DISCONTENT INDUSTRIES? CREATIVE WORKS AND INTERNATIONAL TRADE LAW

MAKING SENSE OF ANALOGUE IP RULES IN A DIGITAL AGE

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CREATe

DISCONTENT INDUSTRIES? CREATIVE WORKS AND INTERNATIONAL TRADE LAW: MAKING SENSE OF 'ANALOGUE' IP RULES IN A DIGITAL AGE[1]

This working paper is a lightly edited transcript of a CREATe public lecture delivered at the University of Glasgow on 28 November 2018.[2]

Abstract.

The World Trade Organization TRIPS Agreement established multilateral rules on "trade related aspects of intellectual property", purporting to do away with distortions and impediments to trade, and to establish a benchmark for adequate and effective intellectual property protection. It posits a positive-sum relation between the producers and users of technological knowledge. These rules were drawn up a generation ago in Geneva, exactly where and when the World Wide Web was in the process of being invented. The Web epitomises the technological developments – the digital disruptions – that have revolutionised the ways in which intellectual property is formed, regulated, managed and traded; yet the TRIPS Agreement was concluded at a time when creative content was mostly embedded in physical media, and almost exclusively counted as trade in goods. New business models for the creative industries and new technology platforms for the distribution of content have outpaced regulatory, legislative processes, let alone the capacity of multilateral rules to be adapted and updated to respond to these developments. Recent bilateral and regional deals – negotiated expressly outside the multilateral sphere – have sought to define and promote digital trade.

This working paper reviews the abiding significance of the TRIPS Agreement for trade in creative content against the fundamental shift from trade in physical carrier media to trade in network data packets: is TRIPS somehow 'wired' – a timely trade pact that foreshadowed the growth in trade in IP as a valued good in itself; or 'tired' – rooted in a bygone set of assumptions about how IP is traded; or indeed 'expired', superseded by fundamental technological shifts and subsequent trade deals? The paper concludes by reflecting more broadly on what the impact of technological disruption can tell us about the essential relationship between the creator and the consumer of creative works, and the limitations of ways of understanding diffusion of creative works that are limited to legal, technical or regulatory frameworks

[1] Purely a personal and informal oral presentation on work still in progress, not presented as a finished published work. Further development of this material will be published in Antony Taubman & Jayashree Watal (eds), Trade in Knowledge: Economic, Legal and Policy Aspects, Cambridge University Press (forthcoming, 2020). The author welcomes comments at antony.taubman@wto.org. This working paper does not present views that can be attributed to the WTO, its Secretariat, or its members.

[2] The accompanying presentation is available at http://bit.ly/taubman-glasgow-create

Introduction

We in the multilateral policy space are heavily dependent on the research and the insights from the academic community. Scholarly work is critically important on the issues that we're going to look at this evening. A vital part of my work is fostering and revitalising the feedback, the dialogue, the conversations the communities of policymakers, practitioners and scholars. The issues are simply too great at the moment for us to work away in isolation from each other.

So for me it is a tremendous privilege and, frankly, a kind of therapy for me to step out of the rather bizarre world of the Geneva multilateral system and try to make sense of it in front of, well I hope, a sympathetic and curious audience.

I'll do my best to make some sense of what is going on, but I also want to take the opportunity to explore some of the unresolved questions, some of the fundamental concerns about equity and balance that have always been at the heart of the intellectual property system, ideas of equity and balance and the quest for a just reconciliation of conflicting interests, that has always been the motor of IP law, and that poses acute challenges now at the global level. As testament to the significance of the issues at stake, the heads of state of the world's two greatest economies are reportedly on the point of having a serious conversation about intellectual property.

And as I mentioned to the rather impressive group of students I spoke to earlier today, the interaction between policy, practice and theory is not working as well as it could today. It is not finding its way into the forefront of these high-level discussions and I think that's much overdue. And, in fact, what I am hoping to do tonight is to trace through some of the policy challenges that we have at the multilateral level and to look to you in your work, in your research, in your future work for some solutions.

From trade-related aspects of IP to IP-related aspects of trade, and trade in IP

Trade is, I know, very much a current issue in the UK. But what is it exactly? We don't have a formal definition of 'trade', even the World Trade Organisation - it is our middle name, and we don't have a definition of it. It's not altogether clear what class of commercial interactions constitutes trade. It seems to be very important, people negotiate about it, they fight about it, they conduct disputes about it; but on close inspection it turns out that trade is an amorphous and fast-evolving thing. We see this definitional uncertainty in the interaction between trade, as such, and the intellectual property system, as such. In the law, economics and policy of trade, IP used to be construed simply as something embedded in physical goods, that were traded as goods, as part of the 'added value' of traded goods.[3] To take an ontological turn, IP was not conceived of as an intangible good, but only as a quality or

[3] Thus the Harmonized Commodity Description and Coding Systems (HS) classification of traded goods – for purposes of customs valuation and statistics for trade in goods - distinguishes between recorded and unrecorded optical media, magnetic media, and photographic media: the presentation illustrates the differing trade patterns in goods in HS classification 852341 (unrecorded optical discs) and 852349 (recorded optical discs).

characteristic embedded in and transported by a physical carrier medium, which was the 'real' good being traded.

What we have seen over the past twenty years or so has been the evolution from the idea that intellectual property is an aspect of trade, a dimension of trade, to the advent of trade in intellectual property as such. Just as, through one 'IP' protocol, the internet is effectively constituted of packets of digital information, we can see internet-enabled trade in packets of the other IP, as tradeable goods in their own right – a song, an app, a periodical, an e-book construed as an IP licence, the object of a consumer's commercial purchase. This is the essential digital disruption that has transformed the interplay between IP and trade, and that has created the new paradigm that we are working with. It came as a shock in particular for trade negotiators, trade lawyers, and trade economists especially for whom intellectual property had been anathema in the past. Intellectual property was a rent-seeking device,[4] it was an obstacle to trading in goods; from a trade policy point of view, it was something that got in the way and had to be minimised, contained. We now have this extraordinary situation that packets of intellectual property as such, IP packets if you like, are transacted, are the object of trade in themselves, and that is something that the system wasn't ready for, and in many respects is still not ready for.

But why does it matter today? Well, from the point of view of an intergovernmental secretariat, servicing 164 member governments, most of which are developing countries, we find that governments are deeply concerned about finding their way in the contemporary global economy at a time when their economic and trade interests are rapidly evolving. We find two broad areas of interest in general. First, the potential of new trading platforms: the idea that if you are a creator, if you are producing creative works anywhere on the planet, you should be able to have equitable access to global markets for your creative works, so there is that idea of a level playing field in a positive sense reducing the barriers for creative people to benefit from their works across the globe. And, secondly, more in the technological area perhaps, there are cultural significances. Knowledge, content, creative works are non-rivalrous, they can be shared, they can be reproduced infinitely, and developing countries are looking to see the spill overs in terms of their technological development, their intellectual development, and their cultural development.

We have in the WTO, in the WTO legal system an agreement on intellectual property, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), and one question I want to explore tonight is whether this is simply out of date. The text itself was concluded many years ago, effectively in 1991-92 just as the World Wide Web was in the process of being invented just down the road in Geneva at CERN. There was actually no connection whatsoever between those two phenomena, ironically so: just after the TRIPS Agreement came into force in 1995 as a legal instrument, that's exactly when the internet came along and completely revolutionised much of the way copyright works, and how creative works are distributed and transacted. The question is: was

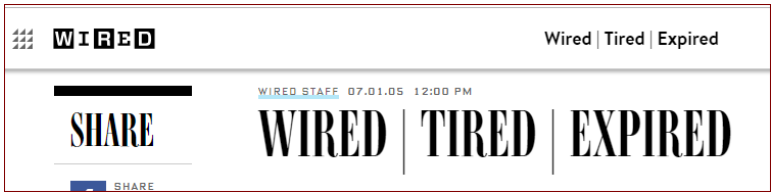


Figure 1: TRIPS: Wired, tired or expired?

[4] A recent critical view was expressed by Rodrik in the Trade Talks podcast, available at www.tradetalkspodcast.com/podcast/25-what-are-trade-deals-for-dani-rodrik-does-trade-talks-part-1/

TRIPS just out of date already, as WIRED Magazine very brusquely puts it (Figure 1) - is TRIPS wired (is it actually purpose built or ready-made for the digital economy), is it tired (is it in need of refreshing), or is it expired (is it simply an analogue treaty in a digital age)?

One of the major challenges we have is that exactly since the TRIPS Agreement came into force as a multilateral treaty, governments have gone off and renegotiated key elements of that balance in other configurations. Key elements of that relationship between the producer of creative content and the consumer of creative content, that balance, have as been renegotiated in a dizzying patchwork of bilateral and regional agreements.

In the old days, intellectual property in the trading system was seen as something embedded in goods, in physical goods, inasmuch as it mattered, and it did matter to the major economies at that time. The US and the European Communities in particular during the 1970s were getting very nervous about the capacity of developing countries to become more competitive in manufacturing, and nervous about the loss of manufacturing jobs. Does this sound familiar? This concern was then focused on counterfeit goods, the idea that certain goods, certain traded physical goods could amount to *illegitimate* trade, could be inappropriate trade, the kind of trade that could be suppressed even within a system that promotes trade. These interests led to proposals for an agreement on suppressing counterfeit trade.[5] That did not get very far because the developing countries did not want even this kind of constraint on their economic activity at that time.

At the time of the creation of the multilateral trading system in the late 1940s, intellectual property really was not on the map at all. Trade was about trade in *goods*, trade was trading physical things, this just as the General Agreement on Tariffs and Trade (the GATT) was being concluded. Legally, intellectual property is mentioned in the GATT, the fundamental, underpinning trade agreement then, as an exception.[6]

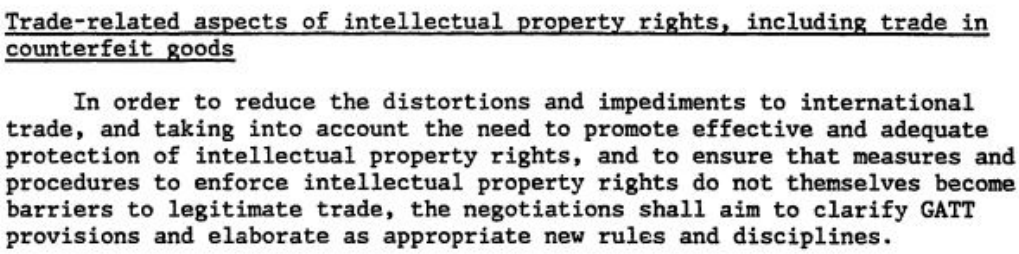
So the legal logic of this was simply: you can protect intellectual property if you must, certainly do not feel obliged to. You can protect intellectual property if you must in your domestic law, it is a domestic kind of regulation along with dog licences and parking fines – fine, but just do not do it in a way that interferes with trade, do not do it in a way that is prejudicial, that is discriminatory.

There were disputes in this old paradigm concerning enforcement measures on patents that were seen as unreasonable constraints on trade, creating a barrier to trade, or discriminating against foreign goods, imported goods. It was an issue inasmuch as it could affect trade in goods, but it was not seen as an integral part of the trading system: it was seen more as something opposed to the trading system that had to be contained and balanced against the objectives of the trading system. The fundamental paradigm shift that TRIPS Agreement represents is a complete inversion of that logic. When it came to the mid-1980s, as the negotiations commenced on a new multilateral round of trade rules, the major economies - the US, the EU, Japan - again insisted that there would not be a conversation, there would not be a negotiation, unless intellectual property was on the agenda, literally on the agenda. This

[5] Thus the early work of the GATT on IP protection in a trade policy setting was in the form of a draft 'Agreement on Measures to Discourage the Importation of Counterfeit Goods' (see, e.g. GATT document L/4817 of 31 July 1979)

[6] Article XX of the GATT.

led to this rather odd phrase "trade-related aspects of intellectual property rights, including trade and counterfeit goods" (see Figure 2). This was simply a negotiating formula, a diplomatic manoeuvre. It was a diplomatic mechanism literally to get the idea of intellectual property on the agenda in a literal sense – the idea of 'trade-related aspects ' was actually borrowed from the investment area where there had been agreement to work on trade-related investment measures (or TRIMS).



Trade-related aspects of intellectual property rights, including trade in counterfeit goods

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

Figure 2: The negotiating mandate on TRIPS from the Punta del Este Declaration of 1986

This is where we get this rather awkward acronym, TRIPS, that does not actually correspond to what it says here, just for euphony, so from 'TRIMS', the term 'TRIPS' was adapted. I mention this because at that time there was no settled understanding of what the 'trade-related aspects' of intellectual property rights were; and we do not even know absolutely today, but even so, that was the very foundation of the negotiations. Ultimately, however, the ensuing negotiations delivered a binding international legal instrument, the TRIPS Agreement, which purportedly regulated separate standards for those 'trade-related aspects'. Why do I harp on about this? Because that relationship between trade and intellectual property is incredibly dynamic and is still not well understood today, and if we do want the trading system to deliver effectively and equitably in the creative sector we do have to understand that relationship, also at a practical level.

Creative content: trade in atoms or bits?

We do have a crude measure of what trade in creative works looks like in the analogue era, if you like, at the time when there was no trade in disembodied digital content. There was trade in blank optical media, discs, blank CDs. So we can count the amount of discs physically passing across borders. There is a completely separate category defined for trade in recorded discs, as against blank recording media. This was literally the way that the exports and imports of creative works could be measured – and still is measured for the most part - by contrasting the value of trade in blank discs as against the value of trade recorded discs. You can see (Figure 3) that the value of trade is more than seven times higher overall, and the pattern of export is very different, the chief difference being the

addition of intangible creative content.

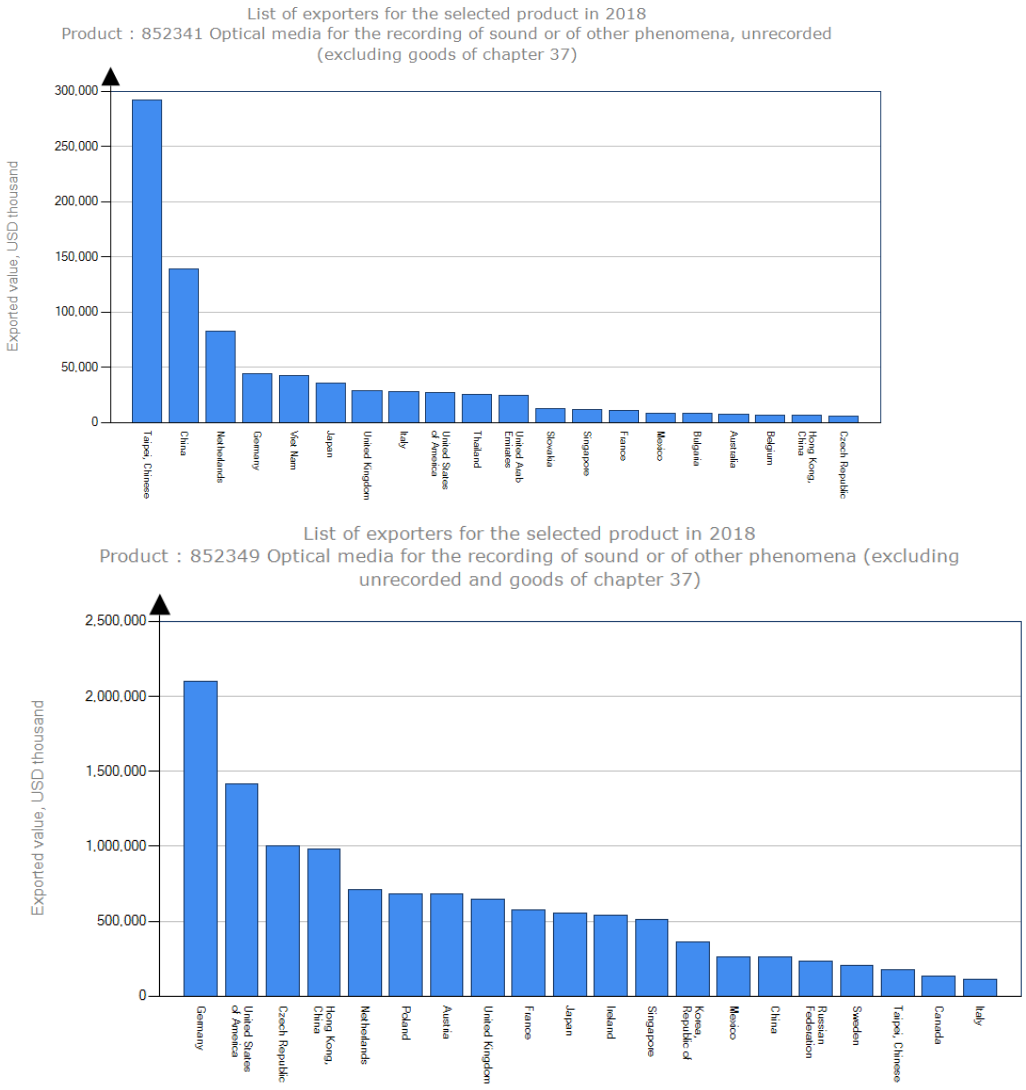


Figure 3: Comparative patterns of exports in unrecorded and recorded optical discs (CD, DVDs)

But this crude measure, as you know, is extraordinarily different from the flow of royalties and benefits to the actual creators, to the songwriters, to the performers, who only get a tiny amount of this traded value anyway, and it's not recorded in the trade statistics very well. We now have completely new markets for creative content that were not dreamed of by the TRIPS negotiators who sought to create a link between trade and intellectual property. So not only in the developed world but in developing countries such as in India there is a market for Callertunes, or the music that I force you to listen to if you call my telephone number. Now this is a completely separate way of, if you like, making money from creative content, it's a new market, a new kind of market that was undreamed of by the people who thought that

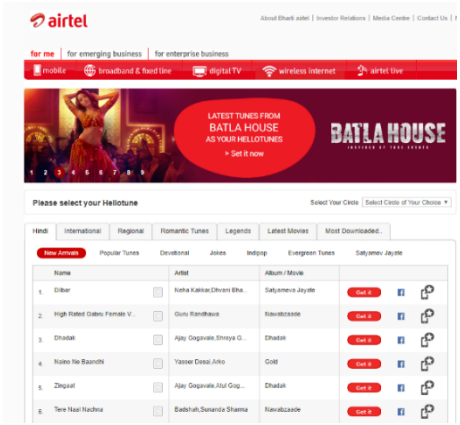


Figure 4: Airtel Hellotunes market

intellectual property was something embedded in goods that were shipped across the border in containers and counted as such. This is a phenomenon generally that creative artists in the developing world are increasingly benefiting from, we hope, but we don't have the numbers to be sure what it means in terms of improved results for actual creators. This uncertainty, and rapid evolution, raises far-reaching questions about the nature of trade and the nature of the legal foundation for monetising creative works. But the disruptive impact of new technology is not altogether a new phenomenon.

Figure 5: Fred Waring

Meet Fred Waring, a successful American musician at the time radio broadcasting became mainstream. This was another kind of technological disruption to the way that creative works were shared, were distributed, and were put on the market. This technological disruption raised fundamental questions about not only the equities of royalty flows but even the very legal character of these transactions. Fred Waring ran into this difficulty as a performer at a time when the only way you could get access to music was either turning up to his performance live or purchasing a physical product - a disc - and his case even then exposes the issue that remains of interest today. If you do buy a physical carrier medium, a gramophone record or an optical disc, what are you actually purchasing? What is the very nature of that transaction? Remember we are thinking about the very nature of trade: are you buying a physical thing, a chattel, a physical thing that you have property rights over and can sell and pass on to others, or are you buying a rather limited private right to use the content, to use the intangible content, or both? And that, of course, is Copyright 101, the central question.

Figure 6: "Radio Enters the Home", 1922

Fred Waring, leader of the Pennsylvanians, ran into difficulty enforcing an agreement with his record company, the Victor Talking Machine Company: the music was licensed only for gramophone production provided they were labelled "not licensed for radio broadcast", as the valuable broadcast market was a separate source of income. However, WDAS Station broadcast these recordings contrary to the original licence that you were understood to take out when you bought a disc. At that time you paid your 75¢ and bought the gramophone record, and the records bore the legend "not licensed for radio broadcast" or "only for non-commercial use on phonograms in homes." That is not unlike the licence you take out when you click through today when purchasing downloaded content, if you do ever read the terms and conditions. We have an intuitive idea that you are supposedly 'buying' a song, 'buying' a musical work, but in fact you are tying yourself to a licence to use it in very restricted ways. And that is what they sought to do with the legend on the gramophone record in the Waring case. The case is somewhat historic, but it is still of interest, because it is exactly the same dynamic that we have today. The Court said look, technology has really changed things:

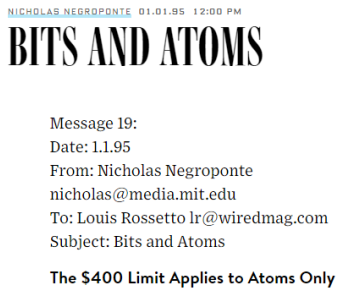
> The problems involved in this case have never before been presented to an American or an English court. They challenge the vaunted genius of the

> law to adapt itself to new social and industrial conditions and to the progress of science and invention. For the first time in history human action can be photographed and visually re-portrayed by the motion picture. Sound can now be mechanically captured and reproduced not only by means of the phonograph for an audience physically present, but, through broadcasting, for practically all the world as simultaneous auditors. Just as the birth of the printing press made it necessary for equity to inaugurate a protection for literary and intellectual property, so these latter-day inventions make demands upon the creative and ever-evolving energy of equity to extend that protection so as adequately to do justice under current conditions of life.[7]

In this case, the challenge of technological disruption led to the intriguing conclusion on the part of the Supreme Court of Pennsylvania that the IP licence tied to the gramophone disc was an "equitable servitude" on a chattel.[8] It was not strictly a matter of an IP licence over the recorded content, but rather an equitable constraint on certain use of the disc as a physical possession. The court upheld the complaint on the basis that the radio station's use was an act of unfair competition Fred Waring merely granted "the incorporeal privilege of reproducing the rendition of the song indented upon the chattel sold by the Talking Machine Co."[9]

Figure 7: Here it is Monday and I've Still Got a Dollar, "Not Licensed for Radio Broadcast"

So that sounds like a rather convoluted way of structuring that licence, but the concept was that when I purchase the gramophone I am accepting that I am bound by an equitable servitude and that restrains my use of the music contained on that gramophone. This is awkward, this is a cumbersome way of managing the idea, but I think it's very interesting because it shows the tension that the law experiences when a new form of technology comes along and fundamentally alters the way that the content, the creative works, are distributed and made available. By the way, this construction of the law was not sustained elsewhere – it is mentioned here as an instance of the difficulty in applying established principles to new technological challenges. In a forward-looking mood, the court proclaimed that "there is no reason … why an ancient generalization of law should be held invariably to apply to cases in which modern conditions of commerce and industry and the nature of new scientific inventions make restrictions highly desirable.


NICHOLAS NEGROPONTE 01.01.95 12:00 PM

BITS AND ATOMS

Message 19:
Date: 1.1.95
From: Nicholas Negroponte
nicholas@media.mit.edu
To: Louis Rossetto lr@wiredmag.com
Subject: Bits and Atoms

The $400 Limit Applies to Atoms Only

Figure 8: 'Wired', 1 January 1995

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[7] Fred Waring v WDAS Station Inc. 194 A. 631 (Pa. 1937) 433.

[8] Chafee, Equitable Servitudes on Chattels, 41 Harvard Law Review 945.

[9] "[No] valid reason exists why the restriction attached to the manufacture and sale of the records in this case should not be enforced in equity. ... in a sense plaintiff was not imposing a restriction in connection with a sale by him of a chattel. The chattel here consisted of the phonograph record. This the plaintiff never owned.
What he granted was merely the incorporeal privilege of reproducing the rendition of the song indented upon the chattel sold by the Talking Machine Co. The reservation or restriction imposed by him was to limit the extent of this privilege. The title to the physical substance and the right to the use of literary or artistic property which may be printed upon or embodied in it are entirely distinct and independent of each other." Waring v WDAS, at 447.

Mere aphorisms should not be permitted to fetter the law in furthering proper social and economic purposes." And of course we do see similar issues today.

The very day the TRIPS Agreement came into force in 1995, Nicholas Negroponte, a cyber guru writing again for WIRED magazine,[10] published this opinion piece on bits and atoms, arguing, in effect, look how our mindset about value, about what we transact, about what we trade, is driven by atoms, the GATT is about atoms. This is 1995, even new movies and music are shipped as atoms, the balance sheets declare atoms as assets, but their bits, often far more valuable, do not appear: it is strange. That provocative piece in WIRED twenty and a half years ago was quite prophetic because we have seen exactly that shift occur and a move towards recognising trade in bits, that value is embedded in the information content and not the physical platform to some extent.

Recent developments: IP as a tradable good?

A very recent development, which I think is fascinating and will be part of my concluding remarks, is the Music Modernization Act, recently passed by the US Congress, which establishes the principle: exactly what does the user of the creative work owe to the producer of the creative work? It is a vexed question about what is an appropriate royalty rate for use of copyright works in the music area at a time of proliferation and diversification of platforms, of mechanisms for the dissemination, for the making available of musical works, your Spotifys, your download platforms, and so on. It establishes the principle that the rates and terms are those that would have been negotiated in the marketplace between a willing buyer and a willing seller.[11] That is the principle that the Copyright Royalty Board is expected to apply. For me this is quite interesting because it suggests that there is a marketplace, that it does work, that at least conceptually, hypothetically, the Copyright Royalty Judges are able to put themselves in the shoes of the willing buyer and willing seller and establish a royalty rate according to market standards.

Of course, this formula raises huge questions and it will be fascinating to see how it is actually implemented - but that, to me, is the essence of a paradigm shift, moving away from the idea that it is something like an equitable servitude on a chattel or, as was often perceived, a copyright licensing fee akin to a government tax on trade. Trade economists saw IP royalties just as rent collection. The suggestion now is that the relationship ultimately between the musician and the consumer of the music is in a sense a marketplace. I am not saying

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[10] N Negroponte, 'Bits and Atoms' *Wired* 1 January 1995 https://www.wired.com/1995/01/negroponte-30/

[11] The Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.
In determining such rates and terms, the Copyright Royalty Judges—
'(i) shall base their decision on economic, competitive, and programming information presented by the parties, including—

> (I) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from the copyright owner's sound recordings; and
> (II) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk; and

(ii) may consider the rates and terms for comparable types of audio transmission services and comparable circumstances under voluntary license agreements.

necessarily that it is a good idea. I am saying it is an interesting idea, and it certainly betokens the kind of paradigm shift we are seeing.

Yet in the US two Supreme Court cases arguably have, in a sense, gone in the other direction, putting greater emphasis on the value of the physical thing. In patent area, the Lexmark case[12] concerns ink cartridges. The question there was very roughly this: if I buy an ink cartridge that falls within the scope of patent rights, am I - in a sense - subject to an 'equitable servitude': can a patent licence constrain my use of that ink cartridge? The Court said no, once you own that ink cartridge it is yours, you are free to do with it whatever you like.

And likewise, or similarly, in the copyright area, the Kirtsaeng case[13] concerned international exhaustion of copyright: a textbook produced for the developing world market could be imported back into the US, even though it was in breach of a copyright license. Why? Because – in the court's view, at least - you are the owner of the book, the physical thing, and you are entitled to deal with it as you wish.[14] I am not analysing these cases this evening. I am simply making the point that there is this tension: do we value and then construct the legal nature of the transaction around the physical thing, the chattel, or do we value the intangible character of the transaction, the willing buyer and the willing seller of the creative work as such, and not the underlying carrier medium or physical platform? Identifying that tension is at least intended to set up the conceptual problems we are encountering.

What is trade anyway?

Figure 9: Apple iTunes store

This is certainly a big deal now. This image (figure 9) represents one firm, one shop if you like, reporting what is now over 100 billion transactions, and there have been many more since then. That is a lot of trade, and at least if we look at the terms and conditions of what you are agreeing to when you click that OK button. It is not a sale, the nature of the transaction that is you're taking out a licence, you're not buying anything; and this is similar also to the Google Play Store. At least from the point of view of these platforms, this is what they make out the transaction to be: so it is a forum, it is a market for licences rather than things.

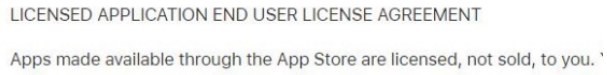

Figure 10 trade in IP? "licensed, not sold..."

[12] Impression Products, Inc. v. Lexmark International, Inc. 137 S. Ct. 1523 (2017).
[13] Kirtsaeng v. John Wiley & Sons, Inc. 133 S. Ct. 1351 (2013).
[14] By contrast, the court in the Waring case, discussed earlier, had found that the restraint on the downstream use of the physical copy, the gramophone record, was justified: " it is clear that the restriction affixed to the records, "Not licensed for Radio Broadcast," was not unreasonable, nor did it operate in restraint of trade. It was intended to effect a legitimate purpose; indeed, unless such a restriction can be imposed and enforced, it will be impossible for distinguished musicians to commit their renditions to phonograph records — except possibly for a prohibitive financial compensation — without subjecting themselves to the disadvantages and losses which they would inevitably suffer from the use of the records for broadcasting. Such a restriction, therefore, works for the encouragement of art and artists. Moreover, it does not limit the use of the records in private homes or even public halls where a breach could not readily be detected or enjoined; the employment of the records for radio broadcasting would immediately become a matter of general knowledge. Uses of the records on phonographs and for broadcasting purposes are so radically distinct as to belong practically to two totally different fields of operation." (at 447-448)

This was already considered in the WTO ages ago, almost two decades ago, when Indonesia and Singapore put forward a paper[15] saying, in effect - has anyone noticed? There is a new kind of trade now, trade in books, music and software: now that they can be divorced from a physical carrier medium, a book can be an eBook, musical work can be a download, software can be simply be an app you download. They do not have to be put in those cartons and containers and shipped across borders. Could these products simply be considered as trade in intellectual property rights and not be classified as a good or a service?

Now if you have followed this issue in the WTO, you will know that this is an unspeakable heresy because there's only two right answers. Trading in intangible content - in eBooks, music, software - must only be either a good or a service. There is an incredibly abstruse debate, an ideological debate about what is the very nature of this trade in the WTO taxonomy.

Since then it has blossomed as a major area of trade. This is a snapshot of the app economy: the trade in apps (Figure 10). The critical thing here is that it has become very international, and the bulk of the activity is in the Asia-Pacific region. In other words, it is no longer a concern simply of the developed world or the industrialised world: the bulk of the trade is in the developing world.

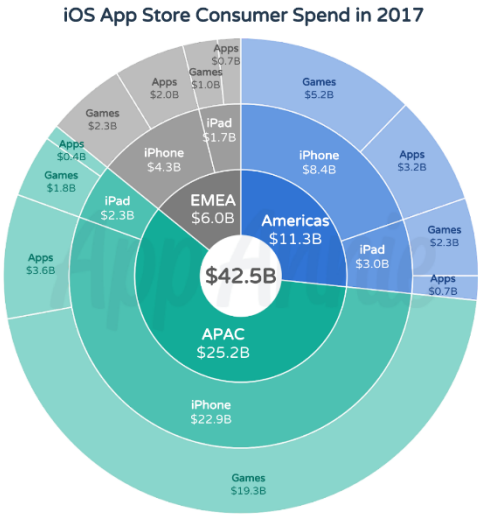

Figure 11: Regional patterns of business to consumer trade in apps (Source: App Annie)

This is not only to reconsider who are the consumers – the market – it also means we should consider the potential benefits for developers and SMEs in the developing world. What we also know is that the platforms, whether for music, apps or ebooks, obviously the platforms are not absorbing all of that money: they do pay out money to content creators and app developers. This year, Apple reported that it had paid out USD 100bn to developers around the world. But we do not know - and I am speaking now of our trade statisticians - we do not know who is getting that money, we do not know where - in this case – this revenue is going to. Yet for our developing country members especially, governments are anxious to ensure that their younger generation - who are typically well-educated, very cyber savvy but unemployed - they are very anxious to ensure that they are getting a fair share of these billions of transactions.

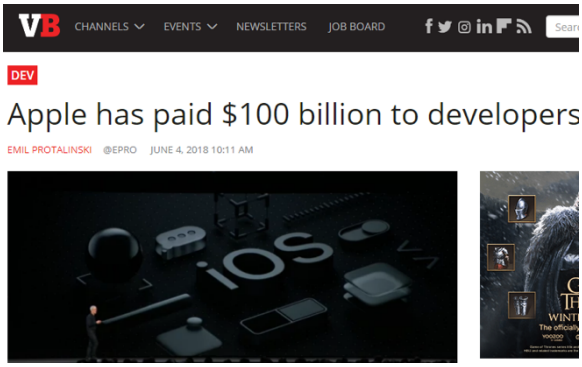

Figure 12: Developers' earnings from 'trade in IP'

[15] WT/GC/W/247, 9 July 1999

Now the potential - from a development point of view, and for invigorating creative industries in the developing world - is enormous. But there is a complete, or near-complete, gap in how it could be measured, and therefore there's no empirical foundation for an effective debate about how to make it work fairly, more efficiently and more equitably. Nonetheless the numbers cannot be ignored even though we are reliant on two sources: on press releases from the firms concerned, and from some private sector statistics which are not reflected in the actual physical, in the formal trade statistics.

Hence, at a time when trade balances - as you might have noticed - have become a major concern for the US in particular, we have a situation where the trade in physical things is still privileged in terms of measuring our place in the world. So a deficit of trade in goods, in trade in atoms, is a terrible thing, but at a time when all of this is going on, countless – literally countless - billions are paid out to digital content platforms around the world and this barely enters trade statistics at all. Now I would venture to suggest that a good chunk of that money is going from other countries into the US, but is not necessarily being recorded as a trade win for the United States. So you can see how these issues also have bearing on the political economy of the day, and even on international relations more broadly. At this level it is quite a critical issue.

Equally, we are seeing developing countries building up their interest in this area. This chart represents the growth of intellectual property earnings received by the BRICs economies, it's a bit out of date I'm sorry, but we do see BRICs economies and emerging economies more generally are becoming significant exporters of intellectual property, in itself again not embedded in physical goods. Royalties are flowing into these economies. I mean the US is still predominant in this area, its IP revenues counted at over USD 128 bn in 2017, two and half times even the EU, but we are seeing enormous growth in the emerging economies. Equally, economies like Hong Kong and Singapore, traditional entrepots for physical goods, are today looking to become trading hubs for IP, for IP as such, IP as a tradeable good in itself, and there are a number of very significant programmes underway to undertake this.

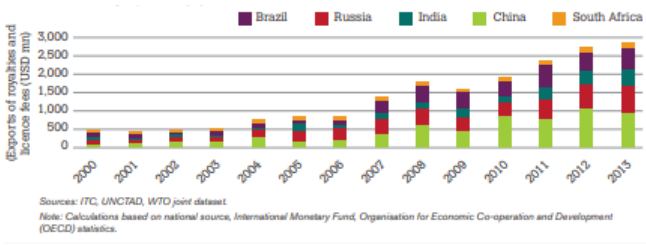

Figure 13: Reported IP revenues paid to BRICS

This chart – the so-called 'smile curve' - is a reminder of why this is important. It is my only attempt at economics this evening and it will be brief. Broadly speaking, the idea is that as something like an iPhone is produced and distributed the addition of value to the product starts out very high - that is the product design process, what goes on in Cupertino, California and so on, the research and development. The people working in that area are well paid, they benefit enormously from this trade. As it goes down to the process of simply assembling it, which is what takes place in China for the most part, the value addition there is very little, and equally the IP component is very little. For the product design and research and development, the IP component is very high. Likewise, as the device moves closer to the actual consumer, the IP

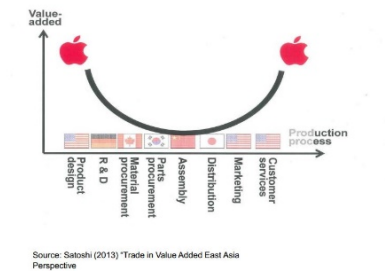

Figure 14: 'Smile curve' of the iPhone

component increases, in particular concerning branding and marketing, and the value added, the benefits to the employers and employees, improves at that stage as well.

This is important in this debate because if we look at the iPhone or a smartphone simply as a physical thing, as a traded good, we have a whole misleading picture of the world. If the US imports a $1,000 iPhone, if that's what they're worth now, that can be counted as $1,000 in trade deficit because it is trading, it is a good and it is valued at that as it comes into the economy. But what is inside it? Well, a whole lot of IP, and for the most part the IP is not owned by China, the royalties do not go to China. The royalties go to Cupertino, they go to Korea, they go to Germany and so on. It is an incredibly complex bundle - you know all this stuff - but the point I am making is that we do not factor that into our trade statistics. Those trade statistics are driving a very difficult political debate and yet it seems to be detached from the, even the basic, economic realities of this iconic traded good.

By the way, just recently there has been a suggestion of punitive tariffs on smartphones that are coming out of China, so this is very much a current trade issue. And my point is simply this: once again we are focusing on the physical good, the atoms, and we are not understanding the value and the beneficiaries of the trade in bits. It is complex, and that is what makes it difficult to run a sensible debate on this area today.

A new menu for digital trade: spaghetti, lasagne or ravioli?

So, what is going on? I was trying to come up with a generic 'pasta' pun with a view to the evening meal I am keeping you from, but I just didn't manage it. Yet there are three ways that pasta helps us look at the normative response the governments have taken in the time since the TRIPS Agreement: lasagne, spaghetti, ravioli. What on earth does that mean, apart perhaps from hastening our move to the dinner table? In my view we are seeing what we can call a lasagne effect. What am I talking about?

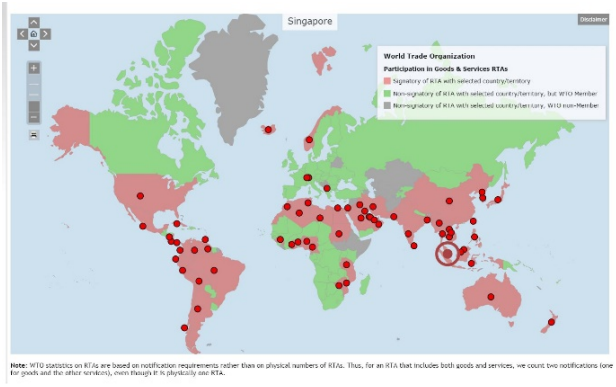

Figure 15: Singapore's bilateral trade agreements (source: WTO)

In the time since the WTO was established, and the TRIPS Agreement came into force, we have seen an enormous proliferation of bilateral and regional trade agreements. This figure illustrates the partners that Singapore alone has entered into bilateral agreements with, either regionally or bilaterally. Many of these bilateral or regional agreements embellish or renegotiate the balance in the TRIPS Agreement relating intellectual property to trade. Generally, for trade in goods, bilateral trade agreements are preferential in character: they define relations in a way that is spaghetti-like - this is a term used by trade economists who disparage bilateral agreements - the idea is that you have a preference between two economies, and those two alone, as a 'spaghetti' linkage. The

trouble is that when you have huge numbers of deals, you have an enormous tangle of bilateral preferences: the 'spaghetti bowl' effect, as it's called.[16]

But concerning TRIPS, in the intellectual property area, what you can see is that trade agreements is not directly about trade preferences, it is about regulations, standards, what is in your Copyright Act, what are the kind of enforcement measures that your courts, your customs, your police must implement, so the accumulation of trade deals in the IP area is more like a layering of standards, more like clumsily prepared lasagne than a bowl of spaghetti:[17] a layering of standards rather than a distribution of bilateral preferences.[18]

A third approach is the ravioli model, where you have discrete bundles of normative standards passed across through the bilateral agreement, but without linkage with the existing legal framework.[19] And we see all of these trends, each one of them problematic from a policy point of view, even from a treaty interpretation point of view, and certainly from an implementation point of view, each one of them problematic.

If we look at some of the recent trade agreements, very recent trade agreements, we see perhaps a valuable step forward in that there is a recognition, there is such a thing as a digital product, a new tradeable thing. This is the case for the recently concluded US-Mexico-Canada agreement, sometimes termed NAFTA 2.0. It recognises that there is such a thing as a digital product, as a tradeable thing. It deals with, for example, customs duties: so it says there won't be customs duties on digital products when they are transmitted across the border. It also says there will not be customs duties when a digital product is embodied on a physical carrier medium.[20]

It would lead to a curious kind of trade liberalisation. It suggests that because there is digital content on that disc - remember those discs crossing the border? - suddenly you cannot impose tariffs on that trade because of the value, the content that they carry, so this is inverting the value system that I was talking about earlier.

Equally, it creates a new kind of non-discrimination principle: you cannot discriminate on digital products according to where they come from, so you cannot favour your local producers over imported producers, for example. We do not know how this will play out in practice, and one of the difficulties is what it means to translate these bilateral standards or regional standards into domestic law, and how it has effect, but it is clearly an attempt to structure an open international marketplace for digital products without discrimination, without burdens such as customs duties.

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[16] Jagdish Bhagwati, US Trade Policy: The Infatuation with FTAs, Columbia University, Discussion Paper Series No. 726, April 1995, available at https://academiccommons.columbia.edu/doi/10.7916/D8CN7BFM

[17] Antony Taubman, The Lasagna Effect: What Do Layers of Bilateral and Regional Norms Mean for Multilateral Intellectual Property Law, Lecture at the Spangenberg Center for Law, Technology and the Arts, Case Western University, April 2016, available at https://www.youtube.com/watch?v=3gTNXtNUYX4

[18] This layering of standards is underpinned by the fact that the WTO TRIPS Agreement has limited exceptions to the most-favoured nation principle, and does not provide (unlike the other principal WTO multilateral agreements) for exceptions for preferential bilateral and regional trade agreements.

[19] Prominent recent examples would be the distinct rules established for 'digital products' in bilateral trade agreements.

[20] USMCA, Articles 19.3, 19.4, 19.11, 19.17

Yet in each case these provisions typically say 'but this is without prejudice to intellectual property protection', and, well, just a minute, is a digital product not more or less defined as a bundle of intellectual property? But because of the dynamics of the negotiating process these issues are dealt with almost literally by separate committees, and so the possibility of creating at last a unified understanding of how IP is actually traded and how that should be regulated has not taken place. There is still this kind of distance between the two – trade in digital products, on the one hand, and trade rules on IP, on the other.

We see this also in the provisions concerning what are called interactive computer services, and a distinction between the people who provide the computer pipelines and the people who provide the content. There is an assumption that these are going to be completely different and that's an idea that's entrenched in the treaty. Given the fast-evolving situation today, the lack of distinction between content providers and internet access providers, it is difficult to see how this is going to play out, particularly since - in this case – it relieves the providers of internet service from liability for abusive material - that is what the provision implies - but there is an exception for IP, so they still have to look after the IP dimension.

Similar provisions, but less precise, are found in the CETA, in the Canada-EU Trade Agreement: equally, there's a statement that look, just in case of any doubt we have got all of this stuff on electronic commerce, and in this case a digital product is defined as delivery.[21] It is simply the word 'delivery', that is the digital product, but in this case if there is any conflict with intellectual property provisions[22] they provide it anyway, so it backs away from that possibility of having an integrated understanding of how IP is traded in the digital space: it is expressly excluded, that kind of synthesis.

Similarly in the CPTPP, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership text.

Figure 16: Platform liability? i, 28 November 2018

It is not as though this is not an issue, and this is from today's paper, the idea that internet service providers should not be liable for potentially damaging content, it's not as though this is not an issue, and it's one of the difficulties that you encounter if you try to come up with too precise a technological category at a time when these categories are in constant evolution.

So, broadly speaking, yes there are important new developments in the normative space, in the bilateral and regional trade agreements, but they are a difficult, partly indigestible pasta meal, rather than a clear synthesised understanding, and we are seeing a divergency between an EU-centric model, a US-centric model and an East Asian type model for the same, supposedly seamless, global digital trading space. The intellectual property component has simply not been thought through and embedded in any one of these three systems.

[21] CETA, Article 16.1
[22] CETA, Article 16.7

And now for the soft part: the development dimension[23]

What does this then mean for sustainable development - which is what the multilateral system is concerned with - and more broadly for justice in the knowledge economy? There is a whole host of issues that - really - we are still struggling with internationally; the shift towards the knowledge economy, the uncertainty about what liabilities and what responsibility you have when you acquire content, the imposition of new constraints on the openness of the internet, and how to measure those benefits, those royalties that flow when they are behind the corporate veil.

This is something that one of this year's Nobel laureates in economics, Paul Romer, has written about extensively, and his central observation - for a non-economist - is simply that a theory of economic growth and development has to include the knowledge component at the very centre, it cannot be excluded as an exogenous black box, it has to be endogenous, and I know I am channelling a certain former Prime Minister of this nation, but it is true, endogenous growth theory was the major shift that has changed the perspective not only of developed economies, but also of many developing countries which are looking to endogenous factors of growth, are looking to draw on their innovative and creative capacity and not on their physical assets as a pathway to development.

The major change that has happened since this time, this came out exactly as the TRIPS Agreement was being signed in 1994,[24] was the stark distinction between the interests of a country like the Philippines which is seen in this case entirely as a recipient, as a beneficiary of other people's technology or knowledge, and a country like the US which is seen as the innovator for everybody else.[25] What we see today is a far more interesting and a heterogeneous international system, and we are seeing many developing countries working their way up the ranks of innovative capacity, but it has become a major concern for policymakers, let's move on.

[23] "The South Korean rapper, known as PSY, this week topped the pop charts in Britain and lay second in America. His gloriously inane video, "Gangnam Style" (with some 350m online viewings so far), has proved that Asia's economic powerhouses can lead the world in exporting intangible goodies as well as things you can drop on your foot.", 'Now for the Soft Part', *Banyan*, *The Economist,* 6 October, 2012

[24] Paul Romer, 'The Origins of Endogenous Growth', *Journal of Economic Perspectives,* 8(1) 1994, 3-22

[25] "We will be able to rejoin the ongoing policy debates about .... the feedback between trade policy and innovation, the scope of protection for intellectual property rights, the links between private firms and universities, the mechanisms for selecting the research areas that receive public support, and the costs and benefits of an explicit government-led technology policy…. In a developing country like the Philippines, what are the best institutional arrangements for gaining access to the knowledge that already exists in the rest of the world? In a country like the United States, what are the best institutional arrangements for encouraging the production and use of new knowledge?", Ibid, at 22

Are borders going out of business?

So the question I raise finally is where the borders are going out of business: we have an international trading system that has been founded on the understanding there are sovereign borders between atomistic trading partners and we have this overlay of a digital trading space that, at least in principle, enables producers of creative content on one side of the planet to engage directly with willing consumers in this marketplace on the other side of the world. And, equally, the borders between different categories of goods or services of IP protected content and the physical platforms that carry it, those borders too are similarly going out of business.

Figure 17: Borders going out of business?

It is when I thought of this idea, and of course I came up with this actual case of borders going out of business because we have seen this reality, we have seen this transformation in the way that content is managed, is distributed, is traded, and in this case it was because borders made a pretty big bit in merchandising, went heavy into CD and music and DVDs just as the industry was going digital. So, the Borders going out of business in this case literally was a bookshop going out of business because it bet on atoms and not bits.[26]

The future of borders if you like was one of the questions that when the internet first became a public thing, John Perry Barlow, in the *Declaration of the Independence of Cyberspace*,[27] said, well, that is the end of it, we have a cyber libertarian vision, the lumbering industrial governments of the world have no jurisdiction here. That was the expectation of the time, and equally we saw at that time an exploration of the idea that the border between goods and services trade also was being eroded. This was a time when it seemed like these categories were going to change dramatically, and this was a time when someone like Jagdish Bhagwati was really questioning the validity of intellectual property protection in the trade law system. As he said in this piece, and he has said many times, "intellectual property does not belong in the World Trade Organisation since protecting it is simply a matter of royalty collection. The matter was forced onto the WTO's agenda, even though this risked turning the WTO into a glorified collection agency."[28] So behind that is this idea that trading in IP as such is not real trade, there is something illegitimate about it, it is a form of rent collection. This can be refuted however because I would claim that there is no glory attached to the WTO and it is certainly not a collection agency, we do not get our share of these royalties.

The point is this, once again we are validating the physical good and not the valued content, not the creative content, and that to me is the shift that we are still struggling with in different ways, moving from the atoms to the bits, the observations way back when TRIPS was coming in place. I think we need to accept that trading in creative content as such is a legitimate

[26] "In the mid-1990s, Borders lost its edge… It made a pretty big bet in merchandising. [Borders] went heavy into CD music sales and DVD, just as the industry was going digital. And at that same time, Barnes & Noble was pulling back.... " Yuki Noguchi, " Why Borders Failed While Barnes & Noble Survived", *NPR: All Things Considered,* 19 July 2011, at https://www.npr.org/2011/07/19/138514209/why-borders-failed-while-barnes-and-noble-survived

[27] https://www.eff.org/cyberspace-independence

[28] Jagdish Bhagwati, 'From Seattle to Hong Kong,' *Foreign Affairs*.

thing, it is not a form of government tax as it was often seen, copyright licensing was often perceived. We know from parliamentary debates that it is often perceived as a form of government tax and resented in that way, rather than that a willing seller, a willing buyer transaction of valued content.

And the question is do we have an economy of licence givers, an economy of granters of access? If that is the case what kind of trade rules would work, can we develop a set of trade rules that are legitimate, that are equitable, that make sense across the globe? We have seen halting attempts at doing that in these bilateral and regional agreements, but they haven't gone to the heart of the issue, they have tried to frame the issue in too sectoral a way, in too narrow a way, and not dealt with the reality that what is being traded and the value that is returned is often as intellectual property licences as such, it is simply not contained in those trade agreements.

So what do we do about it? Do we work with the existing analogue paradigm, the TRIPS Agreement, the framework that we have that is rooted in the analogue past when IP was something embedded in physical goods, or do we try to reimagine a digital trading space and develop a new set of rules to govern that, or to enable that? Broadly speaking, I would argue that we can and indeed should work with the existing toolkit for several reasons. I mean these are, in my view, inherently analogue ideas, the ideas of balance with equity that you so often hear in the intellectual property policy space. And we get tangled up if we try to anticipate or even track technological developments, if we try to capture particular ways of dealing with trading with creative content, and, perhaps unwittingly, we create barriers to that positive relationship between the producer and the consumer of creative content that I would argue should be the norm.

We do see how this can work in the infamous three step test in international copyright law. Part of the international principles that govern exceptions and limitations to copyright concerns the idea of normality, the normal exportation of a work, and we know from WTO dispute settlement jurisprudence, that that idea of normality evolves with technological change but also with changing licensing practices, it is technologically neutral, it is not bound to particular ways of dealing with creative content. Just as well because when those words were written nobody had ever imagined that music would be traded as IP packets in the internet protocol sense, that just was not imagined.

So if we took a view that normal exportation was the way that copyright was dealt with in circa 1994 that, yes, the rules would be instantly out of date and quite absurd, but the idea was that normal exportation in the copyright area evolves constantly, and an empirical observation on what is seen as a fair equitable way of dealing with copyright content that is the foundation for our understanding of what is an appropriate balance between public and private interests in this area. So that I think makes a virtue of necessity because attempts to create technologically specific solutions, and examples of these I have mentioned one, the liability rules for internet service providers, and the protection of databases in EU law are weighted to particular technological ideas that the market or the evolution of the digital world simply leave in the dust, so we would never be able to anticipate or adapt certain international rules to keep up with technological change in this area.

So we need to unpack the packets of IP, the internet protocol packets, the packets of intellectual property that constitute all of this digital trade. The digital transformation does

now mean that creative content can be traded in itself, a producer can have a direct transaction with a user of the content, in principle, so we can stop privileging the atoms, the chattel, and reducing the value to simply an equitable servitude, and we do not necessarily have to disparage it as rent collection provided it is indeed fair and equitable, provided it is the musician, the performer getting an equitable share of the benefits. If we get tied up in specific formats or carrier media we will have difficulties, and we see that in the technologically specific solutions.

So as a thought experiment, can we think of an environment in which creative content is valued and transacted on that principle between a willing seller offering to a willing buyer? Can we set aside the distractions of technological specificity and the inevitable normative lag, the idea that the legislator, least of all the trade negotiator, would ever catch up with the developments in the digital space, and accept that after all, justice and equity remain analogue instruments, and that the idea of 'balance' does have that, if you like, that subjective element. We cannot digitise 'balance' in that sense, that deep normative sense. The scales of justice are an analogue instrument.

Figure 18: 'Balance' in an analogue age

We have seen experiments of what that willing seller/willing buyer arrangement might look like. As I say it was a conscious experiment just to say well pay whatever you like, but we are having to deal with these issues very directly to understand the ontology of creative content, what is it that you are buying, what is the nature of your relationship with the producer, with the source of the creative works, and how are we going to make that tradeable in a way that does not benefit the middleman, the record label, but benefits the creative person above all? That is the challenge before us. I do not think anything is going to happen in the multilateral space soon which is why it is a very good time to be thinking about this in a more abstract way, because I think in a new round of multilateral trade negotiations this will be a pivotal concern.

I know for a fact that it is a major interest for governments across the globe, nobody really is on top of this, nobody understands how all these pieces fit together, and yet there is a sense of immense opportunity that the innate inventive capacity, creative capacity of populations across the globe. I have been talking to least developed countries in this area and they're not, like the Philippines as depicted in Romer's 1994 paper,[29] just waiting to receive the benefits of technology , they say no, we have got really great creative people, we just are being denied effective access to these wonderful digital markets, we are not getting our share of that showy $100 billion cheque that comes up in the Cupertino presentations.[30] That is the challenge in the future, how to link those creative people to the willing consumers and to ensure that the transactions are free and fair in the words of trade negotiations, but also equitable in terms of access to those global markets.

[29] See fn 25 above

[30] Tim Bradshaw, Apple estimates $100bn paid to developers over decade, Financial Times, June 4, 2018, at https://www.ft.com/content/146ebf2e-681f-11e8-b6eb-4acfcfb08c11

Conclusion

So I leave you with these general reflections. I know I have skipped over a lot of controversial issues, technical issues, and controversial and technical issues, but I hope I have at least provided some ideas for you to pursue. I know for a fact that work desperately needs to be done in this area, and I do also think that it exemplifies that feedback is necessary, as we started, between the scholars, between the policymakers, and between the practitioners. At the moment it is not happening, and that in itself provides a tremendous opportunity so that we can put these pieces together.

Thank you very much for your patience. I am certainly happy to discuss this or any other aspect of international intellectual property and the kind of challenges that we are going through today.

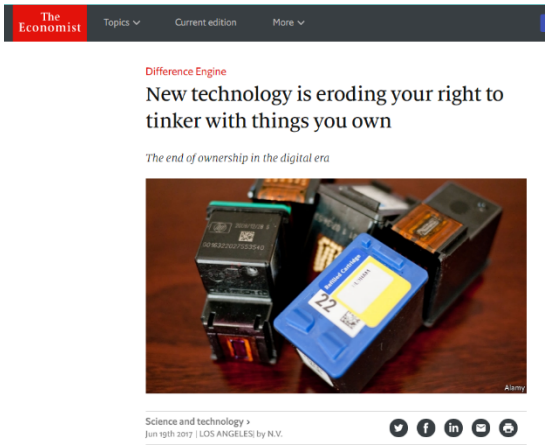

Figure 19: The end of ownership?

Figure 20:
Honest! Really! Truly! Waring's Pennsylvanians – "must not be used for broadcasting nor publicly performed"

Image credits

Figure 1 www.wired.com

Figure 4: https://www.airtelhellotunes.in/

Figure 5: Fred Waring Collection at the Pennsylvania state university

Figure 8: www.wired.com

Figure 9: www.apple.com

Figure 10: www.apple.com

Figure 11: https://www.appannie.com/en/insights/market-data/more-than-50-of-spend-on-the-ios-app-store-comes-from-markets-in-asia/

Figure 12: https://venturebeat.com/2018/06/04/apple-has-paid-100-billion-to-developers/

Figure 13: WTO, Changing the Face of IP trade and policymaking, 2015, at https://www.wto.org/english/thewto_e/20y_e/trips_brochure2015_e.pdf

Figure 14: Satoshi Inomata, 'Trade in Value Added: An East Asian Perspective,' *Asian Development Bank Institute Working Paper No. 451*, December 2013, at https://www.adb.org/publications/trade-value-added-east-asian-perspective

Figure 16: https://twitter.com/BBCNews/status/1067547389785985024/photo/1

Figure 17: Dwight Burdette

https://commons.wikimedia.org/wiki/File:Borders_store_closing_Pittsfield_Township_Michigan.JPG

Figure 18: detail from Basel, Universitätsbibliothek, AN II 4, p. 173v – Matriculation Register of the Rectorate of the University of Basel, Volume 2 (1586-1653)

Figure 19: https://www.economist.com/science-and-technology/2017/06/19/new-technology-is-eroding-your-right-to-tinker-with-things-you-own

Figure 20: https://www.discogs.com/Warings-Pennsylvanians-Honest-Really-Truly--Im-Only-Guessin/release/11313372

DISCONTENTINDUSTRIES?CREATIVEWORKSAN

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