

The Corporate-Consumer Power Dynamic Operating Behind the International Intellectual Property Regime: An Intractable Development Model with Uneven Results

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ABSTRACT

The corporate-consumer power dynamic operating behind the international intellectual property regime has created a development model that perpetuates the hegemonic power of corporate elites and their governmental agents at the expense of developing nations. The inequity of the regime seems to be rooted in the paradoxical delegation of exclusive intellectual property rights to private corporate interests who dispense knowledge as a global public

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good. However, the inequality actually begins with the inception of knowledge itself and is the consequence of natural exclusivity over one's own thoughts and creations, including how those ideas are conveyed to the public sphere. The freedom to pool individual ideas and resources into corporate structures, combined with the propagation of consumerism, has led to remarkable innovations, but it has also facilitated the concentration of corporate power and the projection of that power abroad. Propelled by this power dynamic, multinational corporations have successfully lobbied for the international restriction of knowledge as a global public good, thereby frustrating attempts to promote a more equitable development model. Nevertheless, an understanding of how the corporate-consumer dynamic operates can help advance potential solutions to address the inequities, while at the same time retaining the beneficial aspects of the regime. By fostering an enlightened global citizenship that is more consistent with public works projects, a new corporate ethic may begin to acknowledge sustainable development goals and embrace a more equitable distribution of global public goods over the long term.

I. INTRODUCTION

International regimes are the pervading sets of “norms, rules and decision-making procedures” that have developed in international relations around global ideals,¹ such as free trade, environmental protection, and non-proliferation. Regimes help to mitigate the anarchical world system by developing standards of behavior, including the rights and obligations of states, and also by institutionalizing the practices and expectations of the global community. The ultimate stage of an international regime is the codification of decision-making behavior that advances an international regulatory scheme of governance.

In the domain of intellectual property, the World Intellectual Property Organization (“WIPO”) facilitates the interaction of member states and private enterprise to incentivize “innovation and creativity for the benefit of all.”² WIPO has encouraged global governance through a rules-based regime that is negotiated at various levels within or in connection with the organization.³ The pinnacle of the negotiations to establish international intellectual property enforcement was the 1994 World Trade Organization

1. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L REGIMES 185, 186 (1983).

2. *Inside WIPO*, WIPO, <https://www.wipo.int/about-wipo/en/> [https://perma.cc/S739-JVGP].

3. *See Policy*, WIPO, <https://www.wipo.int/policy/en/> [https://perma.cc/R4EZ-UJXX].

(“WTO”) deal on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).⁴

The international intellectual property regime is furthered by educating the global community on the best practices of IP law enforcement.⁵ As explained in the Interpol media guide for the 2019 International Law Enforcement and IP Crime Conference: “This international event brings together police, customs, regulatory agencies and private sector IP crime investigators to share and develop best practices to combat counterfeiting and piracy crimes.”⁶ The agenda addressed issues pertaining to transnational organized crime, trafficking of illicit goods, enforcement strategies, cybercrime, and case studies from both law enforcement and “industry perspectives.”⁷ On the IP Crime Conference website, a promotional video pans the entrance hall and arrives at an elongated reception table lined with multi-colored flags representing more than eighty countries.⁸

Although the ascendancy of the international intellectual property regime is a relatively recent phenomenon in global affairs, the regime’s ascent is the result of a corporate-consumer power dynamic which has developed over the last two centuries. Since the mid-nineteenth century, corporations have: (1) pooled capital investments into limited liability business entities to expand capacity; (2) attained legal recognition of corporate personhood with Constitutional rights to property, free speech, and public policy advocacy; (3) increased their capital accumulation from a massive consumer base in the United States; and (4) consolidated their power through the marketing of exclusive intellectual property rights.⁹ The corporate playbook thus includes promoting and utilizing intellectual property laws to convert the global public good of knowledge into privately controlled commodities,

4. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

5. See *Media Invitation: 2019 International Law Enforcement IP Crime Conference*, INTERPOL (Oct. 14, 2019), <https://www.interpol.int/en/News-and-Events/News/2019/Media-invitation-2019-International-Law-Enforcement-IP-Crime-Conference> [https://perma.cc/UQN5-Q9E2].

6. See *id.*

7. *Id.*

8. Video at *2019 Conference Highlights – Cape Town, South Africa*, INT’L IP CRIME INVESTIGATORS COLL. (Nov. 17, 2019), <https://www.iipic.org/conference.php> [https://perma.cc/25FE-E4R2].

9. See discussion *infra* Section II.

infusing these commodities into consumer products, and then accruing the financial benefits in exponential proportions.

The corporate-consumer power dynamic has created a development model that perpetuates the hegemonic power of corporate elites and their governmental agents at the expense of developing nations. Under this model, the *immediate* benefit of knowledge as a global public good does not extend universally because it has been legally restricted from use in the development of the global society as a whole. To more effectively address the inequities of the regime, an understanding of the roots of inequality as well as the historical development of the corporate-consumer power dynamic is required.

II. THE INEQUALITY OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME

According to the leading IP Economist and Nobel laureate Joseph Stiglitz, the injustice of the international intellectual property regime is demonstrated by the inequities of international development.¹⁰ In his essay *Knowledge as a Global Public Good*, Stiglitz explains that: “The intellectual property regime affects how the gains are shared, and *in doing so affects the pace of development* within less developed countries.”¹¹ It is widely acknowledged that this IP-driven model results in uneven development throughout the world.¹²

The premise of the inequality argument is that knowledge, as a public good, should provide a foundation for the development of all humankind, not just the private sector.¹³ From this perspective, the ideal state would be the total and uniform dispersion of knowledge in perfect equilibrium, tailored to localized needs, and yielding maximum utility. Thus, the optimum result of any international intellectual property regime, as argued by Stiglitz and others, requires a balancing of productivity with access:

An international intellectual property regime, designed to facilitate the production and use of the global public good—knowledge—in a way that sustains high rates of growth and is consistent with broad notions of equity, must balance a variety of

10. See Joseph E. Stiglitz, *Knowledge as a Global Public Good*, in *GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY* 308, 316 (Inge Kaul, Isabelle Grunberg, & Marc Stern eds., 1999) (emphasis added) [hereinafter Stiglitz].

11. *Id.* (emphasis added).

12. See Amy Kapczynski, *Access to Knowledge: A Conceptual Genealogy*, in *ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY* 17, 19 (Gaëlle Krikorian & Amy Kapczynski eds., 2010) [hereinafter Kapczynski].

13. Ugo Pagano, *Knowledge as a Global Common and the Crisis of the Global Learning Economy*, in *TOWARD A JUST SOCIETY: JOSEPH STIGLITZ AND TWENTY-FIRST CENTURY ECONOMICS* 353, 353 (Martin Guzman ed., 2018) [hereinafter Pagano].

concerns, including dynamic and static efficiency and the use of the global knowledge commons.¹⁴

However, because intellectual property rights give corporations control over the development of knowledge, an intractable conflict arises between the private and public spheres. Under the international intellectual property regime, the corporate entity responsible for the development of knowledge is effectively charged with securing the global public good for the benefit of all. The responsibility for distribution of such public goods by a corporate entity is unavoidable because such goods are almost always derived from a specific zone of knowledge which originates with the corporate entity.

Thus, the delegation of *exclusive* intellectual property rights can be seen, paradoxically, as the delegation of a public works project to private corporate interests in order to achieve the ideal state of universal access to such knowledge.¹⁵ The U.S. Supreme Court echoed this sentiment in a 2018 opinion which held “that the decision [of the government] to grant a patent[,] [which provides the exclusive right to practice an invention,] is a matter involving *public rights*—specifically, the grant of a *public franchise*.”¹⁶ It has similarly been argued that intellectual property “rights are granted to serve an important *public purpose*, from the promotion and dissemination of new creative works (copyright) and innovation (patent) to the assurance of goods and services of consistent quality (trademark).”¹⁷ In this respect, “the public international law system of intellectual property rights has always been about how private rights are regulated and how effectively the owners of private rights are able to navigate the public international law system.”¹⁸

Restricting legal rights to private production as a means to universal distribution and public access may seem contradictory, but the contradiction actually occurs from the inception. Knowledge does not begin as a global public good because knowledge ultimately originates from some private idea. While all new ideas are in some fashion built on what has come before, at the moment of their creation the new ideas are entirely within

14. Stiglitz, *supra* note 10, at 316.

15. See Pagano, *supra* note 13, at 355.

16. Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018) (emphasis added) (emphasis omitted).

17. Llewellyn Joseph Gibbons, *Fake It Till You Make It: A Justification for Intellectual Property “Piracy,”* 48 IND. L. REV. 65, 101 (2014) (emphasis added).

18. P. Sean Morris, *Private Intellectual Property Regulation in Public International Law*, 26 UC DAVIS J. INT’L L. & POL. 147, 190 (2020).

the control of an individual, residing within the mind of the creator. Corporations claim ownership of such ideas under the “work-for-hire” doctrine, which automatically deems all employee creations produced within the scope of employment as corporate property.¹⁹ Even truly independent inventors are prone to file for patents, copyrights, and trademarks, as a means of raising “risk capital” through a limited liability corporate structure known as a start-up company.²⁰

Thus, the somewhat paradoxical goal of the international intellectual property regime is to transform, apply, and disperse, privately developed and corporate-held ideas into universally accessible global public goods. It would be a mistake to assume the automatic application and dispersion of knowledge; ideas are not magically commanded into a global public good through political incantations. Rather, the transformation of an abstract idea into a global public good requires physical human force acting upon the idea and turning it into useful technology. Such public works projects are, therefore, assigned to those who are in the best position to develop and present them, i.e., the inventors of the scientific discoveries and the authors of the artistic works.

Because all knowledge is initially conceived in the form of an idea, an absolute state of unequal access exists; the creator is naturally endowed with exclusivity from the moment of creation. This natural state of exclusivity is implicitly recognized in international law under Article 27(2) of the Universal Declaration of Human Rights: “Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the Author.”²¹ This human right reflects the principle that every person should have control over his or her own thoughts and creations as well as the volition to decide the manner in which such ideas may be delivered to the public sphere.

In recognition of this fundamental right, the U.S. Constitution seeks to move beneficial ideas from the private to the public square by conferring an exclusive property right in “Writings and Discoveries.”²² As stated in Article 1, Section 8, the purpose of granting such exclusive rights, *at least for limited times*, is: “To promote the Progress of Science and useful Arts” for the “general Welfare.”²³ But what is “Progress?” And can Progress

19. Kapczynski, *supra* note 12, at 23.

20. Ikechi Mgbefi, *The Juridical Origins of the International Patent System: Towards a Historiography of the Role of Patents in Industrialization*, 5 J. HIST. INT’L. L. 403, 422 (2003).

21. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

22. U.S. CONST. art. I, § 8.

23. *See* U.S. CONST. art. I, § 8.

really be universal, as the capital “P” suggests, if the ideas emanate from a private source?

The concept of a universal progress based on the “Science and Useful Arts” grew out of the philosophy of the Enlightenment.²⁴ Specifically, the “idea of progress” resulting from a “scientific method” was first crystallized by the likes of such philosophers as Francis Bacon and René Descartes.²⁵ The Enlightenment’s universal application of progress is derived from an understanding of scientific information as naturally diffuse:

Since the optimum condition of the progress of science demands *the cooperation of the scientists of various countries*, and hence freedom of communication among them, and requires as well the spread of knowledge of the conditions of the advancement of science, Enlightenment implies “open societies” linked with each other in the common enterprise of “the mastery of nature.” It is necessarily antithetical to any societies, *or elements in a society*, that seek the *autonomous* cultivation and preservation of their own morality and way of life. Thus Enlightenment is by intention a universal politics, potentially of global magnitude, and the first of philosophical origin.²⁶

It was assumed that scientists would cooperate in the communication of their ideas to achieve universal progress and, comparatively, there was little regard given to the actual implementation of scientific knowledge to utilitarian applications. Under the Enlightenment philosophy, the spread of knowledge would seemingly disseminate as a result of a “universal politics” toward the mastery of nature for the benefit of all.

While appearing to overlook the *means* of application and distribution of ideas in the form of material benefits, the Enlightenment philosophy of science and universal politics was nevertheless still historically ambitious; “[u]ntil the Scientific Revolution . . . it was considered impossible for human know-how to overcome the world’s fundamental problems.”²⁷ It is from this Enlightenment tradition that progress has come to be generally defined as the “gradual betterment” of some condition, especially “the progressive development of humankind.”²⁸ During the nineteenth century, “ideologies of progress” combined with industrialization and “rational state-

24. See Richard Kennington, *René Descartes*, in HISTORY OF POLITICAL PHILOSOPHY 379, 391–92 (Leo Strauss & Joseph Cropsey eds., 1963).

25. See *id.* at 435.

26. *Id.*

27. YUVAL NOAH HARARI, SAPIENS: A BRIEF HISTORY OF HUMANKIND 264 (2015).

28. See *Progress*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/progress> [<https://perma.cc/B6HT-K76V>].

building” thereby resulting in a global transformation of modern international relations.²⁹

In this historical context, progressive development came to be understood as the incremental improvement of the human condition through the continuing production of public goods that is implicit in and necessitated by human existence. From a social science perspective, the idea of progressive development is an inherent goal in the social structures of every political society.³⁰ As a matter of practical necessity, and by definition, each governing state is involved in multiple dimensions of development, including the production of public goods such as infrastructure, housing, agriculture, and education, as well as scientific knowledge and the useful arts.

Any of the foregoing examples could be produced by government or the private sector, or even in combination. In every society, a decision has to be made and implemented, whether consciously or not, regarding the ways and means of producing the material conditions necessary for achieving progressive development. The way in which various power structures act upon society to affect this determination and implementation of progress is known as “the politics of development.”³¹

III. INTERNATIONAL DEVELOPMENT AS A PRODUCT OF THE RULING POWER STRUCTURE

International development represents the idea of progress as envisioned, expressed, and implemented by some social power dynamic operating within a “historical construct.”³² Understanding how knowledge and power drive international development first requires an analysis of the underlying dynamics of the ruling power structure.

Power, in its most benign sense, is developed through policies that are naturally attractive and are instinctively embraced. This has been referred to in international relations as a type of “soft power.”³³ Power is more visible when an agent overtly signals preferences for a set of social, economic, or

29. BARRY BUZAN & GEORGE LAWSON, *THE GLOBAL TRANSFORMATION, HISTORY, MODERNITY AND THE MAKING OF INTERNATIONAL RELATIONS* 21 (Christian Reus-Smit & Nicholas J. Wheeler eds., 2015).

30. Dr. Wiliam Arrocha, Associate Professor, Middlebury Institute of Int’l Studies, Lecture at the Middlebury Institute of International Studies: Politics of Development (Mar. 2, 2020).

31. *Id.*

32. Arturo Escobar, *The Invention of Development*, 98 *CURRENT HIST.* 382, 384 (1999).

33. JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 5 (1st ed. 2004).

other public policies.³⁴ Power can also be exercised in a more covert fashion through agenda control, thereby denying any articulation of alternative policy preferences.³⁵ Another type of power involves the projection of preferences in a manipulative manner such that adherents to such preferences seem to be acting voluntarily.³⁶ In contrast, Foucault viewed power as a reflection of social norms, the boundaries of which are enforced and ultimately conditioned by constant surveillance and the consciousness of surveillance within a “carceral” or “disciplinary society.”³⁷ According to Foucault, social forces act upon individuals thereby “rendering them capable of and willing to adhere to norms . . . of prevailing propriety.”³⁸

The power to project a set of public policy preferences on society at large is related to the “dominant ideology thesis”—a Marxist notion that “the ideas in every epoch are the ideas of the ruling class.”³⁹ Neo-Marxists like Antonio Gramsci further developed this concept by defining power in terms of a hegemony of ideas which are promoted, espoused, and inculcated by and through an intellectual, institutional, and professional elite.⁴⁰ Gramsci described the dissemination of ideas, including legal norms, as perpetuating the power of the ruling class.⁴¹ Based on the “diffusion and popularization” of their ideology, the ruling class maintains political control over agendas and public policies through a combination of coercion and consent.⁴²

An existing power structure must, therefore, maintain an air of legitimacy to maintain a minimum level of consent. “Without *some* level of legitimacy, it is hard to see that any state could be sustained, and consequently a great deal of work goes into defending the state’s claim to exercise not just effective power, but also legitimate authority.”⁴³ Given how social power structures lost legitimacy in the Age of Revolution (e.g., the American and French Revolutions), the idealism of progressive

34. Joseph Agolano, *Steven Lukes*, in *THE ENCYCLOPEDIA OF POWER* 393, 393–94 (Keith Dowding ed., 2011).

35. *Id.*

36. *Id.* at 394.

37. Steven Lukes, *Power*, in *ENCYCLOPEDIA OF PHILOSOPHY AND THE SOCIAL SCIENCES* 748, 750 (Byron Kaldis ed. 2013). *Id.*

38. *Id.*

39. *Id.* at 749.

40. *Id.*; see also Thomas R. Bates, *Gramsci and the Theory of Hegemony*, 36 *J. HIST. IDEAS* 351, 351 (1975) (discussing Gramsci’s idealist tradition of ideas).

41. *Id.*

42. *Id.* at 352.

43. CHRISTOPHER PIERSON, *THE MODERN STATE* 18 (2d ed. 2004).

development that began with the Enlightenment and the scientific method inevitably broke down. The unfortunate truth is that technological advancement may in fact lead to tyrannical social relations when the power over knowledge is abused to sustain and perpetuate the existing and entrenched power structure.

For example, the abuses of nineteenth century industrialization led to the debasement of the working class. At that time, Marx saw the operative power structure in society as resulting from the accumulation of capital within Modern Industry's establishment of a world market: "[T]he bourgeoisie has at last, since the establishment of Modern Industry and of the world market, conquered for itself, in the modern representative State, exclusive political sway."⁴⁴ According to Marx, the exploitation by the ruling economic class over the world market provides the basis for the globalization of knowledge as a commodity: "And as in material, so also in intellectual production. The intellectual creations of individual nations become common property."⁴⁵ What were once thought of as the universal ideas of Science and the Arts during the Enlightenment subsequently became intellectual property, as defined in law, and thus made subject to the control of the ruling industrial class.

IV. THE CORPORATE-CONSUMER POWER DYNAMIC

The problem with a purely capitalistic organization of society is that it tends to concentrate the benefits of society's production of public goods into fewer and fewer hands.⁴⁶ "This is the fly in the ointment of free-market capitalism. It cannot ensure that profits are gained in a fair way, or distributed in a fair manner."⁴⁷ However, if the working class is so exploited that its purchasing power is limited to subsistence levels as envisioned by Marx, the capitalist system will eventually collapse and lead to some form of a workers' revolution.

Thus, to avert revolution, a capitalist economy requires the creation of a market for its products that consists of the very working class that is the subject of capitalism's exploitation. The industrial class also needed to develop consumerism to absorb the natural inclination of capitalism to overproduce:

44. KARL MARX & FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY (Frederick Engels ed., Samuel Moore trans., Chicago: Charles H. Kerr & Company 1888) (1848).

45. *Id.*

46. PARK AVENUE: MONEY, POWER AND THE AMERICAN DREAM (Democracy Pictures LLC & Steps International 2012).

47. HARARI, *supra* note 27, at 331.

The modern capitalist economy must constantly increase production if it is to survive, like a shark that must swim or suffocate. Yet it's not enough just to produce. Somebody must always buy the products, or industrialists and investors will go bust. To prevent this catastrophe and to make sure that people will always buy whatever stuff industry produces, a new kind of ethic appeared: consumerism.⁴⁸

An expansive U.S. market led the way to the vital increase of consumption that was necessary to sustain capitalism: "American businesses pioneered both in advertising and salesmanship as ways of incorporating the population into mass markets for the goods pouring out of their factories. The ethos of mass production for mass consumption was an American invention."⁴⁹ The increased growth of production in the United States after the American Civil War led to expanded capacity needs.⁵⁰ This required "massive consolidation and centralization in a wide range of industries, especially those in consumer goods."⁵¹

The wave of market integration following the U.S. Civil War was perfected through the use of the modern corporate structure developed by investment banks such as J.P. Morgan.⁵² A corporation exists as a "legal fiction," a paper entity with the power to buy and sell property, maintain bank accounts, employ people, and harness the collective capital of individual investors without any risk to the personal property of the incorporators.⁵³ "The idea behind such companies is among humanity's most ingenious inventions."⁵⁴ This is because the corporate structure "enables millions of strangers to cooperate and work towards common goals" associated with industrial production.⁵⁵

The framework for the American corporate power structure was completed with the recognition of corporate personhood by the U.S. Supreme Court in the late nineteenth century.⁵⁶ This power has since been magnified by the Court's approval of corporate Constitutional rights to free speech regarding public policy.⁵⁷ Thereafter, in *Citizens United v. F.E.C.*, corporations were authorized to utilize their massive economic resources to disproportionately

48. HARARI, *supra* note 27, at 347.

49. JOHN AGNEW, HEGEMONY, THE NEW SHAPE OF GLOBAL POWER 83 (2005).

50. *Id.* at 85.

51. *Id.*

52. *Id.*

53. HARARI, *supra* note 27, at 28–29.

54. HARARI, *supra* note 27, at 29.

55. HARARI, *supra* note 27, at 31.

56. *See Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 394–95 (1886).

57. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 766 (1978).

influence public policy within the American political system.⁵⁸ As explained in Justice Kennedy’s opinion:

State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets. This does not suffice, however, to allow laws prohibiting speech. It is rudimentary that a state cannot exact as the price of those special advantages the forfeiture of First Amendment rights.⁵⁹

However, it is precisely the conferral of such political rights in combination with the extraordinary rights of limited liability, perpetual existence, and special capital accumulation tools, that allows for the exertion of unyielding power. This is also an example of how “[c]orporate form ‘naturalisation’ conceals the distributive effects and relations of exploitation that lie at its base and thus affects our ability to confront the natural effects of corporate power.”⁶⁰

The expanding corporate power of the late nineteenth century led to the international development of cheap natural resources which were needed to sustain mass production. “The imperialist solution to capitalism’s problems, then, has two sides: profitable investment opportunities in the dependent countries and the expansion of an affluent market in the imperialist countries, created by a transfer of value in the form of superprofits and cheap goods to sustain superwages.”⁶¹ The resulting “imperialist value transfer acts to thwart the evolving development prospects of the exploited countries.”⁶² However, the transfer was deemed necessary so that “the capitalists of the core could pacify their own working class through further exploitation of the periphery.”⁶³

Thus, one of the main drivers of international development in the twentieth century was the advent of the modern “ethic of consumerism.”⁶⁴ This ethic was propelled by the systematic psychological manipulation of the public, executed through modern advertising campaigns and promoted by corporate business interests.⁶⁵ Modern mass media of the twentieth

58. See *Citizens United v. Fed. Elections Comm’n*, 558 U.S. 310, 310 (2010).

59. *Id.* at 350.

60. Grietje Baars, *The Roots, Development, and Context of the Legal Concept of the Corporation: The Making of a Structure of Irresponsibility and a Tool of Imperialism*, in *THE CORPORATION, LAW AND CAPITALISM* 31 (2019).

61. ZAK COPE, *THE WEALTH OF (SOME) NATIONS: IMPERIALISM AND THE MECHANICS OF VALUE TRANSFER* 77 (2019).

62. *Id.* at 14.

63. Stephen Hobden & Richard Wyn Jones, *Marxist Theories of International Relations*, in *THE GLOBALIZATION OF WORLD POLITICS* 145 (6th ed. 2014).

64. HARARI, *supra* note 27, at 347.

65. *THE CENTURY OF SELF: EIGHT PEOPLE SIPPING WINE IN KETTERING* (BBC, Apr. 7, 2002).

century, specifically film and radio, made it possible for corporations to link their products to the emotional and irrational subconscious of desires and feelings.⁶⁶ By utilizing the psychological techniques of consumer appeal and persuasion developed by Edward Bernays, corporations transformed how the general population thought of their products.⁶⁷ The strategy was to make “wants” equivalent to “needs” by utilizing suggestive marketing such as “product placement.”⁶⁸

President Hoover was among the first politicians to articulate consumerism as a basis for economic progress in the 1920s.⁶⁹ The idea was that the general population could attain self-actualization as a “consuming self” operating within a mass democracy, thus providing the basis for a happy, docile, and stable state.⁷⁰ No longer was the identity of the individual tied to his or her menial labor. Rather, the modern American ethos shifted as individuals were conditioned to associate their identities with a product and a brand name promoted by some corporate interest secured by a patent, trademark, or copyright; so much so that the value of “brand names, research and development, patents and other forms of abstract capital such as digital platforms and data flows [now exceeds] fixed or tangible assets in the profitability and valuation of many leading corporations.”⁷¹

Following World War II, President Truman embraced the use of private corporate capital in international development under the Point Four program.⁷² As a result of post-war American hegemony, the underdeveloped world had to rely on multinational corporations as part of their development model within the international system. “It is widely accepted that economic regimes established after the Second World War owe their existence to the presence of the USA as a hegemonic power.”⁷³

The consequent internationalization of corporate control through U.S. hegemony was further advanced by corporate lobbying efforts in the

66. THE CENTURY OF SELF: THERE IS A POLICEMAN INSIDE ALL OUR HEADS; HE MUST BE DESTROYED (BBC, Mar. 31, 2002).

67. THE CENTURY OF SELF: HAPPINESS MACHINES (BBC, Mar. 17, 2002).

68. *Id.*

69. *Id.*

70. *Id.*

71. Dick Bryan et al., *Capital Unchained: Finance, Intangible Assets and the Double Life of Capital in the Offshore World*, 24 REV. OF INT'L POL. ECON. 56 (2017).

72. Stephen Macekura, *The Point Four Program and U.S. International Development Policy*, POL. SCI. Q. 127, 143 (2013).

73. Richard Little, *International Regimes*, in THE GLOBALIZATION OF WORLD POLITICS 289, 297 (John Baylis, Steve Smith & Patricia Owens eds., 6th ed. 2014).

regulation of intellectual property in international trade. For example, it has been widely reported that “U.S. industries and their affiliated organizations have forged tremendous influence on IP legislation and international negotiations”⁷⁴ Corporate lobbying has also led to specific enforcement actions under the “Special 301” provision of the U.S. Trade law.⁷⁵

On Capitol Hill, the influence from U.S. industries and industrial organizations can be seen clearly. Each year, testifying before congressional committees they make charges of foreign IP violations, providing estimates of losses, etc., in order to get their message across. Eventually these allegations are included in their petitions under the Special 301 provisions which will receive the USTR’s attention.⁷⁶

The U.S. Trade Representative has the authority under the “Special 301” provision to publish an annual “Priority Watch List” designating the countries that “deny adequate and effective protection of intellectual property rights.”⁷⁷ It has been argued that “[t]he coercive effect of this trade instrument stems from the fact that countries listed face the risk of trade sanctions unless they take appropriate measures to address concerns raised.”⁷⁸ Thus, it is the United States “often at the behest of prominent multinational corporations[,]” that “most actively promote[s] higher IP protection globally, [and] it benefits most from upward IP harmonization.”⁷⁹

The culmination of the corporate lobbying on international negotiations and enforcement on intellectual property harmonization was the TRIPS agreement adopted under the auspices of the WTO in 1994.⁸⁰ In the early 2000s, it was acknowledged that “[TRIPS] was a matter of powerful companies with intellectual property concerns essentially dictating trade policy.”⁸¹ As noted by many legal analysts, “the industrialized country policymakers behind TRIPS were largely driven by private corporate interests, and

74. Paul C.B. Liu, *U.S. Industry’s Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87, 92 (1994).

75. *Id.* at 88.

76. *Id.*

77. See Identification of Countries that Deny Adequate Protection, or Market Access, for Intellectual Property Rights, 19 U.S.C. § 2242 (2020).

78. Jean-Frédéric Morin & Edward Richard Gold, *An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries*, 58 INT’L STUD. Q. 781, 786 (2014).

79. *Id.* at 785.

80. Steve Lohr, *New Economy; The intellectual property debate takes a page from 19th-century America.*, N.Y. TIMES (Oct. 14, 2002), <https://www.nytimes.com/2002/10/14/business/new-economy-intellectual-property-debate-takes-page-19th-century-america.html> [<https://perma.cc/F6YX-NE3Y>].

81. *Id.* (quoting “trade expert” Keith E. Maskus).

developing countries agreed to these minimum IP standards based on promises of favorable trade terms.”⁸²

Utilizing the above-described strategic marketing and legal fulcrum of TRIPS, the corporate-consumer power dynamic has re-framed international intellectual property laws to address “counterfeiting,” “piracy,” and “quality control” in international trade. These are calculated terms of art used in the “intellectual property discourse” by corporations to evoke a “global war against counterfeiters and prosecution of pirates.”⁸³

According to the United Nations Office on Drugs and Crime, counterfeit products have a direct link to organized crime, including the smuggling of “drugs, firearms and people[,]” as counterfeited products use the same illicit trade routes.⁸⁴ The range of counterfeit goods includes automotive parts, chemicals and pesticides, consumer electronics, electrical components, food and agricultural products, pharmaceuticals, tobacco and household products.⁸⁵ These counterfeits can, among other deleterious effects, “lead directly to injury and death.”⁸⁶

While all counterfeit goods generally pose safety risks due to lack of safety compliance, testing, and inspections, the most dangerous counterfeits are medicines.⁸⁷ For example, some counterfeit medicines are known to have the wrong doses of ingredients and may even include toxic substances.⁸⁸ These counterfeit medications also leave people under the false impression that their medical condition is being treated when in fact it is not.⁸⁹ The World Health Organization has estimated the number of fraudulent medicines available in developing countries to be as high as ten percent, while “in parts of Asia, Africa and Latin America, fraudulent pharmaceuticals could amount to as much as 30 per cent of the market.”⁹⁰

82. Daniel J. Hemel & Lisa Larrimore Ouellette, *Knowledge Goods and Nation-States*, 101 MINN. L. REV. 167, 171 (2016).

83. Roya Ghafele, *Of War and Peace: Analyzing the Policy Discourse on Intellectual Property*, 3 INTELL. PROP. Q. 237 (2010).

84. *The Illicit Trafficking of Counterfeit Goods and Transnational Organized Crime*, U.N. OFF. ON DRUGS & CRIME, https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf [<https://perma.cc/4HDZ-Y2XL>].

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

The recent report by the U.S. Department of Homeland Security (“DHS”), *Combating Trafficking in Counterfeit and Pirated Goods*, similarly documents the link between counterfeits and “health and safety” as well as other risks to economic and national security.⁹¹ For example, counterfeit semiconductors known as “Trojan chips” can infiltrate military products with viruses and malware which undermine national defense.⁹² Other specific threats include organized criminal networks, coerced child labor, and terrorism financing.⁹³

The DHS report concludes by recommending “Global Initiatives” to combat these issues such as internet surveillance and international capacity building.⁹⁴ Interpol’s partnership with Underwriters Laboratories in the operation of the International IP Crime Investigators College is cited as a specific example of “the cooperative efforts available to combat the trafficking of counterfeit and pirated goods.”⁹⁵ These are the corporate and law enforcement organizations that promoted the International IP Crime Conference in South Africa (2019), and they remain active participants in the ascendancy of the international intellectual property regime.

The foregoing examples demonstrate how the corporate-consumer power dynamic has shaped the collective consciousness, literally instructing government agents in the prosecution of IP counterfeiting and piracy. “Wealthy corporations are successfully making the case for increased state enforcement of intellectual property rights by effectively framing the issue of intellectual property enforcement as a health and safety issue in order to advance their commercial interests.”⁹⁶ Instead of being necessary for the protection of the private interests of multinational corporations, or to provide an incentive for inventions,⁹⁷ a global IP regime is now viewed as necessary for the protection of the consumer within a safe and stable world order.⁹⁸

91. U.S. Dep’t of Homeland Sec. Off. of Strategy, Pol’y & Plans, *Combating Trafficking in Counterfeit and Pirated Goods: Report to the President of the United States*, U.S. DEP’T OF HOMELAND SEC. (Jan. 24, 2020), https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf [<https://perma.cc/G4XU-4PU2>].

92. *Id.* at 20.

93. *Id.* at 19.

94. *Id.* at 52.

95. *Id.*

96. J. Janewa OseiTutu, *Private Rights for the Public Good?*, 66 SMU L. REV. 767, 771 (2013).

97. Robert Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property*, 36 MICH. J. INT’L L. 557, 566 (2015).

98. See *Global Cyber and Intellectual Property Crimes*, U.S. DEP’T OF JUST. (May 13, 2021), <https://www.justice.gov/criminal-opdat/global-cyber-and-intellectual-property-crimes> [<https://perma.cc/L8XG-TKLL>] (providing examples of international IP enforcement and successes).

V. CONCLUSION

The corporate-consumer power structure operating behind the international intellectual property regime exhibits at least five different elements of power: (1) power is exercised overtly as corporate interests and their corresponding government agents openly state their preference for the global IP regime, couching its benefits in terms of the public goods of health, safety and security; (2) power is signaled more covertly through corporate lobbying and agenda-setting, including the maintenance of international intellectual property as an issue in international trade agreements like TRIPS; (3) power is manipulated to obtain voluntary consent using modern psychological techniques to develop an ethic based on consumerism where identity is subconsciously tied to corporate products and brand names; (4) power is demonstrated in a Foucauldian manner through international law enforcement, internet surveillance, and legal capacity building, and (5) power is effected through the dissemination of ideas and legal norms which serve to perpetuate the legitimacy of the international intellectual property regime.

The resulting prosecution of international IP crimes in developing countries has, at least in some respects, negatively impacted international development. As argued by Stiglitz, global inequality is being reinforced through a system that (1) restricts access to knowledge-based goods according to ability-to-pay, (2) transfers wealth to the hoarders of knowledge through a system of rent-extraction, and (3) ultimately undermines the economic productivity of lesser developed countries by restricting knowledge as basis for future development.⁹⁹ Therefore, the uneven results of the international intellectual property regime must eventually be confronted through globalized dispersion incentives.¹⁰⁰ However, no other model of development, such as grants, prizes, tax incentives or other public financing¹⁰¹ has gained any significant traction in the establishment of an alternative regime. This is because any such reform must first confront the reality of the corporate-

99. See Joseph E. Stiglitz, *How Intellectual Property Reinforces Inequality*, N.Y. TIMES (July 14, 2013), <https://opinionator.blogs.nytimes.com/2013/07/14/how-intellectual-property-reinforces-inequality> [<https://perma.cc/HY5S-ZKNV>] [hereinafter *How Intellectual Property Reinforces Inequality*]; see also Dean Baker, Arjun Jayadev & Joseph Stiglitz, *Innovation, Intellectual Property, and Development: A better set of approaches for the 21st Century* 61-68 (July 2017), <https://cepr.net/images/stories/reports/baker-jayadev-stiglitz-innovation-ip-development-2017-07.pdf> [<https://perma.cc/R6ZS-LTJF>].

100. See Stiglitz, *supra* note 10, at 320.

101. See *How Intellectual Property Reinforces Inequality*, *supra* note 99.

consumer power dynamic operating behind the international intellectual property regime.

Historically, international law enforcement regimes have been concerned with the elimination of global public evils. For example, the classic law enforcement regime to eliminate the international slave trade in the nineteenth century was made possible “because of Britain’s hegemonic status in the international system.”¹⁰² The regime to eliminate the global public evil of the slave trade was accepted internationally “because it was recognized that Great Britain intended to police the regime and possessed the naval capacity to do so.”¹⁰³

In contrast, under the international intellectual property regime, enforcement is being conducted within the jurisdiction of individual nation-states. The enforcement is driven at the behest of the corporate-consumer power dynamic for the protection of corporate property. While the international IP regime was negotiated utilizing the hegemonic power of the United States, in reality it was the corporate interests dictating the negotiations through their governmental agents. The corporate-consumer power dynamic has subsequently sustained the corporate agenda by defining counterfeiting and piracy as global public evils. As a result, corporations have successfully pushed for the international restriction of knowledge as a global public good. Propelled by this dynamic, multinational corporations preserve and enhance their rights to exclusive development of knowledge on a global basis, thereby frustrating attempts to promote a more equitable development model.

Nevertheless, an understanding of how the corporate-consumer dynamic operates may help advance potential solutions to address the inequities, while at the same time retaining the beneficial aspects of the regime. One hurdle for greater equality is that multinational corporations have been able to leverage the corporate-consumer power dynamic to affect public policy and mitigate the effects of any time limits on IP enforcement. Given this dynamic, one of the potential solutions could include the rebalancing of international IP enforcement for limited times and in limited venues. This is the general approach that seems to be advocated for by Stiglitz and his followers. However, the solution may also involve readjusting the narrow focus of multinational corporations within public policy debates by fostering an enlightened global citizenship that is more consistent with public works projects. Over time this could even evolve into a fiduciary obligation that will take into account, at least in some measure, the public works aspect of intellectual property rights.

102. Little, *supra* note 73, at 297.

103. Little, *supra* note 73, at 297.

According to a recent article on IP legal education, “a new pathway for a shift in the IP rights paradigm is being laid involving a sustainable development ethos.”¹⁰⁴ Similarly, a new corporate ethic may begin to acknowledge sustainable development goals and ensure a more equitable distribution of global public goods over the long term. It is also up to legal scholars and practitioners to promote legal norms and practices that are more attuned to the inherent inequities of the seemingly intractable development model that is the international intellectual property regime.

104. Janice Denoncourt, *Integrating Sustainable Development Awareness in Intellectual Property Law Education* 10 (July 31, 2021), <https://ssrn.com/abstract=3897254> [<https://perma.cc/6RKQ-B5ES>].

