of this new paradigm depends in large measure upon the legitimacy of its dispute resolution procedures. For her, robust legitimacy lies in a model of decision-making that emphasizes transparency, recognizes non-economic values and allows for the participation of non-state actors.

Together the articles in this volume constitute an extensive analysis and discussion of the fundamental issues raised by the new trade paradigm for intellectual property. They will serve as a valuable resource for scholars seeking to understand this paradigm.

Notes and References

1. P. Drahos, 'Global property rights in information: the story of TRIPS at the GATT, *Prometheus*, 13, 1, 1995, pp. 6–19.
2. G. Hardin, 'The tragedy of the commons', *Science*, 162, 1968, p. 1243.
3. See, for example, Timothy Swanson, *The International Regulation of Extinction*, Macmillan Press, Houndmills, 1994, pp. 245–246.
4. See Peter Hall this issue, p. 271.

Property Rights in Information: The Trade Paradigm

PETER DRAHOS

Legal revolutions arrive quietly, often unnoticed. It is only when one tradition departs and a new one in the form of practices and principles expressing different economic and social relations is established, that one can assign to a legal event the status of turning point. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a case in point. TRIPS became obligatory for the more than 100 states which signed the Final Act Embodying The Results of The Uruguay Round Of Multilateral Trade Negotiations at Marrakesh on 15 April 1994.

When the history of the globalization of property rights in information is written, the significance of TRIPS to the constitution of a new world paradigm for property will be much better understood. TRIPS is the outcome of a contest involving actors and principles. On one side of this contest was an alliance between the US state, US business Non-Governmental Organizations (NGOs) and key multinationals like IBM, Du Pont and Pfizer.[1] The core principles this group fought for were national treatment, most-favoured-nation and harmonization. Their opponents were states which had little to gain from increasing levels of intellectual property protection and which were to an extent reliant on a strategy of free-riding for the purposes of development—Brazil, India and South Korea were prominent in this group. This second group campaigned under the principles of the free flow of information, the common heritage of mankind and national sovereignty. These principles gained prominence during the era of the New International Economic Order (NIEO) (roughly the period from the beginning of the 1970s to the early 1980s) when developing countries used them in an attempt to refashion the international order along more equitable lines. These principles grounded a redistributivist agenda in which technological resources and information would become the common heritage of all.

The principles of common heritage, free flow and national sovereignty along with the NIEO agenda meet their Waterloo in TRIPS. TRIPS entrenches the principles of national treatment, most-favoured-nation and harmonization (this last one by implication). Intellectual property rights are, as the preamble to TRIPS states, 'private rights'. Thus an old dialetic, which lies deep in the heart of capitalism, between the 'natural' right of private property and needs-based access to resources reaches a new historical apogee. But this time its subject is not land or goods, but information.

The trade paradigm for intellectual property brings with it a distinctively liberal interpretation and ordering of those principles that constitute the paradigm. The free flow of information is a principle which the US has used to ground arguments for allowing unrestricted transborder data flows and the removal by nation states of restrictions on the acquisition of foreign programming and broadcasting. And, as we have just observed, developing countries have made use of the same principle in an attempt to acquire access to technological resources. The difference between the two

0810-9028/98/030245-04

versions of the free flow principle comes to this. Within the context of telecommunications and broadcasting the free flow principle relates to the free flow of commodified information. The principle is made co-active with private property rights. Within the context of the NIEO, the principle was given a collectivist interpretation by developing states—technological information should flow to all since it is jointly owned by all as part of a common heritage. This principle, as we have seen, has no place in TRIPS.

In many ways the principle of common heritage is now seen more as part of the problem. Common heritage is linked to the idea of the commons. The unregulated common leads to tragedy.[2] In the absence of private property rights the commoners have an incentive to exploit and no incentive to conserve. Ironically, the principle of the common heritage of mankind once used in an attempt to dismantle western intellectual property regimes is itself giving way to arguments that intellectual property style regimes can be used to foster biodiversity conservation.[3]

The fate of the common heritage and free flow principles also reveals the way in which the operation of regulatory principles can be affected through an interpretive ordering. These principles have the potential to ground a destabilizing critique of a private property rights regime in information. Yet the interpretation of these principles which has prevailed in those fora that matter in the globalization of regulation sees important relations being established between them and property rights. The free flow principle is made consistent with property rights in information by being reassigned to the task of promoting the free flow of commodified information. The common heritage principle which might be used to prioritize the intellectual commons over private property rights in information is simply not recognized as relevant in that forum (the World Trade Organization) which is driving the globalization of these rights. The crucial relation which is established through this process of interpretive ordering is that property rights in information which lie at the heart of information capitalism are given a lexical priority over those principles that might threaten their operation.

The articles contained in this special issue constitute an extensive exploration of the new trade paradigm for intellectual property. With the exception of the article by Dawson, the articles are revised versions of presentations given at the National Intellectual Property Teachers' Workshop held at the Australian National University, Canberra in February 1998. Attending this workshop were lawyers and economists from the private, public and academic sectors, as well as senior bureaucrats. The articles reflect this diversity of perspectives.

The articles by Mason and Lamberton set the scene. Running through Mason's article is the concern that treaties like TRIPS cause states to lose some of their juridical sovereignty, the full consequences of which only manifest themselves later. One of Lamberton's points is that the economic theory which lies behind TRIPS assumes that the most important role for the regulation of information is to turn information into a commodity. This, argues Lamberton, is an oversimplified view of the economics of information. It leads to simplistic policy recommendations.

The policy complexity that faces individual states when considering levels of intellectual property protection is well brought out by Hall. There are no snappy policy solutions in a dynamic world, a world of shifting costs and benefits. Importantly, he argues that 'carefully calibrated variations within and among IPR regimes may offer the prospect of greater benefits than uniform levels of IPR protection'.[4] The problem is that within the political economy of intellectual property standard setting we can observe the push by key states for globally harmonized high levels of protection. The article by Blakeney documents an interesting shift in the use of intellectual property regimes by developing states. They are at the regional level being used by states as tools of integration and cohesion.

Dawson's article takes for its problem the regulation of the intellectual commons. Intellectual property, in ways that he illustrates, helps to constitute this commons. Drawing on the political philosophy of liberalism and economic theory he outlines a regulatory strategy for the commons.

The articles by Macmillan and Sutherland bring another perspective to bear on the trade paradigm, a perspective based on a synthesis of law and politics. A central preoccupation of liberal philosophy has been the impact of state power on the rights of individuals. Macmillan shifts away from this preoccupation and looks at the way in which states through copyright regulation have helped to constitute private power. She examines the impact of this private power on culture. Given that culture is one form of intellectual commons, her suggestions for regulatory change should be read in conjunction with the strategies suggested by Dawson. The article by Sutherland discusses the cultural politics that surrounds the propertization of genetic resources. Her analysis of the recent history of this area reveals a politics of counterhegemony, as indigenous peoples attempt to gain control over their traditional resources using the liberal legal tools of property and contract. Through liberal discourse and politics they are attempting to 'recalibrate' intellectual property standards in a way that suits their own needs. Whether they will be successful in this enterprise only time will tell.

The articles by Thorpe and Wiseman both advance prescriptive arguments for the way in which copyright regulation might be improved. Intellectual property rights may solve a market failure problem, but their collective enforcement, as Thorpe demonstrates, creates other kinds of social costs. His strategy for reform is based on a processual theory of regulation in which the collective administration of copyright is guided by a set of legislatively entrenched principles that aim to minimize the monopoly costs of collective licensing practices. Wiseman's article examines the role of copyright in the education sector. In particular, it focuses on the issue of ownership of copyright by academics, a topic which will no doubt be of interest to many readers of this journal. Drawing on a conception of copyright as a trade regulation device, she argues that copyright offers academics and universities greater possibilities for the control of their work than has been realized to date. Copyright regulation, if used creatively, offers the possibility of enhancing rather than diminishing academic autonomy.

The articles by Rothnie, Arup and Walker discuss the emerging role of competition policy in the trade paradigm of intellectual property. The article by Arup explores the interactions between trade, intellectual property and competition regulation. As he points out, the purpose of competition regulation remains the subject of debate. For aficionados of trade regulation, the globalization of competition regulation seems superfluous. An open trading regime will make domestic monopolies unsustainable. Competition regulators take the opposite line. Without competition policy, significant barriers to market entry and trade will remain. Both trade regulators and competition regulators express some scepticism about the merits of global property rights in information. The Arup article is a valuable discussion of these regulatory complexities and tensions. Rothnie offers a different perspective on these issues by examining the interaction between intellectual property and competition policy in the framework of TRIPS. Through an examination of the case law he shows that the indeterminacies and subjectivities inherent in the concept of competition within a juridical setting may serve to destabilize the expectations (and therefore investment) that intellectual property regimes create. The article by Walker surveys the practical issues and problems that intellectual property rights have created for competition regulators in Australia.

The final article by Evans deals with the issue of dispute resolution within the new trade paradigm created by the Uruguay Trade Round. Her argument is that the success