

AALS Workshop on Intellectual Property
June 14-16, 2006
The Politics of Global Intellectual Property

Margaret Chon
Professor and Dean's Distinguished Scholar
Seattle University School of Law

Globalization is forcing intellectual property scholars to confront first principles in unfamiliar contexts. Challenges are starting to emerge to the standard binary policy balance between exclusivity and public domain; the dominant transcendentalist approach to subject matter and other various doctrinal applications; the narrow utilitarian justification and its concomitant inattention to distributional concerns; as well as the usual reliance on domestic welfare balancing mechanisms. Many across the ideological spectrum have noticed and worried about the growing asymmetries between the global South and North in the intellectual property regimes managed by the WIPO and the WTO. In a global game of formal equality, at which almost all countries now play, how can developing countries, who are not IP-rich, move from being “free riders to fair followers,” from being imitators to innovators, without falling into a pothole or even being “left outside the global information superhighway,” to use a felicitous but tragic phrase?

Proposals range from utilizing the “normative elasticity” of TRIPS to formulate policy responsive to developing country needs, to engaging in the “constructive ambiguity” of TRIPS so as to maximize the possibility of a “pro-development” presumption in norm-interpretation, to calling for “user rights” or an international fair use doctrine, to imposing “substantive maxima” through TRIPS, to invoking the reserved welfare power of the states under article XX of GATT to argue for increased domestic

flexibility analogously under TRIPS. Some are examining the policy space left in domestic laws after TRIPS to maximize exceptions and limitations to the minimum rights mandated by TRIPS, others are defending the remaining areas of free competition such as the exhaustion doctrines, and/or proposing to strengthen national competition law and policies as a counter to overly-aggressive use of exclusive rights. And some have begun to try to connect the global intellectual property regime to other global legal regimes, such as the human rights regime, the public health regime, or the human development regime, in order to make global intellectual property more responsive to the overall global context in which it operates. For example, I have argued that, *inter alia*, Articles 7 and 8 of TRIPS set forth a human development-based call for a substantive equality norm in intellectual property, linked to the Millennium Development Goals and other persistent soft law documents that have arguably coalesced into customary international law.

All of these academic efforts are valiant but they sublimate a profound threshold question that requires attention: the global or transnational mechanisms to address these new policy challenges have not kept pace with the proliferation of the challenges arising from linking intellectual property to trade, public health, human rights and human development. The global policy infrastructure is primitive at best, especially within intellectual property, and yet the global policy questions are among the most complex that intellectual property law has been called upon to consider explicitly. We cannot yet rely on a global equivalent of a nation-state to provide global citizens with the optimal policy balance of intellectual property vis-à-vis other social goals. How then can intellectual property be considered with or contribute in a meaningful way to these larger global policy issues? I explore the concept of intellectual property as one type of global

public good that must work in tandem with other many global public goods, in order to ensure that intellectual property does not unduly distort the realm of global policy-making.