



Duncan Matthews

Intellectual Property, Human Rights and Development

The Role of NGOs and Social Movements

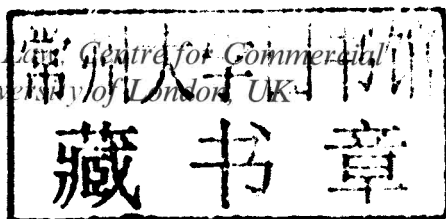


Intellectual Property, Human Rights and Development

The Role of NGOs and Social Movements

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Acknowledgements

The idea for the book first came when I visited Scotland with my father in June 2004. We were staying at the Steam Packet Inn in a small fishing village called the Isle of Whithorn in Wigtownshire. This is the part of Scotland where my father was born and brought up and there is something about the tranquillity of the place that clears the mind and encourages clarity of thought.

With time to spare, I reflected on a book I had completed two years earlier entitled *Globalising Intellectual Property: the TRIPS Agreement*. It struck me that the book I had written about the role that multinational companies had played in creating a new international regime for intellectual property rights deserved a companion volume, outlining the extent and influence of non-governmental organizations (NGOs) that had subsequently highlighted concerns about the relationship between intellectual property, human rights and development.

Coincidentally, the Economic and Social Research Council (ESRC) had just placed a newspaper advertisement, calling for research proposals to be funded within its Non-Governmental Public Action (NGPA) Programme.* I saw the newspaper advert and decided to apply for funding. Charles Clift, Graham Dutfield, Susan Sell and Sandy Thomas all provided invaluable encouragement and advice as I put the research proposal together. Subsequently, I was fortunate enough to receive a grant from the ESRC (grant RES-155-25-0038) and set about making plans to undertake the research I had envisaged while staying at the Steam Packet Inn. Jude Howell was then appointed by the ESRC as the NGPA Programme Director and proved to be outstanding in her support and encouragement for many years to come.

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Queen Mary, University of London, was kind enough to match the ESRC funding with a period of research leave. The next step was to appoint Viviana Munoz-Tellez as a full-time research assistant. She proved to be an incredibly hard working, loyal, knowledgeable and intelligent assistant and her contribution to the research was simply outstanding.

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enough to know that when this book appeared in print all the effort would have been worthwhile.

*Duncan Matthews
Hackney, London
July 2010*

Abbreviations

| | |
|----------|--|
| 3D | Trade - Human Rights - Equitable Economy |
| A2K | Access to Knowledge |
| ABC | Abacavir |
| ABIA | <i>Associação Brasileira Interdisciplinar de AIDS</i> (Brazilian Interdisciplinary AIDS Association) |
| ABS | Access and Benefit Sharing |
| ACTA | Anti-Counterfeiting Trade Agreement |
| ACTSA | Action for Southern Africa |
| AFSC | American Friends Service Committee |
| AIDS | Acquired Immune Deficiency Syndrome |
| ALP | AIDS Law Project |
| AMTC | Affordable Medicines and Treatment Campaign |
| ANVISA | <i>Agência Nacional de Vigilância Sanitária</i> (National Health Surveillance Agency) |
| ARV | Anti-retroviral |
| AZT | Azidothymidine/Zidovudine |
| BI | Boehringer Ingelheim |
| BIPRI | <i>Bureaux Internationaux Reunis pour la Protection de la Propriete Intellectuelle</i> (the United International Bureau for the Protection of Intellectual Property) |
| CALS | Centre for Applied Legal Studies |
| CAMEX | <i>Câmara de Comércio Exterior</i> (Chamber of Foreign Trade) |
| CBDC | Community Biodiversity Development and Conservation Programme |
| CBD | Convention on Biological Diversity |
| CBD-COP | Convention on Biological Diversity – Conference of the Parties |
| CDIP | Committee on Development and Intellectual Property |
| CDSCO | Central Drugs Standard Control Organization |
| CEO | Chief Executive Officer |
| CEPPWAWU | Chemical, Energy, Paper, Printing, Wood and Allied Workers Union |

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| CESCR | Committee on Economic, Social and Cultural Rights |
| CGEN | <i>Conselho de Gestão do Patrimônio Genético</i> (Council for the Administration of Genetic Resources) |
| CGIAR | Consultative Group on International Agricultural Research |
| CGRFA | Commission on Genetic Resources for Food and Agriculture |
| CIEL | Center for International Environmental Law |
| CIPIH | Commission on Intellectual Property Rights, Innovation and Public Health |
| CoFAB | Convention of Farmers and Breeders |
| COSATU | Congress of South African Trade Unions |
| CPAA | Cancer Patients Aid Association |
| CPTech | Consumer Project on Technology |
| CSIR | Council for Scientific and Industrial Research |
| CSO | Civil Society Organization |
| CTE | Committee on Trade and Environment |
| DFID | Department for International Development |
| DNA | Deoxyribonucleic acid |
| DNDi | Drugs for Neglected Diseases Initiative |
| DNP+ | Delhi Network of Positive People |
| DSB | Dispute Settlement Body |
| EFF | Electronic Frontier Foundation |
| EMBRAPA | <i>Empresa Brasileira de Pesquisa Agropecuária</i> (Brazilian Agricultural Research Corporation) |
| EMRs | Exclusive Marketing Rights |
| ESRC | Economic and Social Research Council |
| ETC | Action Group on Erosion, Technology and Concentration |
| EU | European Union |
| FAO | Food and Agriculture Organization of the United Nations |
| Farmasa | <i>Laboratório Americano de Farmacoterapia</i> (American Pharmacotherapy Laboratory, incorporated by Hypermarcas S.A. in 2008) |
| FASE | <i>Federação de Órgãos para Assistência Social e Educacional</i> (Federation of Organs of Social and Educational Assistance) |
| FDA | Food and Drug Administration |

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|------------------------|---|
| FDI | Foreign Direct Investment |
| FENAFAR | <i>Federação Nacional dos Farmacêuticos</i> (National Federation of Pharmacists) |
| FGV | Fundação Getúlio Vargas (Getúlio Vargas Foundation) |
| FIOCRUZ | <i>Fundação Oswaldo Cruz</i> (Oswaldo Cruz Foundation) |
| FTA | Free Trade Agreement |
| FTAA | Free Trade Area for the Americas |
| FURP | <i>Fundação para o Remédio Popular</i> (Popular Medicines Foundation) |
| GAPA | <i>Grupo de Apoio à Prevenção à AIDS</i> (AIDS Prevention Support Group) |
| GARPP | Generic Antiretroviral Procurement Project |
| GATT | General Agreement on Tariffs and Trade |
| GCAIPA | Global Coalition against the Indian Patent Amendment |
| GESTOS | Gestos Pernambuco |
| GI | Geographical Indications |
| GIPI | <i>Grupo Interministerial de Propriedade Intelectual</i> (Inter-Ministerial Group on Intellectual Property) |
| GIV | <i>Grupo de Incentivo à Vida</i> (Group of Incentive for Life) |
| GPA | Global Plan of Action on Plant Genetic Resources for Food and Agriculture |
| GPV | <i>Grupo pela VIDA</i> (Group for Life) |
| GRAIN | Genetic Resources Action International |
| <i>Grupo pela VIDA</i> | <i>Grupo pela Valorização, Integridade e Dignidade do Doente de AIDS</i> (Group for Life, which is also an acronym for the Valorization, Integrity and Dignity of the AIDS Patient) |
| GSK | GlaxoSmithKline |
| GTA | <i>Grupo de Trabalhos Amazônicos</i> (Amazonian Working Group) |
| GTPI | <i>Grupo de Trabalho sobre Propriedade Intelectual</i> (Working Group on Intellectual Property) |
| HAART | Highly Active Antiretroviral Therapy |
| HAI | Health Action International |
| Health GAP | Health Global Access Project |
| HIV | Human Immunodeficiency Virus |
| IATP | Institute for Agriculture and Trade Policy |
| IBASE | <i>Instituto Brasileiro de Análises Sociais e</i> |

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| | <i>Econômicas</i> (Brazilian Institute of Social and Economic Analyses) |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICTSD | International Centre for Trade and Sustainable Development |
| IDCID | Instituto de Direito do Comércio Internacional e Desenvolvimento (International Trade Law and Development Institute) |
| IDEC | <i>Instituto Brasileiro de Defesa do Consumidor</i> (Brazilian Consumer Protection Institute) |
| IFPMA | International Federation of Pharmaceutical Manufacturers & Associations |
| IGC | Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore |
| IIMs | Inter-sessional Intergovernmental Meetings |
| ILO | International Labour Organization |
| IMCA | <i>Instituto Mayor Campesino</i> |
| INESC | <i>Instituto de Estudos Socioeconômicos</i> (Social Economic Studies Institute) |
| INP+ | Indian Network of Positive Persons |
| INPI | <i>Instituto Nacional da Propriedade Industrial</i> (National Institute of Industrial Property) |
| Intervozes | <i>Intervozes – Coletivo Brasil de Comunicação Social</i> (Brazilian Aggregation for Social Communication) |
| IP | Intellectual Property |
| IPC | International NGO/CSO Planning Committee for Food Sovereignty |
| IP Watch | Intellectual Property Watch |
| ISA | <i>Instituto Sócioambiental</i> (Socio-Environmental Institute) |
| ISF | International Seed Federation |
| ITDG | Intermediate Technology Development Group |
| ITPGRFA | International Treaty on Plant Genetic Resources for Food and Agriculture |
| IUCN | International Union for Conservation of Nature |
| JAMA | Journal of the American Medical Association |
| JPO | Japanese Patent Office |
| JSA | Jan Swasthya Abhiyan |
| KEI | Knowledge Ecology International |
| KRRS | Karnataka State Farmers' Association |

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| LDC | Least-developed country |
| LRC | Legal Resources Centre |
| MAB | Man and Biosphere Programme |
| MMV | Medicines for Malaria Venture |
| MNP+ | Manipur Network of Positive People |
| MoU | Memorandum of Understanding |
| MSF | Mèdecins Sans Frontières |
| MTCT | Mother to Child Transmission |
| NEDLAC | National Economic Development and Labour Council |
| NEHAWU | National Education, Health and Allied Workers Union |
| NGF | National Gene Fund |
| NGO | Non-governmental organization |
| NGPA | Non-governmental public action |
| NHRC | National Human Rights Commission |
| OHIM | Office for the Harmonization of the Internal Market: the Trade Marks and Designs Registration Office of the European Union |
| Oxfam | Oxford Committee for Famine Relief |
| PACS | <i>Instituto de Políticas Alternativas para o Cone Sul</i> (Institute for Alternative Policies to the South Region) |
| PAIA | Promotion of Access to Information Act (South Africa) |
| PATAM | Pan-African Treatment and Access Movement |
| PBRs | Plant Breeders' Rights |
| PCDA | Provisional Committee on the Development Agenda |
| PCIPD | Permanent Committee on Cooperation for Development Related to Intellectual Property |
| PCT | Patent Cooperation Treaty |
| PhRMA | Pharmaceutical Research and Manufacturers of America |
| PMA | Pharmaceutical Manufacturers Association of South Africa |
| QUNO | Quaker United Nations Office |
| R&D | Research and Development |
| RAFI | Rural Advancement Foundation International |
| RDS | Revised Drug Strategy |
| REBRIP | <i>Rede Brasileira pela Integração dos Povos</i> (Brazilian Network for the Integration of the Peoples) |

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| RFSTE | Research Foundation for Science, Technology and Ecology |
| RNP+ | Brazilian Network of People Living with HIV/AIDS |
| SASI | South African San Institute |
| SCP | Standing Committee on the Law of Patents |
| SIDA | Swedish International Development Cooperation Agency |
| SPLT | Substantive Patent Law Treaty |
| SSNC | Swedish Society for Nature Conservation |
| STD | Sexually Transmitted Disease |
| SUDS | <i>Serviços Unificados e Descentralizados de Saúde</i> (Unified and Decentralized Health Services) |
| SUS | <i>Sistema Único de Saúde</i> (Unique Health System) |
| TAC | Treatment Action Campaign |
| TACD | Trans-Atlantic Consumer Dialogue |
| TAN | TRIPS Action Network |
| TNNP+ | Tamil Nadu Network of Positive People |
| TRALAC | Trade Law Centre for Southern Africa |
| TRIPS | Agreement on Trade-Related Aspects of Intellectual Property Rights |
| TWN | Third World Network |
| UDF | United Democratic Front |
| UK | United Kingdom |
| UN | United Nations |
| UNAIDS | Joint United Nations Programme on HIV/AIDS |
| UNCTAD | United Nations Conference on Trade and Development |
| UNDP | United Nations Development Programme |
| UNESCO | United Nations Education, Scientific and Cultural Organization |
| UNGASS | United Nations General Assembly Special Session on HIV/AIDS |
| UNCHR | United Nations Commission on Human Rights |
| UN-NGLS | United Nations Non-Governmental Liaison Service |
| UPD | Union for the Public Domain |
| UPOV | Union pour la Protection des Obtentions Végétales (International Union for the Protection of New Varieties of Plants) |
| US | United States of America |
| USAID | United States Agency for International Development |

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| USP | Universidade de São Paulo (São Paulo University) |
| USPTO | United States Patent and Trademark Office |
| USPTO MPEP | Manual of Patent Examining Procedure of US Patent and Trade Mark Office |
| USTR | United States Trade Representative |
| VCT | Voluntary Counselling and Testing |
| WHA | World Health Assembly |
| WHO | World Health Organization |
| WIMSA | Working Group of Indigenous Minorities in Southern Africa |
| WIPO | World Intellectual Property Organization |
| WTO | World Trade Organization |

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1. The interface between intellectual property, human rights and development

INTRODUCTION

Only a few years ago, the notion that intellectual property rights promote development remained largely uncontested.¹ International policy-making and norm-setting in the field of intellectual property focused almost entirely on ensuring that national intellectual property regimes provided strong protection for rights holders, with the presumption that benefits would then accrue for developing countries.

When the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) was being negotiated between 1986 and 1994, it was argued that these benefits would include increased foreign direct investment (FDI), higher levels of technology transfer or licensing leading to the transfer of know-how and expertise that would contribute to local economic growth and higher levels of domestic innovation. However, there was relatively little substantive debate about the potential for adverse effects to result from higher standards of intellectual property rights protection and enforcement in the developing world (Matthews 2002, p. 108).

In fact, during the TRIPS negotiations themselves, the paucity of the information about the likely impact of intellectual property rights on developing countries was exacerbated by the fact that many developing countries experienced information deficiencies and lacked the technical expertise to evaluate effectively the costs and benefits of higher standards of intellectual property protection and enforcement for their territories. With only about ten developing countries actually sending intellectual property experts to the TRIPS negotiations, the lack of considered debate on this issue is hardly surprising (Matthews 2002, p. 44). In contrast to developed country delegations that had access to the highest levels of advice from industry and rights holder groups, in the majority of cases developing country delegations to TRIPS negotiations were from national trade ministries or directorates, in some instances augmented by officials from the

national patent offices, but even in these cases the patent office officials were career civil servants who were not necessarily aware of the wider societal impact of intellectual property rights on developing countries. In the absence of the necessary expertise, developing countries simply did not have the knowledge necessary to negotiate effectively on the detailed content of the text of the TRIPS Agreement (Matthews 2002, p. 44).

The situation was complicated further by the fact that, while industry and rights holder groups were advising developed country delegations when the TRIPS Agreement was being negotiated (Matthews 2002, p. 44), public interest non-governmental organizations (NGOs) were generally absent from the debate. The General Agreement on Tariffs and Trade (GATT) Secretariat, for instance, reportedly received no complaints about the TRIPS Agreement from consumer groups (Sell 2002, p. 14), prompting Braithwaite and Drahos to conclude that the consumer movement had been largely 'reactive and ineffectual' in this area (Braithwaite and Drahos 2000, p. 202).

However, it was during the subsequent implementation phase of the TRIPS Agreement that the debate on the impact of intellectual property rights on developing countries came sharply into focus. It was during this implementation phase that NGOs began to play a much more significant role. Activists began working with developing country governments that had not fully grasped the scope and depth of the rights obligations enshrined in the TRIPS Agreement when they signed up to these commitments in 1994 (Gervais 2007, p. 20). NGOs also helped to ensure that there is greater awareness of the possible adverse impacts of intellectual property rights and the potential for alternative proposals that take greater account of development orientated objectives. As a result, intellectual property rights are now seen as hugely political issues rather than as purely technical matters (Chon 2010, p. 5).

So the increased engagement of NGOs began to contribute to new levels of debate and understanding about the interface between intellectual property and development. This has served to shift attention away from an unquestioned assumption of the benefits of intellectual property rights, instead giving greater emphasis to public policy objectives that concern sections of society other than industry and rights holder groups.

In particular, NGOs have highlighted the fact that, while intellectual property rights can stimulate innovation, investment in research and development (R&D) and diffusion of knowledge, intellectual property rights can also hinder development if a balance between rewarding innovators and safeguarding the public domain for a wider public good is not achieved.

This relatively recent NGO engagement in the seemingly complex and