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The World Intellectual Property Organization: Changing Narratives on Intellectual

Property

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Since its inception, the mission of the World Intellectual Property Organization (WIPO) has been to spread the concept and benefits of a strong intellectual property system to the entire world. Countries who developed copyright and patent laws sought to create an international mechanism that would protect what they considered to be their property at the global level. Since intellectual property is primarily a western concept, wrapped up in the liberal economic paradigm of individualism and markets, an important goal of WIPO has been to create the conditions for acceptance of intellectual property throughout the global south using education and training as its primary tool. WIPO considers intellectual property laws to be the foundation of innovation and progress and thus a public good that all nations should share.

Since its official inception in 1970, WIPO has had to adapt to a considerably changed world. The emergence of digital technologies, the creation of the World Trade Organization (WTO), and a growing awareness of intellectual property issues around the world have all made the operation of WIPO more complex. Since the Trade Related Aspects of Intellectual Property Agreement (TRIPS) came into force as part of the WTO in 1995, the WTO has taken center stage in intellectual property disputes. Given the powerful enforcement mechanisms available through the TRIPS agreement, WIPO's relevance as an organization was threatened as states "forum shop," seeking the best protection for their "property."

As the world wakes up to the negative impact of strong intellectual property protection, WIPO's global role as an intellectual property booster has also come into question. Sparked by increasing emphasis put on the protection of intangible property,

the past decade has witnessed a growing concern over the implications of strong intellectual property protection. The global south has generally aligned against the strong intellectual property protection embodied in the TRIPS agreement. UN agencies, such as UNESCO and WHO, express growing concern with intellectual property rights.

International agreements, such as the Convention on Biological Diversity (CBD), have entered into the intellectual property debate by claiming that intellectual property rights should not trump health care, human rights, or environmental protection.

The changing landscape has made WIPO the center of a “development” agenda that seeks to increase transparency and accessibility to member countries from the developing world and from NGOs representing their interests. As WIPO seeks to remain relevant in the post-WTO world, it has become the center of several debates whose trajectories could undermine the very concept of intellectual property. In this paper I would like to examine WIPO’s past and its future and argue that WIPO *could* become a forum that gives voice to a new intellectual property paradigm that takes into consideration the needs of its global south constituencies, but to do so would require a substantial revisioning of WIPO’s mission and practice.

First, based upon archival research, I’ll detail the history of WIPO and how it has traditionally defined its mission. Second, I will look to the ways in which WIPO has altered (or resisted altering) its identity to deal with pressing contemporary issues. Specifically, I’d like to look at the work WIPO is doing related to the development agenda and traditional knowledge. Third, I’d like to present a mini case-study as a method for examining the functions provided for WIPO and their benefit to a county in the Global South. Finally, I’d like to make recommendations for how WIPO should

consider its future in the context of the development round agenda and the issues raised by the global south.

WIPO'S HISTORY¹

There is much to learn about the structure of an international organization by investigating its history. An organization is a product of its history, thus learning something about the history of WIPO should help explain its current approach to intellectual property issues. Having said this, the “official” beginning of WIPO was not exciting, but essentially the logical transition of one organization into another.

WIPO began life as the Bureaux Internationaux Reunis pour la Protection de la Propriete Intellectuelle (The United International Bureau for the Protection of Intellectual Property),² known by its acronym BIRPI. BIRPI was called the United International Bureau because the Government of the Swiss Confederation merged the Paris Union for the Protection of Industrial Property (1883) and the Berne Union for the Protection of Literary and Artistic Works (1886) under a single secretariat in 1893.³ Prior to 1893, the Paris and Berne Unions had functioned independently and were indicative of late 19th century international organizations. Ballreich argues that the underlying international

¹ The research for this paper was made possible by the Sabbatical Leaves Subcommittee and the Academic Dean's office at Otterbein College who approved and funded my sabbatical research to Geneva. Additionally, the WIPO library, while technically open to the public, was only accessible because of the help of the staff. Much of the documentation I draw on for this paper is available only at the WIPO library in the form of minutes and reports from the early conferences.

² Originally, the “PI” in BIRPI stood for industrial property and the name was changed to intellectual property in the mid-1950s as the concept of intellectual property was popularized.

³ WIPO, “Report of the World Intellectual Property Organization to the Economic and Social Council of the United Nations at its Fifty-Ninth Session,” Analytical Summary for the Year 1974, Geneva, April 30, 1975, p. 7; Arpad Bogsch, “The First Twenty-Five Years of the World Intellectual Property Organization from 1967 to 1992.” International Bureau of Intellectual Property: Geneva 1992. WIPO Publication No. 881 (E), p. 21.

functionalism of the system was grounded upon the notion that issues of intellectual property could and should be regulated universally.

Here, the basic assumption is that there are world-wide subject-matter interests independent of national boundaries, and which in the various States are so similar and so free from political friction, that they can be said to be self-regulating and may be regulated by consent. Cooperation should be as universal as possible, not necessarily between States as political units but rather as units of administration, which usually coincide, however, with a State's territory.⁴

While it may not be the case that IP is “free from political friction,” the underlying assumptions of the early system are instrumental in understanding how the international organization functioned.

BIRPI, while an international organization, was funded and operated by the Swiss government who also appointed its director.⁵ There was an unsuccessful attempt to include the Berne Union under the auspices of the League of Nations, which resulted in a treaty of mutual cooperation for the years the League functioned.⁶ During the 1950s the confusing nature of multiple organizations dealing with similar topics became apparent. A struggle for power over who would govern intellectual property was brewing. Jacques Secrétan, the director of the BIRPI between 1953 and 1957⁷ outlined in 1957 the ways in which the International Bureaux was seeking to be the representative body for intellectual property by forging working relationships with a variety of UN organizations.

In International relations, that is to say, the relations with States, the important Specialised Agencies of UNO or other international organizations, the International Bureau for the Protection of Intellectual Property should certainly be

⁴ Hans Ballreich, “World Intellectual Property Organization,” p. 410-414. WIPO library, E31 BAL.W (no further citation information provided). .

⁵ Bogsch, p. 23.

⁶ Ballreich, p. 410.

⁷ The World Statesman, “International Organizations,” World Intellectual Property Organization, Available at:

http://www.worldstatesmen.org/International_Organizations2.html#WIPO.

regarded as the proper body to represent and defend the principles incorporated in the Conventions connected with intellectual property. This being so, we have concluded Working Agreements with Unesco, the World Health Organization, the Council of Europe and certain other organizations. The most important of these Agreements are the one concluded with the World Health Organization and the new one to be signed with the Council of Europe, because they regard, basically, the International Bureaux as the representative body for intellectual property in international relations.⁸

One concern of BIRPI member states was that their status as the “premiere” organization focused on intellectual property was being eroded by the United Nations, specifically because UNESCO oversaw the Universal Copyright Convention it was considered a threat. One motivating factor behind the creation of WIPO and its ultimate inclusion as a special organization of the UN stems from the desire of BIRPI to retain its supremacy as the interpreter of intellectual property issues, a desire reflected in Mr. Secrétan’s speech.⁹

As part of a longer-term goal to become part of the United Nations and the global interpreter of IPRs, BIRPI, originally located in Berne, Switzerland, moved to Geneva in 1960.¹⁰ Independent of the strategic goal of joining the UN, BIRPI was undergoing modernization to better reflect the state of contemporary international organizations.

According to Arpad Bogsch, the Deputy Director of BIRPI in 1963 and the first Secretary General of the new WIPO, the modernization process began in the late 40s and continued

⁸ Jacques Secrétan, Director of the United Bureaux for the Protection of Industrial, Literary and Artistic Property. Fourth William Henry Ballantyne Lecture. “The Work of the Berne Bureaux in the International Field at the Present Time,” Lecture delivered to the British Group of the Association at the Old Hall, March 12, 1957. WIPO Library. p. 10.

⁹ Sisule F. Musungu and Graham Dutfield, “Multilateral Agreements and a TRIPS-plus World: The World Intellectual Property Organization (WIPO),” TRIPS Issue Papers #3, Quaker United Nations Office (GUNO), Geneva. Available at: <http://www.geneva.guno.info/pdf/wipo%28A4%29fminimal0304.pdf>. As discussed later, Bogsch makes the argument that WIPO sought to be supreme in how intellectual property would be interpreted globally.

¹⁰ Bogsch, p. 21.

through the 1960s as the major conventions (the Paris and the Berne) underwent changes increasing representation and creating more permanent governing bodies.¹¹ One modernizing act saw the Unions establish the Permanent Bureau of the Paris Union and the Permanent Committee of the Berne Union, which met jointly as the Interunion Coordination Committee.¹² These permanent bodies helped provide BIRPI with a more structured existence.

In 1962 the Interunion Coordination Committee recommended a study to determine how best to adapt the Unions into “present-day intergovernmental organizations.”¹³ The recommended changes culminated for BIRPI in the Intellectual Property Conference of Stockholm, otherwise known as the Stockholm Conference, where the WIPO convention was adopted July 14, 1967 after five weeks of meetings.¹⁴ The primary structural changes associated with the creation of WIPO included moving control of the organization from the Swiss,¹⁵ who had previously been exclusively responsible for funding BIRPI, to a more formal governing body that included a structure

¹¹ Bogsch, p. 23-24.

¹² WIPO, “Records of the Intellectual property Conference of Stockholm, June 11 to July 14, 1967,” Geneva 1971. (Minutes from the meeting to create WIPO), p. 1222.

¹³ *Ibid.*, p. 1222.

¹⁴ “Convention Establishing the World Intellectual Property Organization, Signed at Stockholm on July 14, 1967 and as amended on September 28, 1979.” World Intellectual Property Organization, WIPO Publication No. 250(E), Geneva 1998. The Stockholm Conference was attended by almost 500 representatives -- 389 delegates, 36 organizations and 93 observers. See: Bogsch, p. 28.

¹⁵ BIRPI, “Intellectual Property Conference of Stockholm, 1967: Proposals for Revising the Administrative Provisions and the Final Clauses (Articles 13 and 20). Vol 1. S/3: Geneva, September 16, 1966, Document S/3, p. 10. One acknowledged concern was that BIRPI was economically dependent upon the Swiss government and transitioning to a more international organization would alleviate that dependence.

where delegates from member countries would meet regularly (as opposed to the previous process where meetings were only held every twenty years or so).¹⁶

The Stockholm Conference established a three-year timeline for member nations to acquiesce to the new organization.¹⁷ The name WIPO was chosen after some debate because the term “world” instead of “international” better reflected the goals of the organization – to extend intellectual property throughout the world regardless of membership in the organization; it also created a better acronym.¹⁸ Not all supported the new organization. The minutes of the meeting reflect that both France and Italy spoke against the creation of WIPO, but given that the majority of member states approved of the new organization they did not oppose its creation.¹⁹ The minutes concluded with words of praise for the new WIPO and its mission.

There is reason to hope, however, that the spirit of international cooperation which was so manifest in the Stockholm Conference will continue to prevail in the new Organization and will allow any difficulties to be resolved. It is in this way that WIPO will be able to achieve the noble purpose which has been assigned

¹⁶ Ibid., Document S/3, p. 8. Minutes from this meeting suggest that one of the main reasons for the Stockholm Conference is to modernize BIRPI.

¹⁷ According to Article 15 of the Convention, the Convention would enter into force three months after ten member states of the Paris Union and seven member states of the Berne Union ratified the document. For any states seeking to join after that point, there would be a three-month time lag between ratification and the entry into force of the Convention for that state. “Convention Establishing the World Intellectual Property Organization,” p. 20.

¹⁸ “International” may denote an organization of any number of States, however small this number may be. “World” would better express the universal vocation of the Organization. It is shorter: one syllable instead of five. It is more dynamic. It is not over-used like “international.” Finally, it would yield a better abbreviation: “WIPO” “IIPO” is difficult to pronounce, and “IPO” is incomplete since one of the worlds (either ‘international’ or ‘intellectual’) would not be covered.” BIRPI, “Intellectual Property Conference of Stockholm, 1967: Convention Establishing the International Intellectual Property Organization.” Vol. 1. S/10: Geneva, September 16, 1966, S/10, p. 10-11.

¹⁹ See: WIPO, “Records of the Intellectual property Conference of Stockholm, June 11 to July 14, 1967.” Geneva 1971. (Minutes from the meeting to create WIPO), p. 1243.

to it and give effective encouragement to creative activity, thereby contributing to the spiritual enrichment and the material well-being of mankind as a whole.²⁰

Nothing less than the “noble purpose” of contributing to the “spiritual enrichment and the material well-being of mankind as a whole” was at the heart of WIPO’s creation.

However, numerous procedural issues still needed to be worked out.

Among the most difficult was the issue of transforming BIRPI into WIPO. The transition period was complex. First, member states of BIRPI could choose to join WIPO, but were not required to join. For those who didn’t join, BIRPI would continue to exist as the governing organization. Second, membership in WIPO was opened to any state not part of the Berne or Paris Unions if that state was a member of the United Nations or one of its specialized agencies.²¹ Third, membership could be extended to states that were not part of the UN if invited by the General Assembly.²² The underlying goal once WIPO was officially created as an organization was to apply for special organization status with the United Nations. Thus, the structure of the nascent WIPO mirrored the structure of other special organizations affiliated with the UN.²³

Certain financial advantages existed by having UN status, specifically, staffing became part of a general financial pool and WIPO would be lifted of responsibility for funding its staff; but, membership in the UN also meant many more developing countries would join WIPO and concern existed that the developing country members would seek

²⁰ Ibid, p. 1245.

²¹ “Convention Establishing the World Intellectual Property Organization,” p. 6.

²² Ibid.

²³ Bogsch, p. 28. To become a specialized agency of the UN one must have a bilateral agreement with the UN that is voted on both by the general assembly of the UN and of the specialized agency, and the agency is “subject to the competence and responsibilities of the United Nations and other specialized agencies.” Bogsch, p. 29-30.

to weaken intellectual property regulations.²⁴ In part, this fear was premised upon the voices of the developing countries present at the Stockholm Conference (57% of the member states of Paris and Berne were developing countries) who sought to lower protection in their countries for copyright and patents.²⁵ Despite the concerns that developing voices would seek lower protection, the ability to have copyright and patent protection “extended over the world, or at least to the great majority of countries, made it worth the risk.”²⁶ These subjects will be taken up in greater detail later in the paper.

WIPO was officially created in 1970 and admitted as a special organization to the United Nations December 17, 1974.²⁷ As implied from the outset, there were some concerns regarding the relationship between WIPO and other UN agencies, specifically UNESCO. Because the United States was not a member of the Berne convention (and did not join the Berne until 1989), it had created a separate intellectual property treaty through UNESCO called the Universal Copyright Convention. Once WIPO was added to the UN, it created a situation where two competing UN agencies had oversight regarding intellectual property issues. In fact, during the Stockholm conference, UNESCO registered concern regarding the potential competition between the two organizations. UNESCO saw itself as the body best able to interpret culture and copyright issues.²⁸ WIPO, for its part, sought to be the definitive body for interpreting intellectual property disputes. The concerns of UNESCO and WIPO became irrelevant once the US joined Berne in 1989 and the Soviet Union collapsed in the early 1990s rendering the UNESCO

²⁴ Bogsch, p. 28.

²⁵ Bogsch, p. 28.

²⁶ Bogsch, p. 28.

²⁷ Bogsch, p. 29

²⁸ WIPO, “Records of the Intellectual property Conference of Stockholm, June 11 to July 14, 1967.” Geneva 1971. (minutes for the meeting to create WIPO), p. 1088.

treaty virtually obsolete and providing WIPO with additional interpretive power as the sole remaining organization dedicated to IP issues, at least for the brief period before TRIPS entered the international scene.²⁹ WIPO's membership increased throughout the 70s and 80s as most developing countries joined the organization.³⁰ In July of 2003, WIPO had 179 members, the bulk of whom represent countries from the global south.³¹

THE POLITICAL ECONOMY OF WIPO

While the Stockholm Convention dealt in great detail with the pragmatics of transition and the advantages and disadvantages of implementing a new organization to oversee intellectual property that could dominate world discussion of the issue, the geopolitical concerns of state actors were a substantive aspect of the discussion. The role developing countries would play in the organization, the fear that they would be able to “out-vote” the developed countries and thus weaken intellectual property protection, and cold war politics framed the debates.

Even prior to the discussion at Stockholm, Jacques Secrétan, articulated the scope of the issue in stark “clash of civilization” terms. The battle to extend intellectual property rights to the entire world, the penultimate goal of the new organization, was also a battle enlightened Europe must wage against the threat posed by the growing anarchy in the rest of the world. His speech, delivered in 1957, highlights what some felt to be the central crisis facing the protection of intellectual property.

²⁹ Bogsch writes as if the moment WIPO became ‘supreme’ is an important milestone. See Bogsch, p. 30.

³⁰ Bogsch, p 30.

³¹ Musungu and Dutfield, p. 4.

Secrétan delivered the Fourth William Henry Ballantyne Lecture entitled, “The Work of the Berne Bureaux in the International Field at the Present Time.”³² He articulated the concerns of many regarding the protection of creative work in the world and the unique position of European nations in creating and thus protecting that work. Secrétan saw an international crisis in the protection of intellectual property and in the incoherent approach taken at the international level to address this crisis.

What is far more worrying than the crisis itself, is the incoherence, both procedural and doctrinal, with which it is approached by the majority of States and reflected by the different intergovernmental organizations, which, in some way or another, believe themselves to have the authority to establish texts of Conventions on intellectual rights. In the expansion of international organizations, are we to end up with several contradictory conventions voted for by the same States? That would be the last straw!³³

Apparently, the variety of approaches taken by organizations was part of the problem, soon (hopefully) to be remedied by the consolidation of power in WIPO. Secrétan articulated the problem in terms of a threat to western civilization itself. The Paris and Berne conventions, created by “men of courage and initiative” protect our

[M]ost precious assets for the development of our civilization, namely, the opportunity for the author and the artist to work and the right of the inventor and manufacturer to benefit from the fruits of their labour, were thus safeguarded and have enabled the civilized world to bring a ray of hope throughout the world in spite of the partial and senseless destruction of Europe.³⁴

It is the duty of this generation, Secrétan opines, to create a new protective regime for our most valued creative work and protect it from the threats of the non-western world.

³² Jacques Secrétan, Director of the United Bureaux for the Protection of Industrial, Literary and Artistic Property. Fourth William Henry Ballantyne Lecture. “The Work of the Berne Bureaux in the International Field at the Present Time,” Lecture delivered to the British Group of the Association at the Old Hall, March 12, 1957. WIPO Library.

³³ Ibid., p. 18.

³⁴ Ibid., p. 18.

Europe of today seems to appear, more and more, as a kind of “Land’s End” prolonging, into the Atlantic and the Mediterranean, the vastness of Asia! But however small Europe may appear to be, it possesses assets of incalculable value, the equivalent of which are hard, if not impossible, to find anywhere else in the world. I am now thinking, naturally, of the production of literary and artistic works for which it has been the centre for centuries.³⁵

For Secrétan, however, not enough has been done to protect the most valuable assets of Europe – intellectual property. While Secrétan finds that many European governments tend to associate with states they should not and that scholarships are granted to foreign students who only use their new education to advocate for causes other than Europe’s, he is especially concerned that European countries seem “totally disinterested in intellectual rights which protect their authors, their artists and their industrialists.”³⁶ Speaking to the political economy of the time, Secrétan suggests that the heart of liberty is the protection of intellectual property.

Swept away on a wave of sentimentality, people have endeavored to light across the world the torch of liberty, without thinking for a moment of that very essential element of liberty which one calls industrial and intellectual property. This property is essentially based on intellectual rights, i.e. on literary and artistic works on the one hand, and, on the other, the working of patents of invention and trademarks, in the interest of both the producers and the general public.³⁷

Secrétan’s words suggest that more is at stake in forging a unified and coherent intellectual property organization than streamlining bureaucracies and creating a strong organizational structure. For Secrétan, liberty is only ensured if intellectual property is protected. Forces outside Europe threaten liberty and by extension civilization itself by undermining intellectual property laws.

³⁵ Ibid, p. 18.

³⁶ Ibid, p. 19.

³⁷ Ibid, p. 20.

What is often forgotten in the heat of contemporary battles over the “development agenda” and “traditional knowledge” is that WIPO was born into the controversy of how intellectual property would impact the developing world and perhaps one of the most depressing realizations of reviewing the debates surrounding WIPO’s creation is just how little has changed since 1967.

Article 3 of the Stockholm convention outlines the objectives of WIPO.

According to the document the objectives are:

- (i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization;
- (ii) to ensure administrative cooperation among the Unions.³⁸

Of course, implicit in the objectives is the assumption that protecting intellectual property throughout the world is an appropriate goal and one that will ultimately benefit all countries. It is exactly this goal that concerned developing countries involved in the Stockholm Convention.

While there was general agreement over the creation of WIPO, there were concerns raised by developing and developed countries regarding the functions of the organization. Generally speaking, the underlying objective was to develop a comprehensive intellectual property regime that would be expanded throughout the entire globe. The interests protected by WIPO would be the interests of the intellectual property producing classes, not the users of intellectual property. The NGOs that attended the meetings highlight the balance of power and whose interests were most represented (See Table 1)

³⁸ Convention Establishing the World Intellectual Property Organization, p. 5.

Table One: NGOs Observing the Creation of WIPO

1. Asian Broadcasting Union (ABU)
2. European Broadcasting Union
3. Inter-American Association of Industrial Property (ASIPI)
4. International Alliance for Diffusion by Wire (AID)
5. International Association for the Protection of Industrial property (IAPIP)
6. International Bureau for Mechanical Reproduction (BIEM)
7. International Chamber of Commerce (ICC)
8. International Confederation of Societies of Authors and Composers (CISAC)
9. International Federation of Actors (IFA)
10. International Federation of Film Distributors' Associations (FIAPF)
11. International Federation of Journalists (IFJ)
12. International Federation of Musicians (FIM)
13. International Federation of Patent Agents (FICPI)
14. International Federation of the Phonographic Industry (IFPI)
15. International Gesellschaft fur Urheberrecht (INTERGU)
16. International League Against Unfair Competition (LICCD)
17. International Literary and Artistic Association (ALAI)
18. International Publishers' Association (IPA)
19. International Secretariat of Entertainment Trade Unions
20. International Union of Cinematograph Exhibitors (UIEC)
21. International Writers' Guild (IWG)
22. Union of European Patent Agents
23. Union of National Radio and Television Organizations of Africa (URTNA)

Source: Arpad Bogsch, "The First Twenty-Five Years of the World Intellectual Property Organization from 1967 to 1992." International Bureau of Intellectual Property: Geneva 1992. WIPO Publication No. 881 (E), p. 125.

While NGOs have no voting power and are not allowed to view all parts of the meeting, it is apparent from the list that the primary interests being represented at the formation of WIPO were copyright producers. Furthermore, virtually all organizations represent international unions with strong constituents in Europe and North America.

In order (perhaps) to pre-empt the argument made by developing countries that strong IPRS do not benefit them, the United States' representative Mr. Kaminstein sought to turn the US history of piracy into a moral lesson that would teach developing countries that the costs of piracy outweighed the benefits of adhering to intellectual property laws.

He said that while the US had ignored copyrights during their own development period in order to facilitate literacy and education, the result had been that American authorship was stifled and the US remained culturally dependent for too long.

There were obviously certain advantages to be gained, particularly in respect of education, by denying protection to foreign works so that they could be made freely available but, as the United States had found, the cost was long-term cultural dependency and an irretrievable loss of national authorship that might not be apparent for a century or more. Because at a certain stage of development a country's immediate needs had to take priority, it was often difficult for it to realize that, in the long run, literature and art were the most valuable national resources.³⁹

The US representative was happy to see so many developing countries involved in the discussions and hoped that they would see the benefit of strong IPRS for the long-term health of their economies.

Despite the words of the US representative and the overwhelming presence of copyright interests that would support the extension of copyright throughout the world, the Stockholm Convention minutes reflect the concerns of the developing world, expressed by the Cuban representative. Cuba felt that technological innovation must be understood within the context of colonialism and underdevelopment and sought to integrate into the discussion a demand for access to technical knowledge. Mr. Garcia Inchaustegui, the Cuban representative, suggested that one of the greatest threats to international peace was underdevelopment and that in the context of development these

³⁹ WIPO, "Records of the Intellectual property Conference of Stockholm, June 11 to July 14, 1967." Geneva 1971. (minutes for the meeting to create WIPO), p. 924-925.

countries should be given extensive technical assistance.⁴⁰ The minutes reflect Cuba's position on the issue:

The Government and people of Cuba believed, as their leader had proclaimed, that all technical knowledge was wealth to which the whole of humanity was entitled – especially those who had suffered the greatest exploitation. All developing countries had the right to all the technical knowledge ever published in the world. Much of the wealth of the advanced countries had been acquired from colonial rule; developed countries had developed at the expense of the new developing countries. International regulation of access to knowledge and technology was the only way of bridging the gap.⁴¹

The demand for access to technical knowledge was key to developing country concerns and the chasm between the story told by the US representative and the needs of the developing world are clear. While the US talked of protecting cultural work, developing countries sought access to the technical knowledge of development – science, engineering, physics, industrial designs, etc. Obscuring these developmental imperatives behind a claim that piracy would harm indigenous cultural development misses the point. Additionally, developing nations have vibrant local cultures that exist without the protection of copyright (and are currently mined by the West for new ideas). What the developing world needed, and what the Cuban representative made clear, is that future peace and security hinged on bridging the gap regarding technology transfer and exchange, a debate that has not progressed since 1967.⁴²

⁴⁰ WIPO, "Records of the Intellectual property Conference of Stockholm, June 11 to July 14, 1967." Geneva 1971. (minutes for the meeting to create WIPO), p. 1085-86, 4089.2-4089.3.

⁴¹ Ibid, p. 1086, para 4089.4.

⁴² In alignment with the cold war mentality, the Soviet Union representatives supported the Cuban argument against those made by the U.S., but also agreed that the convention should move forward. WIPO, "Records of the Intellectual property Conference of Stockholm, June 11 to July 14, 1967." Geneva 1971. (minutes for the meeting to create WIPO), p. 1087.

The result of the Stockholm Convention was the creation of WIPO and in order to forge a compromise between developed and developing nations, some concessions were given to developing countries. In a press release announcing the successful conclusion to the meeting, the organization elaborated on the compromise:

A great deal of time was devoted at the Stockholm Conference to the copyright needs of developing countries. In the extensive debates on this question it was generally recognized that the educational and cultural advancement of the developing countries requires the application of special provisions for their particular needs. The result has been the adoption of a special Protocol Regarding Developing Countries. Under this Protocol, certain countries whose economic situation and social or cultural needs so require may, under stated conditions, impose compulsory licenses for the translation of works, and for the reproduction of works for educational or cultural purposes. Such countries may further restrict copyright protection if the purpose is exclusively for educational teaching, study or research, provided the author receives compensation according to established national standards.⁴³

The creation of a special protocol regarding developing countries allowed the convention to move forward, but there was concern that it would keep countries in the developed world from signing on to the new organization given that the needs of the developing world were accommodated at the expense of intellectual property producers in the developed world.

By 1970 when the WIPO formally met for the first time under the protocols outlined at the Stockholm Convention, it was clear that both developing and developed countries found room in the agreement for their interests. While the developing world felt they had negotiating room to help provide technology transfer; the developed world saw enormous benefit in creating an organization whose sole purpose would be to spread

⁴³ “Intellectual property Conference of Stockholm, 1967”, Vol. 4. BIRPI: Geneva & Stockholm. Press Release, July 14, 1967 from BIRPI regarding the just completed Intellectual Property Conference of Stockholm, 1967.

the concept of intellectual property globally and help countries create laws to protect intellectual property, which would of course primarily come from abroad.⁴⁴

Table Two: Signatories to WIPO by Convention		
WIPO Convention	Paris Convention	Berne Convention
1. Belgium	1. Belgium	1. Belgium
2. Brazil	2. Brazil	2. Brazil
3. Bulgaria	3. Bulgaria	3. Bulgaria
4. Byelorussia	4. Canada	4. Canada
5. Canada	5. Chad	5. Czechoslovakia
6. Chad	6. Cuba	6. Denmark
7. Cuba	7. Czechoslovakia	7. Finland
8. Czechoslovakia	8. Denmark	8. France
9. Denmark	9. Finland	9. German Democratic Republic (Contested)
10. Finland	10. France	10. Germany (Fed. Rep)
11. France	11. German Democratic Republic (Contested)	11. Ireland
12. German Democratic Republic (Contested)	12. Germany (Fed. Rep),	12. Israel
13. Germany (Fed. Rep),	13. Hungary	13. Italy
14. Hungary	14. Ireland	14. Ivory Coast
15. Ireland	15. Israel	15. Luxembourg
16. Israel	16. Italy	16. Niger
17. Italy	17. Ivory Coast	17. Norway
18. Ivory Coast	18. Luxembourg	18. Pakistan
19. Luxembourg	19. Malawi	19. Rumania
20. Malawi	20. Norway	20. Senegal
21. Norway	21. Rumania	21. Spain
22. Rumania	22. Senegal	22. Sweden
23. Senegal	23. Spain	23. Switzerland
24. Spain	24. Sweden	24. United Kingdom
25. Sweden	25. Switzerland	25. Upper Volta
26. Switzerland	26. United Kingdom	26. Yugoslavia.
27. Ukraine	27. US	
28. United Kingdom	28. USSR	
29. US	29. Upper Volta.	
30. USSR		
31. Upper Volta		
32. Yugoslavia.		

⁴⁴ According to Bogsch, industrialized countries knew they would not be able to control the debates, but that the ultimate trade-off would be worth it. See: Bogsch, p. 29.

Source: “Administrative Bodies of WIPO and of the Unions Administered by WIPO and BIRPI.” First Series of Meetings, Geneva, September 21 to 29, 1970). Organisation Mondiale de la Propriete Intellectuelle, p. 239. WIPO Library.

Much like the earlier meetings, the list of agencies and organizations with observer status is instrumental in understanding the interests represented at the new WIPO. While very specific rules governed who was invited as an observer and who could attend what session, the distinct lack of civil society groups and the overabundance of intellectual property owner groups is apparent (See Table Three)⁴⁵.

Table Three: Non-Governmental Organizations and Agencies attending the 1970 WIPO meetings.

Category A: (United Nations and Specialized Agencies)	Category B (Intergovernmental Organizations specialized in certain branches of industrial property)	Category C (Other intergovernmental organizations) (on a worldwide scale):
<ol style="list-style-type: none"> 1. United Nations 2. United Nations 3. Conference on Trade and Development (UNCTAD) 4. United Nations Industrial Development Organization (UNIDO) 5. International Labour Organisation (ILO) 6. World Health Organization (WHO) 7. United Nations 	<ol style="list-style-type: none"> 1. International Patent Institute (IIB) 2. African and Malagasy Industrial Property Office (OAMPI) 3. Intergovernmental Conference for the Setting Up of a European System for the Grant of Patents 4. Benelux Trademark Office 	<ol style="list-style-type: none"> 1. International Institute for the Unification of Private Law (UNIDROIT) 2. International Olive Oil Council (COI) 3. International Vine and Wine Office (IWO) 4. Council of Europe (CE) 5. Council for Mutual Economic Assistance (COMECON) 6. European Economic

⁴⁵ For the WIPO General Assembly, category A and B were invited to all meetings, category C would be invited specifically by the Director General if there were items of special interest to the organization. For the WIPO Conference, all categories could attend all meetings. Finally, NGOs that had relationships with BIRPI would be allowed to observe when there was a special or direct interest to that organization (as assessed by the Director General). They could come to the general assembly meetings and to the WIPO Conference, but could not attend coordination committee meetings or anything related to the Paris, Berne or Nice Unions. “Administrative Bodies of WIPO and of the Unions Administered by WIPO and BIRPI.” First Series of Meetings, Geneva, September 21 to 29, 1970). Organisation Mondiale de la Propriete Intellectuelle, p. AB/I/14 p. 6/ p. 503. WIPO Library.

<p>Educational, Scientific and Cultural Organization (UNESCO)</p> <p>8. General Agreement on Tariffs and Trade (GATT) (BIRPI already had a working agreement with the GATT in 1970)</p>		<p>Community (EEC)</p> <p>7. European Free Trade Association (EFTA)</p> <p>8. Industrial Development Centre for Arab States (IDCAS)</p> <p>9. Latin American Free Trade Association (ALALC)</p> <p>10. Organization of American States (OAS)</p> <p>11. Permanent Secretariat of the General Treaty for Central American Economic Integration.</p>
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Source: “Administrative Bodies of WIPO and of the Unions Administered by WIPO and BIRPI.” First Series of Meetings, Geneva, September 21 to 29, 1970). Organisation Mondiale de la Propriete Intellectuelle, p. AB/I/14 p. 6/ p. 503. WIPO Library.

The 1970 meetings, the first for WIPO, also involved issues of development. A letter from the Swiss government outlined what they considered to be the burden of developed countries towards global development.

The widening gap in the standard of living of, on the one hand, the industrialized and on the other, the developing countries has caused increasing concern during the past decades. Hard efforts have been made by the developing countries themselves to achieve a self-sustainable development. It is, however, evident and also recognized by the industrialized countries that how great the efforts of the developing countries themselves may be, these will not be sufficient to enable them to achieve this end. Economic and social progress is the shared responsibility of the entire international community. It is also a process in which the benefits derived by the developing countries from the developed countries are shared by the world as a whole. Every country has the right and duty to develop its human and natural resources, but the full benefit of its efforts can be realized only with concomitant and effective international action.⁴⁶

The Swiss letter was particularly concerned with the use of patents on the part of developed countries to protect their markets in finished products rather than foster the

⁴⁶ WIPO “Administrative Bodies of WIPO and of the Unions Administered by WIPO and BIRPI” Addendum to Document AB/I/7. First Series of Meetings, Geneva September 21 – 29, 1970, p. 570/p.1.

conditions for technology transfer and economic growth globally. Indeed, for the Swiss, patents seemed to be a barrier to technology transfer, not a facilitator.

Instead, industrialized countries often take out patents in the developing countries with the aim of protecting a profitable export trade to these countries in finished products. One consequence of this is that patenting in developing countries does not to a sufficiently great extent embrace that technology in which these countries are most interested for their industrial development. It has also been alleged that there are great difficulties in signing license agreements for the establishment of industries in developing countries. Even if a developing country would be capable of starting production of an invention that is not protected by patent in that country, such production meets great difficulties since the country has not as a rule knowledge of the techniques connected with utilization of the invention. This know-how can only be transferred by means of license agreements.⁴⁷

Yet, while acknowledging the problems caused to technology transfer, the Swiss go on to remark that the newly formed Patent Cooperation Treaty (PCT) would be a step in the right direction because it would allow WIPO to create technology transfer services for the developing countries.⁴⁸ Ultimately, while the PCT has successfully generated revenues for WIPO, the primary benefit WIPO continues to provide the developing world is help creating the infrastructure for protection of intellectual property and not facilitating the exchange of technology.

As the narrative present in the meeting minutes of the formative WIPO events suggests, the developing country critique of IP has been a part of the conversation since WIPO's inception. It was clear that from the beginning that IP did not afford the developing world the same advantages it did for the overdeveloped world. However, once established (with the acquiescence of the developing world) and set upon its course, the

⁴⁷ Ibid, p. p. 571/p. 2

⁴⁸ Ibid, p. 572/p. 3. The PCT was signed in 1970 and creates a clearing house for international patent filing. Fees from the process are used to help support WIPO's work. See: Michael P. Ryan, "Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property," Washington D.C., Brookings Institute, 1998, p. 96-97.

primary objects of WIPO – to expand legal protection of intellectual property and educate people throughout the world regarding the value of this regime fell into place and the help extended to developing countries as they developed was not technology transfer, but the transfer of legal systems and education regarding a regime considered appropriate in a “one size fits all” world.⁴⁹

Despite a seeming concern for the development needs of intellectual property rights during the 60s and 70s as WIPO was forming and gaining control over the discourse of intellectual property, the situation today is one of déjà vu. In many ways, the debate of the late 60s simply mirrors the today’s concerns. Most, if not all, of the global south continues to fall behind and in some cases has even deteriorated since the late 60s. The claims regarding intellectual property, technology transfer, and access to knowledge remain the same. For all the rhetoric international institutions may engage in regarding help for the poor, it remains just that – words. Instead, the trend is towards increasing protection of intellectual property as the emergence of TRIPS under the WTO and TRIPS plus negotiations on the part of the United States prove so clearly.

The prevailing wisdom seems to suggest that if development is to occur, it must do so only under the conditions established by the already over-developed countries. Specifically, the issues raised by Cuba and the Swiss in the early debates should be ignored – poor countries can import finished products; they cannot engage in licensing agreements that might spark local innovation and production; and they certainly cannot develop an alternative approach to intellectual property that may protect works now

⁴⁹ James Boyle, “A Manifesto on WIPO and the Future of Intellectual Property,” 2004. Available at: <http://www.law.duke.edu/journals/dltr/articles/PDF/2004DLTR0009.pdf>. Boyle argues that the “one size fits all” approach is a rights maximalist approach that is not functional in the long term.

called “traditional knowledge,” but termed “folklore” during the 70s. However, despite the fact that change for the better has not happened and that research suggests that privatization continues to erode our abilities to exchange creative work freely, the beginnings of a resistance have emerged and part of the resistance has taken up the issue of access to knowledge (again) and framed it in terms of a development agenda for WIPO. In the next section, the claims of the A2K group will be outlined and some of the structural barriers they face regarding the success of their agenda.

ACCESS TO KNOWLEDGE AND THE DEVELOPMENT AGENDA

Musungu and Dutfield highlight one of the most important structural barriers facing the growing development agenda. Primarily, WIPO sees its constituency as two-fold; member states, negotiating for their national interests and the market sector, reflected in the creation of the Industry Advisory Commission (IAC) in 1998.⁵⁰ Nowhere are the interests of the general public or organizations seeking a balanced approach to intellectual property taken into consideration. In this way, WIPO reflects a deep flaw in the structure of international organizations generally, especially those within the United Nations family. While these organizations see themselves as engines for democracy and freedom around the world, they are organized in an anti-democratic fashion. Membership is extended to states (and not all states are democratic). Indeed, the international community is premised upon the needs of state interests and while representative governments are themselves subject to a critique of denial of access, this problem is exacerbated at the international level. It is virtually impossible for an

⁵⁰ Musungu and Dutfield, p. 8.

individual citizen to petition an international body for a grievance – those grievances must come in the form of a national or industry interest.

The system as structured along 19th century lines of national sovereignty within a “family of nations” is deeply flawed if the criteria one might use to assess it is democratic where access for a general international (or cosmopolitan) public could prevail. Perhaps one of the most interesting aspects of the Access to Knowledge movement is that it asserts a right to join the international discussion on the part of a general citizenry – as part of a global civil society. As such, it is making a unique claim, one that is being heard by international organizations who have opened their doors to a variety of NGOs that were not been previously present as observers. While still vastly overwhelmed by intellectual property boosters, some NGOs and intergovernmental organizations critical of the extension of intellectual property are becoming part of the process.⁵¹ However, these self-described “civil society” groups remain outnumbered by the industry specific organizations represented at WIPO.

The development round for WIPO emerged in the context of dissatisfaction on the part of many developing countries with the options available to them under the TRIPS agreement administered by the WTO. TRIPS has not proved to be viable for development from a global south perspective, but has instead hindered access to medication and knowledge. The call for a development round at WIPO parallel’s similar requests for transparency and access to the WTO. Because only member states can bring issues to discussion at WIPO, delegations from Argentina, Bolivia, Brazil, Cuba, the

⁵¹ The South Centre, Medecines Sans Frontieres, and Action Aid are examples of NGOs or Intergovernmental organizations with observer status for WIPO. See: Musungu and Dutfield, p. 29-31. However, a random individual cannot even access the building beyond the foyer, let alone view WIPO’s meetings.

Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela co-sponsored a proposal called the “Development Agenda” at WIPO’s meeting of the General Assembly in 2004.⁵²

Both the member states and the “Group of Friends of Development” sought to place issues affecting the global south on WIPO’s agenda. Their proposal argues that WIPO could have a new role to play in the future, one that takes development issues more seriously,⁵³ that aligns WIPO’s mission more directly with the mission of the United Nations,⁵⁴ and seeks to clarify that despite WIPO’s attention to providing technical help to developing countries, they should be doing more to aid actual development.⁵⁵ Much of the hopes of those in favor of a development agenda are summed up in the “Geneva Declaration on the Future of the World Intellectual Property Organization,” a document produced by the Consumer Project on Technology. What these organizations seek is not the overthrow of WIPO, but a substantive transformation in the way WIPO proceeds regarding intellectual property issues:

We do not ask that WIPO abandon efforts to promote the appropriate protection of intellectual property, or abandon all efforts to harmonize or improve these laws. But we insist that WIPO work from the broader framework described in the

⁵² The member states were joined by the “Group of Friends of Development” who issued their own proposal in support of the member state’s proposal. See: “Proposal to Establish a Development Agenda for the World Intellectual Property Organization (WIPO): An Elaboration of Issues Raised in Document WO/GA/31/11. Submission by the Group of Friends of Development. Available at: <http://www.cptech.org/ip/wipo/fod-iim.doc>. The South Centre, a non-governmental organization seeking to protect the needs of the global south has also highlighted the need for a development agenda. See: South Centre Analytical Note, “A Development Agenda for Intellectual Property Negotiations in 2004 and Beyond,” *South Centre*, March 2004. Available at: http://www.southcentre.org/tadp_webpage/research_papers/ipr_project/ipnego_devtagenda_mar04.doc.

⁵³ “Proposal to Establish a Development Agenda,” para 10.

⁵⁴ *Ibid*, para 20.

⁵⁵ *Ibid*, para 21-22.

1974 agreement with the UN, and take a more balanced and realistic view of the social benefits and costs of intellectual property rights as a tool, but not the only tool, for supporting creative intellectual activity.⁵⁶

Specifically, the declaration requests that WIPO:

- “Express a more balanced view of the relative benefits of harmonization and diversity, and seek to impose global conformity only when it truly benefits all humanity.
- Reject a “one size fits all” system that “leads to unjust and burdensome outcomes for countries that are struggling to meet the most basic needs of their citizens.”
- Establish a development round to openly discuss these issues.
- Support the mandate from the 1974 UN/WIPO agreement that WIPO “promote creative intellectual activity and facilitate the transfer of technology related to industrial property.”
- Create “a moratorium on new treaties and harmonization of standards that expand and strengthen monopolies and further restrict access to knowledge.”
- Create standing committees on technology transfer and development issues.
- Support a Treaty on Access to Knowledge and Technology.
- Reform the technical assistance programs and provide developing countries with the ability to implement the Doha Declaration on TRIPS and Public Health.⁵⁷

This declaration, signed by hundreds of individuals and organizations, establishes an agenda for action that WIPO has agreed to discuss. The ultimate goal of this agenda is to provide a broader range of discussion within WIPO regarding intellectual property.

Generally, it is assumed that WIPO as a global intellectual property booster pays little attention to the scope of protection and instead seeks maximum IP protection everywhere. The Declaration creates the possibility that WIPO would deal more sympathetically with countries seeking limited IP protection to balance their development interests.⁵⁸

⁵⁶ “Geneva Declaration on the Future of the World Intellectual Property Organization,” p. 2. Available at : <http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf>.

⁵⁷ Ibid, p. 2-3.

⁵⁸ The Electronic Frontier Foundation (EFF) has also signed on to the Development Agenda. For their analysis of what is happening see: “The WIPO Development Agenda

As the debate heated up, WIPO decided to allow only NGOs with “permanent” status to participate in the development agenda talks, effectively shutting out the majority of civil society groups who had only gained “ad hoc” observer status under WIPO rules.⁵⁹ In response, an open letter signed by over 800 groups and individuals was sent to WIPO protesting the exclusion of ad hoc observers,⁶⁰ which resulted in their ultimate inclusion in the talks. However, it is clear from the political process that the frame within which issues of development will be discussed continues to skew power in favor of states and industrial organizations.

The future and ultimate impact of the development agenda remains to be seen. Given the response on the part of the United States, Mexico and the United Kingdom, it is unlikely that progress will be quick without continued pressure from all aspects of civil society.⁶¹ As more civil society groups express concern about intellectual property and the negative impacts this regime has on development, WIPO will not be able to pursue its traditional activities without some level of criticism. Additionally, there is the possibility that change might happen from within regarding WIPO. One aspect of WIPO’s overall

and Why You Should Care About it.” Available at:

http://www.eff.org/IP/WIPO/dev_agenda. Site visited 2/18/06.

⁵⁹ “WIPO Shutting out Public Interest Organizations,” March 7, 2005. Available at: http://www.eff.org/news/archives/2005_03.php#003401. Site visited 2/18/06.

⁶⁰ Ultimately signed by over 1,000 people and organizations from all continents. See: <http://www.cic.unb.br/docentes/pedro/trabs/wipo-stats.html>. Site visited 2/18/06.

⁶¹ The US proposal was to create a WIPO Partnership Program that would establish a database to facilitate the use of intellectual property. Basically, the US proposal is similar to assurances made in the 70s that of course technology would be transferred – promises that never were fulfilled. See: WIPO, Inter-sessional intergovernmental meeting on a development agenda for WIPO, Proposal by the United States of America for the Establishment of a Partnership Program in WIPO, First Session, April 11-13, 2005, Geneva. Available at:

http://www.wipo.int/meetings/en/html.jsp?url=http://www.wipo.int/edocs/mdocs/mdocs/eniim_1/iim_1_1.doc. Site visited 2/18/06.

program, the focus on traditional knowledge, has the possibility of transforming the way WIPO (and by extension other international agencies) deal with states, individuals, and civil society.

TRADITIONAL KNOWLEDGE AND WIPO

Traditional knowledge, much like development itself, has long been a concern of member states associated with WIPO. Early discussions called traditional knowledge “folklore” and many countries sought specific protection of folklore.⁶² These issues reemerged within the context of traditional knowledge in the early 1990s when the Convention of Biological Diversity (CBD) highlighted the importance of traditional knowledge and folklore in relation to biological diversity and sought some avenue for recognizing its importance.⁶³ Since the early 90’s, WIPO has taken up the idea of traditional knowledge and has held a series of meetings to discuss the issues involved.

⁶² WIPO, “Records of the Intellectual property Conference of Stockholm, June 11 to July 14, 1967.” Geneva 1971. (minutes for the meeting to create WIPO), p. 913. The debates over traditional knowledge were preceded by debates over folklore and possible national protection. In fact, it is the same debate, but with more actors expressing concerns today. In a press release concluding the 1967 Stockholm talks, the concerns of the developing countries regarding folklore were also expressed.

“An additional new provision of the Stockholm text which will be of particular importance to developing countries, but which will have general application, relates to works of folklore. It is now recognized that unpublished works of which the identity of the author is unknown may be protected by a competent authority designated by the legislation of the country of which the author may be presumed to be a national.”

Press Release, July 14, 1967 from BIRPI regarding the just completed Intellectual Property Conference of Stockholm, 1967.

⁶³ Commission on Intellectual Property Rights, “Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights,” London, September 2002, p. 75.

In 1998, WIPO invited indigenous people from around the globe to participate in discussions regarding traditional knowledge and intellectual property.⁶⁴ As described in *WIPO Magazine*, “This Roundtable marked the beginning of a dialogue between member States of WIPO and the world’s diverse indigenous populations.”⁶⁵ However, from WIPO’s perspective, the talks were about educating indigenous groups about the benefits of intellectual property.

There is a broad and deep lack of awareness of intellectual property rights among indigenous peoples, which leads to a lack of consideration of these avenues of protection. The Roundtable was organized under a new WIPO program to facilitate discussion of effective application and possible improvements of intellectual property systems to accommodate the unique contributions of indigenous peoples, and help them protect their traditional knowledge, innovations, and cultural heritage.⁶⁶

In 1999, WIPO initiated a series of fact-finding missions, which “identified and explored the intellectual property needs and expectations of holders of traditional knowledge, in order to strengthen the role of the intellectual property system in their cultural, social and economic development.”⁶⁷ In 2000, WIPO created the “Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.” The first session, scheduled in 2001, focused on “access to genetic resources and benefit-sharing, (ii) protection of traditional knowledge, innovations and creativity, whether or not associated with those resources; and (iii) the protection of expressions of folklore,

⁶⁴ “Indigenous Peoples Discuss Issues at First Roundtable,” *WIPO Magazine*, July/August 1998, p. 8.

⁶⁵ *Ibid.*, p. 8.

⁶⁶ *Ibid.*, p. 8.

⁶⁷ WIPO, “Intellectual Property and Genetic Resources, Traditional Knowledge,” Available at: http://www.wipo.int/about-ip/en/studies/publications/genetic_resources.htm. Site visited 2/19/06.

including handicrafts.”⁶⁸ WIPO has continued to emphasize the importance of talks with indigenous peoples on issues related to traditional knowledge and has held nine meetings since beginning their fact finding on traditional knowledge.⁶⁹

Despite WIPO’s dedication to extending their specific version of intellectual property, the talks with indigenous peoples from around the world is unusual for an organization that governs itself with a state-based structure. Indigenous peoples often do not have recognition within the nation-states whose territories bind them and it could be argued that indigenous peoples, speaking for themselves under a very different rubric of “nationality” do as much to undermine the nation-state system as to reproduce it.

For example, the sixth session in 2004 included NGOs representing numerous indigenous groups as accredited observers (Table Four). Displacing the nation-state in discussions is a unique approach. Certainly, these organizations only have observer status, but focusing talks on issues associated with traditional knowledge suggests that WIPO, and perhaps other aspects of the UN, are ready to think around the nation-state.⁷⁰

Table Four: NGOs focused on traditional knowledge
Assembly of First Nations (ASN)
Call of the Earth
Aboriginal and Torres Strait Islanders Commission (ATSIC)
Foundation for Aboriginal and Islander Research Action (FAIRA)
Canadian Biodiversity Network
Coordinating Body of the Indigenous Organizations of the Amazon Basin (COICA)
Hokotehi Moriori Trust

⁶⁸ WIPO, “Assemblies of the Member States of WIPO,” Thirty-Sixth Series of Meetings. Geneva, September 24, to October 3, 2001. Geneva, p. 4 A/36/4.

⁶⁹ WIPO will hold the 9th session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore” in April of 2006. Information available at: http://www.wipo.int/meetings/en/details.jsp?meeting_id=9765. Site visited 2/18/06. See also: “

⁷⁰ The United Nations has established a Permanent Forum on Indigenous Issues to deal with issues associated with indigenous communities. See: <http://www.un.org/esa/socdev/unpfii/>. Site visited 2/18/06.

Rekohu, Aotearoa (New Zealand)
Indigenous Peoples Caucus of the Creators Rights Alliance
Saami Council
International Indian Treaty Counsel
Kaska Dena Council
Pauktuutit Inuit Women's Association
Tebtebba Foundation
Tulalip Tribes of Washington

Source: World Intellectual Property Organization,
<http://www.wipo.int/tk/en/igc/ngo/ngopapers.html>⁷¹

In their 2003 statement to the fifth session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore the Call for the Earth NGO highlighted an important problem related to talks at WIPO and indigenous communities. Call of the Earth seeks to “enable indigenous peoples to reframe the debate on intellectual property rights and traditional knowledge from an indigenous perspective.”⁷² According to Call of the Earth, “many indigenous peoples see IP claims in relation to indigenous knowledge and cultural expressions as ‘technically, spiritually and morally wrong.’”⁷³ Thus, while some organizations are concerned that WIPO will distort the debate over intellectual property by infusing it with a property rights discourse,⁷⁴ it is also possible that interaction with indigenous cultures may begin to break down the IP maximalist approach often favored by WIPO.

⁷¹ This is not a comprehensive list.

⁷² Call of the Earth, “Ancient Wisdom for Sustainable Livelihoods,” Statement at the Fifth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, July 8, 2003. Available at: http://www.wipo.int/tk/en/igc/ngo/coe_igc5.pdf. Site visited 2/18/06.

⁷³ Ibid.

⁷⁴ GRAIN, “The Great Protection Racket: Imposing IPRs on Traditional Knowledge,” *Seedling*, January 2004. Submitted to WIPO and available at <http://www.wipo.int/tk/en/igc/ngo/ngopapers.html>. Site visited 2/18/06.

The Call of the Earth group recognizes that the process is likely to be difficult to impact due to the member-nation structure of WIPO. However, WIPO has made an effort to give indigenous communities a substantive role in discussions despite their inability to meet at the table as member-states.⁷⁵ Such a policy decision helps erode the importance of member-states and suggests that at least when it comes to Traditional Knowledge, WIPO is open to exploring some possible options expanding access to groups not officially constituted as “states.” I would argue this is a positive move and one that should be encouraged, not just at WIPO, but throughout the international organizational structure.

Substantively, indigenous communities also offer a challenge to WIPO. Despite multiple meetings to discuss, as WIPO sees it, education regarding the benefits of intellectual property, indigenous communities have provided an alternative model for understanding what many call intellectual property and have not fallen quickly in line to exert intellectual property protection over their traditional knowledge. For example, at the 5th Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, the Tulalip Tribes of Washington argued that indigenous communities simply reject the notion of both intellectual property and the public domain.

In indigenous cosmology, knowledge is a gift from the Creator. There is no clear distinction between sacred and other kinds of knowledge of the kind made in the Secretariat’s paper. Indigenous peoples have collective systems for using the Creator’s gifts, and these generally have complex systems of regulating the use of knowledge, in which some knowledge may be held by individuals, clans, or other

⁷⁵ Call of the Earth, p. 2.

groups. Although sometimes superficially similar to Western concepts of property rights, they are not the same.⁷⁶

At the sixth session in 2004, the issue of using intellectual property rights to protect traditional knowledge had not made much progress. As the statement by the Saami Council suggests, they do not see intellectual property adequately protecting traditional knowledge.⁷⁷

While the framework of intellectual property will continue to drive discussions of traditional knowledge at WIPO and all debates will take place within the framework of the member-states, the seeds of an alternative are planted by these discussions and it is possible that combined with the concept of the development agenda that WIPO can undergo substantial changes in the future.

WIPO, TRIPS AND THE FUTURE

Prior to 1995, when the WTO opened its doors and TRIPS became a tour de force for protection of intellectual property, WIPO began to think about how it would face the future given the presence of the WTO just down the road. In 1994, WIPO passed a resolution in which they committed themselves to helping the WTO by creating a “mutually supportive relationship” between the two organizations.⁷⁸ In 1996, WIPO and

⁷⁶ “Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain,” Submitted to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, Geneva, July 5-17, 2003, p. 2. Available at:

<http://www.wipo.int/tk/en/igc/ngo/tulaliptribes.pdf>. Site visited 2/18/06.

⁷⁷ “Statement by the Sammi Council,” Submitted to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Sixth Session, Geneva, March 15-19, 2004, p. 1. Available at:

http://www.wipo.int/tk/en/igc/ngo/saamicouncil_igc6_tk.pdf. Site visited 2/28/06.

⁷⁸ WIPO, Governing Bodies of WIPO and the Unions Administered by WIPO, Twenty Sixth Series of Meetings,” Geneva, September 25 to Oct 3, 1995, “Activities in the Year 1994, report of the Director General,” AB/XXVI/6, p. 8.

the WTO entered into an agreement to streamline their respective IP duties.⁷⁹ The irony of WIPO's attempts to work with the WTO is that, according to the former Director General, WIPO was not invited to play a substantive role in the development of the TRIPS agreement.⁸⁰ Despite the fact that the creation of TRIPS undermined WIPO's supremacy in the intellectual property arena, WIPO quickly went to work developing an educational agenda for the developing world regarding the new burdens associated with TRIPS.⁸¹ Instead of focusing on how WIPO might help developing countries develop, WIPO made educating developing and least-developed countries regarding their responsibilities under TRIPS its goal.⁸² As discussed in the 27th session of the WIPO General Assembly:

Under this joint initiative, the two Organizations commit themselves to use available resources to provide, on request, assistance to enable least-developed country Members of the WTO to comply with obligations under the TRIPS Agreement within the applicable time limits. Our two Organizations will provide technical cooperation, both individually and jointly, using both in-house resources and outside experts, and, wherever appropriate, in conjunction with donor countries. The joint initiative aims to facilitate enhanced utilization of programs both in respect of the provision of substantive intellectual property rights and the respect of procedures and remedies for their enforcement, which is an integral part of the TRIPS Agreement.⁸³

⁷⁹ Agreement Between the World Intellectual Property Organization and the World Trade Organization (1995)" Geneva: WIPO, 1997 WIPO Publication 223 (E).

⁸⁰ Arpad Bogsch, "The First Twenty-Five Years of the World Intellectual Property Organization from 1967 to 1992." International Bureau of Intellectual Property: Geneva 1992. WIPO Publication No. 881 (E), p. 86. "WIPO invited GATT to each of its meetings dealing with substantive intellectual property law, and GATT was represented in almost all of them, but WIPO was invited only to GATT meetings of a formal kind and not to the (very numerous) meetings that discussed the substantive intellectual property questions and worked on the above-mentioned draft. This unbalanced situation flowed – almost needless to say – entirely from the will of the governments representing their countries, whether in WIPO or GATT."

⁸¹ "WIPO General Assembly" Twenty-Seventh (15th Ordinary) Session, Geneva, Sept 24 – Oct 3, June 14, 2001. WO/GA/27/6.

⁸² Ibid.

⁸³ Ibid.

The full scope of what WTO and WIPO agreed to provide the developed countries can be found in Table Five.

Table Five: Services provided by WIPO and WTO to Developing Countries

Assistance Regarding Legislation	Human Resource Development	Institution Building and Modernization of Intellectual Property System
<ol style="list-style-type: none"> 1. Advice on compatibility of existing legislation with the provisions of the TRIPS Agreement 2. Advice on the preparation of new legislation including the preparation of draft legislation with commentaries or explanatory notes or the preparation of comments and suggestions on draft laws or legislative provisions prepared by Governments 3. Preparation of draft implementing regulations including schedules of fees and forms. 	<ol style="list-style-type: none"> 1. International, regional, sub-regional and national meetings to explain and discuss the provisions and implications of the TRIPS Agreement 2. Training courses, fellowships, study visits, advisory missions and on-the-job training. 3. Special meetings and courses for policy makers/advisors, officials, judiciary and enforcement agencies (customs/police), attorneys, scientific, research and academic institutions, inventors and inventors' associations, etc. 4. Assistance regarding technology transfer and licensing agreements. 5. Teaching of intellectual property law. 	<ol style="list-style-type: none"> 1. Establishing and modernizing intellectual property offices 2. Assisting the setting up of collective administrations for copyright 3. Preparation of work manuals and rationalization and simplification of work procedures 4. Information technology, automation and computerization 5. Patent information services 6. Collaboration with regional and national training institutions 7. Preparation and implementation of Nationally Focused Action Plans (NFAPs), inter alia, for the above.
Enforcement	Notification Obligations under the TRIPS Agreement	Online
<ol style="list-style-type: none"> 1. Training of trainers 2. Networking of and coordination among the enforcement agencies 3. Facilitating the creation of data bases 4. Special fora for judiciary 5. Training for enforcement 	<ol style="list-style-type: none"> 1. Assistance in meeting the notification obligations under the TRIPS Agreement 	<ol style="list-style-type: none"> 1. Provision of information through the Internet websites of the two Organizations (www.wipo.int and www.wto.org)

agencies including customs and police officials 6. Liaison with the private sector and rights holders associations.		
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Source: WIPO General Assembly. Twenty-Seventh (15th Ordinary) Session, Geneva, Sept 24 – Oct 3, Doc: WO/GA/27/6.

Every function listed above focuses on developing a bureaucratic infrastructure to ensure protection of intellectual property rights. Not a single function ensures that development issues are taken into consideration, unless one understands development as the growth of an intellectual property bureaucracy and legal regime. Thus, when faced with the question of how to approach development in the future and remain relevant in a post-TRIPS world, WIPO chose to operate in a copyright maximalist manner instead of taking the opportunity to rethink its underlying mission as called for by the development agenda.

The Director General of WIPO, Dr. Idris, highlights the goals of WIPO in his 1999 “Vision and Strategic Planning for WIPO” article for *WIPO Magazine*. He states,

An institution without a vision and a strategy for realizing that vision is doomed to irrelevance. That will never be our fate, for we know what our goals are, what has to be done and how to go about it effectively and efficiently, in close partnership with our member States, the private sector and civil societies.⁸⁴

The article goes on to divulge that the appropriate goal for WIPO in the future is to assist in the development of an “intellectual property culture” that can offset the threats to IP caused by globalization and new technologies.⁸⁵ Thus, the future of WIPO, from WIPO’s perspective is clear – to continue pursuing the global acceptance of intellectual property and create conditions upon which even broader areas of protection will be able to exist.

⁸⁴ “Vision and Strategic Direction of WIPO,” *WIPO Magazine*, September 1999, p. 8-9.

⁸⁵ Ibid.

In the final section of the paper I'd like to briefly introduce a case study in order to test the development goals of WIPO against one of the original countries to sign on to the agreement. If WIPO is correct, and adherence to intellectual property laws is a necessary condition for development, then one should find that development has been improved by membership in WIPO. If development has not improved, then one must question the role of an organization like WIPO and suggest that they reconsider their own assessment techniques. For the most part, WIPO assessment focuses on the number of trainings held, the number of people who have heard the intellectual property message, and the number of countries who are revising their laws to meet the standards associated with WIPO. However, WIPO does not investigate what these new laws and educational paradigms actually facilitate on the ground. While only one country to which many more should be added, Chad makes an interesting case study and will be the focus of the final section.

DEVELOPMENT, INTELLECTUAL PROPERTY AND CHAD

Chad gained its independence from the French in 1960 and was a deeply troubled nation-state from the start, in part because it faced a negative colonial legacy. The French came to the region at the turn of the century and fought a long and protracted war to achieve the subservience of the local population. Southern Chad more quickly accepted colonial rule in an effort to preserve themselves from the slave-taking Northerners.⁸⁶ The North, Center and East of Chad were dominated by “powerful

⁸⁶ ⁸⁶ Bernard Lanne, “Chad: Regime Change, Increased Insecurity, and Blockage of Further Reforms,” in John F. Clark and David E. Gardinier, eds. *Political Reform in Francophone Africa*, Boulder: Westview Press, 1997, p. 268.

theocratic predatory and full-time warring states.”⁸⁷ The South “enjoyed a sedentary agricultural life that provided most of the necessities and ensured comfortable living.”⁸⁸ However, despite variation in strength, resistance to colonial rule existed throughout the territory. The French never adequately subjugated the North of Chad and these areas remained fairly independent under French rule.⁸⁹ According to Azevedo, the French rule of Chad was intrinsically violent.⁹⁰

Generating tax revenue in Chad was problematic from the start due to the lack of natural resources and the fact that the vast majority of Chad’s population lived subsistence lifestyles. Without income, the French could not derive the appropriate revenue to run a colonial regime. As a result, the colonial government established in Chad was ruled by the least competent of French civil servants and deemed a demotion for those who were required to move there.⁹¹ The French relied upon forced labor to impose cotton on the Southern region and to supply the French military with fresh bodies. The resistance of the local population, the lack of an accepted governmental structure, compounded with oppressive rule, set the stage for little stability in the region.

The French approached colonization as a form of assimilation. Those (few) who adopted French culture and language could be assimilated, become French citizens, vote, own property and attend school in Europe.⁹² As Azevedo notes, “To qualify for

⁸⁷ Mario J. Azevedo and Emmanuel U. Nnadozie, *Chad: A Nation in Search of its Future*, Boulder: Westview Press, 1998, p. 17.

⁸⁸ *Ibid.*, p. 17.

⁸⁹ *Ibid.*, p. 20.

⁹⁰ *Ibid.*, p. 65.

⁹¹ Mario J. Azevedo, *Roots of Violence: A History of War in Chad*, Amsterdam: Gordon and Breach Publishers, 1998, p. 67; Terry M. Mays, *Africa’s First Peacekeeping Operation: The OAU in Chad, 1981-1982*, Westport: Praeger, 2002, p. 19.

⁹² *Ibid.*, p. 74.

assimilation they had to be able to read and speak French, adopt French culture (in dress code and eating etiquette, for example), abandon the drums and local dancing styles, be monogamous and, in most cases, Christian – and have the financial means to sustain themselves.”⁹³ Those who were not assimilated were forced into a labor system, le système indigénat, and had no rights within their own country.⁹⁴ Very few Africans were assimilated and instead experienced harsh working conditions or military service.

Upon independence nothing had been done to resolve the pre-colonial tensions between the Northern and Southern ethnic groups in Chad. In fact, the French had exacerbated these tensions through discriminatory taxing structures and governance practices. François Tombalbaye, Chad’s first President, sought “redress for past grievances,” which did nothing to improve relations between the regions. Furthermore, he consolidated power into a single-party state governed exclusively by him.⁹⁵

Chad had been neglected as a colony and upon independence had few educated people ready to take over the government. According to Azevedo, “on the eve of independence, the entire colony of Chad had only one law school graduate and one graduate of the French Overseas National School, and, contrary to the spirit and the letter of the Loi Cadre of 1956, only a handful of southerners actually became full French citizens.”⁹⁶ Writing in 1962, two years after independence, Guy Benveniste and William E. Moran, Jr. noted that the vast majority of Chadians still lived traditional lifestyles that were at odds with the requirements of a modern nation-state.⁹⁷

⁹³ Ibid, p. 74.

⁹⁴ Ibid, p. 74.

⁹⁵ Ibid., p. 89- 90.

⁹⁶ Ibid, p. 178.

⁹⁷ Guy Benveniste and William E. Moran, Jr. *Handbook of African Economic Development*, New York: Praeger, 1962, p. 6.

The French and European missionaries had established some primary schools and a few secondary schools, but the Northern Chadians who adhered to the Islamic tradition refused to send their children to these schools.⁹⁸ This meant Southerners were the most qualified to take over government positions and French-educated southerners took over governmental responsibilities after independence.⁹⁹ Benveniste and Moran argued in 1962 that Chad, and much of the rest of independent Africa, needed administrative officials and technical assistance. While the technical assistance programs provided under the United Nations were essential, without adequate personnel, they argued, there was no way for technical and development assistance programs to succeed.

While most Chadians were involved in subsistence agriculture, the few elites who had been educated in Europe sought “nontraditional goals,” and these were the people who inherited the colonial structure. These new elites were invested in the notion of a liberal market economy.¹⁰⁰ Thus, as with many newly established countries within Africa in the late 60s, issues of economic development quickly assumed a Western liberal form, placing emphasis on industrial evolution and the establishment of markets despite the fact that most of the population was not prepared for liberal economic development. While cotton had been imposed on Chad as a way to create funding for the colonial regime, it quickly became an essential export industry for the emerging nation-state. With the exception of cotton, the new nation-state had limited industry, few civil servants, and an incomplete educational structure.

⁹⁸ Bernard Lanne, “Chad: Regime Change, Increased Insecurity, and Blockage of Further Reforms,” in John F. Clark and David E. Gardinier, eds. *Political Reform in Francophone Africa*, Boulder: Westview Press, 1997, p. 269.

⁹⁹ J. Millard Burr and Robert O. Collins, *Africa's Thirty Years War: Libya, Chad, and the Sudan 1963-1993*, Boulder: Westview Press, 1999, p. 26.

¹⁰⁰ Guy Benveniste and William E. Moran, Jr. *Handbook of African Economic Development*, New York: Praeger, 1962, p.6-7.

Given the nature of the economy upon independence, the French continued to provide aid to Chad. According to Burr and Collins, 95% of Chad's budget was provided by the French, along with advisers.¹⁰¹ Essentially, Tombalbaye's rule was made possible by this foreign aid. Because the French maintained control over health care, education, banking and the cotton industry, they remained a powerful influence in Chad even after independence.¹⁰² Despite foreign support, Chad made little economic progress between 1960 and 1968.¹⁰³ Deficits rose throughout the 1960s and the lack of internal infrastructure (few roads that could be used all year and no fully navigable rivers) made trade difficult.

The lack of development along with the increasingly brutal rule of Tombalbaye exacerbated tensions between Northern and Southern Chadians. In 1966, revolutionary forces in Chad united as the National Liberation Front of Chad (Front de Libération Nationale du Tchad, or FROLINAT) to resist the Tombalbaye government and the abuses perpetuated by Southern government officials against Northerners.¹⁰⁴ Throughout the late 60s and into the 70s much of Chad's attention was focused on the civil war that erupted between the North and the South and the French were called upon to intervene to support the Tombalbaye government against the rebels.¹⁰⁵ Robert Buijtenhuijs argues that because of Tombalbaye's rule and the resistance to it, the Chadian state virtually disintegrated during the late sixties and early seventies. But for French intervention

¹⁰¹ Ibid, p. 26.

¹⁰² Ibid, p. 26.

¹⁰³ International Monetary Fund, *Surveys of African Economies: Volume I: Cameroon, Central African Republic, Chad, Congo (Brazzaville), and Gabon*, IMF: Washington DC, 1968, p. 4.

¹⁰⁴ Lanne, p. 270.

¹⁰⁵ Ibid., p. 270.

between 1969 and 1971, the Tombalbaye regime would have been overthrown by the FROLINAT rebels.¹⁰⁶

Despite these internal conflicts, the concept of the Chadian nation-state remained important for all parties.¹⁰⁷ The Northern resistance sought a different Chad, not the elimination of Chad. Certainly the French seemed to think that maintaining a state in Chad was essential for their national interests. However, they placed the future of Chad in Tombalbaye's hands because they wished for Chad to remain Francophone instead of possibly coming to be dominated by the Northern Islamists.¹⁰⁸ In addition to military support between 69 and 71, the French sent a Mission for Administrative Reform (MRA) to help stabilize the functions of Tombalbaye's government, a mission that did not meet with cooperation on the part of Chadian civil servants.¹⁰⁹

Despite the many internal problems, Tombalbaye seemed intent on placing Chad on the regional and international political map. On July 10, 1963, Chad joined the United Nations. They joined the International Monetary Fund in 1967. They also were a member of several regional and international organizations dedicated to economic development including the Common Organization of African and Malagasy States, the European Economic Community Association and the UN Economic Commission for Africa.¹¹⁰ As Burr and Collins note,

During the first three years after independence the Republic of Chad differed very little from the colonial Chad. This would change as Chad followed other newly

¹⁰⁶ Robert Buijtenhuijs, "French Military Interventions: The Case of Chad," in Anthony Kirk-Greene and Daniel Bach, Eds. *States and Society in Francophone Africa Since Independence*, New York: St. Martin's Press, 1995, p. 215-217.

¹⁰⁷ Hans Eriksson and Björn Hagströmer, *Chad – Towards Democratisation or Petro-Dictatorship?* Nordiska Afrikainstitutet, Uppsala, 2005, Discussion Paper 29, p. 37.

¹⁰⁸ *Ibid.*, p. 217. See also Burr and Collins, arguing that President de Gaulle had a fondness for Chad and a desire to see Francophone Africa remain intact (p. 46-50).

¹⁰⁹ *Ibid.*, p. 217.

¹¹⁰ IMF, p. 176.

independent African nations to create autochthonous regional organizations designed to stimulate political and economic integration. In addition, there were numerous Third World and African meetings to attend, alliances to be formed in the United Nations and its subsidiary organizations, and an awareness of the very active Arab, Islamic coalitions, and the growing importance of Third World regional blocs, which spanned the globe eastward from the Atlantic to the Pacific.¹¹¹

Tombalbaye was active at the regional and international level and even as the country faced the disintegration of internal governmental structures, it retained its identity as a nation-state internationally.

Much like their participation within regional and international organizations more generally, Chad is a signatory to virtually all the international agreements on intellectual property. They signed the Paris treaty to protect industrial property in 1963, the same year they became a member of the UN. As mentioned above, Chad signed on to WIPO in 1970. In 1971, they signed the Berne convention which protects literary and artistic works along with a series of smaller treaties administered by WIPO.¹¹² In 1977, Chad became party to the Bangui Agreement on trademarks, patents and industrial designs, the regional agreement establishing intellectual property protection and administered by the African Intellectual Property Organization (OAPI).¹¹³

According to OAPI, until 1962 French law governed the patent process in all countries part of the French Union. Upon independence, under the rules set forth in the Paris convention (which Chad signed in 1962), regional organizations could be created to establish patent protection. In central Africa the regional agreement was called the

¹¹¹ Burr and Collins, p. 29-30.

¹¹² For a full account of Chad's membership see: Chad: Intellectual Property Profile, <http://www.wipo.int/ldcs/en/country/pdf/td.pdf> Site accessed August 3, 2006.

¹¹³ For the full text of the Bangui Agreement, updated in 1999, see: African Intellectual Property Organization, http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf. Site visited August 3, 2006.

Libreville Agreement.¹¹⁴ According to OAPI, “the Libreville Agreement covered the territories of African countries of French expression and culture.”¹¹⁵ Thus, the early adherence and creation of intellectual property regimes in the former French colonies were linked in part to France’s involvement in these regimes.

By 1977, Chad, along with the rest of central Africa, had a series of intellectual property laws that met international standards. These agreements were reached and signed while Chad was in the midst of a full-fledged civil war that brought the state to the edge of destruction, including the assassination of President Tombalbaye in 1975. Given this political context, it is difficult to understand what Chad thought would be the benefit of membership in WIPO and these international treaties to protect intellectual property.

Perhaps Chad saw membership in WIPO as another avenue to align with the growing delegation of Third World countries that had emerged onto the international scene in the post-colonial years. It is possible that Chad, like many developing countries in the late 60s and early 70s saw international organizations like the United Nations (and thus possibly a future WIPO) as the mechanism through which they could focus world concern on development. However, while membership in the UN makes sense under this analysis, given that Tombalbaye was forcing Chad through a period of Africanization where he sought to move away from Western ideas at the same time, it seems strange for Chad to sign treaties protecting a Western notion of creative work while at the same time seeking to distance himself from Western culture.

It could be that Chad was convinced by the rhetoric associated with WIPO that signing these regimes would help facilitate technology transfer to countries desperate for

¹¹⁴ Africa Intellectual Property Organization, “History of the OAPI,” <http://www.oapi.wipo.net/en/OAPI/historique.htm>. Site visited August 3, 2006.

¹¹⁵ Ibid.

development. Development issues were alive and well during WIPO discussions and many thought that the demands of the developing world would threaten the creation of WIPO. Chad would have been involved in these discussions and understood the possible benefits of technology transfer. In retrospect, the talk of technology transfer to facilitate development was more rhetorical than actual and was linked to WIPO's desire to become a UN special organization.

The reasons for Chad's decision to join WIPO are not at this point clear. However, what is clear is that WIPO promised that membership in the organization and protection of intellectual property via the creation of copyright and patent laws would spark domestic economic development. More than 30 years have passed since Chad became a member of WIPO and it should be possible to assess how their membership in this organization has helped Chad develop. Is Chad better off today than they were in 1970? World Bank data would suggest that little about Chad has improved over the past 35 years.¹¹⁶ Only recently has there been some upward movement regarding Chad's economic conditions, but this upward movement is related to the discovery and exploitation of oil within Chad's borders. It is yet to be seen if the profits from oil exploration will be used for further development in Chad.¹¹⁷

WIPO continues to assert that intellectual property rights are essential for innovation to exist within the developing world, yet in Chad where these laws have been on the books since the mid-70s they have done nothing to spur foreign investment or domestic innovation. While WIPO would most likely argue that the lack of development

¹¹⁶ The World Bank Group, World Data Online. <http://devdata.worldbank.org/dataonline/> Search done August 2, 2006.

¹¹⁷ Hans Eriksson and Björn Hagströmer, Chad – Towards Democratisation or Petro-Dictatorship? Nordiska Afrikainstitutet, Uppsala, 2005, Discussion Paper 29.

is due to the minimal enforcement of IP laws, it is equally likely that numerous intervening variables have made the use of intellectual property laws less relevant to development than they might appear for a more advanced economy. First, Chad's educational system remains rudimentary with literacy rates in the country continuing to be low. Thus, copyright laws hinder access to materials necessary for basic education and it is difficult to see how copyright laws will be useful until the day when the population achieves a higher rate of literacy and annual incomes sufficient to purchase copyrighted material.

Second, while Chad hosts a university which opened its doors in 1970, much of its early life was threatened by civil war. Chad, like so many countries in the global south sends many of its best minds to be educated outside the country and suffers from the inevitable brain drain that results when these people do not return to their home country. Those with advanced degrees and the potential for innovation are often working outside their home country.¹¹⁸ Again, international political economy considerations intervene to make copyright and patent law less relevant.

Third, while copyright and patent law is considered essential for a technology industry, Chad has few Internet connections, few households with computers and is far more likely to be harmed by the high prices associated with copyrighted products than helped by them.¹¹⁹ Few within Chad's borders can afford these communication tools

¹¹⁸ Robert Verzola discusses this trend in his important work. See: Robert Verzola, *Towards a Political Economy of Information: Studies on the Information Economy*, Quezon City, Philippines: Foundation for Nationalist Studies, 2004, p. 25-28.

¹¹⁹ The World Bank Group, World Data Online. <http://devdata.worldbank.org/dataonline/> Search done August 2, 2006.

unless free software became accessible. Thus, to the degree that technology exists in Chad, copyright hinders access instead of helping.

It should also be noted that available research on Chad suggests that a vibrant economic life based upon traditional knowledge sustains many Chadian citizens. This knowledge is shared within the community and does not rest in any way upon intellectual property laws. Furthermore, this traditional knowledge is better suited to the local environment and the way of life lived by most people within Chad.¹²⁰ To that end, Chad is more threatened by the destruction of the natural environment and the reduction in the size of Lake Chad than by the weak protection of intellectual property.

Finally, despite some economic growth, Chad remains one of the poorest countries in the world. Given these economic conditions, it can be argued that there are greater concerns than protecting intellectual property and developing the infrastructure necessary to enforce these laws. While Chad may rely upon OAPI for enforcement, the lack of domestic intellectual property based industries suggest that there has been little to no benefit of membership in WIPO for the past 36 years. What WIPO can provide as outlined in table five, are not viable steps towards economic development and technology transfer, but a bureaucratic framework that few would use. One must wonder how Chad would have developed in the absence of WIPO and the answer seems to be that not much about Chad's development would have changed – not a glowing assessment of the world's preeminent intellectual property organization.

CONCLUSION

¹²⁰ Caterina Batello, Marzio Marzot, Adamou Harouna Touré, *The Future is an Ancient Lake: Traditional Knowledge, Biodiversity and Genetic Resources for Food and Agriculture in Lake Chad Basin Ecosystems*, FAO, 2004.

International organizations are bound by their histories and the cultures created by those histories and institutional structures. However, at given moments, it is possible for an organization to evaluate its past and make attempts to change its trajectory in the future. WIPO is at such a stage today. Developing countries, civil society groups and indigenous communities are all urging WIPO to create a new pathway to understanding intellectual property in the future. WIPO should take up this challenge. After over thirty years of existence, it cannot be said that intellectual property laws have made developing countries better off, and in fact, it can be argued that the plight of the developing world is as bad, if not worse, today than it was thirty years ago. Thus, WIPO should align itself with those seeking to avert human suffering and redefine its mission to include more than simply endorsing development and technology transfer, but implement plans through which development and technology transfer may take place.

International organizations, including WIPO, are structured from a top-down hierarchical paradigm emerging from the 18th and 19th century romance with the nation-state. As the world globalizes and transcends nation-state boundaries and as the private actors (corporations and intellectual property interests) become as large, if not larger, than some nation-states, it is also time for WIPO to rethink its membership directives. Representation on the part of civil society groups in a “democracy from below” approach is also an option that should be seriously considered. Until WIPO, and the UN more generally, can come to terms with the flaws imposed on it by its state-based structure, real global transformation cannot occur. WIPO and the UN are already paving the way in the traditional knowledge arena. However, this process can go much further. The development agenda is about more than exerting the rights of the developing world, it is

about expanding the opportunities for a transparent and democratic system at the highest levels of government. As such, it should be endorsed and taken even further. While the hopes of success are limited given the prevailing interpretation of intellectual property as a key right in innovation, the time is ripening for massive resistance to the maximalist IP approach. WIPO can be ready for this resistance or caught unawares. I suggest that their next strategic plan seek to assess the interests of the masses of people in the world who need more than a copyright office installed in their country, but instead need access to the innovation available throughout the world that is truly the “heritage of humankind.”