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FOREWORD

THE INTERNATIONAL EVOLUTION OF INTELLECTUAL
PROPERTY RIGHTS

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Two of the papers included in this issue of the *NYU Journal of Intellectual Property and Entertainment Law* illustrate, in the context of intellectual property law, a tension that exists across all areas of international law. To what extent should the rules of different countries be harmonized? Or, alternatively, to what extent should these laws be adapted to the local conditions within any given country? A moment's reflection should indicate why there is no pat answer to this challenge in any area of substantive law.

On the one side, a stout commitment to uniformity of law facilitates the cross-border transactions that are the life-blood of international trade and cooperation. The ability of private parties and government officials to know that the rules of the game are constant in all arenas should lead to a massive simplification of the overall operation of the international legal order. The gains from such simplification should be substantial even in transactions requiring harmonization between only two legal systems. But with intellectual property, nothing is more common than for key transactions to have a global reach that could

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easily require cooperation among dozens of nations. The greater the variation in local laws, the harder it becomes to do business in multiple jurisdictions simultaneously.

To be sure, this proposition is subject to one key qualification. It should be taken as a matter of course that routine ministerial functions such as recordation will require that different formalities be observed in first one state and then the other. But so long as these requirements do not actually conflict, small differences on ministerial matters will not retard international transactions any more than they block interstate commerce within the United States or, indeed, within any nation governed by federalist principles.

The stakes are considerably higher, however, with rules governing the substantive legality of particular transactions. For example, consider the intersection between antitrust and intellectual property law. In this context, the tension is omnipresent because the central purpose of all intellectual property rights (IPRs) is to create a limited monopoly as a spur to innovation within a given area. Yet difficulties arise when the holders of IPR seek to attach conditions to the use of their property, or to cross-license them, or in the patent context to incorporate them as part of standard essential patents.¹ On this substantive front, we have already witnessed serious difficulties when the European Union applies more stringent standards to mergers than does the United States.² In this context, because merger approval is needed in each and every country where the various

¹ The literature on these topics is vast and is divided between those who think that market ingenuity is sufficient to respond to these risks and those who think that the holdout question is serious and needs explicit legislative or judicial intervention. For an exhaustive review of in support of the former view, see Jonathan M. Barnett, *The Anti-Commons Revisited*, 29 HARVARD J.L. & TECH. 127 (2015); for the most well known statements on the other side, see, for example, MICHAEL A. HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* (2008); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998). For my critique, Richard A. Epstein, *Heller's Gridlock Economy In Perspective: Why There is Too Little, Not Too Much Private Property*, 53 ARIZ. L. REV. 51 (2011); Richard A. Epstein & Bruce Kuhlik, *Is There a Biomedical Anticommons?*, 27 REGULATION 54 (2004).

² For one recent discussion, see, for example, EUR. PARLIAMENTARY RES. SERVICES, BRIEFING 27/03/2014, EU AND US COMPETITION POLICIES: SIMILAR OBJECTIVES, DIFFERENT APPROACHES (2014), [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI\(2014\)140779_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI(2014)140779_REV1_EN.pdf). For an account of the EU rejection of the 2001 GE/Honeywell merger, see Donna E. Patterson & Carl Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, ANTITRUST, Fall 2001, at 18, <http://faculty.haas.berkeley.edu/shapiro/divergence.pdf>.

parties plan to do business, the case for uniformity becomes quite powerful indeed. Yet deep substantive disagreements block that needed convergence, which accordingly gives the bargaining advantage to the nation that wishes to impose the most stringent standard, for it alone has a blocking position on any proposed transaction.

Yet on the other side, there are strong forces that push nations to wish to develop their own distinctive regimes for different forms of intellectual property. One such conflict takes place between large nations with sophisticated research facilities, which are more likely to be exporting intellectual property, and developing nations, which are more likely to be using or consuming such property. The problem is most acute in the patent area, especially for pharmaceuticals, where the developed nations continue to push hard for strong protection of IPR, while the developing nations work hard to limit the scope of patents in order to increase the sale of generic drugs that can be sold at a fraction of the price of branded drugs under patent protection.

Ironically, the shoe is often on the other foot in the area of copyright. Now many nations with strong indigenous cultures seek to extend copyright protection for those group works that, by definition, lack the authorship of original works required under traditional copyright conceptions.³ Instead, they want protections for tribal and other cultural works that evolve collectively over time, for which there is a strong desire for protection. The difficulty here is that it is not sufficient to protect such intangibles as poems and dances solely in their country of origin, if they can be freely performed in mass markets elsewhere, where they receive no property protection. Oddly enough, therefore, recognizing these cultural claims also requires uniformity, in the willingness of other nations to pay a tax on productions that they could otherwise make for free. In this case, the developed nations enjoy the benefit of the blocking position.

In dealing with these issues, it should be clear that there are only two ways in which uniformity can be achieved. The first is for different nations to adopt parallel rules independently. That outcome is not so far-fetched as it sounds because there are good reasons to think that the basic trade-offs in IPR are the same everywhere. The point here is a modern instantiation of the earlier natural law tradition, dating from Gaius and Justinian, which treats the basic institutions of property (as acquired by first possession), tort (as protecting liberty and property

³ WORLD INTELL. PROP. ORG., BOOKLET NO. 1, INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE (2001), http://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf.

from the use of force and fraud), and contract (as facilitating joint ventures and the transfer of property) as largely universal.⁴ Under this view, local differences are largely confined to matters of form, such as those needed to complete a contract or to transfer property. Differences in registration systems for IPR fall comfortably within the basic tradition. The second, and cleaner way is to enter into a set of bilateral, or preferably multilateral, agreements to set the standards for judging international transactions dealing with IPR, or indeed any other form of right.

On the substantive front, however, uniformity in IPR is more elusive. In one sense, this field is unified because the same basic trade-offs have to be negotiated in all countries. No matter where one looks, general mathematical theorems, ordinary words, and natural elements all fall into the public domain, leaving open for dispute the correct treatment of certain claimed inventions that apply particular transformations of various inputs in order to create directions for medical diagnosis⁵ or financial investing.⁶ Just how far these protections should extend is a subject of hot controversy within the United States, and in other countries. What is less clear is whether the ideal solution should vary across countries, when the same trade-offs occur in all places. Similarly, a strong system of IPR protection will encourage innovation, but simultaneously it will prevent the movement of technology and literary works into the public domain where in most instances they can be more effectively utilized. Yet once again, it is not clear that the ideal patent or copyright length should differ across countries. But even if uniformity is the ideal, there is ample room for healthy disagreement as to the ideal length of patents and copyrights, even if there is widespread agreement that copyright terms should be on average longer than patent terms. But even that basic position does not preclude criticism that patent protection on pharmaceuticals may be too short (given the time that patented goods are tied up before the FDA) or that copyright terms (following the Copyright Term Extension Act of 1998)⁷ are too long, lasting as long as 50 years after the death of the original author.

⁴ For discussion of this theme, see Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989); Richard A. Epstein, *The Uneasy Marriage of Utilitarian and Libertarian Thought*, 19 QUINNIPIAC L. REV. 783 (2000).

⁵ See *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013) (denying patent eligibility for naturally occurring genetic sequences, but allowed them for gene sequences created by synthetic processes).

⁶ See *Alice Corporation Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014) (treating as patent ineligible a scheme for mitigating "settlement risk" in complex business transactions).

⁷ Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303, 304(c)(2)).

These basic difficulties provide a convenient entrée into two of the papers contained in this volume: *Addressing Climate Change: Domestic Innovation, International Aid and Collaboration*,⁸ Joy Xiang and *Towards a New Dialectics: Intellectual Property, Public Health and Foreign Direct Investments*⁹ by Valentina Vadi.

In her paper, *Addressing Climate Change: Domestic Innovation, International Aid and Collaboration*,¹⁰ Joy Xiang asks two key questions: “(1) Is IPR a major barrier to the international transfer of clean technologies, and (2) why has the international transfer of clean technologies to the developing nations been limited?” I agree with her basic position that IPR does not form such a barrier. Indeed, I would go further and argue that climate change issues are not an exception to the general rule that strong IPR acts as a spur to innovation. To be sure, the owners of IPR will charge for the use of their technologies, as in any other field. But before such charges could be regarded as a barrier to exchange, it must be remembered that without IPR protection, these new technologies may never have emerged in the first place. In general, the strongest protection against monopoly power is not price controls, but the emergence of competitive technologies, which will themselves emerge only if IPRs obtain strong protection.

Xiang is surely correct to insist that a strong patent system is not a sufficient condition for the diffusion of technological issues needed for patent control. Setting up cooperative business arrangements depends on a whole host of other government regulations that could either impede or propel the elaborate contractual schemes that are needed to develop an efficient system of tech transfer. The task is surely formidable owing to the high level of global cooperation needed to make good on these schemes. But the clearer the initial property rights in technology, the more likely it is that these beneficial arrangements can take place.

In her article *Towards a New Dialectics: Intellectual Property, Public Health and Foreign Direct Investments*¹¹ Valentina Vadi claims that international arbitral commissions should take into account public health considerations in adjudicating patent cases in the pharmaceutical area. In order to do so, she claims that it is imperative to avoid the “excessive protection” of private interests at the expense of public ones.

⁸ Joy Xiang, *Addressing Climate Change: Domestic Innovation, International Aid and Collaboration*, 5 N.Y.U. J. INTELL. PROP. & ENT. L. 196 (2015).

⁹ Valentina Vadi, *Towards a New Dialectics: Intellectual Property, Public Health and Foreign Direct Investments*, 5 N.Y.U. J. INTELL. PROP. & ENT. L. 113 (2015).

¹⁰ Xiang, *supra* note 8.

¹¹ Vadi, *supra* note 9.

I agree that there is surely good reason to worry about how patent protection intersects with public health considerations. Nonetheless, it is less clear to me that these two should be regarded as necessarily in tension with each other. To be sure, at the time of some health crisis, the widespread availability of patented pharmaceuticals could be critical to the welfare of a nation. It need not, however, follow from this observation, that it is appropriate to weaken the level of patent protection provided for in the various treaties that regulate these issues. One possible response to Vadi's claims is to build some public health exception into the basic treaties that govern the use of these patented drugs, thereby eliminating the need to renegotiate or arbitrate these treaties down the road. Another possibility is for the state to exercise its eminent domain powers, which could allow it to purchase these drugs for its own citizens who may not be able to afford the price. That alternative will not shrink the supply of new drugs, because it will not dull the incentives to invest by the drug companies who are called upon to supply the drugs in question. *With these challenges in mind, does it ever make sense to take separately into account public health considerations when adjudicating patent cases.*¹² In this area, as in so many others, it is not possible to ignore the ex ante effects of ex post redistribution, whether it be through arbitration or adjudication.

In looking at these papers, therefore, it is useful for the reader to ask over and over again, the extent to which it is possible to develop a single overarching theory of IPR that works across subject matter areas and across national boundaries. In the end, the ability to achieve substantive uniformity on key issues may be the greatest boon to the technological improvements that are so needed in dealing with copyright, global warming, and pharmaceutical products.

¹² See Richard A. Epstein & F. Scott Kieff, *Questioning the Frequency and Wisdom of Compulsory Licensing for Pharmaceutical Patents*, 78 U. CHI. L. REV. 71 (2011), for a discussion of the dangers of compulsory arbitration.