A MANIFESTO ON WIPO AND THE FUTURE OF INTELLECTUAL PROPERTY

JAMES BOYLE[1]

ABSTRACT

In this Manifesto, Professor Boyle claims that there are systematic errors in contemporary intellectual property policy and that WIPO has an important role in helping to correct them.

I. INTRODUCTION

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. Traditionally, those laws have been made as state-facilitated contracts among affected industries. To the extent that "the public interest" ever figured in those discussions, it was assumed to be limited to the eventual ability to purchase the 'products' – drugs, films, books – whose creators and distributors receive their incentives from intellectual property rights. Yet intellectual property rights are not ends in themselves. Their goal is to give us a decentralized system of innovation in science and culture: no government agency should pick which books are written or have the sole say over which technologies are developed. Instead, the creation of limited legal monopolies called intellectual property rights gives us a way of protecting and rewarding innovators in art and technology, encouraging firms to produce quality products, and allowing consumers to rely on the identity of the products they purchased. The laws of copyright, patent and trademark are supposed to do just that – at least in some areas of innovation – *provided* the rights are set at the correct levels, neither too broad nor too narrow.

The World Intellectual Property Organization, or WIPO, has built itself around the attempt to promote and harmonize intellectual property laws internationally, though the organization's actual responsibility within the UN system is significantly broader: "promoting creative intellectual activity and . . . facilitating the transfer of technology related to industrial

---

 James Boyle is William Neal Reynolds Professor of Law at Duke Law School and the cofounder of the Center for the Study of the Public Domain. The ideas presented here are his alone and should not be attributed to any organization with which he is connected.

property to the developing countries in order to accelerate economic, social and cultural development." WIPO is only 34 years old, but its history stretches back 120 years, to the treaties of Paris and Berne. During that period, WIPO and the international secretariats that were its precursors have done work of great value. But times have changed since 1883, and even since WIPO itself was founded in 1970; at the same time, some of the oldest lessons of intellectual property law have apparently been forgotten or ignored. WIPO has a uniquely influential role to play in setting innovation policy worldwide. But fundamental changes need to be made in both role and attitude if the organization is to serve its real goal – the promotion of innovation in science, technology and culture for the benefit of the peoples of the world.

A. The Maximalist 'Rights Culture' and the Loss of Balance

- As intellectual property protection has expanded exponentially in breadth, scope and term over the last 30 years, the fundamental principle of balance between the public domain and the realm of property seems to have been lost. The potential costs of this loss of balance are just as worrisome as the costs of piracy that so dominate discussion in international policy making. Where the traditional idea of intellectual property wound a thin layer of rights around a carefully preserved public domain, the contemporary attitude seems to be that the public domain should be eliminated wherever possible. Copyrights and patents, for example, were traditionally only supposed to confer property rights in expression and invention respectively. The layer of ideas above, and of facts below, remained in the public domain for all to draw on, to innovate anew. Ideas and facts could never be owned. Yet contemporary intellectual property law is rapidly abandoning this central principle. Now we have database rights over facts, gene sequence, business method and software patents, digital fences that enclose the public domain together with the realm of private property . . . the list continues. And while these rules differ from nation to nation, the pressure is to harmonize them only *upwards*, adopting the strongest protections of facts, the longest copyright terms, the greatest scope of patentability.

- Intellectual property policy is in the sway of a maximalist "rights-culture" which leads debates astray. The assumption seems to be that to promote intellectual property is automatically to promote innovation and, in that process, the more rights the better. But both assumptions are categorically false. Even where intellectual property rights *are* the best way to promote innovation, and there are many areas where they are not, it is only by having rules that set the correct *balance* between the public domain and the realm of private property that we will get the

innovation we desire. Yet trade treaties require very high "floors" of international intellectual property protection while rarely imposing "ceilings," even though too *much* intellectual property protection is just as harmful, and as distorting of trade flows, as too *little*. This asymmetry is reflected in the international policy-making process.

- As an organization that specializes in the subject, WIPO should be comparatively immune from the fallacy that intellectual property policy should always aim towards stronger rights. But since the alternative is to make intellectual property policy through trade organizations in which the developing countries have even less influence, in many areas states have used WIPO to join, rather than to restrain, the intellectual property rights arms-race. This is deeply unfortunate, because it abdicates the role that WIPO could and should have. In fact, the maximalist agenda is not good policy *even for the developed world*. It represents the interests and attitudes of a remarkably narrow range of businesses, and does so with little democratic scrutiny; participation by civil society in the formulation of intellectual property policy has been far narrower than in any field of comparable importance. To have the specialized agency within the United Nations that is responsible for maintaining the correct balance in the intellectual property system, buy into this narrow and biased maximalist rights culture would be little short of a tragedy.

B. WIPO and International Development: One-Size ('Extra Large') Fits All?

- The history of development in intellectual property is one of change. The countries that now preach the virtues of expansive minimum levels of intellectual property protection, did not themselves follow that path to industrial development. Intellectual property protections changed over time, responding to the internal and external economic and technological context. Even within industries in particular developed countries, patterns of use of intellectual property typically vary as the industry matures and develops. Compare the freewheeling beginnings of Silicon Valley to its current well-stocked legal departments, for example. Given this history, one would expect that international intellectual property agreements, whether made through trade treaties or in the context of WIPO, would be highly sensitive to the idea that "one size does not fit all" when it comes to intellectual property policy and developing countries – who themselves are hardly a homogeneous group. Though WIPO and the Trade Related Aspects of Intellectual Property Rights (TRIPS) both make claims to flexibility, critics have pointed out that the actual practice has been to push the developing countries to adopt 'TRIPS-plus' levels of protection – while progress on

making humanitarian and regional exceptions, even ones clearly contained in international agreements, has been grudging. Again and again one finds the same assumptions: Rights are always the best path to innovation. More rights means more innovation. International treaties should set minimums (but not worry about maximums). One size fits all. And it is "extra large."

- This "one size fits all" attitude has been widely condemned, in both the developed and developing world. In the words of the UK Commission on Intellectual Property, "Intellectual property systems may, if we are not careful, introduce distortions that are detrimental to the interests of developing countries. Developed countries should pay more attention to reconciling their commercial self-interest with the need to reduce poverty in developing countries, which is in everyone's interest. Higher IP standards should not be pressed on developing countries without a serious and objective assessment of their impact on development and poor people. We need to ensure that the global IP system evolves so that the needs of developing countries are incorporated and, most importantly, so that it contributes to the reduction of poverty in developing countries by stimulating innovation and technology transfer relevant to them, while also making available the products of technology at the most competitive prices possible." Yet because the debate on intellectual property policy is so narrow – both in terms of intellectual assumptions and groups participating – the "one size fits all" attitude is often the one that dominates.
- Even where flexibility and exceptions are built into the international regime, developing countries often lack the technical and legal expertise to take full advantage of them. In intellectual property law, exceptions and limitations are deeply important. They are part of the policy rather than merely a suspension of it. Thus it is just as important to WIPO's mission to enable developing countries to make use of the flexibility built into the system as it is to persuade them to adopt and implement the latest draconian digital rights management legislation. In practice, however, the resources flow only one way.

C. WIPO in an Online World: Fighting Rather than Embracing the Net?

- WIPO now presides over the harmonization of a set of laws that regulate the citizen-publishers of cyberspace as well as protecting traditional publishers from competitors in the same industry. The reach of the law is markedly different: it regulates more people directly, regulates them with different effects, through different means, and implicating different norms. The acts that triggered intellectual property protection were once the preserve of major industrial concerns.

Those who were regulated knew the law intimately. They were well-represented, both as the law was made and as it was applied, and they were on guard against a well-understood set of economic threats from their horizontal competitors. But the new citizen-publishers of the Net are not well-represented in domestic and international councils and their interests are most certainly not limited to "passive consumption." They cannot meet the threat of a lawsuit or prosecution by turning to in-house lawyers. Can we therefore apply the assumptions of the last 120 years to the policy process that makes these rules? Or are we to say that their work, their contribution to culture and debate, is somehow unimportant?

- Intellectual property rules not only affect a different audience, they also directly implicate different values. More than ever, they have direct and measurable impact on privacy protection, freedom of expression, the design of the communications infrastructure and access to education and cultural heritage. If the policy process was ever merely a technocratic effort to facilitate the interests of affected industries, it cannot claim to be so any more. Yet policy making has been slow to keep up with these changes, both in process, and content.

- Debates at WIPO frequently seem blind to the change in the level of "spillover" of the agreements it promotes. Rules that were made to stop one Victorian publisher from copying another's book did little to put practical constraints on an anonymous letter writer campaigning on women's suffrage. But the practical and technological effects of intellectual property regulation of the Internet might very well have effects on a modern-day human rights activist seeking anonymity, or a whistle-blower trying to reveal some corporate misdeed. This does not mean that we should give up regulating the Internet. But it does mean that we must do so with far more sensitivity to the effects of that regulation – regulation that is increasingly inscribed in technological form.

- The communications technology possessed by millions of citizens has capacities for reproduction and distribution that were once reserved to the giants of industry. This fact has been featured in debates over intellectual property policy largely as an appeal to the threat of unauthorized distribution and piracy. But it also presents another paired risk, one that has, sadly, not received as much attention; *that our intellectual property rules actually* ***hamper*** *the ability of the Internet to generate intellectual activity, encourage new methods of innovation, and distribute culture and education worldwide.* The Internet is the most democratic speech technology yet invented, one with the greatest potential of allowing freedom of expression to those who do not own a printing press or a television station. It allows us to dream of offering,

to a truly global audience, access to the educational, cultural and scientific materials of the world. Our intellectual property rules need to embrace this fact, rather than legislating that the Internet become like some more familiar and less democratic medium.

- Policy makers have had 20/20 vision about the dangers of almost costless copying, but have been blind to its benefits – both to traditional content companies and to the larger society. In fact, it is remarkable to consider that the areas where the Internet has succeeded most readily – for example as a giant distributed database of facts on any subject under the sun – are traditionally those in which there are little or no intellectual property rights. The software on which the Internet runs is largely open source, another Internet-enabled method of innovation to which policy makers have been slow to adapt. The Internet offers us remarkable opportunities to achieve the real goals that intellectual property policy *ought* to serve: encouraging innovation and facilitating the dissemination of cultural and educational materials. Yet policy making has focused almost entirely on the Internet's potential for illicit copying. An example demonstrates the point.

- Copyright term limits are now absurdly long. The most recent retrospective extensions, to a term which already offered 99% of the value of a perpetual copyright, had the practical effect of helping a tiny number of works that are still in print, or in circulation. Estimates are between 1% and 4%. Yet in order to confer this monopoly benefit on a handful of works, works that the public had already "paid for" with a copyright term that must have been acceptable to the original author and publisher, they deny the public access to the remaining 96% of copyrighted works that otherwise would be passing into the public domain. Before the Internet, this loss – though real – would for most works have been largely a theoretical one. The cost of reprinting an out-of-print book or copying and screening a public domain film was often prohibitive. But once one adds the Internet to the equation, it becomes possible to imagine digitizing *substantial* parts of the national heritage as it emerges into the public domain, and making it available to the world. Now this is truly fulfilling the goals of copyright: encouraging creativity, and encouraging access. It has positive effects on education, on development and on creativity. Instead, the process of international "harmonization" grinds on, relentlessly extending copyright terms retrospectively, locking up cultural and educational materials that could and should be available to the world. The "loss" caused by copyright here rivals and exceeds any possible loss from "piracy"; yet one will listen in vain for this loss to be mentioned in international debates on the subject. There are many other instances; the erosion of copyright formalities has massive unintended negative

effects in the online context, for example, but the maximalist "rights culture" seems to be oblivious to all of them.

D. Blindness to Alternatives: In and Out of the System

- Even when the system of intellectual property works just as it is supposed to, it clearly will not solve certain pressing human problems. A pharmaceutical innovation policy that relies solely on patent incentives for example, will never supply adequate medicines for the diseases of the global poor. By choosing to focus our innovation policy in the pharmaceutical area solely on the provision of patent incentives, we are *choosing* to have children die of malaria and sleeping sickness. This is not a criticism of drug companies, or even of the current system of patents – both are working as they are designed to. It is a criticism of the belief that this system is the only way to produce innovation. It is thus incumbent on organizations such as WIPO to be more hospitable to proposals that attempt to reform, or to supplement the intellectual property system, or to offer alternatives to it. It is tragic that it has taken 120 years for us to return to the exploration of mechanisms for encouraging innovation – such as state sponsored prize systems whose products are distributed at marginal cost – that were widely discussed and even sometimes practiced in the years before the Paris and Berne conventions. Sadly, that history – and the many thoughtful criticisms of the limits of intellectual property policy that it was part of – seem to be lost to contemporary debates in WIPO. The rights culture is myopic, but it also suffers from historical amnesia.

- Alternatives can also exist *within* the current system – using the rights currently provided. Open source software and collaborative efforts in science and medicine have shown that there are many ways to produce high quality innovation, innovation that the intellectual property system should facilitate and encourage in the same way it encourages more traditional, proprietary methods. Yet policy-makers have sometimes seemed either uncomprehending or actively hostile to such attempts, as if the intellectual property system required fidelity to a certain business-model of innovation. A perfect example is the remarkable hostility shown by some national governments to a recent proposal that WIPO explore the potential of these open and collaborative efforts. The proposal was warmly received by WIPO staff. Yet it was squashed by pressure from companies pursuing a different business model, who were able to rely on the language of the "rights culture" to convince state decision makers that only 'closed source' models were legitimate. One high ranking US official in the Patent and Trademark Office even argued that such a meeting would be contrary to WIPO's goal, which is "to promote intellectual-property rights. To hold a meeting which has

> as its purpose to disclaim or waive such rights seems to us to be contrary to the goals of WIPO." The level of ignorance revealed by such a comment is lamentable. The open source software community uses intellectual property to achieve its remarkable level of innovation; without copyright, the General Public License would be unenforceable. People who develop the software get rights under that license, and agree to limitations, just as in a patent pool or any other deal. Saying that this flourishing and imaginative use of intellectual property rights is somehow outside the world of intellectual property is like saying that the only legitimate use of real property is to sit on it and let no one in, on any terms. It is absurd. Again, the 'rights culture' imposes a blindness that curtails our imagination just when it should be most active.

II. THE GUIDING PRINCIPLES OF RATIONAL AND HUMANE INTELLECTUAL PROPERTY POLICY

If we are to have an intellectual property policy that genuinely promotes innovation, international development and human well-being, we need to expose the assumptions of the maximalist rights culture to the democratic scrutiny they have so sorely lacked. More than 50 years ago, environmentalists taught us to see beyond a disconnected set of problems in the natural world – polluted streams and air, disappearing wetlands – to a larger interconnected system called the environment. Successful development could only proceed if it were sustainable; the environmental impact must be part of the analysis. Similarly, both nationally and internationally, we need to recover the traditional insight of our intellectual property laws; that it is not *rights* that generate progress, but the *balance* between rights and the public domain, a balance that is highly context dependent. One size cannot fit all.

This argument has implications far beyond WIPO, of course, but it also implies the need to reorient WIPO's mission in the coming century. WIPO has made some halting steps towards this in its most recent Medium Term Plan, but if it is to fulfil its goal of encouraging intellectual activity, and serving the citizens of the world, it must abandon the tunnel vision of the maximalist rights culture and adopt the following seven principles.

1. Balance

Intellectual property policy must maintain a balance between the realm of protected material and the public domain. When WIPO documents speak of "balance" they generally refer to a balance between producer and consumer, or developed and developing nations. But the intellectual property system depends on a different, and neglected, kind of balance. Science, technology and the market itself depend on a rich "commons" of

material available to all, just as they also depend on the incentives provided by intellectual property rights. Too many rights will slow innovation as surely as too few. The WIPO secretariat should be required to perform an "Intellectual Environmental Impact Statement" on each new proposal for the expansion of rights, detailing its effects on the public domain, and the commercial, innovative, artistic and educational activities that depend on the public domain.

2. Proportionality

Each piece of intellectual property legislation imposes costs as well as benefits on the public. Extending the copyright term retrospectively, for example, denies a twenty year swath of culture to the public in order to benefit the tiny minority of works that are still being exploited commercially. Any other regulation that enforced massive costs for tiny benefits would be subject to intense scrutiny. Intellectual property regulation through WIPO should be no exception. A formal, detailed and specific statement of costs and benefits should accompany any proposed action.

3. Developmental Appropriateness

The history of intellectual property law over which WIPO has presided is actually one of considerable change, with a considerable variation in the rules both over time and space, at different moments of economic development. In tune with this history, WIPO needs to be a counterforce to the tendency to impose 'one size fits all' solutions worldwide, not the place where "TRIPS-plus" standards are to be pursued.

4. Participation and Transparency

Intellectual property law always had implications beyond the regulation of competitors in the same industry, but today those implications are so great and so pressing that they demand a much more participatory and transparent procedure. WIPO needs to continue the welcome steps it has already taken to increase the participation of civil society groups in the discussion and debate. When intellectual property implicates everything from access to essential medicines and free speech to education and online privacy, it cannot be made according to the assumptions of a narrow coterie of lawyers and industry groups.

5. Openness to Alternatives and Additions

Intellectual property is a remarkable human invention, but it cannot solve all problems. A pharmaceutical innovation system built on patents, for example, will not cure the diseases of the global poor. To solve those

problems, and others like them, we must think more imaginatively about alternative and additional methods of encouraging and organizing innovation. WIPO, which has long had expertise in thinking about the limits of intellectual property, and which has certainly presided over developments far outside of the narrow range of copyright, patent and trademark, should become the most prominent global institution in which those alternative methods are proposed and debated. WIPO's goal cannot be the narrow one of creating bigger and bigger intellectual property rights. In the words of the agreement between WIPO and the UN, its goal is the broader one of "promoting creative intellectual activity and . . . facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development." In the long term, we must come to understand that the requirement of a level playing field in international trade is not that each country adopt a uniform set of intellectual property rights, but that each country bear its fair share of global research and development expenses – however, that process is organized in a particular sector or area. The answer to the child with sleeping sickness or malaria cannot be "our tools cannot solve your problems." WIPO must be the institution in which we join, rather than fight, the search for alternatives.

6. Embracing the Net as a Solution, Rather than a Problem

From the mid-1990's onwards, the tendency in international intellectual property has been to treat the Internet as a threat rather than an opportunity. Despite the fact that the Net has demonstrated again and again the possibility of generating, through dispersed collaborative networks, innovation and intellectual activity of exactly the kind WIPO is supposed to foster, policy makers have focused only on the threat of illicit copying. WIPO should establish a standing committee which focuses on two key issues: the barriers that traditional intellectual property erects against global educational and cultural access (for example, through overly long copyright terms retrospectively extended), and the ways in which the traditional rules of intellectual property need to be rethought when they are applied to the citizen-publishers of cyberspace. WIPO must work *with* the new medium, rather than seeking to cripple it in order to make it more like the old media in which traditional intellectual property rights arose.

7. Neutrality

Within the realm of existing intellectual property rights, our policy must be neutral between different methods of using those rights to encourage innovation. For example, both closed source, proprietary and open source, collaborative software developers use the intellectual property system to generate innovation of global worth. It is not WIPO's job to pick

winners in this competition between different methods of innovation. WIPO should be as concerned about the impact of software patents on open source software development, as it is about the impact of software piracy on closed source software development. Intellectual property rights are tools, and WIPO needs to respond creatively and flexibly to the new ways in which those tools can be used, not view any new method of innovation as somehow illegitimate.

III. CONCLUSION

The ideas proposed here are not radical. If anything they have a conservative strand – a return to the rational roots of intellectual property rather than an embrace of its recent excesses. Patents, for example, have a restricted term and were always intended to work to fuel the public domain. Copyrights were intended to last only for a limited time, to regulate texts, not criminalize technologies, to facilitate rather than to restrict access. Even the *droits d'auteur* tradition was built around the assumption that there were social and temporal limitations on the author's claims; natural right did not mean absolute right. Neither Macaulay and Jefferson, nor Le Chapelier and Rousseau would recognize their ideas in the edifice we have erected today. In the name of authorial and inventive genius, we are creating a bureaucratic system that only a tax-collector or a monopolist could love. But genius is actually *less* likely to flower in this world, with its regulations, its pervasive surveillance, its privatized public domain and its taxes on knowledge. Even if the system worked exactly as specified, it could not solve some of the most important human problems we face, and it would likely hamper our most important communications technology. And now we foist that system on the world, declaring that anyone who does not have exactly the same legal monopolies as we do is distorting trade. True, WIPO's power to undo these trends is limited at the moment. Trade negotiations have become the preferred arena for expanding rights still further. But if these trends are to be reversed there will need to be an international, informed, democratic debate about the trajectory we are on. WIPO's role in that debate is a central one. It should embrace that role, rather than seeking to jump onto the bandwagon of ever-expanding rights.

AFTERWORD

This manifesto is my attempt to bring greater democratic scrutiny to bear on some pressing problems in international intellectual property policy. It was prepared for a Meeting on the Future of WIPO, convened in Geneva in September 2004 by the Open Society Institute, the Consumer Project on Technology and the Duke Center for the Study of the Public Domain, but it represents my views alone. It attempts to compress into a few pages, for a

non-specialist audience, problems that have had lengthy tomes devoted to them; in the process a lot of issues get short shrift or are ignored altogether because I felt they receive adequate attention elsewhere. I owe gratitude to a number of people for their comments on, though not necessarily their agreement with, this work. Thanks go to Arti Rai, Jennifer Jenkins, Larry Lessig, Sisule Musungu, Yochai Benkler, Justin Hughes, Cory Doctorow, Anthony So, Jamie Love, Bernt Hugenholtz, Wendy Seltzer, Vera Franz, Darius Cuplinskas and Terry Fisher.

Suggested Further Reading:

- James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBLS. 33 (2003), *available at:* http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+33+(WinterSpring+2003).
- SISULE MUSUNGU & GRAHAM DUTFIELD, MULTILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) (2003), *available at* http://www.geneva.quno.info/pdf/WIPO(A4)final0304.pdf.
- Jerome Reichman & Keith Maskus, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT'L ECON. L.279-320 (2004), *available at* http://www3.oup.co.uk/jielaw/hdb/Volume_07/Issue_02/jqh018.sgm.abs.html.