

# Is it Time to Create New Geographies for Today's "Flexible" Intellectual Property Rights?

Doris Estelle Long\*

The substantive boundaries of intellectual property rights are rapidly shifting in the face of the dual demands of the digital environment and global trade. From access to medicines for patents, to free speech concerns for copyrights and noncommercial uses for trademarks, intellectual property rights as conceived in the 19<sup>th</sup> and 20<sup>th</sup> Centuries are undergoing a profound change.

Whether these changes are the result of the increasing international focus on "flexibilities,"<sup>1</sup> "resistance" to present intellectual property norms generally,<sup>2</sup> or an accommodation to the altered reality of the global digital environment in which many intellectual property rights now operate, there is no question that intellectual property rights, or more accurately the boundaries of those rights, are undergoing fundamental changes in the 21<sup>st</sup> Century. There is no question that it is time to reconsider the boundaries between access and protection established under present day international intellectual property instruments. Yet, as we consider the nature of the new geographies created by such reconsiderations, we need to determine to what extent the old geographies should remain. Should the territoriality-based norms established in the 19<sup>th</sup> Century give way to other bases? Or can "geography" serve, not merely as a metaphor, but also as a guiding paradigm, for future normative mapping activities?

## *1. The Flexible Boundaries of 21<sup>st</sup> Century IP "Geographies"*

Intellectual property rights boundaries have always been subject to a certain interpretive "wiggle room",<sup>3</sup> "constructive ambiguity",<sup>4</sup> or, the currently more prevalent term, "flexibility."<sup>5</sup> Even during the latter decades of the 20<sup>th</sup> Century, when international harmonization efforts were

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\* Professor of Law, Director of the Center for Intellectual Property, Information and Privacy Laws, The John Marshall Law School, Chicago, Illinois. Thanks to the participants of the Conference on Searching for the Boundaries of Intellectual Property Law, sponsored by the University of Hong Kong Faculty of Law, Peking University and Drake University Law School, The Geographies of Intellectual Property Conference, Birkbeck, University of London, and The Trans-Pacific Intellectual Property Roundtable, sponsored by the University of New South Wales for their helpful comments on ideas contained in this Article. As always, any errors belong solely to me.

<sup>1</sup> See, e.g., "Doha Declaration on the TRIPS Agreement and Public Health", November 14, 2001, WT/MIN(01)/DEC2.

<sup>2</sup> Ruth Okediji, "Public Welfare and the International Patent System", in Ruth Okeiji and Margo Bagley (eds), *Patent Law in Global Perspective* (Oxford: Oxford University Press, 2014).

<sup>3</sup> See Jerome Reichman, "From Free Riders To Fair Followers: Global Competition Under The Trips Agreement," 29 N.Y.U. J. Int'l L. & Pol. 11, 28 (1997), p. 28.

<sup>4</sup> Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Oxford: Oxford University Press 2001), p.7.

<sup>5</sup> Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2<sup>SEP</sup>20 (November 14, 2001) (Paragraph 4).

arguably at their highest peak with the establishment of diverse European Union “harmonization” directives<sup>6</sup> and the negotiation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),<sup>7</sup> domestic policies were still recognized definitional modifiers of substantive obligations.

Although the term “flexibility” does not appear in the reported negotiating documents for TRIPS, the premiere international IP standardization instrument of the 21<sup>st</sup> Century, there is no question that TRIPS anticipated that its new substantive obligations would be subject to differing treatment among signatory Member Countries. Like harmonies in music, harmonized norms do not anticipate that all countries will apply identical tests and analyses. Instead, some (arguably predictable) level of domestic variation is not only anticipated, it is expected. The clearest example of such harmonization may be the three-part test for patentability established under Article 27 of TRIPS.

TRIPS Article 27 requires that member states provide patent protection “for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.”<sup>8</sup> Footnote five clarifies this new three-part test: “For the purposes of this Article, the terms ‘inventive step’ and ‘capable of industrial application’ may be deemed by a Member to be synonymous with the terms ‘non-obvious’ and ‘useful’ respectively.”<sup>9</sup> Yet even in 1994 when TRIPS was signed, despite certain *similarities* between European Union and US patent practices, it was clear that the U.S. test for “non-obviousness” was not *identical* to the European Union test for “inventiveness.”<sup>10</sup>

Despite the consistent recognition that some level of interpretive flexibility was permissible even in the most allegedly harmonizing multilateral instruments, it is undeniable that demands for flexibility have increased over time. Domestically, in the United States, for example, new boundaries have arisen from the development of a “transformation” test for “fair uses.”<sup>11</sup> This

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<sup>6</sup> These Directives covered a wide-range of IP issues, including trademark harmonization, First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [European Trade Mark Directive], [1989] OJ L 40/1; computer software, Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [European Software Copyright Directive], [1991] OJ L 122/42 as amended; and biotechnology patents, Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [European Biotechnology Directive]. Many of these directives were amended in subsequent years but their basic role to harmonize intellectual property protections remains unaltered.

<sup>7</sup> 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].

<sup>8</sup> TRIPS, *supra* note 7, Art. 27(1).

<sup>9</sup> TRIPS, *supra* note 7, Art. 27(1) n.5.

<sup>10</sup> See John Richards, “Obviousness and Inventive Step -New Differences?,” available at [http://fordhamipconference.com/wp-content/uploads/2010/08/John\\_Richards\\_Obviousness\\_and\\_Inventive\\_Step\\_New\\_Differences.pdf](http://fordhamipconference.com/wp-content/uploads/2010/08/John_Richards_Obviousness_and_Inventive_Step_New_Differences.pdf) [Accessed February 25, 2015](outlining the on-going distinctions in the US and EU treatment of the “inventive step” - “nonobviousness” tests for patentability).

<sup>11</sup> I am using the U.S. term for what is generally referred to in other countries as “fair dealing” and is generally governed internationally by the three-step test codified in various multinational instruments, including Article 13 of TRIPS. TRIPS, *supra* note 7, Art. 13 (requiring Members to “confine limitations or exceptions to

“transformation” test under copyright has expanded the boundaries of the public domain. In *Author’s Guild, Inc. v. Hathitrust*,<sup>12</sup> the Second Circuit Court of Appeals found that a digital scanning project of several universities’ library collections, without the permission of the copyright owners of those works, qualified as a transformative, acceptable fair use:

[W]e conclude that the creation of a full-text searchable database [as a result of the scanning of the works in question] is a quintessentially transformative use... [T]he result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn. Indeed, we can discern little or no resemblance between the original text and the results of the HDL full-text search [that the project enables]....

There is no evidence that the Authors write with the purpose of enabling text searches of their books. Consequently, the full-text search function does not ‘supersede[ ] the objects [or purposes] of the original creation,’ *Campbell*, 510 U.S. at 579 (internal quotation marks omitted). The HDL does not ‘merely repackage[ ] or republish[ ] the original[s],’ or merely recast ‘an original work into a new mode of presentation,’ *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 143 (2d Cir.1998). Instead, by enabling full-text search, the HDL adds to the original something new with a different purpose and a different character.<sup>13</sup>

The decision by the U.S. District Court for the Southern District of New York demonstrated a similar treatment for Google’s digitization<sup>14</sup> project, describing Google’s use of the copyrighted works at issue as “highly transformative.”<sup>15</sup> Like the court in *Hathitrust*, the court in *Authors Guild, Inc. v. Google Inc.* emphasized that digitization “transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books. ... Google Books has created something new in the use of book text—the frequency of words and trends in their usage provide substantive information.”<sup>16</sup>

This transformation test has proven so wide-ranging, it has given rise to a new method for analyzing the adverse market impact of an unauthorized “transformative” use. This new market valuation tool effectively narrows a copyright holder’s ability to control derivative uses if they are found to be “transformative.” Market impact is one of the four required statutory factors courts must consider in the U.S. to determine fair use.<sup>17</sup> In *Bill Graham Archives v. Dorling*

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exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”).

<sup>12</sup> 755 F.3d 87 (2d Cir. 2014).

<sup>13</sup> *Authors Guild Inc. v. Hathitrust*, 755 F.3d 87, 97 (2d Cir. 2014).

<sup>14</sup> Like *Hathitrust*, Google scanned books from diverse university libraries with the permission of the libraries, which owned a copy of the work, but *without* the permission of the copyright holder of the scanned works.

<sup>15</sup> *Authors Guild, Inc. v. Google Inc.*, 954 F.Supp.2d 282, 291 (SDNY 2013).

<sup>16</sup> *Ibid.* at 291.

<sup>17</sup> 17 U.S.C. §107(4)(“the factors to be considered shall include...the effect of the use upon the potential market for or value of the copyrighted work”)

*Kindersley Limited*,<sup>18</sup> in deciding whether plaintiff's use of defendant's copyrighted posters as a time line in a biographical work on *The Grateful Dead* singing group qualified as an acceptable fair use, the court expressly rejected any attempt to demonstrate an adverse market impact based on lost licensing fees for such literary uses:

In the instant case, the parties agree that DK's use of the images did not impact BGA's primary market for the sale of the poster images. Instead, we look to whether DK's unauthorized use usurps BGA's potential to develop a derivative market... [W]e do not find a harm to BGA's license market merely because DK did not pay a fee for BGA's copyrighted images....Instead, we look at the impact on potential licensing revenues for "traditional, reasonable, or likely to be developed markets"... "[C]opyright owners may not preempt exploitation of transformative markets ...." *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 146 n.11 (2d Cir. 1998). Moreover, a publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images. Since DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees.<sup>19</sup>

This new flexibility is also strongly reflected in domestic law approaches to patent protection for pharmaceuticals. In India, for example, public accessibility is part of the statutory analysis for determining if a compulsory license is warranted for patented pharmaceuticals.. Section 84 (1)(b) of the Indian Patent Act expressly provides that such licenses can be granted on evidence "that the patented invention is not available to the public at a *reasonably affordable price*."<sup>20</sup>

In *Natco Pharma Ltd. v. Bayer Corporation*,<sup>21</sup> the Comptroller of Patents granted an Indian company, Natco Pharma Ltd, a compulsory license to sell Sorafenib, the generic version of the German-based Bayer AG's patented kidney and lung cancer drug Nexavar. Such grant was based in part on the drug's high prices in India. Bayer charged US\$5,600 per month for the drug; Natco charged \$177 per month. In establishing the lack of affordability under Section 84, the Controller stressed the limited amount of the drug Bayer sold in India compared to the relatively higher 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."<sup>22</sup> Bayer countered that its drug was reasonably priced because it was charging the same price in all countries, but the Controller rejected that defense. Although he recognized that patentees are entitled to charge

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<sup>18</sup> 448 F.3d 605 (2d Cir. 2006).

<sup>19</sup> *Ibid.* at 614 – 615. See also *Authors Guild Inc. v. Hathitrust*, 755 F.3d 87, 100 (2d Cir. 2014)("[I]t is irrelevant that the Libraries might be willing to purchase licenses in order to engage in this transformative use (if the use were deemed unfair). Lost licensing revenue counts under Factor Four only when the use serves as a substitute for the original and the full-text-search use does not.")

<sup>20</sup> India Patent Act of 1970 as amended, s. 84 (1)(b)(Emphasis added).

<sup>21</sup> *Natco Pharma Ltd. v. Bayer Corporation, Application for Compulsory Licenses Under Section 84(1) of the Patents Act, 1970, in Respect of Patent No. 215758* (2012), available at [hkindia.com/images/compulsory.pdf](http://hkindia.com/images/compulsory.pdf) [Accessed October 1, 2014; February 2, 2015].

<sup>22</sup> *Ibid.* at 36.

prices necessary to recoup their investment, the Controller, nevertheless, found that Bayer had failed to provide sufficient evidence regarding Bayer's investment recoupment. Ultimately, the Controller granted Natco a non-exclusive license to manufacture and sell the drug in India for \$177 per month in exchange for a 6% royalty.

Internationally the strongest evidence of the growing role of public access as a new modifier for the boundaries for IP geographies may be the creation of Article 31*bis* as a protocol to the TRIPS Agreement.<sup>23</sup> Established in 2005 in direct response to the Doha Declaration on the TRIPS Agreement and Public Health,<sup>24</sup> Article 31*bis* permits eligible countries the right to grant compulsory licenses for patented pharmaceuticals for purposes of importation where the granting country lacks sufficient manufacturing capacity to produce the drug. Such compulsory licenses must be limited to "only the amount necessary to meet the needs of the eligible importing Member [so long as] the entirety of this production shall be exported to the Member..."<sup>25</sup> Paragraph 5 of Preamble stresses that Article 31*bis* is "without prejudice to the rights, obligations and *flexibilities* that Members have under the provisions of th[e] TRIPS Agreement ... including those reaffirmed by the [Doha Declaration] on Public Health and to their interpretation."<sup>26</sup>

## 2. *The Geography of "Public Access"*

With such a strong emphasis on public access, choosing to create a new normative standard that secures such access on a reasonable basis would appear an undeniable next step. Yet a new normative geography based on the foundational principle of public access (over other principles, such as providing incentives for innovation) may not be necessary or even desirable. Before reworking present boundaries, based on 19<sup>th</sup> Century territoriality-based norms,<sup>27</sup> what I consider the legal equivalent of physical geographies, we must be certain that such alterations are required to secure to countries the necessary domestic flexibility to meet the demands of the 21<sup>st</sup> Century.

Although there is an increasing public drumbeat underscoring today's need for greater public access, the battle between protectionism and access is not a new one. To the contrary, concern over public access formed an ongoing source of tension during the development of the key 19<sup>th</sup> Century instruments governing international IP protection even today. Both the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),<sup>28</sup> governing copyright, and the Paris Convention for the Protection of Industrial Property (Paris

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<sup>23</sup> "Amendment of the TRIPS Agreement" (December 8, 2005) WT/L/641, Art.31*bis*.

<sup>24</sup> See, e.g. "Doha Declaration on the TRIPS Agreement and Public Health", November 14, 2001, WT/MIN(01)/DEC2.

<sup>25</sup> "Amendment of the TRIPS Agreement," *supra* note 23, Art.31*bis*.

<sup>26</sup> *Ibid.* (Emphasis added).

<sup>27</sup> See discussion *infra* Part 4.

<sup>28</sup> Berne Convention for the Protection of Literary and Artistic Works, July 14, 1967, art. 2, 828 U.N.T.S. 221.

Convention),<sup>29</sup> governing patents and trademarks, marked an undeniable increase in international protectionism for intellectual property rights. Yet the history of the international intellectual property norms memorialized in those Conventions from the 19<sup>th</sup> Century underscores that the standards contained in them did not represent an *inevitable* protectionist choice. To the contrary, the myth of the monolithic protectionism of these 19<sup>th</sup> Century instruments ignores the strong anti-protectionist forces at work when they were being established. In fact several countries such as the Netherlands and Switzerland, rejected patent protection because of its perceived adverse impact on innovation and commercial development.<sup>30</sup>

In Great Britain anti-patent narratives focused on the adverse effect of patents on British industrial growth:

The abolitionists contended that patents for inventions obstructed the free flow of information, restricted adoption of new technology and slowed the pace of industrialization... [ J.E. Thorold] Rogers [an occasional Professor of Political Economy at Oxford]...emphasized the obstructive potential of patents, likening the patentee to a squatter on the public domain, ‘squatting upon materials and powers which are the property, not of individuals, but of the human race.’ ... Most abolitionists were willing to concede that such artificial incentives [as patent protection] might have been necessary in pre-Industrial Britain...they argued that patents had served their purpose and now could be safely disposed of.<sup>31</sup>

Germany demonstrated a similar anti-patent stance with several trade associations and chambers of commerce in Germany in 1893 condemning patents of invention as “injurious to common welfare.”<sup>32</sup>

Although the inclusion of international standards for patenting that appeared in the 1883 Paris Convention can be seen as evidence of the failure of the anti-patent movements, the Paris Convention still allowed countries a flexible approach under which they could reject patent protection to achieve goals of public access. Unlike the TRIPS Agreement, established over a century later, the Paris Convention of 1883 did not *obligate* countries to protect inventions under patent. It merely required national treatment for those countries that chose to do so.<sup>33</sup> Thus, for example, England declined to permit patents for chemicals in order to challenge Germany’s

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<sup>29</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, revised at Stockholm July 14, 1967, 828 U.N.T.S. 305.

<sup>30</sup> Christopher May & Susan Sell, *Intellectual Property Rights: A Critical History* (2006), p. 112 (describing the Dutch’s rejection of patent protection as “an obstacle to the growth of industry”).

<sup>31</sup> Maureen Coulter, *Property in Ideas: The Patent Question in Mid-Victorian Britain* (1991), pp. 88-89.

<sup>32</sup> Fritz Machlup, “An Economic Review of the Patent System, Study of the Subcommittee on Patents, Trademarks and Copyrights of the Committee of the Judiciary”, available at <https://mises.org/etexts/patentsystem.pdf> [Accessed October 7, 2014], p. 4.

<sup>33</sup> Paris Convention for the Protection of Industrial Property 1883 (1883)(Paris Convention, Original), Art. 2.

dominance until the early decades of the 20<sup>th</sup> Century.<sup>34</sup> Similarly, many countries eschewed patent protection for pharmaceuticals until the TRIPS Agreement obligated such protection.<sup>35</sup>

The Paris Convention contained other accommodations to access demands. Even the national treatment obligation for patents contained in Article 2 of the Convention was strictly limited by the requirement that inventors comply with any “formalities and conditions” the country in which protection was sought imposed, including critically, registration and examination obligations.<sup>36</sup> Countries were also granted the right to obligate patent holders to practice their invention within the territorial boundaries of the granting country in order to maintain patent rights. Article 5 expressly provided that patents remained under any working obligation [“l’obligation d’exploiter son brevet”] that might exist in the country where protection was sought.<sup>37</sup> The obligation to “work” or practice the patented invention within the country allowed sovereigns to impose compulsory licenses, and ultimately to revoke the patent grant if the owner failed to work the invention within a particular period of time. A local working requirement assured domestic access to foreign technologies beyond that obtainable from the mere disclosure contained in the patent grant.

These rights were firmly bounded by the dominant philosophy at the time of the Paris Convention’s foundation – Neo-Imperialism and the strong relationship between law and sovereign authority.<sup>38</sup> This focus on territory as the basis for sovereign rights over intellectual property underscores the cultural role that “geography” continues, and should continue, to play in reconsidering IP rights boundaries for the 21<sup>st</sup> Century. This “geography” is not necessarily the “geography” of the physical world - the map of the mountains, rivers, deserts and seacoasts of the globe – although physical geography may play a role in such activities. Instead, it is the legal “geography” created by the revised norms established in response to the demands of the 21<sup>st</sup> Century.

### 3. *Geography, Destiny and Intellectual Property Rights*

Geography has often been defined as “destiny” particularly in connection with the industrial development of a particular country. Jared Diamond, one of the foremost exponents on geographic industrial determinism of the 1980s, rejected cultural or other explanations to support historic distinctions in industrial development in favor of the simple impact of physical geography:

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<sup>34</sup> B.Z. Kahn, “Intellectual Property and Economic Development: Lessons from American and European History,” Study Paper 1a, Commission on Intellectual Property Rights (London: 2002), p. 14

<sup>35</sup> TRIPS, *supra* note 7, Art. 27(1). See World Health Organization, “Access to Medicines, Intellectual Property Protection: Impact on Public Health” (WHO 1999), available at <http://www.who.int/medicines/areas/policy/who-dap-98-9rev.pdf?ua=1> [Accessed February 25, 2015], pp. 19-20.

<sup>36</sup> Paris Convention, Original, *supra* note 29, Art. 2.

<sup>37</sup> Paris Convention, Original, *supra* note 29, Art. 5.

<sup>38</sup> Doris Estelle Long, “Exposing the Processes of Empire in the International Protection of Intellectual Property” in Debora Halbert and William T. Gallagher (eds), *Intellectual Property in Context: Law and Society Perspectives* (Cambridge University Press, 2015).

History followed different courses for different peoples because of differences among peoples' environments....In short, Europe's colonization of Africa had nothing to do with differences between European and African peoples themselves.... Rather, it was due to accidents of geography and biogeography—in particular, to the continents' different areas, axes, and suites of wild plant and animal species. That is, the different historical trajectories of Africa and Europe stem ultimately from differences in real estate.<sup>39</sup>

Beyond industrial determinism, physical geography has also effected cultural development. Mountains, deserts and jungles generally serve to isolate communities from one another while rivers and flatlands generally facilitate cross-border and cross-cultural exchanges. Thus, for example, the traditional indigenous textiles of the Kuna Yala of the San Blas Islands of Panama reflect a culture developed apart from foreign contact until the colonialization of the Spanish Empire in the 16<sup>th</sup> Century. These indigenous textiles, referred to as “molas”, consist of elaborate embroidery designs created by a reverse appliqué pattern historically used on dresses and blouses.<sup>40</sup> By contrast, the traditional embroidery of Gujarat, India, reflects India's longstanding role as a trade cross-roads. Created from cotton grown in the region, the embroidered images incorporate a wide-range of both geometric designs and physical elements, including in the abhala style mirrors through-out the design.<sup>41</sup>

Geographic determinism remains a potent, if somewhat altered, force today. As Robert Kaplan in his latest work *THE REVENGE OF GEOGRAPHY* warns:

[R]ather than eliminating the relevance of geography, globalization is reinforcing it. Mass communications and economic integration are weakening many states, exposing a Hobbesian world of small, fractious regions. Within them, local, ethnic, and religious sources of identity are reasserting themselves, and because they are anchored to specific terrains, they are best explained by reference to geography. Like the faults that determine earthquakes, the political future will be defined by conflict and instability with a similar geographic logic. The upheaval spawned by the ongoing economic crisis is increasing the relevance of geography even further, by weakening social orders and other creations of humankind, leaving the natural frontiers of the globe as the only restraint.<sup>42</sup>

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<sup>39</sup>Jared Diamond, *Guns, Germs and Steel: The Fates of Human Societies* (New York: W. W. Norton & Company, 1991), pp. 25 & 401.

<sup>40</sup> See generally Mari Lyn Salvador, “Kuna Women's Arts: Molas, Meaning, and Markets”, in Eli Bartra (ed), *Crafting Gender: Women and Folk Art in Latin America and the Caribbean* (Durham: Duke University Press, 2003), p. 47 (discussing Kuna Yala clothing designs and techniques). For pictures of traditional and nontraditional mola patterns, see Maricel E. Presilla, *Mola: Cuna Life Stories and Art* (New York: Henry Holt and Co., 1996).

<sup>41</sup> Gujarat's textile handicraft, a legacy of Indian culture, available at <http://blog.indianeagle.com/2013/10/26/gujarats-textile-handicraft-a-legacy-of-indian-culture> [Accessed October 1, 2014].

<sup>42</sup> Robert Kaplan, “The Revenge of Geography”, *Foreign Policy*, 96 (May/June 2009). Kaplan expanded these views in his subsequent work *The Revenge of Geography* (New York: Random House, 2012), pp. 34-35.



Geography similarly remains a viable basis for reconsidering IP rights boundaries of IP rights in the 21<sup>st</sup> Century. Although I do not believe that geography is an immutable determiner of fate, there is no question that physical geography has played a role in the creation of disparate IP systems, and continues to play a role today. The modern intellectual property laws and treaties that shape current debates over IP geographies grew up largely in the cauldron of Western Europe under the combined forces of the Industrial Revolution, 19<sup>th</sup> Century Neo-Imperialism and the global trade that they engendered.<sup>43</sup> The current impact of geography on intellectual property systems is amply demonstrated by countries such as China, Brazil and India where stronger IP enforcement exists along the developed coastal areas, and is largely non-existent in the interior regions where geography has given rise to a different set of factors to impede its protection.

Beyond physical limitations on enforcement, geography also gave rise to cultural limitations on such enforcement. In one of the earliest, most recognized, works in the field, William Alford's *A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* underscored the impact of Confucianism on IP protection in China. He contrasted Europe's "notion that authors and inventors had a property interest in their creations that could be defended against the state,"<sup>44</sup> with China's continued practice "to regulate this area predominantly in terms of however best to maintain the state's authority."<sup>45</sup> Alford claimed that Confucianism explained these distinctions: "Lying at the core of traditional Chinese treatment ... was the dominant Confucian vision of the nature of civilization and of the constitutive role played therein by a shared and vital past .... Simply stated, the need to interact with the past sharply curtailed the extent to which it was proper for anyone other than persons acting in a fiducial [sic] capacity to restrict access to its expressions."<sup>46</sup>

Although Alford's view of the inherent cultural conflicts between Confucianism and intellectual property rights has been subsequently questioned,<sup>47</sup> his contention that cultural differences lie at the heart of distinctions regarding the degree and scope of protection afforded intellectual property rights in various countries remains potent today. These distinctions are not limited to East-West differences in culture. To the contrary, they underscore some of the critical differences in protection that have developed among the West as well. The history of IP Dispute Settlement proceedings before the World Trade Organization is rife with disputes arising

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<sup>43</sup> See generally Christopher May and Susan Sell, *Intellectual Property Rights: A Critical History* (Boulder: Lynn Rienner Publishers Inc, 2006); Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge: Cambridge University Press, 2006); Doris Estelle Long, "Exposing the Processes of Empire in the International Protection of Intellectual Property," *supra* note 38.

<sup>44</sup> William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford: Stanford University Press, 1995), p. 18.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid* at pp. 19-21.

<sup>47</sup> See Peter K. Yu, "Intellectual Property and Asian Values," 16 MARQ. INTELL. PROP. L. REV. 329 (2012), pp. 340-349.

between the United States and the European Union.<sup>48</sup> At the core are philosophic differences about the nature and scope of intellectual property rights.

#### 4. *Geography, Territory and 19<sup>th</sup> Century “Flexibilities”*

Beyond its role in diverse access and development trends, “geography” has historic normative claims that support its adoption as the continuing paradigm for establishing 21<sup>st</sup> Century IPR boundaries. Born during the 19<sup>th</sup> Century when Neo-Imperialism flourished, both the Berne Convention and the Paris Convention reflect the philosophic foundations of Neo-Imperialism in the strong relationship established between IP rights and the sovereign authority of the country in which the right was sought to be protected.<sup>49</sup> Both Conventions embraced national treatment as a *plurilateral* obligation,<sup>50</sup> yet this advance was tempered by the continuing recognition of sovereign power over the terms on which such national treatment would be extended.

Article 2 of the 1886 Berne Convention premised national treatment on “the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work.”<sup>51</sup> Similarly, enforcement of the rights granted under the Convention, including seizure of pirated goods, was expressly subject to the domestic legislation of the country where such seizure was sought.<sup>52</sup> Even in areas where substantive standards were established, such as in the definition of a copyright protectable work under Article 4 of the Berne Convention,<sup>53</sup> parties were free to maintain domestic variations in the types of works for which protection would be granted, particularly in connection with newly emerging technologies, and commercially useful applications of copyrighted works to marketed goods, including, for example, applied art and cinematography.<sup>54</sup>

Industrial property protection under the Paris Convention reflected an even greater affirmation of the power of sovereigns over the scope of protection afforded IP within their

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<sup>48</sup> See, e.g., “United States – Section 110(5) of the US Copyright Act”, Report of the Panel, June 15, 2006, WT/DS/1601R.

<sup>49</sup> Long, “Exposing the Processes of Empire in the International Protection of Intellectual Property,” *supra* note 38.

<sup>50</sup> Convention, Original, *supra* note 33, Art. 2; Berne Convention for the Protection of Literary and Artistic Work 1883 (Berne Convention, Original), Art. 2.

<sup>51</sup> Berne Convention, Original, *supra* note 50, Art. 2. The ultimate elimination of formalities as a limitation on domestic copyright protection occurred during the Berlin Revision in 1908. See Berne Convention for the Protection of Literary and Artistic Works, 1886 (Berlin Act, 1908), Art. 5(1).

<sup>52</sup> See, e.g., Berne Convention, Original, *supra* note 50, Art. 12 (requiring the seizure of pirated goods “on importation” but providing that such seizure “take place in accordance with the domestic legislation of each country.”). The reliance on domestic legislation for accomplishing seizures of pirated goods has been retained to the present day. Berne Convention, Paris Act, Art. 16(3).

<sup>53</sup> Berne Convention, Original, *supra* note 50, Art. 4.

<sup>54</sup> Compare Berne Convention, Original, *supra* note 50, Art. 4 (no listing of applied art as covered copyrightable work) with Berne Convention, Berlin Act 1908, Art. 4 (adding to the list of protected works a special exception for “works of art applied to industrial purposes” which only need to be protected “so far as the domestic legislation of each country allows”).

territories.<sup>55</sup> Yet despite the strong territorial nature of intellectual property rights in the 19<sup>th</sup> Century, there was already evidence that such territoriality was giving way in the face of the demands of international trade. Technology similarly eroded the utility of “territory” as a foundational principle. Territoriality for trademarks eroded in the face of domain names whose global utility demanded an international solution. Copyrights became global communication tools as user-generated content flooded the internationally accessible media of digital communications.

These erosions of earlier territorially-bounded rights, combined with access and social justice demands for flexibility, necessitates a revised “map” for intellectual property rights. Yet in creating such a new map we must be careful to avoid simply wiping the slate clean and starting over. Much of the present political turmoil we face today comes from global powers treating the physical map of the world as one without recognizable pre-existing borders.<sup>56</sup> We should not apply this same misguided approach to the present map of intellectual property rights. To the contrary, there are many lessons to be learned from the battles in the 19<sup>th</sup> Century that can help ensure that the norms we create today strike a balance between access and protection that will avoid the problems of the perceived protectionist past.

#### 5. *Four Lessons in Crafting a New IP Rights Geography*

*Lesson One. Territorial-based rights do not guarantee monolithic pro-protectionist regimes.* The Berne and Paris Conventions of the 19<sup>th</sup> Century contained critical access protection measures that should be reconsidered and reinvigorated. Among one of the most critical provisions for reconsideration is the in-country working obligation imposed on domestic patents in Article 5 of the Paris Convention. Tied to the benefits of domestic patent disclosures, working obligations support the technology transfer goals at the heart of today’s social justice demands.

Even TRIPS, the most protectionist multilateral IP treaty to date, actually establishes a fair use/fair dealing right for patents that should be reconsidered and re-activated. In language that tracks the fair dealing provisions of Article 13<sup>57</sup> for copyright, Article 30 provides:

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.<sup>58</sup>

Such “fair dealing” provisions could be applied domestically to expand acceptable uses of a patented invention, particularly since Article 30 allows consideration of “the legitimate interests

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<sup>55</sup> See discussion *supra* Part 2.

<sup>56</sup> See David Fromkin, *A Peace to End All Peace: The Fall of the Ottoman Empire and the Creation of the Modern Middle East* (New York: Holt Publishing Co. 1989).

<sup>57</sup> TRIPS, *supra* note 7, Art. 13.

<sup>58</sup> TRIPS, *supra* note 7, Art. 30.

of *third parties*.”<sup>59</sup> Such third parties could include generic manufacturers and patients among others.

*Lesson Two. Neither access nor protection is an unbounded benefit.* It is the balance between the two that provides the most rational boundaries. Such balances may be better achieved by providing tests, similar to Articles 13 and 30 of TRIPS that recognize the need to balance competing interests to reach an equitable result.<sup>60</sup> Those who support access must also recognize that creators and inventors share the same need to secure income from their work as do those who would use their works and inventions. We should focus on articulating factors and norms for *balancing* rights. Without such balance, no defensible international mapping norm is possible.

In crafting these new balances, as I have advocated elsewhere, we should be willing to adopt new measures and factors. In particular, there are significant lessons that can be adapted from the informal market, what I label “deviant globalization” that could help re-balance compensation and access rights in ways that acknowledge compensation rights while assuring access.<sup>61</sup>

*Third Lesson. The Economy Matters.* Although many factors contributed to the eventual failure of the anti-patent movement of the 19<sup>th</sup> Century, one of the most significant factors was the 1873 financial crisis. It made the free trade needs that supported an absence of patent protection appear to be a failed policy.<sup>62</sup> The successful emphasis by the pro-patent forces on the *economic* value of patents ultimately mustered the necessary support across a broad array of interests in favor of stronger patent protection in the 19<sup>th</sup> Century. This would suggest that while access based on free speech and other non-economic social justice demands may provide a powerful ethical basis for greater access to intellectual property, a focus on the developmental benefits of such increased access may ultimately prove a more convincing basis for revising presently protectionist norms.

*Fourth Lesson. Icons Help Promote Acceptance of Normative Changes.* The anti-patent battles of the 19<sup>th</sup> Century teach us that icons matter in mustering the public support required to achieve a re-working of IP geographies. The perceived need for greater protection of local industry in the form of heightened patent protection was supported by the increasing number of technology expos that stressed the significance of innovation to progress. These expos also demonstrated that such progress was largely within the hands of large companies such as Siemens Co., The Edison Electric Company, and Farbenfabriken vorm. Friedr. Bayer & Co. These companies were generally helmed by “myth-making inventors” such as Thomas Edison and Werner Siemens. These men fueled the myth of the Heroic Inventor which in turn fueled

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<sup>59</sup> TRIPS, *supra* note 7, Art. 30 (Emphasis added).

<sup>60</sup> TRIPS, *supra* note 7, Arts. 13 & 30.

<sup>61</sup> Doris Estelle Long, “Deviant Globalization: The Next Step in the Multilateral Protection of Intellectual Property,” 2 NORDIC J. COM. L. 1 (2012).

<sup>62</sup> Markus, Lang, “The Anti-Patent Movement Revisited: Institutional Change and Cognitive Frames in Nineteenth Century Germany,” available [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1695437](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1695437) [Accessed October 7, 2014], p.19.

the perceived need for patent protection to encourage such “heroic” efforts.<sup>63</sup> Similar icons would be helpful in promoting the benefits of greater access.

### *Conclusion*

Far from being an outdated paradigm, territorially-based geographies remain a powerful starting point for creating new IP rights boundaries in the face of altered 21<sup>st</sup> Century demands for greater public access. The members of what I refer to as the “Developed South,” China, India and Brazil are already using patent working obligations, well-known mark local knowledge requirements and traditional knowledge protections for local culture to deal with access issues. These provide useful models from which to craft useful future norms. These laws are not copies of one another. To the contrary, they represent a range of choices that are among the strongest representations today that geography remains a powerful factor in crafting access-based norms for the 21<sup>st</sup> Century. It may also remain a powerful paradigm for drawing the new boundaries for intellectual property rights today.

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<sup>63</sup> Long, “Exposing the Processes of Empire in the International Protection of Intellectual Property,” *supra* note 37.