

From Agenda to Implementation: Working outside the WIPO Box

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Introduction

The Development Agenda adopted by the World Intellectual Property Organization (WIPO) on 28 September 2007 presents a formidable implementation challenge.¹ This challenge does not simply arise from the breadth and aspirations of the document but also from its critical demand that WIPO take on the very lifeblood of the organization—that sometimes less, not more, intellectual property (IP) is best. Any paradigm shift, as represented by the Development Agenda, is daunting and would challenge any large institution attempting to manage it. For example, it took significant effort for the World Bank to transform its objectives from infrastructure reconstruction in Europe to facilitating economic growth in developing countries and, more recently, from debt management to sustainable development and poverty reduction. This chapter suggests, however, that the challenge of making the necessary changes at WIPO may be even more challenging than the World Bank's transformation. Such a shift is daunting for three reasons: (1) WIPO is not in a position to manage the cultural change required by the Development Agenda; (2) WIPO's principal strength is in administering technical IP treaties rather than in norm development; and (3) WIPO members have a tendency to say one thing internationally but to do the opposite nationally. Given these factors, WIPO should not be entrusted with implementing its own agenda. Instead, it should restrict its role to finding and funding outside organizations to do the transformative work that is required to implement the Development Agenda.

WIPO's Internal Culture

WIPO is not, and has never been, neutral with respect to the function of IP. The organization's core mission is “to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organisation.”² In recent times, WIPO has exhibited an unquestioning belief in the fact that IP necessarily brings prosperity to all. This attitude is well illustrated by the words of the former WIPO director-general Kamil Idris (2003, 25): Intellectual property could be called the Cinderella of the new economy. A drab but useful servant, consigned to the dusty and uneventful offices of corporate legal departments until the princes of globalization and technological innovation—revealing her true value—swept her to prominence and gave her an enticing new allure.

This unquestioned belief in IP dogma rather than in the ambiguous reality of how IP functions in practice as revealed by empirical research poses a significant obstacle to WIPO's ability to implement the Development Agenda (Gold et al. 2004; Fink and Maskus 2005). After all, the agenda calls for a critical approach to IP. For example, Recommendation no. 10 notes the importance of requiring a “fair balance between IP protection and the public interest,” while Recommendation no. 16 calls on WIPO to “[c]onsider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain” (WIPO 2007, para. 16). Recommendation nos. 17 and 19, for their part, require the organization “to take into account the flexibilities in international IP agreements,

especially those which are of interest to developing countries and least developed countries (LDCs) and to “facilitate access to knowledge and technology for developing countries.” As Christopher May (2006, 106) points out, “[t]he underlying logic of the Development Agenda, therefore is perhaps best understood as an attempt to ‘mainstream development’ at the WIPO.”

Given the conflict between its institutional dogma and the critical perspective on IP inherent in the Development Agenda, WIPO is now confronted with the need to manage internal change. In his seminal book on internal change within international organizations, Ernst B. Haas (1990) distinguishes adaptation from learning. He defines adaptation as an incremental adjustment during which an organization adds new activities or drops old ones without questioning its original justifications and values. A learning process implies, by contrast, that the organization redefines its ultimate ends and implicit norms. Under this typology, the implementation of the Development Agenda involves a process of learning rather than of adaptation. However, as Haas (1990, 37) concludes, learning is far less common. The “very nature of institution is such that the dice are loaded in favor of the less demanding behavior associated with adapting.”

WIPO’s own history shows that it has consistently favoured adaptation over learning. As May (2007) points out in his recent book, the pro-IP inclination of WIPO is a resilient feature of the organization. Its predecessor organization, the Bureaux internationaux réunis pour la protection de la propriété intellectuelle (BIRPI), was established by developed countries in 1893. At critical moments of its life, such as when it expanded to include developing countries, when it joined the UN system, and when it fought off the call of the New International Economic Order to set aside orthodoxies of IP, the BIRPI/WIPO always preserved its pro-IP orientation. One thing that is of particular relevance to the Development Agenda is the fact that both the BIRPI in the 1960s and WIPO in the early 1970s successfully maneuvered around developing country objections to the organization’s pro-IP orientation (*ibid.*, 22–25). Nothing indicates that WIPO is more open today to the possibility of abandoning its century-old view that IP is universally applicable and that it inevitably leads to economic development. Pressure for change is external, coming in particular from developing country members and not from WIPO management (*ibid.*, 76–82). On the eve of the passage of the Development Agenda, the director-general continued to advocate WIPO’s traditional worldview:

These ideas—that patents are not relevant to developing nations, or that they are incompatible with the economic objectives of the developing nations—are inaccurate because they give the impression that it is possible to simply opt out of the international patent system, and yet still achieve economic development. This is an error, as patents are an essential component of economic strategy regardless of whether the country is developed or developing. (Idris 2003, 133)

Until a new WIPO management team willing to challenge current assumptions takes charge of the organization, WIPO will not be in a position to implement the necessary cultural shift. According to one study, most organizations fail in their efforts to manage change, with success levels as low as 10 percent, primarily because of the preferences of management (Oakland and Tanner 2007). As one group of authors concluded about their study, “these findings suggest an inextricable link between the effectiveness of change initiatives and top management commitment” (Soltani, Lai, and Mahmoudi 2007, 172). Clearly, the outgoing WIPO management is not committed to implementing the Development Agenda. As Sisule Musungu noted on 2 October 2007 in his posting on the Intellectual Property Watch blog: “It does not need a management expert to tell us that for an organisation to navigate such major reform requires leadership from the top.

Such reform cannot happen with an embattled Director General and a divided Secretariat and it cannot happen with a sharply polarized membership.” WIPO’s management team is not the only obstacle to its successful implementation of the Development Agenda. Even with a willingness to change organizational culture, WIPO lacks the capacity to transform itself. Such a capacity depends on the organization’s environment and the flow of communication between it and its environment. And in this respect WIPO is failing.

One of Haas’s (1990, 40) conditions for learning is that those outside of the organization—for example, academics, think tanks, and experts — must believe that change is necessary. This condition has been fulfilled by WIPO. An ever-growing number of academic and policy articles have argued for the contextual and contested nature of IP rights. The resulting conclusion is that, over history, it has been the multiplicity of approaches and the porous nature of IP, not harmonization, that has led to innovation (Inkster, forthcoming). As May (2006, 11) notes, “the position that development will automatically be furthered by the recognition of intellectual property rights, for all states in all developmental stages, is in the critical perspective unsustainable.”

Despite this growing consensus outside of WIPO, however, it has had little impact on the organization. WIPO displays the characteristics of what one could call a “Gore-Tex syndrome”: it repels outside influences— values and beliefs—while breathing out its intellectual airs in the form of educational activities at the WIPO Worldwide Academy. The normative traffic route is thus unidirectional. Non-state actors that work with WIPO often learn and adapt to the organization’s beliefs but do not, in turn, succeed in transmitting their own values to WIPO. This “Gore-Tex syndrome” is due, in large part, to WIPO’s pathological lack of openness. In a 2006 report published by One World Trust, WIPO is listed as the *least* transparent international governmental organization (Blagescu and Lloyd 2006).³ Furthermore, WIPO’s staff openly complained about the outgoing management’s lack of transparency (Cincinnati 2007). WIPO’s management has been so lacking in transparency that when Intellectual Property Watch, which provides independent IP news and analysis, published an open letter from WIPO’s staff on its website, WIPO demanded that it be removed (Intellectual Property Watch Blog 2007a)! In order to change its internal culture, WIPO must open itself to outside influence by becoming more transparent and welcoming.

WIPO’s Expertise

WIPO’s principal strength is in administering its numerous technical treaties, not in developing norms around the adaptation of IP to the needs of developing countries. While WIPO has played an important role in norm development over its history, most of its efforts have been geared toward promoting the advantages, and not the flexibilities, of IP. Cluster B of the agenda explicitly calls upon WIPO, however, to develop substantive norms relating to the role and implementation of IP that “take into account different levels of development; take into consideration a balance between costs and benefits;” consider “the preservation of the public domain;” and “take into account the flexibilities in international IP agreements” (WIPO 2007, paras. 15–17).

The type of norm development required would be new for WIPO. Although some of WIPO’s training activities do talk about adapting IP to developing country circumstances, its treaty-making activities have yet to reflect the norms of flexibility and development. Further, the bulk of the organization’s effort is devoted to the administration of technical treaties involving IP such as the Patent Co-operation Treaty, the Madrid System for the International Registration of Marks, the Hague Agreement Concerning the International Registration of Industrial Designs, and the Lisbon Agreement for the Protection of Appellations of Origin and Their International

Registration.⁴ Most of the organization's income comes from the fees that it charges to IP holders to administer their rights (May 2007, 37). These holders are overwhelmingly in developed countries (ibid., 43–44).

Further, WIPO has not, save for a few small departments with relatively few resources (for example, the Traditional Knowledge Division), had a role in IP strategy—the appropriate use of IP law, the development of supportive practices, and the encouragement of institutions with the mandate and skills to manage the grant and supervise the exercise of IP rights. While WIPO operates the Worldwide Academy, which offers training and courses on IP, this institution, with a few notable exceptions, fails to take into account the very factors identified by the Development Agenda, namely the level of development, the need for a robust public domain, and IP flexibilities. It promulgates, instead, a one-size-fits-all approach to IP training that is suited to none (May 2007, 62). This approach does not even compare to the more subtle and critical courses being provided by some law, management, and economic faculties around the world. If WIPO is to escape from this article of faith, it needs to truly and critically develop a social science of IP, examining whether and how intellectual property leads to both social and economic development. In addition to the training that it provides through its academy, WIPO's Office for Strategic Use of Intellectual Property provides capacity building in developing economies. While one would think that, with a mandate “to assist Member States, particularly in developing countries and countries in transition, in effectively utilizing the IP system for development, extending support to SMEs and enhancing IP assets management capacity” (WIPO, n.d.), the office would provide exactly the kind of support that the Development Agenda requires, it is not the case. Rather, the office (as well as similar units within WIPO) promulgates a “faith-based” approach to IP, in which it attempts to convert non-believers to accepting the benefits of more IP. May (2006, 104) notes—and he is far from a lonely voice in this regard—that the organization has deployed significant resources to attempt to socialize policy makers, legislators, negotiators and enforcement personnel into the “world of intellectual property.” The WIPO encourages them to accept the stories deployed to justify the use of IPRs where the evidence that intellectual property directly promotes innovation and economic development is often absent.

Even if WIPO could overcome its management failure and its lack of an organization-wide engagement in understanding, let alone the development of IP norms, it faces another fatal hurdle. It simply does not have the human resources to provide the services and strategy that the Development Agenda demands. WIPO's staff comes largely from the diplomatic corps rather than from those groups with expertise in IP. Even fewer have previous experience in adapting IP to the needs of developing countries. It would thus require an aggressive staff renewal strategy for WIPO to provide the level and quality of service described in the Development Agenda.

WIPO's Membership

Quite apart from these internal difficulties, WIPO's member states pursue dramatically different policies at the national and international levels. For example, while the United States pursues a maximalist IP agenda at the international level, it possesses one of the most subtle and balanced domestic IP systems in the world (Abbott 2006, 20). Recent decisions by the Supreme Court of the United States in the field of patent law illustrate this well. In *KSR International Co. v. Teleflex Inc.* (2007), the court made it more difficult for patent holders to meet the non-obvious standard, while, in *Merck KGaA v. Integra Lifesciences I, Ltd.* (2005), it opened a vast scope for non-infringing health-related research. In *eBay Inc. v. MercExchange, L.L.C.* (2006), the court moved back from

an absolutist position on interlocutory injunctions. The court has also recently affirmed the principle of exhaustion, which limits the rights of patent owners once a product has been sold (*Quanta Computer v. LG Electronics* 2008). The effect of these decisions is to restore greater user rights in US patent law after years of increasing patent holder rights. This attempt to seek a subtle and evolving balance within IP law at the national level finds no equivalent in the absolutist approach that the United States follows at the international level, ranging from WIPO to the World Health Organization (WHO) and the World Trade Organization (WTO).

Brazil and Kenya, on the other hand, two of the countries that have most stridently called for greater flexibility in international rules relating to IP, carry few of these into their national laws. Both Brazilian and Kenyan IP laws contain restrictions that go beyond international minimum requirements. Brazilian law sets strict restrictions on photocopying, even for research purposes, and does not permit the issuance of a compulsory license for export despite the 2003 Cancun Decision (Basso and Edson, forthcoming).⁵

In addition, the flexibilities that the countries do use are under constant attack internally. For example, both Brazil and Kenya have considered setting significant restrictions on these flexibilities in 2007. Brazil's Congress is contemplating Bill no. 2729/2003, which aims at increasing criminal sanctions against the use of non-authorized patented technologies, even though there are no international agreements or even developed countries that impose similar sanctions. In only the latest attempt to restrict its use of flexibilities, Kenyan legislators defeated a bill that would have prevented the country from issuing compulsory licenses (Intellectual Property Watch Blog 2007b). This is unlikely to be the last attempt. All of these developments imply that a country's support or resistance to the exploration of flexibilities and new ways to conceive of IP internationally has seemingly little to do with its interest in exploring those flexibilities nationally. This contradiction will make WIPO's task all the more difficult since those member states, who are most supportive of the Development Agenda, may resist its implementation in their own countries. While international governments must deal with this kind of inconsistency all of the time, a weak and rudderless organization such as WIPO has little hope of navigating itself through such an environment. All of these three reasons—that WIPO is not able to manage the cultural change required by the Development Agenda, that WIPO is not constructed institutionally to deal with substantive norm development adapted to developing countries, and that the member states internally hold contradictory positions over the Development Agenda—point to WIPO's incapacity to implement the agenda on its own. While those member states and non-governmental organizations (NGOs) that militated for the agenda have celebrated its passage, even they remain skeptical about WIPO's commitment to it (Knowledge Ecology International 2007).

Building a Network around WIPO

The situation is far from hopeless, however. While WIPO cannot, and should not be trusted to, implement the Development Agenda, other organizations can. Perhaps the most important paragraph of the agenda will turn out to be paragraph 43: "To consider how to improve WIPO's role in finding partners to fund and execute projects for IP-related assistance in a transparent and member-driven process and without prejudice to ongoing WIPO activities" (WIPO 2007). Given that WIPO is not currently in a position to carry out its own agenda, it should find and fund those who do.

As noted earlier, WIPO has grown rich from the administration of various IP-related treaties. It can and should use these funds to finance organizations that possess the knowledge,

skill, neutrality, and commitment that WIPO currently does not possess. WIPO should therefore immediately develop a transparent process that will provide funding for the type of training and capacity-building activities that member states have requested. WIPO should no longer be responsible for decision making with respect to projects and for the selection of partners, and these responsibilities should be placed in the hands of external actors.

Included in this group of external actors are several inter-governmental organizations that may be able to provide assistance. The UN Development Programme, the Secretariat of the Convention on Biological Diversity, the Organization for Economic Co-operation and Development, the World Bank, the WHO, and the WTO are presently engaged in initiatives related to IP and development. This multiplication of fora can be either a blessing or a curse. On the one hand, it creates greater avenues for competing and incompatible approaches to IP, leading to ever-greater opportunities for strategic forum shifting. On the other hand, if these organizations coordinate their activities, then together they can quickly push the Development Agenda forward. WIPO can play an extremely helpful role in ensuring that the latter, not the former, takes place. It can coordinate the activities of these organizations by engaging them as partners in carrying out portions of the Development Agenda. That is, WIPO can help build a broad consensus around IP and development, ensure consistency in the “regime complex,” and create new opportunities for valuable cross-issue collaboration (Helfer 2004).

Beyond these inter-governmental organizations, academics, thinktanks, and non-profit organizations have even greater expertise in training and in-country capacity building. Of particular importance will be organizations that have experience with the business sector since, for better or worse, IP will inevitably engage the private sector (in fact, it would not be needed without it). More general and activist NGOs may, on the other hand, provide assistance in pushing out the boundaries of discourse to include a greater number of communities and more points of view. All are necessary for a full and effective implementation of the Development Agenda.

One interesting example of a public-private partnership that has contributed significantly to framing the IP rights development nexus is the UN Conference on Trade and Development–International Centre for Trade and Sustainable Development (UNCTAD-ICTSD) Capacity Building Project on Intellectual Property Rights. UNCTAD contributed the funding and the credibility of a UN agency to the initiative, while the ICTSD brought the flexibility and adaptability of a NGO. Together, they created a successful platform through which academics, advocates, and policy makers can discuss the development implications of international IP law.

One can draw two lessons for WIPO from this partnership: (1) to engage multiple partners and (2) to work with organizations that have direct connections to bureaucrats in national capitals. On the first point, although UNCTAD decided to invest most of its modest IP-related capacity-building efforts in the Capacity Building Project on Intellectual Property Rights, WIPO, which has greater assets, would benefit by diversifying its partners. This seems necessary to reduce the risk that a single interest group might capture the development debate at WIPO. While ICTSD did not try to do so, being itself very inclusive, there is a risk that another partner could. Thus, extending the spectrum of partners would likely enlarge the variety of views that are being considered.

Second, given the fact that not only the UNCTAD-ICTSD program but also many other initiatives are aimed at international negotiators visiting Geneva, WIPO should concentrate its efforts on unmet needs, particularly at the national level. There is a great need for bureaucrats and decision makers located in national capitals (and elsewhere within nations) to understand the

implications of IP for health, the environment, education, and culture. WIPO should likely aim at meeting this need instead of duplicating the efforts of others. Further, developing country negotiators have little time to participate in the initiatives occurring in Geneva. Their stays in Geneva are limited due to cost, their portfolios are large and transversal, and their resources limited. They simply cannot afford the time to engage in events in Geneva, even if these events are free (Busch, Reinhardt, and Shaffer 2008). WIPO should therefore seek partners that have a direct connection with the stakeholders in the national capitals and outside the traditional international IP circles. Further, while large transnational NGOs and industry associations have become the usual participants in the global debate, it is crucial for WIPO to also reach the voiceless small businesses, university technology transfer offices, regional governments, local communities, artists, and scientists.

Outsourcing the implementation of the Development Agenda should not be taken as a sign of WIPO's defeat: quite the contrary. It is rather a crucial first step in demonstrating that WIPO is willing to enter into meaningful communication with its surrounding community. By opening its doors to academics, researchers, and other experts, by building trust and transparency, and by funding those who currently possess the capacity to provide assistance to developing countries, WIPO would be moving toward the incorporation of the Development Agenda within its policies. Such a change would also significantly contribute to WIPO's ability to react flexibly in the future to external pressures and environmental changes. After all, there is no one final lesson to be learned or one ultimate organizational change to implement—WIPO will undoubtedly face other crises and must remain in a position that will enable it to keep learning. From this perspective, a more decentralized and horizontal governance structure based on transnational networks would ensure a steady flow of new ideas, a direct involvement of small and remote actors, an improved diffusion of innovative and best practices, and, ultimately, an enhanced capacity for adaptation. Outsourcing is not only the most rational option for development, but it is also in WIPO's best interests.

Notes

1. Development Agenda for WIPO, <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.
2. Convention Establishing the World Intellectual Property Organization, 14 July 1967, in *Treaties and International Agreements Registered or Filed or Reported with the Secretariat of the United Nations*, 828, no. 11846 at 5.
3. The report measures transparency “by analysing (1) whether organisations make a commitment to transparency and have in place a policy or other written document, underpinned by principles of good practice, that guide their approach to information disclosure; and (2) whether organisations have in place systems to support compliance with these commitments” (Blagescu and Lloyd 2006, 25).
4. Patent Co-operation Treaty, done at Washington on June 19, 1970, amended on September 28, 1979, and modified on February 3, 1984; and on October 3, 2001 (Geneva, World Intellectual Property Organization, 2007); Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of April 14, 1891 I. Act revised at Washington on June 2, 1911 at the Hague on November 6, 1925, at London on June 2, 1934, and at Lisbon on October 31, 1958. II. Additional Act of Stockholm of July 14, 1967; and as amended on September 28, 1979 (Geneva: World Intellectual Property Organization, 2008) the Hague Agreement Concerning the International Registration of Industrial Designs of November 6, 1925 (Geneva: World Intellectual Property Organization, 2008); and the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration as revised at Stockholm on July 14, 1967, and as amended on September 28, 1979 (Geneva: World Intellectual Property Organization, 2008).

5. Article 46(II) of Law no. 9610/98 (Brazilian copyright law) sets stringent obstacles for photocopying copyrighted materials, even for educational purposes. Bill no. 1.197/07 forbids the use of photocopy machines on university premises. I am grateful to Edson Rodrigues, Jr., for drawing these provisions to my attention. WTO General Council, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, WT/L/540 and Corr. 1, 1 September 2003.

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