

Contesting the Private Rights Model of Intellectual Property: Developing Countries and the WTO Implementation of the TRIPS Agreement

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For some time developing countries have expressed concerns about implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The agreement, which is now an integral part of the World Trade Organization (WTO), was particularly crucial to developed economies, while most countries in the developing world opposed it. The introduction of TRIPS into the framework of the WTO and, by extension, into international economic law, involved the globalization of a particular understanding of intellectual property rights and protection. Such rights and protections become law in large areas of the world — principally developing countries — where they had not existed or, if they existed, were not always enforced. The agreement thus represents a decisive globalizing moment by setting in place a host of legal concepts, rules, and practices not previously present in these countries, and often "foreign" to their notions of intellectual and artistic creation. My research addresses three sets of questions:

1. Does our present, developed countries' understanding of intellectual property differ from the historically grounded understanding of it? To what extent has this Western and often industry-driven understanding of intellectual property come to be viewed as the only legitimate interpretation of the concept?
2. To what degree does the TRIPS agreement constitute a globalizing moment when it comes to solidifying and formalizing the contemporary Western notion of intellectual property rights as private rights?
3. To what extent has the change towards interpreting intellectual property rights as private rights strengthened the autonomy of some collective actors and individual persons while reducing or limiting the autonomy of others?

My research led me to conclude that the concept of intellectual property rights must be examined as a social construct embedded in the political culture of a nation at a particular point in its economic development. It would be a mistake to assume that the presently globalized concept of intellectual property as *private rights* is superior and should be universalized just because it is being supported by the industrialized nations at this time in their economic history.

I also conclude that the move to globalize intellectual property rights has strengthened the autonomy of some collective actors and individual persons while reducing or limiting the autonomy of others. In particular, the governments of developing countries have lost autonomy in the sense of being able to define culturally, economically, and politically sensitive rules for intellectual and artistic creation. In addition, the technologically disadvantaged WTO Members fear the adverse impact of the monopolistic nature of patent rights and the costs of implementing TRIPS which routinely exceeds these countries' financial and administrative capabilities.

The birth of TRIPS represented a decisive globalizing moment in establishing a set of legal concepts, rules, and practices that were previously not recognized or were understood differently in many developing countries. The governments of developing countries feel that they have lost their autonomy, as they are no longer free to engage in autonomous policy-making and define rules regulating intellectual and artistic creation. After the establishment of TRIPS the concepts and policies surrounding the regime for protection of intellectual property had to be framed within the legal provisions of the agreement. In developing countries and also some developed countries, individuals engaged in intellectual and creative acts were constrained further by the principles of the TRIPS in sharing and developing their creations.

Moreover, those individuals who belonged to communities who had long nurtured traditional knowledge and folklore related to agriculture, medicine, and other activities lost some of their autonomy in controlling this knowledge and in benefiting from its use. In contrast, transnational corporations that seek profits by developing intellectual property — pharmaceuticals, computer software, films, or plant, animal, and human biotechnology — saw their autonomy significantly enhanced because the rules for intellectual property protection that they had successfully promoted in developed countries would now operate in every country. By the same token, corporations within developing countries would have a freer hand.

In summary, the attempt to globalize the Western model of intellectual property rights via multilateral rules and enforcement mechanisms can be perceived as the advancement of an ostensibly liberal idea through illiberal means of coercion. Based upon the changing autonomies in play as a result of the TRIPS agreement, its enactment has sparked struggles led by many developing countries, supported by farmers', indigenous, and health provider organizations in the South and companion non-governmental organizations in the North, to reverse some of the losses of autonomy. One can understand the concerns expressed by the developing countries about the imperialistic tendencies shown by the industrialized world. Free trade may be a liberal idea but the TRIPS agreement can be used to advance illiberal practices.