THE GLOBAL RATCHET FOR INTELLECTUAL PROPERTY RIGHTS:

WHY IT FAILS AS POLICY AND WHAT SHOULD BE DONE ABOUT IT.

Peter Drahos
RegNet, Research School of Social Sciences, Australian National University.

In 1959 Eleanor Roosevelt asked why the US had suffered a decline in its stature and prestige.[1] She dismissed explanations based on envy of US wealth and power as excuses. The real explanation, she said, lay in the way that the US had conducted its foreign policy.

She argued for three propositions, namely that the US should shed its subtle isolationism, work towards world goals that did not advantage it "at the expense of other nations and peoples" and choose goals that were positive rather than negative. Eleanor Roosevelt's propositions constitute an interesting test of US trade policy on intellectual property (IP) rights. The rest of this paper does three things. Firstly, it describes the global intellectual property ratchet that has been created by the US. Secondly, it shows why this trade policy fails the tests proposed by Eleanor Roosevelt. Thirdly, it suggests a counter-initiative based on the use of a simple framework treaty.

The Global Intellectual Property Ratchet

The global ratchet for IP consists of waves of bilaterals (beginning in the 1980s) followed by occasional multilateral standard-setting (e.g. the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the WIPO Copyright Treaty 1996).[2] The two actors responsible for this process are the US and the EU. In short form, this ratcheting process is dependent upon -

> (a) a process of forum shifting[3] - a strategy in which the US and EU shift the standard-setting agenda from fora in which they are encountering difficulties to fora where they are likely to succeed (e.g. from WIPO to the WTO to bilaterals);
>
> (b) co-ordinated bilateral and multilateral IP strategies; and
>
> (c) the entrenchment in international agreements of a principle of minimum standards.

---

[1] See Eleanoor Roosevelt, 'What Are We For?' in Allida M. Black, (ed.) Courage in a Dangerous World: The Political Writings of Eleanor Roosevelt, Columbia University Press, New York, 1999, 213-221.
[2] For the history see Drahos and Braithwaite, Information Feudalism: Who Owns the Knowledge Economy?, New Press, New York, 2003.
[3] For a detailed explanation of this strategy and some examples see John Braithwaite and Peter Drahos, Global Business Regulation, Cambridge University Press, 2000, ch.24.

Each bilateral or multilateral agreement dealing with IP contains a provision to the effect that a party to such an agreement may implement more extensive protection than is required under the agreement or that the agreement does not derogate from other agreements providing even more favourable treatment. This means that each subsequent bilateral or multilateral agreement can and usually does establish a higher standard of IP protection.

Eleanor Roosevelt's Three Tests

Eleanor Roosevelt's first test was that the US "should shed the remnants of its isolationism and direct itself to achieving world goals". The global protectionist paradigm of IP is an example of the blind expansionist isolationism that Eleanor Roosevelt warned about.

The standards of IP that the US is globalizing are its domestic standards, standards that meet its own economic needs and fit with its cultural and philosophical traditions. For example, strong patent standards may make sense in the US because, amongst other things, it has 3,676 scientists and engineers in R&D per million people, but surely they make no sense in a country like Rwanda that has only 35 per million. Around the world many people have deeply held reservations about the patentability of plants, animals and human genetic resources, reservations that are based on a variety of ethical perspectives and traditions, including religious, indigenous and environmental ones. Yet the US has relentlessly pushed in TRIPs and subsequent bilaterals what the US Supreme Court has declared to be its domestic position, namely that anything under the sun is patentable.[4] It is equally relentless in seeking to impose upon the world a system of agriculture that is really a system of technology in which the farmer becomes the lessee of patented seeds, plants, fertilizers and pesticides. In the copyright field, the US has successfully resisted increased protection for authors and performers while at the same time invoking free speech values to argue that there should be no restrictions on the circulation of US film, television and other copyright works.

Eleanor Roosevelt's second test was that the US should choose goals that did not advantage it "at the expense of other nations and peoples". The US failure to meet this second test has been monumental. In order to see why, it needs to be understood that as measured by indicators such as number of scientific publications, number of students in higher education and number of scientists, the US has a greater volume of knowledge located within it than any other country on earth.[5] For some time now the US has had a historically unprecedented opportunity to use this stock of knowledge to further the development of the many poor states in the world. Since knowledge has the quality of being non-rivalrous in consumption, it follows that the US would not itself lose the knowledge it utilized for development purposes (and in fact would probably add to it

[4] Diamond v Chakrabarty 206 USPQ 193, 200 (1980).
[5] Thomas Schott, 'Global Webs of Knowledge', American Behavioural Scientist, 44 (2001), 1740-1751.

since the application of knowledge generally leads to more knowledge). Moreover, treating knowledge as part of a global intellectual commons would not be inconsistent with the US pursuing its own economic growth. The principle of the intellectual commons is not, as the free software movement and the open source movement have shown, inconsistent with the development of business models. In short, the US could use its stock of knowledge in ways that were consistent with both economic efficiency and global developmental justice. By imposing a global protectionist IP paradigm on the world it has chosen to do precisely the reverse. For example, by imposing its own standards of intellectual property on developing country economies it has changed the *terms of trade* of those economies. Developing states, which are net importers of IP, have been made worse off. [6]

Eleanor Roosevelt's third test for good foreign policy was that the US should choose positive rather than negative goals. This third test also has a resonance in the case of the trade policy and IP. The US has globalized IP rights using the rhetoric of containment and threat. Developing countries have been stigmatized as 'pirate' countries for copying technology, even though often they were not in breach international conventions by doing so and even though learning through copying was itself a part of US industrial development in the 19th and the first part of the 20th centuries. At a deeper level the global IP paradigm is a negative vision. It is primarily about maintaining an economic hierarchy in the world rather than spreading market opportunities.

A Framework Initiative

The global IP ratchet threatens the interests of all small to medium sized economies that have interests in an open global economy that is based on a commitment to multilateralism and human rights. Clearly, developing countries need to strengthen their current fragile cooperation. At the same time they need to work towards genuinely open markets. Markets and the world's trading system are under threat from the IP ratchet. One policy route towards meeting these goals is to consider the potential of framework treaties.[7]

Framework agreements commit states to recognizing general principles rather than specific obligations. They have been extensively used in the environmental area (the Convention on Biological Diversity is one example of many). The use of framework agreements to address issues of access to technology and economic development have to date met with little success. The basic reason is that such agreements are attempts by developing states to impose obligations on developed states and so predictably these attempts have been resisted by powerful developed country lobbies.

However, another use for framework agreements might be as a signalling device to companies within Western markets that are creating technologies and business models

[6] See Global Economic Prospects and the Developing Countries, World Bank, Washington DC, 2002, 137.
[7] For a detailed discussion see Braithwaite and Drahos, Global Business Regulation, Cambridge, Cambridge University Press, 2000, 619-621.

based on the idea of guaranteeing access to the knowledge component of the relevant technology. There are a number of variants to guaranteeing access, but the key to all of them is the giving to subsequent users of the technology a set of core 'use' rights. Generically we can label this approach the 'positive commons' - developers of technology form a commons by entrenching positive use rights with respect to core knowledge needed by others.[8] The most obvious example of where such a treaty could be negotiated is in software development. The free software movement and the open source movement (for present purposes the differences between the two can be ignored) have demonstrated that software can be developed without using intellectual property to prevent access to it and its subsequent copying and diffusion.

Free software business models have huge advantages for developing countries in terms of cost structures and learning effects. Free software development is based on a networked model of innovation that allows developing country programmers to participate in the process, learn by doing and adapt innovation to local needs. Developing countries (and developed countries) are beginning to realize the advantages of this kind of approach. For example, at one stage the Chinese government contemplated encouraging the development of Red Flag Linux by stopping the official use of proprietary software.

The Initiative in Outline

Why is a framework treaty necessary?

1. A framework treaty amongst a hundred or so developing countries, including some major markets such as China, India and Brazil would send a global signal to companies in the US and Europe that are developing technologies based on the positive commons approach. (The interest by companies, including multinationals in technologies based on the positive commons is real. Witness the formation of the Consumer Electronics Linux Forum by Matsushita Electric, Sony, Hitachi, NEC, Royal Philips Electronics, Samsung, Sharp and Toshiba to spread the use of Linux in consumer electronics.)

2. Such a treaty would help to foster a sense of self-reliance amongst developing countries. They would not be asking for access to Western technology, but rather encouraging models of technological and business innovation that met their needs.

3. The treaty would help to build cooperation and sense of identity amongst them.

What would the treaty contain?

[8] For an analysis of the different types of commons see Drahos, A Philosophy of Intellectual Property, Dartmouth, Aldershot, 1996, 57-60.

The treaty would commit developing countries to exploring various ways in which they could encourage the growth of the positive commons in technology markets. In particular, developing countries would undertake to investigate the use to this end of national policy tools such as investment regulation and procurement policies. An information exchange mechanism would be established to ensure that developing countries gained the benefits of each others' experiences on matters such as licensing models for different kinds of technologies and sectors (for example, the pharmaceutical sector).

It would be vital that the treaty not be confined to just software technology. The philosophy of the positive commons is beginning to take hold in other areas, most importantly in the area of biotechnology. (For an analysis of open source biotechnology see the website by Janet Hope, http://rsss.anu.edu.au/~janeth/). The treaty could itself become a global means to stimulate the broader application of the positive commons philosophy.

How would the treaty help to combat the global intellectual property ratchet?

The treaty would commit developing countries and interested developed countries to exploring a different vision of intellectual property, a positive vision. Free software licences, for example, use copyright as the vehicle for the contractual transmission of basic use rights to subsequent users of software. Aside from the economic efficiencies of this approach to intellectual property, it is consistent with basic democratic values of equal treatment and access.

Would the treaty gain the support of developed countries?

The US government would almost certainly not support it. The European Commission would probably take its usual diplomatically cryptic approach. However, this would not really matter. The treaty would be a signal *from* developing countries to companies using the positive commons philosophy in developed country markets, including the vital US market. The treaty would be likely to gain the support of companies in the US that understand the dangers of such practices as the patenting of software. US entrepreneurs would also probably be the first to understand the practical gains of a treaty that encouraged developing country markets to embrace the positive commons philosophy.