TEACHING INTERNATIONAL INTELLECTUAL PROPERTY LAW

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INTRODUCTION

Intellectual property law was in the backwater only a few decades ago. The Section on Intellectual Property Law of the Association of American Law Schools (AALS) was not even founded until the early 1980s,[1] and the creation of intellectual property specialty programs has been a recent phenomenon.[2] As senior legal scholars reminisced, early in their career, they would have been lucky to find a school that would allow them to teach a class on intellectual property law. Even if they were able to do so, that "niche" class might very well have been the only one, and the rest of their teaching duties would have been devoted to other subject areas, such as property, contracts, or commercial law.[3]

Although intellectual property law teaching has come of age in the past decade, international intellectual property law courses remain nonexistent in more than half of American law schools. When Roberta Kwall conducted her AALS survey in 1999, only nineteen out of the sixty-nine ABA-accredited law school respondents reported offering a course on international intellectual

1. Charles McManis was the founding chair of the Section on Intellectual Property Law of the Association of American Law Schools during 1983–1984. Before the Section's founding, the Sections on Law and the Arts and on Law and Computers already existed within the Association. Professor McManis recalled that he was not even sure whether the new section should be named the Section on Intellectual Property Law or the Section on the Law of Unfair Trade Practices. Thanks Chuck for providing these very interesting tidbits.

2. For example, the Cardozo Intellectual Property Law Program was established in 1995, and the Center for Intellectual Property Law and Information Technology at DePaul University College of Law was established two years later. *See* DePaul University College of Law, *Center for Intellectual Property Law & Information Technology: History*, http://www.law.depaul.edu/centers_institutes/ciplit/about_us/history.asp (last visited Feb. 2, 2008). The Annual Intellectual Property Scholars Conference, which became the model for future works-in-progress conferences at other law schools, was launched as a joint venture between these two programs on August 9, 2001. The conference was inspired by a proposal from Roberta Kwall, and the Author was the executive director of Cardozo's program at that time. Participants of the inaugural conference included Ann Bartow, Graeme Dinwoodie, Patty Gerstenblith, Wendy Gordon, Cynthia Ho, Timothy Holbrook, Jay Kesan, Roberta Kwall, Mark Lemley, Malla Pollack, Susan Scafidi, Jed Scully, and the Author. *See First Annual Intellectual Property Scholars Conference*, http://www.peteryu.com/ipsc01.htm (last visited Feb. 2, 2008). The Berkeley Center for Law and Technology at the Boalt Hall School of Law at the University of California at Berkeley and the Stanford Program in Law, Science and Technology at Stanford Law School have since joined as the conference's co-organizers.

3. For discussion of the growing coverage of intellectual property law in American law schools, see generally Roberta Rosenthal Kwall, *The Intellectual Property Curriculum: Findings of Professor and Practitioner Surveys*, 49 J. LEGAL EDUC. 203 (1999); Kenneth L. Port, *Intellectual Property Curricula in the United States*, 46 IDEA 165 (2005).

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property law.[4] Her finding is no surprise. The Agreement on Trade-Related Aspects of Intellectual Property Rights[5] (TRIPs Agreement) had come into effect only a few years before, and many law schools did not offer the course until the mid-to-late 1990s—thanks in no small part to the publication in 1996 of the timely, yet pioneering, international intellectual property law anthology edited by Anthony D'Amato and Doris Long.[6]

The momentum has since picked up quickly, however. At the turn of this millennium, four new casebooks appeared on the market.[7] According to the latest survey conducted by Kenneth Port, seventy-one American law schools offered a course on international or comparative intellectual property law during 2004–2005, with some schools offering even more than one course.[8] In the past two years, two more casebooks arrived, with a third one planned for release in 2008.[9] International intellectual property law is, therefore, no longer

4. Kwall, *supra* note 3, at 208–09. These schools were Boston University, Brooklyn, Chicago, Chicago-Kent, Cincinnati, Columbia, George Mason, Indiana—Bloomington, John Marshall, Loyola—Los Angeles, Marquette, Miami, Nebraska, Saint Louis, South Texas, Suffolk, Syracuse, Texas, and Tulane. *Id.* The overall percentage among all ABA-accredited law schools was likely to be lower than the reported twenty-eight per cent. Most law schools that had strong intellectual property law programs already responded to the survey, and those that did not were unlikely to have a critical mass of students to justify the offering of such a course. *See id.* at 203–04.

5. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement].

6. INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY (Anthony D'Amato & Doris Estelle Long eds., 1996).

7. *See* FREDERICK M. ABBOTT ET AL., THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM: COMMENTARY AND MATERIALS (1999); GRAEME B. DINWOODIE ET AL., INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY (2001); PAUL GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS (2001); DORIS ESTELLE LONG & ANTHONY D'AMATO, A COURSEBOOK IN INTERNATIONAL INTELLECTUAL PROPERTY (2000).

8. Port, *supra* note 3, at 166, 170. Unlike Professor Kwall's survey, Professor Port's included both accredited and unaccredited law schools. *Id.* at 166. Barry University School of Law was the only provisionally accredited or unaccredited law school on the list with at least one course in international or comparative intellectual property law. *See* Port, *supra* note 3, app. I, http://www.idea.piercelaw.edu/Articles/46/appendices/PortAppI.pdf (last visited Jan. 14, 2008). The school was provisionally accredited at the time of the survey and was granted full accreditation on December 2, 2006. *See Barry University School of Law Granted Full ABA Accreditation*, Dec. 2, 2006, http://www.barry.edu/law/details.aspx?ID=11510.

9. FREDERICK M. ABBOTT ET AL., INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY (2007) [hereinafter ABBOTT ET AL., INTEGRATED WORLD ECONOMY]; DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES, AND MATERIALS (2006); PETER K. YU, INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY (forthcoming 2008).

considered a "niche" course. It has finally become a staple in the core intellectual property law curriculum.

Taking advantage of the forum provided by this Symposium, this Essay reflects on the teaching of international intellectual property law. Part I identifies three different stages in the development of an international intellectual property law course. Going from the pre-TRIPs era to the post-TRIPs era, this Part shows how the growing complexity of the international intellectual property regime has made teaching the subject increasingly challenging. Part II focuses on this challenge and examines why international intellectual property law is taught in the first place, what materials teachers can cover, and how they can effectively present those materials. By offering both questions and suggestions, this Part invites readers to evaluate and rethink the design of an international intellectual property law course. This Part concludes with some bonus considerations that may be relevant to both teachers and administrators.

I. THREE STAGES: INTERNATIONAL, GLOBAL, AND GLOBAL PLUS

A. International Intellectual Property Law

Although I was not able to examine materials from any international intellectual property law courses that were offered in the pre-TRIPs era, or ascertain whether or in what form those courses existed and how frequently they were taught, international intellectual property law was widely studied. Some casebooks and treatises on intellectual property law published in that period included a section, usually the last one, on international developments.[10] There were also lengthy treatises on international intellectual property law—most notably, the two classic treatises Stephen Ladas published in the 1930s.[11]

Thus, if an international intellectual property law course were to be conceived in the pre-TRIPs environment, half of it would be likely to cover international and regional developments. The Paris and Berne Conventions[12] are the cornerstones of the international intellectual property regime.

10. In the copyright context, see, for example, RICHARD C. DE WOLF, AN OUTLINE OF COPYRIGHT LAW 168–90 (1925); HERBERT A. HOWELL, THE COPYRIGHT LAW 193–203 (3d ed. 1952); ALAN LATMAN, THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 260–73 (5th ed. 1979).

11. STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTY (1930); STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938). These two treatises were followed by STEVEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION (1975).

12. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised at Paris* July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *revised at Stockholm* July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305.

Established in the 1880s, these two treaties and their multiple revision texts would certainly dominate the list of instructional materials in the pre-TRIPs era. The Rome Convention,[13] which offers protection to performers, phonogram producers, and broadcasters, would also be likely to make the list, although that convention admittedly would receive significantly less attention due to the lack of a neighboring rights regime in the United States. In addition, the course materials would be likely to include the Madrid Agreement Concerning the International Registration of Marks,[14] the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration,[15] the Patent Cooperation Treaty (PCT),[16] the European Patent Convention (EPC),[17] as well as other related international and regional treaties and institutions.

Those who were interested in developments in the European Economic Community would also cover the Treaty of Rome[18] and other community-wide developments, such as the then-proposed (and now-established) Community Trade Mark System, the ongoing efforts to "approximate" trademark laws within the Community, and the origin and special nature of the Benelux Trade Mark Office.[19] Such materials would provide fascinating classroom discussion, because they concerned not only the scope and feasibility of regional harmonization, but also the expediency of developing a "supranational code."[20] Although we now take for granted the existence of the European Union and its many region-wide directives and regulations, these institutions and legislative efforts began as mere experiments. Even today, the Community Patent System, which dates back to the 1960s, has yet to be adopted.[21]

13. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43.

14. Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, *revised at Stockholm* July 14, 1967, 828 U.N.T.S. 389.

15. Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration, Oct. 31, 1958, *revised at Stockholm* July 14, 1967, 923 U.N.T.S. 205.

16. Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231.

17. Convention on the Grant of European Patents, Oct. 5, 1973, *as amended by Decision of the Administration Council of the European Patent Organization of Dec. 21, 1978*, 1065 U.N.T.S. 255 [hereinafter European Patent Convention].

18. Treaty Establishing the European Economic Community (Treaty of Rome), *opened for signature* Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958).

19. *See, e.g.*, Council Directive 89/104, To Approximate the Laws of the Member States Relating to Trade Marks, 1989 O.J. (L 40) 1; Council Regulation 40/94, On the Community Trade Mark, 1994 O.J. (L 11) 1.

20. Jane C. Ginsburg, *International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?*, 47 J. COPYRIGHT SOC'Y U.S.A. 265 (2000) [hereinafter Ginsburg, *International Copyright*].

21. *See Commission Proposal for a Council Regulation on the Community Patent*, COM (2000) 412 final (Aug. 1, 2000).

The other half of the course would likely be devoted to transnational and comparative law. It would cover the protection of U.S. rights holders abroad and their foreign counterparts within the United States. Some of the practice-oriented issues taught in the course would include the mechanics and procedural requirements of the Madrid system, the EPC, and the PCT. It would also be important for students to understand the applicable laws in transnational disputes between multinational parties, related jurisdictional issues, the limitation in the extraterritorial application of U.S. laws, and the cross-border recognition and enforcement of judgments.

When foreign laws were studied, they were usually taught to show their similarities to and differences from U.S. laws. Why were the two bodies of law different? Should foreign laws be harmonized with those of the United States? Should the latter be amended instead to harmonize with the former? Even today, it remains of great interest—not just in a historical sense—to study how U.S. intellectual property laws differ from those of other countries in their origin, substance, and procedure. It is also interesting to show how the United States has gradually turned around from being a pirating nation in both the copyright and patent contexts to assuming the role of the worldwide champion and chief enforcer of intellectual property rights.[22] In sum, virtually all of the classroom discussion would focus on comparative, international, and transnational intellectual property law.

B. Global Intellectual Property Law

This comparative-international-transnational approach was challenged in the mid-1990s by the rude arrival of the TRIPs Agreement and the emergence of new technologies, like biotechnology, the Internet, and other forms of digital communications technologies. Many, indeed, consider the TRIPs Agreement a "sea change" or a "tectonic shift" in international intellectual property law.[23]

The Agreement brought to the field at least four significant changes. First, the Agreement married intellectual property with international trade and established a mandatory dispute settlement process.[24] In response to this change, teachers now have to cover both the international trade and public

22. *See* Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 336–53 (2003) (discussing copyright protection for foreign authors in the United States in the eighteenth and early nineteenth centuries).

23. *See, e.g.*, ABBOTT ET AL., INTEGRATED WORLD ECONOMY, *supra* note 9, at 3 (stating that "[t]he TRIPS Agreement represented a sea change in the international regulation of IPRs"); Charles R. McManis, *Teaching Current Trends and Future Developments in Intellectual Property*, 52 ST. LOUIS U. L.J. 855, 856 (2008) (noting that "the field of international intellectual property law underwent a tectonic shift with the promulgation of the [TRIPs Agreement]").

24. *See* TRIPs Agreement, *supra* note 5, art. 64 (mandating that disputes arising under the TRIPs Agreement be settled by the WTO dispute settlement process).

international law aspects of intellectual property rights. They have to explain not only the processes and institutions through which international treaties were created and implemented, but also how treaties were to be interpreted—under, say, the Vienna Convention on the Law of Treaties.[25]

Until then, many of the concepts and interpretive tools commonly taught in *public* international law—such as the *lex prior* principle,[26] the last in time rule (or the *lex posterior* principle),[27] the *lex specialis* interpretive rule,[28] the non-self-executing nature of many international treaties,[29] and theories of state succession[30]—were rarely covered in an international intellectual property law

25. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

26. As Wilfred Jenks, the former Director-General of the International Labour Organization, described:

> The *lex prior* principle was stated by Vattel as being that 'if there is a conflict between two treaties made with two different States, the earlier treaty prevails'. The principle is derived from the analogy of the law of contract and has an important application in international law in respect of conflicts between bilateral agreements (and other agreements with restricted participation) conferring inconsistent rights on different parties.

C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 442 (1953); *see id.* at 426, 442–45 (discussing the *lex prior* principle); *see also* Vienna Convention, *supra* note 25, art. 30(2) ("When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.").

27. "The *lex posterior* principle [or the last in time rule] may be defined as being that later legislation supersedes earlier legislation." Jenks, *supra* note 26, at 445; *see* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("[I]f [two treaties] are inconsistent, the one last in date will control the other[,] provided, always, the stipulation of the treaty on the subject is self-executing."); Jenks, *supra* note 26, at 445–46 (discussing the *lex posterior* principle); *see also* Vienna Convention, *supra* note 25, art. 30(3) ("When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.").

28. As Hugo Grotius wrote about the *lex specialis* principle: "Among agreements that are equal in respect to the qualities mentioned that should be given preference which is most specific and approaches most nearly to the subject in hand; for special provisions are ordinarily more effective than those that are general." Jenks, *supra* note 26, at 446 (quoting Hugo Grotius); *see id*. at 446–47 (discussing the *lex specialis* principle); Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573, 589–90 (2005) (discussing the *lex specialis* principle).

29. *See, e.g.*, Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 90 (2d Cir. 1998) (noting that the authoritative Nimmer treatise "moves too quickly past the Berne Convention Implementation Act of 1988"); Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191, 195 (S.D.N.Y. 1999) (explaining the importance that the "Berne Convention is not self-executing").

30. *See* Peter K. Yu, *Succession by Estoppel: Hong Kong's Succession to the ICCPR*, 27 PEPP. L. REV. 53, 80–93 (1999) (discussing the various theories concerning the state succession of treaties).

course. Instead, international intellectual property law was generally considered a *private* international law subject. As Paul Geller explained:

> The Berne Convention is above all an instrument of private international law, assuring private parties of rights in literary and artistic works. To have effect, these rights must be vindicated in national courts, to which private parties may have recourse in copyright disputes with other private parties. The GATT, by contrast, is essentially an instrument of public international law: it governs disputes between public entities, notably nation-states, and has procedures to adjudicate such disputes and to sanction states for violating its rules.[31]

To reflect the increasing emphasis on public international law and the gradual shift of focus away from private international law, teachers have to modify their course by including materials on the interactions among state-to-state relations, government policies, and private enforcement of intellectual property rights.[32]

Those interested in the legislative process, the public choice theory, and interest group politics may also include a more in-depth discussion of the international harmonization process. Although harmonization is usually considered a "two-way street" that affects parties on both sides, the process initiated by the TRIPs negotiations and induced by the United States' Section 301 actions was largely a "one-way street."[33] Because the TRIPs Agreement transplanted laws from developed to less developed countries,[34] it has raised difficult issues concerning cultural studies, development theories, transnational jurisprudence, and social justice.

Second, the TRIPs Agreement provided an opportunity for the teaching of other basic forms of intellectual property rights that are rarely covered in a domestic course. Most of the existing introductory courses tend to focus on the four major forms of intellectual property—copyrights, patents, trademarks, and trade secrets. By contrast, the Agreement covers five additional forms of

31. Paul Edward Geller, *New Dynamics in International Copyright*, 16 COLUM.-VLA J.L. & ARTS 461, 469 (1992); *see* Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 437–38 (2004) [hereinafter Yu, *Currents and Crosscurrents*] (discussing the growing importance of public international law and the shift from private international law to public international law).

32. *See* DINWOODIE ET AL., *supra* note 7, at vi ("An understanding of the interaction between state-to-state relations and private enforcement of rights is crucial to appreciate fully the dynamic underlying the development of [international intellectual property] law.").

33. *See* Peter K. Yu, *The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade*, 26 FORDHAM INT'L L.J. 218, 224 (2002) (stating that "[h]armonization is a two-way street"). For discussion of the Section 301 process, see Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 138–40 (2000).

34. For a seminal work on legal transplants, see generally ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993). For discussion of the harmonization process, see Yu, *Currents and Crosscurrents*, *supra* note 31, at 429–35.

protection—geographical indications, industrial designs, plant variety protection, layout designs of integrated circuits, and the protection of undisclosed information (a form of protection that includes both trade secrets and other forms of undisclosed information).[35] In fact, after teaching all eight forms of intellectual property rights covered by the TRIPs Agreement, one has to wonder whether the basic domestic intellectual property survey course needs to be revamped to reflect the multiple areas of protection covered by today's increasingly complex intellectual property system.

Third, the TRIPs Agreement introduced to all WTO member states many uniform minimum standards on which there was no international consensus before. Article 10(1), for example, states that "[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention."[36] Article 23 offers special protection to geographical indications for wines and spirits.[37] Article 27(1) stipulates that "patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced."[38] Article 27(3)(b) requires each member state to "provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof."[39] Article 31 delineates the conditions under which a country can issue a compulsory license.[40] Article 35 offers protection to integrated circuit topographies through a reference to the Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits.[41] Article 39(3) mandates protection against the unfair commercial use of clinical trial data that have been submitted to regulatory agencies for the approval of pharmaceutical or agricultural chemical products that utilize new chemical entities.[42]

Because of the mandatory nature of these minimum standards, as well as the wide acceptance of other optional standards, the international intellectual property system has become tidier, and teaching the course has become easier and more efficient. In the past, teachers had to focus on the laws and customs of many different countries—say Britain, France, and Germany. With the adoption of the TRIPs Agreement, they can now focus on the "harmonized" laws of the WTO community. The arrival of the TRIPs Agreement therefore

35. *See* TRIPs Agreement, *supra* note 5, arts. 22–24 (geographical indications), 25–26 (industrial designs), 27(3)(b) (plant variety protection), 35–38 (layout designs of integrated circuits), 39 (undisclosed information).

36. *Id.* art. 10(1).

37. *Id.* art. 23.

38. *Id.* art. 27(1).

39. *Id.* art. 27(3)(b).

40. TRIPs Agreement, *supra* note 5, art. 31.

41. *Id.* art. 35.

42. *Id.* art. 39(3).

allows teachers to use pedagogical approaches that are commonly reserved for domestic intellectual property law courses. Teaching the TRIPs Agreement as *the* international framework also better reflects the international intellectual property landscape. Except for the few rich and powerful developed countries, most countries, to the dismay of commentators, have used the Agreement as a universal template for modernizing their intellectual property systems.[43]

Finally, and very importantly, the TRIPs Agreement transformed the international intellectual property system from an *international* framework to a *global* one.[44] Traditionally, treaties within the international intellectual property regime, such as the Berne, Paris, and Rome Conventions, were largely introduced to patch up the divergent protections offered in various national systems. Countries, as a result, retained wide autonomy and policy space to develop their own intellectual property systems. The TRIPs Agreement, however, altered that arrangement—so dramatically that a supranational code is now super-imposed on the weaker, if not all, WTO member states.[45] Because this code is insensitive to their local needs, national interests, technological capabilities, institutional capacities, and public health conditions, many less developed countries suffer economically and are confronted with massive domestic problems, such as the widely reported public health crises concerning HIV/AIDS, tuberculosis, malaria, and other epidemics.

As a result, teachers may want to focus on not only the minimum standards (the protection floor), but also the maximum standards (the protection ceiling). Such a focus would be similar to the one they have when they teach the domestic course. For example, in addition to the minimum standards, they may want to emphasize the eligibility requirements for the different forms of intellectual property protection; the nonprotection of ideas, procedures,

43. *See* Assafa Endeshaw, *The Paradox of Intellectual Property Lawmaking in the New Millennium: Universal Templates as Terms of Surrender for Non-Industrial Nations; Piracy as an Offshoot*, 10 CARDOZO J. INT'L & COMP. L. 47 (2002) (criticizing the application of universal templates to non-industrial nations); Rochelle Cooper Dreyfuss, *TRIPS—Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 25 (2004) ("Without adequate counsel, [many less developed countries] may choose to meet their TRIPS obligations by simply transcribing its mandates into law."); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 388 (2006) ("The unexamined transcription of the TRIPs Agreement into law . . . might result in an unbalanced intellectual property system."); *cf.* Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in China in Post-WTO China*, 55 AM. U. L. REV. 901, 906–23 (2006) (cautioning against the crediting of recent changes in the Chinese intellectual property system to the WTO accession despite exaggerated claims by policymakers, industry groups, and commentators).

44. *See* Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 901–06 (2007).

45. *See* Ginsburg, *International Copyright*, *supra* note 20; *see also* Yu, *Currents and Crosscurrents*, *supra* note 31, at 354–75 (discussing the transformation from international agreements to a supranational code).

methods of operation, and mathematical concepts in copyright law; the availability of compulsory licensing of patented pharmaceuticals; unrestricted use of generic terms notwithstanding the protection of trademarks; the importance of technical and functional considerations in laws involving trade dresses and industrial designs; permissive limitations and exceptions under the three-step test; remedies for anticompetitive practices; and special exemptions that seek to respond to national exigencies.

Although the TRIPs Agreement has had a significant impact on the international intellectual property law course, the course has also been heavily impacted by rapid technological change, some of which occurred before or during the TRIPs negotiations. The biotechnology revolution, for example, has proceeded very rapidly since the 1980s—partly as a result of the United States Supreme Court case of *Diamond v. Chakrabarty*.[46] That revolution not only has resulted in the creation of new protectable subject matters, but has also sparked many novel ethical debates and controversies.[47] Fortunately for the public interest, the drafters of the TRIPs Agreement took into consideration some of these controversies and included special provisions and safeguards to alleviate some of the related concerns.

For instance, article 27(2) allows each WTO member state to "exclude from patentability inventions, the prevention . . . of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment."[48] This provision echoes article 53(a) of the EPC, which excludes from protection those inventions "the publication or exploitation of which would be contrary to *ordre public* or morality."[49] Article 27(3)(b) also permits each member to exclude from patentability "plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes."[50]

The drafters, however, did not anticipate all of the latest technological changes. A good example of these unanticipated changes concerns the technological change brought about by the information revolution. Indeed, the

46. 447 U.S. 303 (1980).

47. One such controversy concerns the protection of isolated human genes and genetically-engineered microorganisms. *See, e.g.*, Margo A. Bagley, *A Global Controversy: The Role of Morality in Biotechnology Patent Law*, *in* 2 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 317 (Peter K. Yu ed., 2007) [hereinafter INTELLECTUAL PROPERTY AND INFORMATION WEALTH]; Li Yahong, *Human Gene Patenting and Its Implications for Medical Research*, *in* 2 INTELLECTUAL PROPERTY AND INFORMATION WEALTH, *supra*, at 347.

48. TRIPs Agreement, *supra* note 5, art. 27(2).

49. European Patent Convention, *supra* note 17, art. 53(a).

50. TRIPs Agreement, *supra* note 5, art. 27(3)(b).

advent of the Internet and new communications technologies rendered the TRIPs Agreement obsolete even before it entered into effect. As Marci Hamilton aptly observed:

> Despite its broad sweep and its unstated aspirations, TRIPS arrives on the scene already outdated. TRIPS reached fruition at the same time that the on-line era became irrevocable. Yet it makes no concession, not even a nod, to the fact that a significant portion of the international intellectual property market will soon be conducted on-line.[51]

As a result, policymakers in technology-rich countries, such as the United States and members of the European Community, had to scramble for solutions to respond to challenges brought about by these new technologies. As the international community struggled to update the international intellectual property regime, the 1996 World Intellectual Property Organization (WIPO) Internet Treaties were promulgated.[52] New forms of protection, such as *sui generis* database protection[53] and those offered by the EC Information Society Directive,[54] also found their way into the international intellectual property law course.

In light of these changes and developments, students have to learn not only the distinction between the right of distribution and the right of making available to the public,[55] but also new treaty obligations concerning the so-called "paracopyright" protection.[56] In addition, teachers have to explain why

51. Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 614–15 (1996).

52. WIPO Copyright Treaty, *adopted* Dec. 20, 1996, S. TREATY DOC. No. 105–17, at 1 (1997) [hereinafter WCT]; WIPO Performances and Phonograms Treaty, *adopted* Dec. 20, 1996, S. TREATY DOC. No. 105–17, at 18 (1997) [hereinafter WPPT].

53. Council Directive 96/9, On the Legal Protection of Databases, 1996 O.J. (L77) 20 [hereinafter EC Database Directive] (offering *sui generis* protection to database producers).

54. Council Directive 01/29, On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10.

55. *See* WCT, *supra* note 52, art. 8 (granting to authors "the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the *making available to the public* of their works" (emphasis added)); WPPT, *supra* note 52, arts. 8(1), 10, 12(1), 14 (providing to performers and phonogram producers the exclusive right of making available to the public). For a discussion of the right of making available to the public, see generally Jane C. Ginsburg, *The (New?) Right of Making Available to the Public*, *in* INTELLECTUAL PROPERTY IN THE NEW MILLENNIUM: ESSAYS IN HONOUR OF WILLIAM R. CORNISH 234 (David Vaver & Lionel Bently eds., 2004). For the origin of this right and the compromise struck between the European Union and the United States, see Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 392–98 (1997).

56. *See* WCT, *supra* note 52, art. 11 (requiring parties to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors" to protect copyrighted works); *id.* art. 12 (requiring parties to protect rights management information from alteration and removal in an effort to conceal or facilitate

intellectual property laws now protect "investment," in addition to original creations, as students have learned in domestic intellectual property courses.[57] They also have to discuss the rationales behind the gradual return from national treatment to material reciprocity,[58] as well as the pros and cons of recent bilateral or regional efforts.[59]

Moreover, because these technologies pose unforeseen challenges to the international intellectual property system, teachers also have to help students develop a good grasp of the new technologies themselves. After all, without understanding the technologies or identifying the new situations created by these technologies, it would be very difficult to assess the impact of technological change on, say, traditional conflict-of-law analyses. It would also be challenging to explain the difference between the right of distribution and the right of making available to the public. Thus, the Internet and new communications technologies have posed challenges to both domestic and international intellectual property law teachers.

C. Global Intellectual Property Law Plus

In the late 1990s, the deepening crisis within the international intellectual property regime became apparent, and the anti-globalization protests in Seattle, Washington, Prague, Quebec, Genoa, and other major cities resulted in wide media coverage.[60] While such coverage has led to greater interest in studying international intellectual property law—and more active, and at times more heated, classroom discussion—these latest developments also have broadened the scope of coverage, making it more difficult for teachers to select course materials.

This crisis, in essence, was brought about by the inability of less developed countries to adjust to the high—and, many would say, inappropriate—levels of protection required by the TRIPs Agreement. These countries were not able to

infringement); WPPT, *supra* note 52, arts. 18–19 (stipulating similar requirements concerning the protection of performances or phonograms).

57. *See* EC Database Directive, *supra* note 53, art. 7(1) (requiring all EU member states to implement legislation that grants *sui generis* protection to databases created as a result of "substantial investment" by database producers); Yu, *The International Enclosure Movement*, *supra* note 44, at 892–901 (discussing the incentive-investment divide).

58. *See* Semiconductor Chip Protection Act of 1984, 17 U.S.C. § 902(a)(1) (offering *sui generis* protection to the layout designs of foreign-manufactured integrated circuits and chips only if the foreign country afforded similar protection to U.S. manufacturers); EC Database Directive, *supra* note 53, art. 11 (denying protection to databases produced in non-EU countries that do not offer comparable protection to databases); Yu, *Currents and Crosscurrents*, *supra* note 31, at 375–81 (discussing the use of reciprocal provisions).

59. *See* Yu, *Currents and Crosscurrents*, *supra* note 31, at 392–400 (discussing the growing use of bilateral and regional trade agreements).

60. *See* Peter K. Yu, *World Trade, Intellectual Property, and the Global Élites: An Introduction*, 10 CARDOZO J. INT'L & COMP. L. 1, 3 (2002).

fully implement the treaty by the end of the transitional periods, and reforms in the area have resulted in significant political, social, economic, and cultural problems within their borders. Disillusioned with the WTO process, less developed countries have become increasingly dissatisfied with the international intellectual property regime. As a result, policymakers, scholars, commentators, and nongovernmental organizations begin to question the regime's fairness and legitimacy. Their responses also have led to new international developments that have yet to be covered in a traditional international intellectual property law course.

For example, less developed countries lobbied for the establishment of the Development Agenda, which sought to protect folklore, traditional knowledge, and indigenous practices, as well as to increase access to information, knowledge, essential medicines, and modern communications technologies.[61] To facilitate these demands, less developed countries have actively pushed for intellectual property reforms in not only WIPO and the WTO, but also other fora governing public health, human rights, biological diversity, food and agriculture, and information and communications.[62] These efforts eventually led to the adoption of the Doha Declaration on the TRIPS Agreement and Public Health[63] and a recent protocol to formally amend the TRIPs Agreement by adding a new article 31*bis*.[64]

Meanwhile, developed countries responded by sidestepping the multilateral process to introduce bilateral and regional trade and investment agreements—free trade agreements for the United States and economic partnership agreements for the European Community.[65] Using a "divide and conquer" approach, these two trade powers sought to reduce the policy space available to less developed countries for designing their own intellectual

61. *See* CHRISTOPHER MAY, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA (2007) (discussing WIPO and its new Development Agenda); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2885 (2006) (proposing to integrate a principle of substantive equality "throughout intellectual property globalization decision-making via a legal rule akin to the strict scrutiny doctrine in U.S. constitutional law").

62. *See* Yu, *Currents and Crosscurrents*, *supra* note 31, at 389–90.

63. World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

64. General Council, *Amendment of the TRIPS Agreement*, WT/L/641 (Dec. 8, 2005), *available at* http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm.

65. *See, e.g.*, Central America–Dominican Republic–United States Free Trade Agreement, Aug. 5, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html; United States–Australia Free Trade Agreement, U.S.–Austl., May 18, 2004, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file148_5168.pdf; United States–Singapore Free Trade Agreement, U.S.–Sing., May 6, 2003, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

property systems.[66] As I pointed out elsewhere, there has now emerged an "international enclosure movement" that pushes less developed countries to offer protection that is even stronger than required by the TRIPs Agreement.[67] Because the United States used similar tactics in the late 1980s in the run-up to the establishment of the WTO and the TRIPs Agreement,[68] it remains interesting to see whether these efforts will eventually lead to the further strengthening of the TRIPs Agreement, creating what commentators have referred to as "TRIPs II."[69]

Taken together, the political maneuvering by both developed and less developed countries has resulted in a new era of resistance and contestation.[70] From the standpoint of international law and international relations, the activities by both country blocs have led to the emergence of a new forum-shifting phenomenon, through which countries "attempt to alter the status quo ante by moving treaty negotiations, lawmaking initiatives, or standard setting activities from one international venue to another."[71] This phenomenon has made the international intellectual property regime increasingly complex.[72] Because the discussion of international intellectual property law developments can no longer be confined to activities within WIPO and the WTO, this regime has also posed major challenges to teachers and students.

If geo-political issues are not challenging enough, three additional developments have made the task of teaching international intellectual property

66. *See* Yu, *The International Enclosure Movement*, *supra* note 44, at 855–72 (discussing the growing enclosure of policy space at the international level).

67. *See id.*

68. *See* Yu, *Currents and Crosscurrents*, *supra* note 31, at 361–62, 412–13 (discussing the use of Section 301 sanctions during the TRIPs negotiations to speed up the negotiating cycle, isolate hardliner opposition countries, and persuade other less developed countries to alter their position).

69. *See, e.g.*, DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 48 (2d ed. 2003); Graeme B. Dinwoodie, *The International Intellectual Property Law System: New Actors, New Institutions, New Sources*, 98 AM. SOC'Y INT'L L. PROC. 213, 217 (2004); Dreyfuss, *supra* note 43, at 21.

70. *See* Susan Sell, *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267 (2004); Yu, *Currents and Crosscurrents*, *supra* note 31.

71. Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 14 (2004) (footnote omitted). For excellent discussions of the regime-shifting phenomenon, see, for example, *id.*; JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 564–71 (2000).

72. I coined the term the "international intellectual property regime complex" to describe this complex regime. Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 9–16. The term "regime complex" originated from Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 279 (2004). David Leebron has also used the term "conglomerate regime." David W. Leebron, *Linkages*, 96 AM. J. INT'L L. 5, 18 (2002).

law even more daunting. First, international intellectual property law developments have become increasingly diverse, multi-faceted, and pluralistic. Although the TRIPs-based international intellectual property system remains state-centered, there are considerable developments outside the state-based system. A good example is the development of the non-national system used to reduce cybersquatting in the Internet domain name system.[73] Not only do teachers need to cover the ICANN domain name dispute resolution process,[74] they may also have to examine ongoing developments concerning country-code top-level domains,[75] and perhaps even internationalized domain names.[76]

Second, in response to widespread piracy and counterfeiting problems in less developed countries and in the online world, rights holders have now resorted to the use of technological self-help measures. These measures are not new; encryption technology, for example, was used to protect computer software as early as the 1980s.[77] However, the growth of the global marketplace and the increasing volume of international trade have made these developments particularly salient. Recent examples of new technological measures used to protect intellectual assets include digital rights management tools for the protection of copyrighted works,[78] genetic use restriction technologies for the sterilization of seeds,[79] and the use of RFID (radio-frequency identification) tags and holographic labels to prevent counterfeiting.[80]

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73. *See* Yu, *Currents and Crosscurrents*, *supra* note 31, at 400–06 (discussing the growing trend of non-nationalization).

74. *See* Internet Corp. for Assigned Names and Numbers, *Uniform Domain Name Dispute Resolution Policy* (Aug. 26, 1999), *available at* http://www.icann.org/udrp/udrp.htm.

75. For discussion of earlier developments concerning country-code top-level domains, see generally Peter K. Yu, *The Origins of ccTLD Policymaking*, 12 CARDOZO J. INT'L & COMP. L. 387 (2004).

76. For discussion of internationalized domain names, see generally Molly Torsen, *The Domination of the English Language in the Global Village: Efforts to Further Develop the Internet by Populating It with Non-Latin-Based Languages*, 12 RICH. J.L. & TECH. 2 (2005); Xue Hong, *The Voice of China: A Story of Chinese-Character Domain Names*, 12 CARDOZO J. INT'L & COMP. L. 559 (2004).

77. *See* Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 DENV. U. L. REV. 13, 14 (2006) (noting that technological protection measures "have existed for at least the last couple of decades").

78. For the problems of digital rights management tools in less developed countries, see generally *id.* at 40–57.

79. For discussion of genetic use restriction technologies, see generally Timothy Swanson & Timo Goeschl, *Diffusion and Distribution: The Impacts on Poor Countries of Technological Enforcement Within the Biotechnology Sector*, *in* INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 669 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

80. *See* Susan Scafidi, *Intellectual Property and Fashion Design*, *in* 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH, *supra* note 47, at 115, 124.

The use of these measures not only requires teachers to be up-to-date with the latest technologies, but also adds a layer of complexity to the protection rights holders obtain. The protection offered by these self-help measures is not only legal or technological per se, but constitutes a combination of both—which I have described as the technolegal.[81] While technology helps reinforce or supplement the existing legal protection, law further prohibits the circumvention of technology. As the two forms of protection interact with each other, and improve over time, they result in a technolegal combination that is often greater than the sum of its parts. It is therefore important to understand not only law and technology, but also the interface between the two.

Third, as teachers and students focus more on the challenges confronting less developed countries and on the local conditions in these countries, they also begin to notice that many existing intellectual property problems—be they piracy and counterfeiting or the lack of affordable access to patented medicines—are partly attributable to political, social, economic, cultural, technological, and historical factors. Many of the problems are development-related; they are, as I have described, either "IP-irrelevant" (non-attributable to intellectual property protection) or "IP-related" (only indirectly attributable to such protection).[82]

In fact, it is virtually impossible to tackle enforcement problems in countries like China, Russia, or Ukraine, without building an "enabling environment for effective intellectual property protection"—an environment that provides key preconditions for successful intellectual property law reform, such as a consciousness of legal rights, respect for the rule of law, an effective and independent judiciary, a well-functioning innovation and competition system, and a critical mass of local stakeholders.[83] As Robert Sherwood put it bluntly in his aptly-titled essay, *Some Things Cannot Be Legislated*, "until judicial systems in developing and transition countries are upgraded, it will matter little what intellectual property laws and treaties provide."[84]

81. *See* Peter K. Yu, *New Media at the Turn of the Century: Toward an Integrated Law, Technology, and Society Approach* (2007), *available at* http://ssrn.com/abstract=965579 (discussing the combination of the legal and the technical as "the technolegal").

82. For discussion of the trichotomy of "IP-relevant," "IP-related," and "IP-irrelevant" causes of the access-to-medicines problem in less developed countries, see Yu, *The International Enclosure Movement*, *supra* note 44, at 852–53.

83. *See* Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173, 213–16 (Daniel J. Gervais ed., 2007) (discussing the importance of an "enabling environment" for effective intellectual property protection).

84. Robert M. Sherwood, *Some Things Cannot Be Legislated*, 10 CARDOZO J. INT'L & COMP. L. 37, 42 (2002); *accord* Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 MINN. L. REV. 249, 252 (2003)

In sum, the international intellectual property law course has changed substantially in the past decade. While the establishment of the TRIPs Agreement and the emergence of new technologies has greatly transformed the international intellectual property system, the new developments have also brought to the course many complex issues that are generally not covered in the traditional international intellectual property law curriculum. Whether one likes it or not, the "law and . . ." movement has finally spread to international intellectual property law, and the subject has become increasingly multidisciplinary.

Today, it is no longer adequate to merely cover international, comparative, and transnational intellectual property law, like it would have been in the pre-TRIPs era. Teachers also have to cover the "harmonized" laws achieved by WIPO, the WTO, and other international and regional treaties as well as developments in ancillary areas that are related to intellectual property protection. In other words, the international intellectual property law course is not just about international intellectual property law or global intellectual property law, but global intellectual property law *plus* its ancillary areas.

II. THREE QUESTIONS AND SOME BONUS CONSIDERATIONS

In light of the many challenges to teaching international intellectual property law, this Part explores how teachers can respond to these challenges by reconceptualizing the course. In the tradition of a Socratic dialogue, this Part focuses on three key questions: (1) Why is international intellectual property law taught in the first place? (2) What topics can teachers cover? (3) How can they effectively present the materials? Through questions and suggestions, this Part invites readers to rethink how an international intellectual property law course can be taught. This Part concludes with some bonus considerations that may be relevant to both teachers and administrators. Because the readers of this Essay are likely to either be teaching international intellectual property law or have an interest in doing so, this Part uses the inclusive "we" to refer to international intellectual property law teachers.

("[A] rational strategy for developing countries must not only consider compliance options, but must also account for institutional competency—legislative, judicial, executive, and diplomatic—in order to make the most of available options."); Keith E. Maskus et al., *Intellectual Property Rights and Economic Development in China*, *in* INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH 295, 297 (Carsten Fink & Keith E. Maskus eds., 2005) (stating that, in the context of China, "[u]pgrading protection for IPRs alone is a necessary but not sufficient condition for th[e] purpose" of maximizing the competitive gains from additional innovation and technology acquisition over time, with particular emphasis on raising innovative activity by domestic entrepreneurs and enterprises).

A. Why?

To begin with, let us consider the broader question of why international intellectual property law is, or should be, taught in the first place. Is the course's educational objective to sharpen the students' analytical skills and prepare them for the growing challenges of transnational law practice and the global business environment? Or is it to help students develop a deeper understanding of global legal institutions, lawmaking processes, transnational jurisprudence, and the latest trends in international, comparative, and transnational law? Regardless of the answer, a better grasp of the international intellectual property system will enable students to be more competitive in the job market and outperform their peers when they enter the increasingly global legal profession.

However, if the former is the objective, it may make more sense to teach the course the old-fashioned way, with major emphases on basic international copyright, patent, and trademark laws, but only limited discussion of recent developments in the international intellectual property regime. After all, a lot of the recent developments are unlikely to find their way to legal practice unless the particular student works as a trade official, on the policy side, or in a less developed country. It is, therefore, more important to learn the mechanics and procedural requirements for filing a trademark application in the Madrid or the Community Trade Mark system or a patent application through the PCT than understanding how the WTO Dispute Settlement Body resolves intellectual property disputes.

Even if the instructors are interested in developments in less developed countries, it may be more practical to focus on issues concerning the use and transfer of technology, the management of intellectual property rights and assets, the drafting and negotiation of material transfer agreements, and the development of intellectual property and technology transfer offices. Very few schools, indeed, have the luxury of offering an international licensing or intellectual property management course, and most intellectual property law courses tend to focus so much on the acquisition and enforcement of intellectual property rights that they ignore important issues concerning the commercialization, licensing, management, and transfer of intellectual property assets.

Although international intellectual property law can be taught as a practice-oriented course, the subject has become increasingly theoretical, and many teachers have de-emphasized some of the practical aspects of the course. Indeed, the literature in the area is now filled with discussions of international economic regulations, international regime theories, development studies, third world perspectives, and cross-cultural narratives.

The entering into effect of the TRIPs Agreement has also brought to the field many teachers who have taught or researched in the areas of public

international law, international organizations, international trade, or international business transactions. Those teachers therefore may not be interested in teaching the course as an intellectual property law course alone. Being "migrants" or "visitors," they also may not have the standard experience or background expected from intellectual property law experts. As a result, these teachers are more likely to see the course as one that will help students better understand the changing global legal environment, the international and regional lawmaking processes, and techniques for resolving cross-border disputes. Viewed from this perspective, the course may help reinforce what students have learned in other international and comparative law courses. It therefore can be classified as part of a larger international and comparative law curriculum, in addition to the more specialized, and at times technical, intellectual property law curriculum.

Moreover, studying international intellectual property law can help students acquire the skills needed to become a successful intellectual property lawyer. The international and comparative materials can be used to illustrate the complexities of basic domestic law. As Graeme Dinwoodie, William Hennessey, and Shira Perlmutter wrote in the preface to their widely-used casebook, "One no longer can think or write about, or understand, intellectual property law without considering its international dimension; international developments often drive the content and direction of domestic intellectual property law."[85] The converse is also true. Domestic developments and politics have increasingly found their way to international fora, say from Washington or Brussels to Geneva. Thus, teaching international intellectual property law will help students improve their effectiveness as not only an international lawyer, but also as a domestic one.

B. What?

Second, we have to decide what type of materials we want to include in an international intellectual property law course. Do we want to focus on the TRIPs Agreement, or the so-called international intellectual property framework, and then fill the gaps with additional materials? Or do we want to provide a comprehensive introduction to a large array of international intellectual property law topics? If the former, are we ignoring important topics that may be of interest and importance to our students? If the latter, how can we deal with the course's short duration and crowded syllabus, the strong likelihood that we need to reduce everything to its bare essentials, and the potential incoherence and unwieldiness of teaching many disparate topics in a single-semester course? This is, indeed, the age-old "breadth versus depth" pedagogical debate.

85. DINWOODIE ET AL., *supra* note 7, at v.

Questioning from a different angle, do we want to teach the course as a general survey course for international intellectual property law? Or do we want to teach the course as an advanced seminar that covers in greater depth the international issues that will not, or are unlikely to, be covered in a basic domestic course? As Charles McManis reminded us, "international intellectual property law tend[s] to get short shrift in basic introductory intellectual property courses" and may be "tacked on" as a final topic to be covered in the course.[86] In today's increasingly globalized world, omitting materials on international developments may ultimately harm students in terms of both their competitiveness in the job market and full professional development.

In addition to the course's coverage and central focus, we also need to think about how to teach foreign primary materials and secondary sources. Many of the primary materials in the course come from countries that subscribe to a civil law tradition, such as France or Germany in a class on moral rights, Japan in a class on the doctrine of equivalents, or China or Russia in a class on international enforcement. The structure and style of court decisions in these countries are very different from those studied in domestic courses. Judges in those jurisdictions also differ significantly from their American counterparts in terms of their legal traditions, philosophical backgrounds, judicial mindsets, interpretation approaches, and cultural sensitivities.[87] Teaching the course using the traditional caselaw method, therefore, may not necessarily be ideal or effective. Even if that method serves some pedagogical goals, such as teaching effectiveness due to familiarity, it may create among students a false sense of security, ignoring the "messiness" of international intellectual property law. Students will be better off struggling with these sources in the classroom rather than in their legal career later! Through classroom discussion, they also may gain a deeper understanding and appreciation of these varied sources and approaches.

An additional challenge comes in the form of treaties, statutes, and soft law recommendations. How many of these major international intellectual property agreements do we need to cover? Do we want to engage students in close readings and analyses of at least the major provisions of these agreements? Do we want to devote more time to helping students understand how to analyze and interpret treaties in general? Most important of all, how can we keep our students' attention when teaching these primary texts, which are rarely considered enjoyable reading materials?

Over the years, I have found it particularly helpful to provide problem sets that include hypothetical fact situations with real clients and problems. Students were often asked to provide advice concerning situations involving foreign laws and international treaties. At the very least, students had to skim

86. McManis, *supra* note 23, at 859.

87. *See* Yu, *The Harmonization Game*, *supra* note 33, at 233–34.

the treaties or other primary texts to find the answers. The different interpretations they had of these texts often provoked interesting classroom discussion, and the better students were able to empathize with their clients' situations. When the hypothetical clients came from foreign countries with which some students were familiar, the discussion also raised questions and responses that further challenged the perspectives and assumptions of their peers.

Another challenge concerns WTO dispute settlement panel decisions. What would be the most effective way to teach these decisions? How could we ensure that students be able to review the decisions carefully and effectively? Any casebook authors can recall the challenge in editing down these decisions; they are usually long, detailed, and fragmented, with some running in excess of two hundred pages. In fact, if we need to reduce the class size intentionally to maintain teaching effectiveness, an efficient—though not necessarily recommended—approach would be to start the class by assigning the full text of the two most recent WTO dispute settlement panel decisions in the intellectual property area. If students are questioned about the details and reasoning of those decisions in the same way they were in their first year about *Palsgraf v. Long Island Railroad Co.*[88] or *Pennoyer v. Neff*,[89] many students would be likely to drop the class. Those who remain are very likely to be dedicated and highly motivated. Of course, the teachers who try this approach may also gain a new reputation—for better or worse! So, try it at your own peril!

If the lack of caselaw, the extended details of WTO panel decisions, and the abundance of foreign primary materials and secondary sources do not present sufficient challenges, the recent developments in the international intellectual property arena have forced us to think hard about how to teach related materials that do not fit well in the traditional international intellectual property law curriculum (and whether we should abandon most of these developments entirely). For example, although the access-to-medicines problem touches on important issues about the nature and *raison d'être* of intellectual property rights, the scope and term of protection, the impact of such protection on economic development and social welfare, and government research and development policies, it also raises difficult issues concerning public health, human rights, institutional infrastructure, and government expenditures. Similarly, the growing development of the WIPO Development Agenda and the increasing emphasis on the protection of folklore, traditional knowledge, and indigenous practices have raised difficult issues concerning the protection of indigenous peoples, human rights, cultural patrimony, biological diversity, agricultural productivity, food security, environmental

88. 162 N.E. 99 (N.Y. 1928).

89. 95 U.S. 714 (1877).

sustainability, business ethics, global competition, scientific research, sustainable development, and wealth distribution.[90]

Today, the discipline of intellectual property law—both domestic and international—has become increasingly multidisciplinary. If we cover a lot of related materials that are outside the traditional legal disciplines or the field of intellectual property law, we are likely to lose the interests of our students—and worse, ourselves! If we do not, however, we have to wonder whether students would be able to obtain the complete picture and understand the backgrounds and complexities of the situations in the affected countries. Can we effectively teach the protection of folklore, traditional knowledge, and indigenous practices without discussing cultural values, decolonialization efforts, indigenous rights, and the need for political participation and self-determination? Can we fully explain the piracy and counterfeiting problems in China without delving into the potential cultural differences, the country's political and socio-economic systems, and its lack of an effective and independent judiciary? More broadly, can law be understood outside its cultural context, the socio-economic structures of the relevant society, and the underlying ethical and political values?[91]

C. How?

Third, we have to decide how to present the materials. Do we want to present them within the larger international intellectual property law framework? Do we want to focus on selected topics or recurring themes? Do we want to break the course down into copyright, patent, and trademark law modules, with additional modules on international enforcement and new *sui generis* or emerging forms of protection? The latter may resemble more closely the basic domestic intellectual property law course usually offered in law schools—regardless of whether it is a general survey course on intellectual property law or a separate course on copyright, patent, or trademark law.

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90. *See, e.g.*, Rosemary J. Coombe, *Culture: Anthropology's Old Vice or International Law's New Virtue?*, 93 AM. SOC'Y INT'L L. PROC. 261 (1999); Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59 (1998); Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275 (2001).

91. As John Kozyris explained:

> . . . [Y]ou cannot truly pursue the comparative method through the study of formal legal texts alone. It is necessary to get to know what is behind the texts and also, even more important, how they function. This requires understanding the legal culture that produced the laws, and more broadly, the social and economic structures and the ethical and political values that support them.

P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 TUL. L. REV. 165, 168 (1994).

However, despite its convenience and potential pedagogical effectiveness, some subject matter in international intellectual property law—and even domestic intellectual property law—does not fit easily into distinct modules. Computer programs, for example, are protectable under various forms of intellectual property rights, including copyrights, patents, trade secrets, unfair competition laws, and *sui generis* protection of integrated circuit topographies. If we separate the course into different modules, how can we account for the overlapping materials? To make things more complicated, courts in different jurisdictions may treat claims and disputes differently. While a U.S. court may classify the scope of a grant of copyright law as a contract law question, a German court is likely to classify such an issue as a matter of substantive copyright law.[92] We therefore have to consider what would be the most ideal way to group the various topics.

As mentioned above, there is also the additional challenge of teaching unfamiliar and difficult materials—foreign primary sources, secondary materials, and WTO dispute settlement panel decisions. Should we rely on the caselaw method and the Socratic dialogue? Do we want to have more lectures and policy debates instead? Or do we want to use a problem-oriented approach?

In addition, we have to decide whether we want the course to have any particular focus. Do we want to emphasize the public international law aspects of the course? Do we want to teach international intellectual property law as a form of international economic regulation or international trade law? Or do we want to focus on practical issues or the private international law aspects of international intellectual property law—a hybrid among transnational civil litigation, international business transactions, and domestic intellectual property law?

Is there a specific perspective from which we want to present the materials, or at least some of the materials? Do we want to focus on the tension between the United States and foreign countries? Between the United States and the European Union? Or between developed and less developed countries? What would be an ideal mix of topics that are covered in the course? Does it matter whether we teach the course in New York, East Lansing, or Des Moines? Does it matter whether a majority of the students are pursuing their LL.M./S.J.D. degrees instead of the J.D.'s? Would the coverage be different if there are a significant number of international students? Would the answer to the previous question depend on whether the students come from developed or less developed countries?

We also need to explore how we can help students understand those situations that spark legal responses in the international intellectual property

92. *See* Ginsburg, *International Copyright*, *supra* note 20, at 281.

law regime. How can we expose them to the realities of a world that they may not have seen? How can we help them understand the problems despite the fact that they are likely to come from different cultural, philosophical, and often socio-economic backgrounds? How can we respond to the fact that some students may have different assumptions, or perhaps even misconceptions, about the international legal system in general and some foreign countries in particular? What would be the best way to encourage them to engage in an active, but perhaps politically correct, discussion on sensitive issues? How can we ensure adequate coverage of both Western and non-Western perspectives? These questions are familiar to international law and human rights teachers, who face similar issues concerning how to conceptualize their courses.

Every year, I devote at least fifteen minutes of my international intellectual property law course to a simulation of the international treaty negotiation process. A number of students are each assigned a particular country—developed, less developed, transition, or imaginary—and provided with information about the country's local conditions. The remaining students serve as observers. Held early in the semester, this exercise forces students to develop a more realistic view of what an international negotiation session is like, how compromises are struck, what the constraints (such as geo-political power, economic strengths, and, most importantly, negotiation time) are. After the students go through such an exercise, many of them are likely to approach the materials differently—often more pragmatically, but unfortunately also more cynically sometimes.

In exploring this exercise, we may want to consider when exactly to introduce the exercise. If it is introduced too early, students may have fewer constraints and be more creative. They do not need to think "outside the box," because that proverbial box has yet to be formed! We also may be able to bring together different worldviews that will be useful in later discussions. When exploring materials later, I usually remind students of the earlier discussions we have had during the mock negotiation session. However, if the exercise is introduced later, as a colleague has done, the negotiation can be more sophisticated.[93] Students, by then, will have a better grasp of the international intellectual property system and will be able to make more forceful arguments using what they have learned. The drawback, of course, is their hesitation in offering creative solutions that they assume would not work based on what they have already learned. There are trade-offs either way!

Moreover, because of the increasing expansion of the international intellectual property regime, the course is now filled with many challenging ethical issues, such as those concerning the protection of isolated human genes

93. One colleague asks her students to keep their treaty negotiation identities for the entire semester. She will then ask questions about their perspectives based on the topic covered in the class.

and genetically-engineered microorganisms, the nonconsensual use of biological and genetic materials, and the economic, social, cultural, and environmental impacts of intellectual property protection. How can we get our students to understand their ethical obligations as an international lawyer? How can we alert them to the opportunities for *pro bono* work, or even full-time employment, as a public interest lawyer? Should we introduce them to such institutions or organizations as the Advisory Centre on WTO Law, the International Centre for Trade and Sustainable Development (ICTSD), Knowledge Ecology International, Médecins Sans Frontières (MSF), Oxfam, Public Interest Intellectual Property Advisors, Inc. (PIIPA), the South Centre, and the Third World Network?

Many serious questions have arisen lately about the fairness and legitimacy of the international intellectual property regime. Are there "teaching moments"? Should we introduce role-playing games to let students develop a better understanding of the varied impacts intellectual property protection has on different player groups? Should we draw on case studies that highlight problems stemming from both under- and overprotection of intellectual property rights? Should we challenge students to think critically about the nature of those rights and to evaluate alternative models to promote creativity and innovation (including free and open source software development, open access formats, and other open and collaborative models)? Is the international intellectual property debate more about the fundamental question of the system's existence than about the balance of the system?[94]

D. Bonus Considerations

Finally, this section offers some bonus considerations that may be relevant to both teachers and administrators. From the standpoint of pedagogy and course administration, it is important to consider whether the course should be open to students with no prior training or background in either international or intellectual property law. In my past courses, students did not seem to have any major problems with the materials even without taking prerequisite courses. In fact, those who took international intellectual property law as their first intellectual property law course often brought to the class new ideas that other students would reject quickly based on the fact that those ideas had already been rejected by Congress, the current or prior administration, or the Framers of the United States Constitution. Those students also asked provocative questions that challenged other students to reevaluate the attractiveness of the existing U.S. intellectual property system.

94. Alan Story asked that particular question in relation to the continued existence of the Berne Convention. *See* Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 HOUS. L. REV. 763, 764–69 (2003).

A lack of significant problems with the material, however, does not mean that those students would not be confronted with a steep learning curve. Indeed, they would, especially in the beginning of the course. Thus, a major challenge for us to offer the course without a prerequisite is to help those students quickly grasp the basics of each major form of intellectual property protection. Should we provide overview lectures or primers on basic intellectual property law? Is there any effective way to facilitate classroom discussion so that those students who have taken a basic intellectual property law course can share with their classmates what they have learned (and still remember)? Should we direct the inexperienced students to the extensive and readily accessible introductory materials on the WIPO or WTO websites? (You may be surprised by the abundance of free materials on those sites!) More importantly, how can we respond to the potential gap of knowledge within this wide range of students? At what level of sophistication should we teach the materials?

Second, we need to determine whether the course will be offered as a paper seminar, a regular course with a final examination, or a combination of both.[95] Most teachers, including myself, teach the course as a paper seminar. Although many teachers do so because of the smaller class size and the deeper, and usually more specialized, interest of the student body, there are considerable benefits to teaching the course as a seminar. Such a setup allows students to develop expertise in their respective areas of interest and potential areas of practice. While some students may be interested in writing a paper on copyright, others may want to learn more about patents or trademarks. Likewise, some students, especially the international ones, may be interested in studying developments in less developed countries. Meanwhile, their classmates may be more interested in the impact of globalization on the American intellectual property system.

Such a setup, however, has significant drawbacks. Some students may tend to write papers on topics that are covered in the beginning of the course. As a result, they may lose interest in the later part of the course—either because they focus extensively on their research topic or because they know that the later materials will not be tested and are unlikely to be incorporated into the paper. (Having a class participation grade may provide incentives for some of them!)

There may also be challenges for those students who choose to write the paper on topics that are only covered later. Those students are likely to have to conduct research without the benefit of classroom discussion. Although these students may need additional help, which can be provided through consultation

95. Some colleagues, including one of the Authors' professors, allow students to complete both the final examination and the seminar paper. In doing so, students have the opportunity to maximize their final grades based on their strengths.

during office hours or special tutorials, the seminar setup for the course is still preferable to a regular course with a final examination.

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As with all professors who love to ask questions, I raise more questions than I have answers for. The goal of this Part, however, is not to answer all of these questions, but to raise enough questions so that we can rethink how best to teach the subject. In a Socratic dialogue, we gain insight into the materials through a back-and-forth exchange between the professor and the students. It is through a similar exchange here that we best learn to design a course that would be of interest and practicality to our students. Some of these questions do not have easy answers, or the so-called A answers. Some of these questions also may not result in an either/or choice. Instead, the answers will vary greatly, depending on the experience, background, and interests of teachers as well as the needs and goals of the students.

CONCLUSION

The development of the international intellectual property system remains in flux, and this field has been developing very rapidly. International intellectual property is messy, dynamic, challenging, multidisciplinary, and increasingly complex, but it is also timely, interesting, stimulating, engaging, and of growing importance. By the time I publish this Essay in St. Louis, which may be read by professional colleagues in Hyderabad, Salvador da Bahia, St. Petersburg, or Wollongong, the international intellectual property landscape will have already evolved from its earlier state when I wrote the first draft in Hong Kong. As new protectable subject matters and technologies emerge and new markets get developed, conceptualizing an international intellectual property law course will remain challenging. Hopefully, this Essay will provide insight into how we can prepare for this challenge.