non-physically harmful goods in the marketplace. Such harm includes the failure to develop formal markets and their supporting infrastructure, and the loss of economic opportunities that may result. But such harm is not generally of concern to the participants in the *informal* market. Moreover, its more intangible nature makes it harder for local enforcement officials to justify time and expenditures protecting against such losses.

When dealing with the issue of pirate websites, deviant globalization would require a more nuanced enforcement approach than outright prohibition. Purveyors of potentially harmful goods, such as counterfeit drugs, would be subject to removal and coordinated efforts to prevent their reappearance on the Internet. This could include an array of methodologies such as access blocking by ISPs or better monitoring

⁴¹ Anti Counterfeiting Trade Agreement (ACTA), art. 16(2), Oct. 1, 2011, available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf ("A Party *may* adopt or maintain procedures with respect to suspect in-transit goods") (emphasis added) (not yet entered into force).





of the accuracy of domain name registrant identities for commercial websites in order to support stricter prohibitions on re-registration of prohibited websites.

In contrast, websites that offer unauthorized access (streaming or downloading) might be subject to compulsory licenses. Such licenses maintain consumer access rights while assuring reasonable compensation to the copyright holder. The costs of these compulsory licenses would be imposed on the *websites* distributing the infringing goods and *not* on individual end users. Admittedly consumers might ultimately bear the costs of such licenses through subscription fees and similar direct charges made by the affected websites. However, the indirect nature of the charge should lower any *individual* end user's costs by spreading the general costs across a broader field of paying consumers. Such a license would maintain the primary interest of the participants in deviant globalization in meeting consumer needs while recognizing the copyright owner's right to reasonable compensation.

Deviant globalization's focus on serving consumer interests supports an expansion of the ability to import parallel goods into the marketplace. The heart of the parallel market is the provision of goods and services at affordable prices to those under-served by traditional markets. For example, where an owner has already received adequate compensation for its software, the interests of deviant globalization would argue that international exhaustion should allow its importation and sale in other countries. Similarly, grey market versions of patented medicines should be allowed, as long as the efficacy of such drugs is unquestionable. In order to meet the efficacy concerns of consumers, definitions of acceptable grey market pharmaceuticals may need to be refined to assure that the sources for such goods are legitimate ones. Thus, the importation and sale of legitimate generic drugs should be permissible, while counterfeit goods (which are not subject to quality control) would remain excludable.

Despite the general focus on consumer access that deviant globalization supports, its foundation in market realities does not automatically grant a "free pass" to all unauthorized, non-physically harmful goods. Even pirate markets are divided into carefully differentiated segments. In Russia, vendors of shoddier goods are relegated to back stalls. Similarly, in China, electronic goods – which are presently in high demand – occupy the front stalls of night markets while plastic and neon souvenir goods occupy the outer edges.

The interests that arise from deviant globalization would support more nuanced distinctions in enforcement remedies for the provision of infringing goods. Deviant globalization does not assure automatic





compulsory licenses. To the contrary, in order to provide fair access to consumers, courts would be encouraged to make more realistic appraisals of the consumer need for low-cost compulsory licenses in the face of countervailing intellectual property owners' rights. Thus, medicine to treat pandemics or even diseases, such as diabetes, that affect the quality of life, or even its longevity, more likely would be subject to defensible compulsory licenses. By contrast, those medicines that treat male pattern baldness or offer cosmetic enhancements would be subject to injunctions and outright prohibitions. This segmented market approach would not be limited to medicines. In the area of copyright, compulsory licenses for operating software or smartphone technology would be more readily defensible than those that allow the continuing provision of illegal music, films, or videogames.

C. *Innovative Business Models Deserve Adequate Breathing Space to Flourish*

One of the strengths of deviant globalization is that it allows people at the lowest rung of economic development to earn a living through innovative actions. This "innovation" includes entrepreneurial innovation. Successful entrepreneurial innovation necessarily includes distributive processes and techniques as well as new goods and services. More effective support for distributive innovation under deviant globalization does not require that the needs of intellectual property owners be ignored or given short shrift. But it does require that their interests be re-balanced with those of sellers and consumers. Thus, present "free access" demands for the sake of encouraging innovation or creativity have less importance to deviant globalization than the economic significance of permitting alternative avenues of distribution.

The so-called rogue sites that offer either unauthorized downloadable or streaming, unedited copyrighted content are located at the point of greatest intersection between deviant and traditional globalization. There is no question that rogue sites that provide copyrighted content in a digital format represent a form of *distributive* innovation that provides goods that consumers demand, in a form and with use limitations that meet their reasonable needs. At the same time, compensation flow considerations require that copyright owners receive *some* compensation for the communication to the public of their content.

Present efforts that focus on going after the compensation earned by rogue website owners and third parties who provide advertising and sales support for such compensation streams reflect deviant globalization interests. There is little doubt that the creation of P2P file trading software





represented a distributive innovation. It also led directly to an exponential growth in digital piracy. Yet, as early decisions such as *Napster*⁴² and *Grokster*⁴³ in the United States recognized, the innovation itself was desirable. It is the use of that innovation to create a rapidly expanding informal digital market that has earned the wrath of copyright holders.

Yet, deviant globalization supports such innovations. It also supports consumer access *and* reasonable compensation streams. By focusing on compensation streams, deviant globalization puts the economic viability of piracy into play, *not* its moral necessity.

As economics become the focal point, differences in treatment between websites providing access to useful technologies, as opposed to those that merely meet consumer desires for inexpensive luxury or non-essential goods, would become a critical factor. While consumers may desire free and unlimited access to movies and music, these demands for access raise distinctly different economic and social justification issues than demands for similar access to computer operating software or smartphone technologies. The first may be dealt with by compensation streams to intellectual property owners. These compensation streams do not necessarily require that end users be the source of such compensation. To the contrary, recent efforts in the United States to deal with rogue websites have focused on potential liability of advertising agencies, credit card companies, and others who earn money as a direct result of the provision of pirated copyrighted content as potential sources for compensation.⁴⁴ This technique has been referred to as “following the money trail.” It reflects the deviant globalization interest in low-priced consumer access by placing the burden of compensation on third-party providers as opposed to end users. Such compensation streams might ultimately raise consumer costs. However, their indirect nature makes it more likely that such costs would be lower than direct end user compensation obligations.

In contrast, access to critical computer and digital technologies raise social justice concerns that would focus directly on consumer compensation. Such compensation models would reflect the balance struck by the court in *Natco*⁴⁵ between consumer access and sufficient returns on investment to support ongoing innovation.

Deviant globalization interests would support micropayments, limited field, limited country, copy forward, and other technologically supported limitations and methodologies to rationalize compensation

⁴² *A&M Records Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

⁴³ *Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁴⁴ See Online Protection and Enforcement of Digital Trade Act (OPEN Act), H.R. 3782, 112th Cong. (2012).

⁴⁵ *Natco v. Bayer*, *supra* note 34.





streams and access rights. New compensation flows to support creative uses of copyrighted works to produce goods and services that form part of an economically viable new market will be a cornerstone of the new focus that deviant globalization brings to distributive innovations. Utilization of Western movies to create a local movie industry, such as in Nigeria (Nollywood),⁴⁶ creates new products for underserved markets. Some form of compensation may be required for such derivative works. For example, adapting a novel into a screenplay may require compensation. In contrast, creating parodies or other original (non-superseding) derivative works may not require such compensation under deviant globalization norms.⁴⁷ But as opposed to the injunctive relief and punitive monetary damages awarded under IP-centric models, compulsory licenses, micropayments, and post-production royalty streams are favored under deviant globalization. In particular, post-production royalty streams support local development by sharing investment risks with intellectual property owners. Under this model, only successful works would give rise to a compensation obligation.

Finally, deviant globalization supports expanded exceptions that give new business models room to develop before intellectual property owners close them down. An interesting foreshadowing of this treatment occurred in a case in the United States involving a claimed fair use defense to infringing conduct based on unauthorized P2P file trading.

In *Sony BMG Music Entertainment v. Tenenbaum*, the court specifically recognized that copyright infringement based on new business models might qualify for a fair use defense until the issues surrounding such new uses have been clarified:

The Court can also envision a fair use defense for a defendant who shared files during a period before the law concerning file sharing was clear and paid outlets were readily available.... A defendant who shared files online during this interregnum, sampling the new technology and its possibilities, but later shifted to paid outlets once the law became clear and authorized sources available, would present a strong case for fair use.⁴⁸

The cross-border nature of the borrowings of Nigeria, like the information market of deviant globalization, would also demand new considerations

⁴⁶ See Olufunmilayo Arewa, *The Rise of Nollywood: Creators, Entrepreneurs, and Pirates* (UC Irvine School of Law Research Paper, No. 2012-11, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011980 (examining the role of piracy in the creation of the Nigerian film industry and in its distribution networks).

⁴⁷ See Doris Estelle Long, *Dissonant Harmonization: Limitations on Cash'n Carry Creativity*, 70 ALB. L. REV. 1163 (2007) (advocating a more nuanced approach to the right of copyright owners' ability to control adaptive uses of their works).

⁴⁸ *Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217, 236 (D. Mass. 2009).





of the territorial boundaries of present collective rights licensing models. At a minimum, more joint cross-border representation agreements and regional repertoire databases would be created. Ultimately, a global database that would provide licensing information for all musical and video works, including sound recordings would be created. Experimentation in this area is already underway. It should gain momentum as new models dealing with such diverse issues as collective licensing, orphan works, and webcasting come into existence.

D. Markets Necessarily Require Regulation

Even in the “wild frontier” of deviant globalization, rules exist. They may be unspoken, but they are based on the need to allocate space and supply lines in a transparent manner. Critically, these regulations often represent consensus-based concepts of economic and/or social fairness. In his discussion of the System D market in Sao Paulo in *Stealth of Nations*,⁴⁹ Neuwirth describes a woman who cooks pastries at night and arrives in the early morning hours to sell those pastries and hot coffee to the early traders in the underground wholesale market that occurs before the morning street vendors arrive. She sells the goods out of the back of her truck, which is always parked in the same location. When Neuwirth asked her about the availability of the spot every day, she told him that she “holds it by custom and ... will continue to operate there until she chooses to leave the business.”⁵⁰ There are rules – even in the markets of deviant globalization. “Vendors pay no rent to occupy the curbside, and there’s no protection money, taxes, or other fees ... You simply ask, ‘Can I set up next to you?’ and if it’s okay, you do it. (If it’s no, and you set up anyway, you will surely have a fight.)”⁵¹ Regulation is not the enemy of deviant globalization. Irrational regulation is. Under deviant globalization, such irrationality would be minimized by guiding norms that place economic opportunity for all – intellectual property owners, developing economies, and consumers – at the center of the analysis.

IV. Conclusion

At its heart, deviant globalization – with its focus on the operational and economic norms of the informal economy – is about balancing the competing interests of intellectual property owners, consumers, and the

⁴⁹ NEUWIRTH, *supra* note 17.

⁵⁰ *Id.* at 15.

⁵¹ *Id.* at 14–15.





general public in an economically and socially just manner. In other words, deviant globalization requires attention to a host of diverse interests, including, in particular, the consideration of the interests of the participants in the underground economy. Still, this does not mean that “pirate markets” should, or will, be allowed to flourish. It also does not mean that intellectual property owners necessarily lose control over their creative and innovative works. It *does* mean, however, that intellectual property owners’ interests will be balanced against the practical operating principles that have made deviant globalization such a long-lived market. Similarly, compensatory streams for the unauthorized use of intellectual property works will not disappear, but they may be adjusted to reflect the right of consumers and producers to ensure reasonable access to such works.

Perhaps most significantly, the interests of deviant globalization demand “elbow room” for new products and distributive techniques. As opposed to challenging these new techniques, deviant globalization demands rational accommodation or, in other words, awareness of, and likely the need to embrace, a larger array of diverse interests.

