
ACCENTUATING THE POSITIVE: BUILDING CAPACITY FOR CREATIVE INDUSTRIES INTO THE DEVELOPMENT AGENDA FOR GLOBAL INTELLECTUAL PROPERTY LAW

SEAN A. PAGER*

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* Associate Professor, Michigan State University College of Law. Special thanks to Peter Yu, Sean Flynn, and Ahmed Abdel Latif. Able research assistance was provided by Tom Knox, Ari Zartarian, and Manprit Brar.

*You've got to accentuate the positive
Eliminate the negative
And latch on to the affirmative
Don't mess with Mister In-Between¹*

As international negotiations continue to push toward higher standards of global intellectual property (“IP”) protection, a chorus of commentators have criticized such initiatives as unbalanced.² Critics argue that existing standards of protection already exceed socially desirable levels; many denounce the upward ratchet of international norms as a rent-seeking enterprise that benefits private rightsholders at the public’s expense.³ The perceived lack of balance in global policy-making extends beyond substantive norms. Critics also object to the process by which global IP norms are formulated as fundamentally undemocratic, condemning secretive negotiations in which industry insiders enjoy privileged access.⁴

The quest for balance in global IP norms has been pressed with particular force by developing countries. Developing nations object to inflexible mandates, which they see as imposing developed-world standards contrary to the interests of development.⁵ Disillusionment over unfulfilled expectations in the aftermath of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) intensified their discontent.⁶ In response, developing countries championed the so-called “Development

1. Johnny Mercer, “‘Remember the 40’s-Music of the War Years,’ Vol. IV, 1941-45,” CEMA Special Markets (Capitol-EMI) CDL-57367.

2. See, e.g., Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP*, 18 J. INTELL. PROP. L. 447, 448–49, 450–52 (2011) (describing concerns raised by the push toward “TRIPS-plus” standards through bilateral, regional, and plurilateral agreements).

3. See Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1028–32, 1036 (2011).

4. *Id.* at 1011–19.

5. Neal Weinstock Netanel, *Introduction: The WIPO Development Agenda and Its Development Policy Context*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 1, 2–6 (Neal Weinstock Netanel ed., 2009).

6. See Sean A. Pager, *TRIPS: A Link Too Far? A Proposal for Procedural Restraints on Regulatory Linkage in the WTO*, 10 MARQ. INTELL. PROP. L. REV. 215, 249–51 (2006) [hereinafter *A Link Too Far?*].

Agenda” in the World Intellectual Property Organization (WIPO).⁷ The Development Agenda espouses the explicit goal of balancing the hitherto uncritical promotion of IP rights through harmonized standards by redirecting the global IP agenda toward more flexible, development-friendly policies.⁸

While a broad consensus has emerged over the need to restore balance to the global intellectual property system, sharp differences remain as to how to conceptualize “balance” and how best to achieve it. As the lyrics of the old song have it, there are two ways to improve on the status quo: (1) accentuate the positive or (2) minimize the negative. These two options point to diverging prescriptions for implementing the Development Agenda. This article argues that recent commentary has unduly emphasized “negative” approaches that seek to minimize harms arising from the global IP system rather than actuating its positive potential. It criticizes such “subtractionist” strategies as reflecting a one-sided approach to development.

This article advocates a more balanced approach to rebalancing, which views developing countries as producers of innovation, rather than solely as consumers. It seeks to “latch on to the affirmative” potential for IP rights to harness such innovation in the interests of development. However, rather than advocating for stronger protection by ratcheting upward substantive norms, this article seeks instead to “accentuate the positive” potential of the IP system by removing barriers that prevent existing IP rights from working effectively. In particular, the article calls for refocusing capacity-building initiatives to better support homegrown innovation in

7. Daniel J. Gervais, *TRIPS 3.0: Policy Calibration & Innovation Displacement*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 51, 53–54 (Neil Weinstock Netanel ed., 2009). The WIPO Development Agenda led to adoption of forty-five formal recommendations in 2007. See World Intellectual Property Organization (WIPO), Provisional Comm. on Proposals Related to a WIPO Dev. Agenda (PCDA), June 11–15, 2007, U.N. Doc. PCDA/4/3 Prov.2, Annex I (Aug. 20, 2007) [hereinafter WIPO Development Agenda], available at http://www.wipo.int/edocs/mdocs/mdocs/en/pcda_4/pcda_4_3_prov_2.pdf. A parallel effort within the WTO led to the Doha Declaration, which included several provisions seen as furthering development interests in intellectual property law. See Gervais, *supra*, at 54.

8. Netanel, *supra* note 5, at 2–3.

developing countries. It further argues that such capacity building should prioritize copyright-based creative industries, whose developmental potential remains underemphasized. Harnessing such capacity for creative development would ameliorate some of the present imbalances in the global IP system in ways that are preferable to purely “negative” strategies.

This article contributes to the literature on IP & Development in several respects. First, the article departs from the current preoccupation with tailoring substantive standards in favor of an approach focused on institutional capabilities.⁹ It argues that developing the institutional norms essential for a functioning IP regime is more important than fine-tuning legislative reforms; rights in statute books are useless unless they can be used in practice. Second, it articulates an à la carte model that assesses marginal gains from investing in specific capacity-building measures.¹⁰ In advancing a sector-specific approach to IP calibration, this article goes beyond the now-commonplace notion that implementation of IP rights should be tailored to national circumstances. It argues for further differentiation both between IP rights—e.g., copyright vs. patent—and also within specific sectors covered by a single right—e.g., educational texts vs. entertainment goods. Finally, the article advocates an openly “nativist” approach to IP implementation.¹¹ Existing capacity-building efforts have emphasized domestic enforcement, which suits the export interests of developed countries. Instead, we should prioritize homegrown innovation and refocus capacity building around the needs of indigenous innovators.

The argument proceeds as follows: Part I sets out the theoretical case for “accentuating the positive” potential of IP rights as a rebalancing strategy within the Development Agenda. Part II-A calls attention to the enormous creative potential that developing countries

9. See *infra* Part II(B)(1).

10. See *infra* Part II(B)(4).

11. See *infra* Part II(B)(1); cf. Sean A. Pager, *Patents on a Shoestring: Making Patent Protection Work for Developing Countries*, 23 GA. ST. U. L. REV. 755, 769 (2007) [hereinafter *Patents on a Shoestring*] (defining “nativist” development strategies as those which seek to stimulate indigenous innovation by prioritizing the interests of domestic innovators).

harbor. Part II-B then provides a theoretical framework for assessing the cost vs. benefits of incremental measures to harness such potential through IP law. Part III-A presents a case study of Nigeria's film industry, "Nollywood," to illustrate the under-appreciated potential for creative industries to drive economic and cultural development. Part III-B then explores the comparative advantages of copyright as a policy tool to develop such homegrown industries. Part IV argues for reorienting capacity building to encourage such creative development by empowering domestic authors and publishers to make more effective use of the global IP system. It proposes specific strategies to "latch on to th[is] affirmative" potential. Part V concludes.

I. THEORIZING BALANCE: THE NEW MATH OF DEVELOPMENT DISCOURSE

As Daniel Gervais explains, "IP & Development" has been the subject of competing discourses of "addition" vs. "subtraction," which parallel the "positive" vs. "negative" approaches identified above.¹² Proponents of the "addition" approach generally advocate aggressive expansion of global IP protection as a "power tool for development" that would spearhead investment and innovation in developing countries.¹³ They call for the international community to support such expansion by providing developing countries "model laws" to ease their integration into the global IP system.¹⁴

Gervais describes how the addition approach became discredited in the aftermath of the TRIPS Agreement.¹⁵ Uncritical acceptance of IP's potential gave way to an opposing subtraction narrative, which saw intellectual property rights functioning primarily as obstacles to development. For subtractionists, less rather than more IP is the answer.¹⁶ They encourage developing countries to make maximal use of the flexibility that global IP treaties allow to mitigate the harms of existing commitments while opposing the adoption of new ones.

12. Gervais, *supra* note 7, at 52–53.

13. *Id.* at 52; KAMIL IDRIS, INTELLECTUAL PROPERTY: A POWER TOOL FOR ECONOMIC GROWTH 2, 3 (2003).

14. See Netanel, *supra* note 5, at 7.

15. Gervais, *supra* note 7, at 52–53; see also Netanel, *supra* note 5, at 8.

16. Gervais, *supra* note 7, at 53.

Subtractionist strategies encompass a wide spectrum, including (a) expansive interpretations of exceptions and limitations; (b) issuance of compulsory licenses; (c) scrutiny of anticompetitive practices; (d) an embrace of alternative paradigms for IP such as open innovation and traditional knowledge rights; and (e) demands for extrinsic concessions such as preferential access to technology on non-market terms.¹⁷

Gervais argues we have now arrived at a third “calibration phase,” which acknowledges the diversity among developing countries and rejects one-size-fits-all solutions.¹⁸ He sees the WIPO Development Agenda as the “poster child” for the calibration approach in which a more nuanced approach to IP protection prevails and adjusts implementation strategies according to the level of development of the individual country.¹⁹

This article aligns with Gervais’s calibration approach. I do not suggest that IP rights should be a priority for every developing country, nor would I claim that the current global IP regime strikes an optimal balance in its substantive mandates.²⁰ Furthermore, I acknowledge that building an innovation ecology around IP rights entails significant challenges. The costs of enforcing exclusive rights typically arrive long before the benefits. Realizing the upside requires sustained effort and investment. Getting laws on the books is the easy part. Putting in place the supporting institutional infrastructure to enable such laws to function is harder. And breeding a culture of legal norms to sustain and develop this legal

17. For a recent exemplar, see generally *The Washington Declaration on Intellectual Property and the Public Interest*, GLOBAL CONG. ON INTELLECTUAL PROP. & THE PUB. INTEREST 2, 3, 6 (2011), available at <http://infojustice.org/wp-content/uploads/2011/09/Washington-Declaration.pdf> [hereinafter *Washington Declaration*].

18. Gervais, *supra* note 7, at 54 (stating that the calibration approach recognizes that differences in developing countries necessitate different implementations of TRIPS).

19. Daniel Gervais, *Foreword* to IMPLEMENTING WIPO’S DEVELOPMENT AGENDA xi–xii (Jeremy DeBeer ed., 2009).

20. For example, deferring the patent-protection mandate for the least developed countries makes sense, as do expanded flexibilities for access to knowledge. The goal of this article is not to reject the subtractionist agenda, as such, but rather to complement it with a “positive” component focused on IP-driven development.

infrastructure is hardest of all.²¹ The extent to which developing countries can justify such implementation efforts will vary according to their individual circumstances. Nonetheless, this article suggests that developing countries would benefit from undertaking these challenges in a selective, cost-effective manner. It advocates an à la carte approach to IP calibration that is sector specific and unabashedly nativist: countries should harness IP law to serve the needs of their own innovators.²²

The reality, however, is that Gervais's comforting account of a "third phase" represented by the calibration model masks a schism in global IP policy that remains, if anything, more polarized than ever. As noted at the outset of this article, developed countries continue to push an aggressive agenda of TRIPS-plus standards.²³ In response, subtractionists have launched a variety of counter-offensives, ranging from the high-profile campaign over access to medicines to the less successful push for an access-to-knowledge ("A2K") treaty.²⁴ Meanwhile, alternative paradigms such as open innovation and traditional knowledge rights continue to garner significant policy attention within the evolving Development Agenda,²⁵ and IP abolitionists press their case with renewed vigor.²⁶ Far from being

21. See generally MART LEESTI & TOM PENGELLY, COMM'N ON INTELLECTUAL PROP. RIGHTS, INSTITUTIONAL ISSUES FOR DEVELOPING COUNTRIES IN INTELLECTUAL PROPERTY POLICYMAKING, ADMINISTRATION & ENFORCEMENT 32–34 (2002), available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan017421.pdf> (describing gaps in expertise and institutional capacity as significant constraints on IP regimes in developing countries).

22. See *infra* notes 134–150 and accompanying text.

23. See Sell, *supra* note 2, at 448 (describing the push by developed countries for higher IP protection standards through bilateral, regional, and plurilateral negotiations).

24. See Amy Kapczynski, THE ACCESS TO KNOWLEDGE MOBILIZATION AND THE NEW POLITICS OF INTELLECTUAL PROPERTY, 117 YALE L.J. 804, 806–07 (2008).

25. *Id.* at 806, 858–59; Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 531–34 (2009).

26. Old-school dependency theorists arguing that IP is inherently against the interests of developing countries have been bolstered by the new abolitionism advanced by digital anarchists. Compare Alan Story, *Burn Berne: Why the Leading International Copyright Convention Must Be Repealed*, 40 HOUS. L. REV. 763, 767–68, 792 (2003) (arguing that international copyright conventions are inherently biased in favor of wealthy corporate copyright owners against the economic and access-to-knowledge interests of copyright users in developing

assured of any consensus, developing countries are therefore buffeted by conflicting agendas and competing narratives. Accepting the calibration model hardly resolves the tensions between such rival visions of IP law. It merely brings us back to the challenge noted above: how to define and operationalize “balance.”

Of the two extremes, the developed world’s TRIPS-plus agenda has attracted the greatest critique. A wealth of commentary has savaged the case for ratcheting upward global standards, accusing its proponents of dodgy statistics, misleading/self-serving arguments, and undemocratic abuses of process.²⁷ Such “IP maximalism” is easy to caricature as the product of corporate monopolists whose protectionist agenda would steal from poor countries to make rich ones richer.²⁸ The result has been a polarized North–South discourse in which the interests of developing countries appear to align with IP skeptics.

In previous work, I have criticized maximalist conceptions of IP rights as failing to take into account the full array of stakeholder

countries), with Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, 4 FIRST MONDAY (1999), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/684/594> (arguing digital networks will underwrite the triumph of anarchist production over proprietary models based on IP rights). A burgeoning literature on IP’s “negative spaces” has also emerged. See Elizabeth L. Rosenblatt, *A Theory of IP’s Negative Space*, 34 COLUM. J.L. & ARTS 317, 319–20 (2011) (describing how innovation can flourish within creative communities such as open-source software in the absence of intellectual property protections). IP abolitionists even have their own political party in Europe. See Francis Gurry, *Copyright in the Digital Environment: Restoring the Balance*, 35 COLUM. J.L. & ARTS 1, 5 (2011) (describing the emergence of the Pirate Party to contest elections on the basis of abolition or radical reform of intellectual property and copyright laws).

27. See Sell, *supra* note 2, at 459–61 (claiming that the IP enforcement agenda’s platform is characterized by “strategic obfuscation”); Yu, *A Tale of Two Development Agendas*, *supra* note 25, at 555 (critiquing IP maximalist initiatives for their lack of transparency); see also Joe Karaganis, *Rethinking Piracy*, in MEDIA PIRACY IN EMERGING ECONOMIES 1, 4–18 (Joe Karaganis ed., 2011) (noting that the record and movie industries have used erroneous or unsupported figures in documenting financial losses to piracy).

28. See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1353–54 (2004) (criticizing the international IP regime for establishing asymmetric standards of protection that facilitate the transfer of wealth from poorer countries to richer countries).

interests, including those of developing countries.²⁹ I also have proposed concrete measures to achieve more balanced outcomes.³⁰ In this article, however, I want to shift targets to warn of the reciprocal danger posed by the subtractionist agendas that have mobilized in opposition. Such “negative” strategies approach IP rights as a threat instead of an opportunity. Viewing developing countries as consumers rather than producers of intellectual property, they advance an unduly narrow vision of “balance” in which the development interest inheres in maximizing the negative spaces within the IP system.

As an exemplar of this new subtractionist agenda, this article examines the so-called “Washington Declaration.” An international coalition of academics, activists, and civil society representatives promulgated this manifesto in 2011, purporting to catalogue the public interest in IP law.³¹ While the Declaration lacks legal force, it presents a broad synthesis of IP-related policy concerns, which, at last count, has attracted more than 900 signatories.³² As such, it offers a snapshot of current thinking from the self-styled “public interest” perspective on IP law.

The crux of the Washington Declaration lies in its cogent warning against the “risks of intellectual property maximalism.”³³ As a reaction against the TRIPS-plus agenda being pushed elsewhere, the Declaration’s emphasis on the costs rather than benefits of IP rights is understandable. Moreover, to its credit, the Declaration does

29. See *A Link Too Far?*, *supra* note 6, at 244 (identifying public choice concerns in international IP negotiations that may lead to suboptimal outcomes that permanently disadvantage developing nations).

30. See *id.* at 268–270 (proposing procedural reforms to restrain future IP harmonization); *Patents on a Shoestring*, *supra* note 11, at 796–97 (suggesting that developing countries price patent fees to shift the economic burdens of protection onto rich countries).

31. *Washington Declaration*, *supra* note 17. I participated in Global Congress held at American University Washington College of Law in August 2011, which led to the Declaration, and I agreed with enough of its recommendations to add my name to the signatories. Accordingly, this article should be viewed more as a “concurring opinion” than a dissent.

32. See generally *The Washington Declaration on Intellectual Property and the Public Interest*, INFOJUSTICE.ORG, <http://infojustice.org/washington-declaration> (last visited Aug. 23, 2012) (showing signatories).

33. *Washington Declaration*, *supra* note 17, at 1.

acknowledge that “[i]ntellectual property can promote innovation, creativity and cultural development.”³⁴ In other words, the Declaration recognizes that properly tailored IP rights themselves advance important public interests. Rather than a global indictment of IP law *a priori*, the Declaration correctly identifies the concern over IP law as being merely “too much of a good thing.”³⁵

My concern, however, is that in proposing to “put IP law in its place”³⁶ through a vigorous and comprehensive pruning, the Washington Declaration constructs a dichotomy between “private vs. public interest” in which the public interest appears almost synonymous with the public domain. While the Declaration pays lip service to the “importance of reasonable enforcement of properly-bounded intellectual property rights,”³⁷ its substantive proposals contemplate approaching this promised land of “reasonable IP” entirely through an agenda of subtraction.

Putting IP law in its place by cutting it down to size makes sense if we assume a status quo of “too much” IP. Yet this diagnosis only rings true in the aggregate. The real picture is more complicated. Assessing “reasonableness” and “balance” in the current IP system requires not just consideration of the substantive rights presently enacted but also examination of how these rights are actually being used. In many contexts, the problem may be “not enough” IP rather than “too much.” Because IP rights themselves serve important public interests, we should be concerned about imbalances in both directions: *under*protection, as well overprotection.

Subtractionist agendas respond to the perception that rightsholders are exploiting private entitlements at the expense of the public interest. At the same time, for many authors and inventors, the benefits of IP protection remain troublingly out of reach. By seeking to “eliminate the negative” side of IP rights, without considering ways to “latch on to the[ir] affirmative” yet unrealized potential, subtractionists address only one side of the public-interest equation. They fail to consider the public interest in equalizing the

34. *Id.* I would add economic development to this list of benefits of IP protection.

35. *Id.*

36. *See id.* at 2.

37. *Id.* at 5.

opportunities to benefit from the global IP system.

It is important to recognize that “accentuating the positive” contribution of IP rights in this manner need *not* entail ratcheting up substantive standards. Indeed, such a “positive” agenda is entirely consistent with efforts to resist or roll back IP maximalism. Rather than expanding rights, this version of IP positivism focuses on expanding their effectiveness on behalf of marginalized communities through capacity building. By harnessing IP rights on behalf of a broader array of stakeholders, we would ensure a more equitable distribution of benefits.

Concerns over access barriers are pervasive even in developed countries. A recurrent criticism of IP regimes is that they discriminate against independent authors, inventors, and start-up businesses.³⁸ The U.S. Copyright Office’s recent proposal for small claims dispute resolution responds to such concerns explicitly.³⁹ Similar policy concerns function in the realm of patent law.⁴⁰ For example, the U.S. Patent Office’s reduced fee structure for small entities has the aim of encouraging independent inventors and entrepreneurs.⁴¹ Other jurisdictions tackle the problem by providing

38. See, e.g., Steven T. Lowe, *Death of Copyright*, 28 COMPUTER & INTERNET LAW. 1, 3–5 (2011) (describing how big studios infringe the rights of screenwriters with impunity); Vivek Wadhwa, *Where Are the Jobs? Ask the Patent Trolls*, WASH. POST, May 7, 2012, http://www.washingtonpost.com/national/on-innovations/where-are-the-jobs-ask-the-patent-trolls/2012/05/07/gIQAdIE08T_story.html (describing how software patents disproportionately deter innovation by start-ups); cf. WIPO Development Agenda, *supra* note 7 annex I, at 1 (calling for “particular emphasis on the needs of small and medium-sized enterprises”).

39. See *Remedies for Copyright Small Claims*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/smallclaims/> (last visited Aug. 15, 2012) (describing the need for less expensive, more efficient mechanisms to adjudicate small copyright claims).

40. See, e.g., Jason Rantanen et al., *America Invents, More or Less?*, 160 U. PA. L. REV. 229, 232 (2012) (describing a concern that a shift to a first-to-file patent system will harm small inventors by favoring firms with more resources to draft and file applications quickly); see also *Small & Medium-Sized Enterprises, NO SOFTWARE PATENTS!*, <http://www.nosoftwarepatents.com/en/m/dangers/sme.html> (last visited Aug. 12, 2012) (“[T]he patent system in general has a reputation for increasingly putting [small and medium-sized entities] at a disadvantage . . .”).

41. See *Patents on a Shoestring*, *supra* note 11, at 798 (suggesting that developing countries would benefit from similar tiered pricing schemes that favor

rights in sub-patentable innovation, allowing inventors to bypass the more expensive and cumbersome patent system.⁴² My purpose here is not to advocate the merits of any particular proposal; I merely want to suggest that a public interest agenda can—and arguably should—include measures to ensure more equitable access to IP protection, rather than focusing solely on preserving access to the public domain.

The potential benefits of encouraging broader utilization of existing IP regimes carry particular force when it comes to developing countries. In many such countries, IP rights exist more on paper than in actual practice.⁴³ For domestic authors and inventors denied the benefits of a functioning IP regime, underprotection is a far greater concern than overprotection.

Because the foundations of an intellectual property system remain largely unsettled, to speak of “putting IP in its place” in the development context amounts to a virtual non-sequitur. IP rights function in developed economies against a backdrop of established mechanisms for acquisition, licensure, and enforcement. However, in developing countries, such baseline norms cannot be taken for granted. Therefore, calibrating the appropriate “level” of IP protection requires attention not just to substantive rights but also to the way norms and institutions function in context.

Developing countries are justifiably skeptical of IP rights. Their potential as a “power tool” for development has often been oversold and the difficulties in realizing such potential overlooked.⁴⁴

domestic inventors).

42. J.H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 VAND. L. REV. 1743, 1754 (2000) (proposing a liability rule regime to effectively create “portable trade secrets”). See generally Mark D. Janis, *Second Tier Patent Protection*, 40 HARV. INT'L L.J. 151, 151–52 (1999) (surveying “petty patent” models, which feature short-term protection based on less rigorous protection standards, without prior examination of substantive validity).

43. See JEREMY DE BEER & CHIDI OGUAMANAM, INT'L CTR. FOR TRADE & SUSTAINABLE DEV., INTELLECTUAL PROPERTY TRAINING AND EDUCATION: A DEVELOPMENT PERSPECTIVE 2 (ICTSD Issue Paper No. 31, 2010), available at <http://ictsd.org/downloads/2010/11/iptrainingandeducation.pdf> (stating that “in developing countries, there is a wide gulf between IP laws on the book and the day-to-day realities”).

44. See *id.* (criticizing “simplistic and false” conceptions of IP’s potential).

Proponents of global IP rights have placed an exaggerated and unrealistic emphasis on attracting foreign investment and technology transfer.⁴⁵ Opponents focus on the burden of royalties extracted by foreign rightsholders.⁴⁶ Such trade-focused arguments have arguably eclipsed the primary rationale for IP law: namely, encouraging innovation at home.

Rather than rejecting IP rights as an alien appendage foisted upon them by external pressure, developing countries should consider their positive, yet unrealized, potential to function as engines of domestic innovation. Authors and inventors in developing countries deserve the same opportunity, enshrined in human rights law, to benefit from their creativity as their developed-world counterparts.⁴⁷ Moreover, there are compelling reasons for supporting homegrown innovation as a pathway to sustainable development; increased technology transfer from developed countries is no substitute.⁴⁸

Simplistic expectations that IP rights will serve as a magical cure-all should be rejected. However, reflexive opposition is equally unproductive. Rather, countries should explore the ways in which IP rights can advance their national interest. Even if IP rights appear a losing proposition overall, this should not preclude investments in capacity building in specific sectors of the IP system where prospects appear favorable. This article argues that copyright-driven development of domestic creative industries presents a strong candidate for realizing such net benefits.

45. *See id.* at 13.

46. *See* Chander & Sunder, *supra* note 28, at 1354 (noting that, in 1999, developing countries paid \$7.5 billion more in royalties than the royalties they received, while the United States experienced an \$8 billion increase in its surplus of royalties related to IP transactions between 1991 and 2001).

47. *Cf.* U.N. ESCOR, 35th Sess., U.N. Doc. E/C.12/GC/17 at 3, 5 (Jan 12, 2006) (describing the human right of authors to receive adequate remuneration).

48. Homegrown innovation is more likely to be adapted to local needs in ways that yield positive externalities and result in sustainable development. By contrast, imported technology may arrive without the tacit know-how required to utilize it effectively, and, if tied to foreign investment, its continued development remains hostage to the fickle priorities of foreign capital. *See* Peter Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 376 (2006). Engaging domestic knowledge workers in the production of innovation also helps to prevent brain drain. *Cf.* WIPO Development Agenda, *supra* note 7, at 5 (requesting that WIPO assist developing countries in efforts to prevent brain drain).

Skeptics may question the ability of developing countries to compete in global media markets or cast doubt on their administrative capacity to implement effective IP regimes. Concerns over lack of technological capacity and market access bolster such doubts, as does the belief that IP rights are better suited to developed economies than developing ones. Given the empty promises that fueled pro-IP agendas in the past, such skepticism is to be expected. Rhetoric about incentivizing innovation has too often served to mask corporate interests. Is this case any different?

Arguably, yes, for three reasons. First, models of IP development driven by FDI/tech transfer models were inherently bounded and destined to disappoint. As we now know, IP is only one factor among multiple criteria determining investment, and there are only finite pools of foreign capital to allocate in an often fickle investment climate.⁴⁹ By contrast, creativity is a boundless and universal resource. Developing countries do not need to compete against other states to garner the benefits of homegrown innovation.

Second, the incremental investments entailed to help domestic innovators tap into the global IP system can be quite modest. Developing countries can take advantage of sunk costs as well as piggyback on existing resources provided by others. In some cases, merely providing informational resources can yield tangible benefits.

Third, developing countries do not need to undertake comprehensive reforms. The approach advocated here is explicitly selective and opportunistic. Developing countries can focus their capacity-building investments on sectors where the prospects appear most favorable and pursue subtractionist strategies elsewhere.

Such a calibrated approach to IP & Development would allow developing countries to balance their interests as both producers and consumers of innovation in a blend of short-term and long-term strategies. By contrast, purely subtractionist approaches neglect the potential for developing countries to realize an upside from IP rights and fail to acknowledge the *de facto* underprotection inherent in the

49. See Gervais, *supra* note 7, at 57–58 (noting that other factors determine foreign direct investment, such as the trade regime, tax and competition laws, geopolitical and commercial forces, market liberalization and deregulation, technology development policies, competition regimes, and corruption levels).

status quo. Such one-sided visions of the “development interest” reinforce the trope that developing countries do not produce the sort of innovation that IP law is designed to incentivize.⁵⁰ As Part II explains, the creative potential of the developing world remains both under-recognized and under-exploited. Justified skepticism about IP law should not blind us to the value of incremental steps to encourage its development.

II. EXPLORING IP’S UPSIDE

A. IS CREATIVITY DEAD IN THE DEVELOPING WORLD?

We normally think about intellectual property as the province of giant Western entities—Hollywood, the RIAA, BSA, IFPI, Pharma—who collectively produce and control the world’s most valuable forms of innovation. Such industry groups and their corporate members have legions of well-paid lawyers and lobbyists at their beck-and-call and can direct vast resources to administer and enforce their IP rights. By contrast, the target of their enforcement efforts are many in number but often small in size—college students engaging in peer-to-peer file sharing and shadowy vendors peddling illicit wares in back alleys or on “rogue” websites. Such apparent Davids attract sympathy in their battle against the Goliaths of Big Content/Big Tech. Yet, for creators in developing countries, the struggle to exploit their intellectual property reverses this calculus, with rightsholders cast more in the role of David than Goliath.

That such struggles occur at all is rarely acknowledged. From the standpoint of Western commentators and policy-makers, developing countries figure in IP enforcement debates primarily as centers of piracy, rather than as its victims. Discourse on global intellectual property rights in the developed world centers overwhelmingly on efforts to crack down on such “pirate” nations.⁵¹ Under pressure from industry, Western governments have made the prevention of intellectual property “theft” a foreign policy priority, with global norm-setting in intellectual property law focused on ever more

50. Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J. 79, 79, 136 (2008).

51. See Karaganis, *supra* note 27, at 8.

draconian enforcement. Such efforts may be framed in lofty rhetoric about incentivizing global innovation, but their subtext is clear: we need to stop people “over there” from stealing the valuable intellectual property that we make “here.”⁵²

Conversely, discourse from the development standpoint often remains preoccupied with the inequalities in the global IP regime. The specter of colonialism hovers, as anti-imperialist invective flows freely.⁵³ Efforts to advance IP norms are dismissed as rent-seeking on behalf of Disney and Pfizer. The acrimonious history of the TRIPS Agreement makes such ingrained suspicions understandable.⁵⁴ Moreover, TRIPS's status as an annex to the World Trade Organization Treaty has conditioned developing countries to approach IP law primarily as a trade issue.⁵⁵ The simplistic portrayal of IP rights as “royalty transfer mechanisms” similarly encourages a focus on mitigating losses or extracting offsetting compensation while blinding policy-makers to possible upsides.⁵⁶

52. See, e.g., *The Truth About Rogue Sites Legislation: Facts and Fiction*, DIR'S GUILD OF AM. (Jan. 17, 2012), <http://www.dga.org/News/Guild-News/2012/January-2012/The-Truth-About-Rogue-Sites-Legislation.aspx> (claiming that piracy facilitated by rogue websites overseas jeopardizes U.S. jobs).

53. See, e.g., Anthony R. Noss, *Note: In Defense of TRIPS: It Only Seems Imperialistic*, 1 CYBARIS INTELL. PROP. L. REV. 154, 156 (2010) (responding to widespread criticisms of the WTO's flagship IP treaty as imperialistic); Peter K. Yu, *Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 580 (2002) (citing similar criticism).

54. See Yu, *TRIPS and Its Discontents*, *supra* note 48, at 373–74 (describing the view of TRIPS Agreement as a coercive, imperialistic instrument that turns the WTO into a rent collector for multinational corporations). Rather than being freely consented to in a stand-alone treaty, TRIPS's mandatory minimum standards arrived as a non-negotiable pillar of WTO membership. IPR is viewed thus as an “unconscionable bargain” imposed under duress for the benefit of external rightsholders. See *A Link Too Far?*, *supra* note 6, at 244–45, 249.

55. The acronym “TRIPS” itself advertises a focus on “trade-related aspects” of IP protection.

56. Schultz & van Gelder, *supra* note 50, at 89–90 (describing how policy-makers ignore the creative potential harbored within developing nations); see Robert Sherwood, *Intellectual Property: A Chip Withheld in Error*, in *COMPETITIVE STRATEGIES FOR THE PROTECTION OF INTELLECTUAL PROPERTY* 73, 82 (Owen Lippert ed., 1999) (suggesting that expanded IP protections could actually benefit developing nations).

As critical commentators hammer home the message that IP rights are irredeemably biased toward Western interests,⁵⁷ the notion that such rights might stimulate indigenous innovation loses credibility.⁵⁸ Even IP boosters inadvertently reinforce the notion that technology is something that must be “transferred” from abroad.⁵⁹ As a result, policy-makers in developing countries gravitate toward alternative paradigms such as *sui generis* protection for traditional knowledge, an information commodity in which they supposedly hold a comparative advantage.⁶⁰

Yet, is the North–South “innovation divide” really so intractable? Even practitioners of traditional culture continue to innovate in ways that stand to benefit from conventional IP protection.⁶¹ Moreover,

57. See, e.g., Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J.L. & JURISPRUDENCE 249, 285 (1993) (describing existing IP doctrine as reflecting “particular interested fictions emergent from a history of colonialism that has disempowered most of the peoples on this planet”); Angela Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 177–78 (2000) (criticizing “flagrant dismissal of non-Western viewpoints in . . . interpretation of copyright law”).

58. Incentive theories are dismissed as just another fairy tale proffered by Disney. Cf. COPYRIGHT AND OTHER FAIRY TALES: HANS CHRISTIAN ANDERSEN AND THE COMMODIFICATION OF CREATIVITY 9-13 (Helle Porsdam ed., 2006) (arguing that copyright law encourages corporate commodification of culture in ways that impoverish the public domain and inhibit innovation).

59. Schultz & van Gelder, *supra* note 50, at 83–85.

60. Indeed, it is telling that the Washington Declaration’s one and only call for *increased* IP protection concerns traditional knowledge. Preserving traditional knowledge may be important, but it does nothing to equip developing countries to compete in the information economy of the future. Moreover, IP rights should not be viewed as antithetical to traditional knowledge; rather, properly regulated, they offer the principal means by which source communities can unlock its value. Sean Pager, *Folklore 2.0: Preservation Through Innovation*, 2012 UTAH L. REV. (forthcoming 2012) [hereinafter *Folklore 2.0*] (manuscript on file with American University International Law Review).

61. See Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 L. & CONTEMP. PROBS. 97, 110–12 (2007) (documenting innovation by cultural practitioners of traditional handicrafts and arguing that IP protection could benefit such practitioners). Furthermore, encouraging innovation is not the only rationale supporting IP rights. Trademark law, for example, can be justified based on consumer protection, a rationale that applies with particular force in developing countries where alternative safeguards are often deficient. See Marshall Leaffer, *The New World of International Trademark Law*, 2 MARQ. INTELL. PROP. L. REV. 1, 6 (1998) (expressing concern that consumers in developing countries could be

innovation in the developing world is hardly confined to the realm of tradition. Human creativity is a universal resource. People in developing countries are just as richly endowed in artistic talent, imagination, and inventive spirit as their developed-world counterparts.⁶² Their need for practical problem-solving and self-expression provides just as powerful drivers. That such creative impulses have not hitherto been effectively channeled into commodified forms valued by the global IP system does not mean IP is necessarily a losing proposition.

The biggest source of pessimism about Southern innovative capacity concerns disparities in the patent system. Schultz & van Gelder have noted the tendency in IP & Development discourse to conflate IP protection entirely with patents.⁶³ Such conflation is unfortunate, because patents present by far the least favorable prospects. Patents are expensive and difficult to procure, they require a high bar of inventiveness, and merely to compete often requires access to sophisticated equipment and know-how.⁶⁴ Commercializing patented technology imposes further hurdles.⁶⁵ As such, the benefits of global patent protection are undeniably skewed in favor of technologically advanced countries in the developed world.⁶⁶

Yet, even here, the case for pessimism should be qualified. Developing countries are hardly monolithic. Some developing countries have technology sectors that already compete at the forefront of global innovation, and others are not far behind.⁶⁷ Even

defrauded or exposed to health risks by counterfeit goods).

62. Sherwood, *supra* note 56, at 74, 76.

63. Schultz & van Gender, *supra* note 50, at 86.

64. *See Patents on a Shoestring*, *supra* note 11, at 757, 765.

65. *See* Chander & Sunder, *supra* note 28, at 1351–52 (describing disadvantages that developing countries face competing in global patent markets).

66. *Cf.* Moshaid Khan et al., WIPO, World Patent Report: A Statistical Review 7, 16 (2008) (showing that a handful of developed nations dominate global patent procurement).

67. *See id.* at 16, 29 (noting that China now ranks in the top ten countries in global patent procurement); Shamnad Basheer & Annalisa Primi, *The WIPO Development Agenda: Factoring in the “Technologically Proficient” Developing Countries*, in IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION’S DEVELOPMENT AGENDA, 100, 101–02 (Jeremy de Beer ed., 2009) (criticizing development discourse based on simplistic dichotomy of developing vs. developed countries as failing to account for the growing

countries that lack sophisticated industries may produce cutting-edge academic research that, with more effective technology transfer mechanisms, could be patented and commercialized.⁶⁸

Moreover, innovation comes in many forms. Useful innovation can emerge even without relying on advanced technology, as the “frugal innovation” movement demonstrates.⁶⁹ Such incremental improvements often serve to tailor existing technology to local needs.⁷⁰ Because it is adapted to the local context, such homegrown innovation offers advantages to technology produced abroad, which proactive policies can encourage.⁷¹ Even developing countries that do not stand to benefit from patent protection should therefore consider alternative means to foster such innovation, whether through utility

technological sophistication of developing nations such as India, China, Brazil, and Russia).

68. Catherine Saez, *Developing Countries Need Help to Get Research Results Patented, IP Proponent Says*, INTELL. PROP. WATCH (July 5, 2012, 2:49 PM), <http://www.ip-watch.org/2011/05/10/developing-countries-need-help-to-get-research-results-patented-ip-proponent-says/> (examining a case study in the Philippines).

69. Philipp Aerni & Dominik Rüeegg, *Making Use of E-Mentoring to Support Innovative Entrepreneurs in Africa*, in WORLD TRADE FORUM, TRADE GOVERNANCE IN THE DIGITAL AGE 436, 438 (Mira Burri & Thomas Cottier eds., 2012) (describing how “frugal innovation” caters to the needs of low-budget consumers through “simple, low-energy, reusable and often recyclable” technologies); Martin Labbe, *Harnessing Information and Communication Technologies for Development: The Trade-Related Technical Assistance Perspective*, in WORLD TRADE FORUM, TRADE GOVERNANCE IN THE DIGITAL AGE 421, 424 (Mira Burri & Thomas Cottier eds., 2012) (noting that frugal innovation such as inexpensive smartphones will extend the benefits of digitally networked technology even to the least developed nations); *Asian Innovation: Frugal Ideas Are Spreading from East to West*, ECONOMIST, Mar. 24, 2012, <http://economist.com/node/21551028> (explaining how Asian engineers “re-imagine” Western products in a manner that is cost-efficient and thereby affordable for “ordinary” Asians).

70. Sherwood, *supra* note 56, at 79 (documenting how ceramic companies in Ecuador make innovations in their products and processes in response to local needs).

71. *Id.* at 82 (arguing that homegrown innovation can be advanced through the adoption of enhanced IP protection); Robert Sherwood et al., *Promotion of Inventiveness in Developing Countries Through a More Advanced Patent Administration*, 39 IDEA 473, 478 (1999) [hereinafter *Promotion of Inventiveness*] (asserting that developing countries should promote homegrown innovation as a driver of economic growth, “even to the point of subsidizing the cost of patent acquisition by individual (local) inventors”).

model protection, trade secret law, or *sui generis* schemes.⁷² Even trademark law and geographical indications protection have a place in innovation policy.⁷³

The notion of an “innovation divide” is even less supportable when one moves to the realm of copyright law. Global copyright regimes impose far lower entry barriers than patent. Worldwide protection is available immediately without any formalities upon fixation of a work, and only a modicum of originality is needed.⁷⁴ Production costs and distribution bottlenecks are used to restrict entry to the commercial content industries. However, such barriers have fallen rapidly in recent decades.⁷⁵

To be sure, production of copyrighted content as a global commodity remains skewed in favor of developed countries.⁷⁶ Yet developing countries increasingly figure not just as consumers of imported media (whether authorized or not) but also as producers

72. KHAN ET AL., *supra* note 66, at 25–26 (noting utility model regimes are disproportionately relied on by domestic inventors); Robert Sherwood, *Trade Secret Protection: Help for a Treacherous Journey*, 48 WASHBURN L.J. 67, 104 (2008) (describing benefits of trade secret protection). Experimentation in this realm offers profitable terrain for an opportunistic nativism that tailors protection to maximize local interests. *See Patents on a Shoestring*, *supra* note 11, at 802–806 (recommending developing countries consider *sui generis* protection schemes specifically tailored to domestic inventors).

73. *See* Chander & Sunder, *supra* note 28, at 1365.

74. *See* Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, 1161 U.N.T.S. 3 [hereinafter Berne Convention] (stipulating that the rights in literary and artistic works are not subject to any formality); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991) (stating that originality does not require that facts be presented in “an innovative or surprising way”).

75. *See Folklore 2.0*, *supra* note 60 (manuscript at 17, 23) (analyzing how lowered barriers to entry have enabled an exponential growth of Nigeria's film industry).

76. *See, e.g.*, UNCTAD & UNDP, *Creative Economy: A Feasible Development Option*, 145, U.N. Doc. UNCTAD/DITC/TAB/2010/3 (2010) [hereinafter UNCTAD Report] (stating that the international music trade is “dominated by developed economies,” which account for about eighty to ninety percent of world trade in music goods); Sean A. Pager, *Beyond Culture vs. Commerce: Decentralizing Cultural Protection to Promote Diversity Through Trade*, 31 NW. J. INT'L L. & BUS. 63, 66 (2011) [hereinafter *Beyond Culture vs. Commerce*] (noting that Hollywood commands an eighty-percent share of the global box office, raising the concern that American popular culture threatens a “mental colonization” that would “enslave the rest of the world to American thought and values”).

and exporters. The creative industries they harbor have become important drivers of economic growth.⁷⁷ India's Bollywood, long dominant in domestic film markets, has in recent decades expanded its distribution to global audiences.⁷⁸ Nigeria's video film industry—"Nollywood"—has emerged as the dominant player in Africa.⁷⁹ Egyptian films are watched across the Arab world.⁸⁰ Latin American *telenovelas* and Turkish soap operas command their own global following.⁸¹ Meanwhile, the world music and world beat circuit has become one of the music industry's fastest-growing genres.⁸² From Jamaican reggae and dancehall to West African blues, a diverse array of artists has claimed the mantle of global superstardom. Behind iconic names such as Bob Marley, Youssou Ndour, and Ali Farka Touré lies a much broader array of musical talent from Tuvan throat-singers to Tuareg nomads, who cater both to newly affluent consumers at home and regional and niche audiences abroad.⁸³

Publishing output in developing countries has also dramatically expanded, often exploiting new media to reinvigorate traditional

77. UNCTAD Report, *supra* note 76, at 19–22.

78. See *Beyond Culture vs. Commerce*, *supra* note 76, at 118 (stating that Bollywood's overseas box office revenues increased tenfold between 1981 and 2001, and have more than doubled since).

79. *Folklore 2.0*, *supra* note 60 (manuscript at 15).

80. UNCTAD Report, *supra* note 76, at 220 (reporting that more than seventy-five percent of the 4,000 short and feature-length films made in the Arab world since 1908 have come from the Egyptian film industry, which during its peak produced as many as seventy feature films a year).

81. J.P. Singh, *Culture or Commerce? A Comparative Assessment of International Interactions and Developing Countries at UNESCO, WTO, and Beyond*, 8 INT'L STUD. PERSP. 36, 49 (2007) (asserting that Latin American *telenovelas* are now watched by 2 billion people worldwide).

82. UNCTAD Report, *supra* note 76, at 59–60.

83. See, e.g., Singh, *supra* note 81, at 51 (describing proliferation of homegrown creative industries in emerging markets); Diana Barrowclough & Zeljka Kozul-Wright, *Voice, Choice and Diversity*, in CREATIVE INDUSTRIES AND DEVELOPING COUNTRIES: VOICE, CHOICE AND ECONOMIC GROWTH 17 (Diana Barrowclough & Zeljka Kozul-Wright eds., 2007) (noting rising consumption of entertainment goods by emerging middle classes in the developing world); Anne S. Lewis, *Finding Their Tuva*, AUSTIN CHRON. (Oct. 10, 2003), <http://www.austinchronicle.com/screens/2003-10-10/181055/> (chronicling the musical connection between a San Franciscan blues musician and throat-singers in Russia's Autonomous Republic of Tuva).

genres.⁸⁴ From cartoons based on Indian legends and mythology to a Kenyan youth comic-cum-radio show, what unites these works is their ability to tap new markets of consumers hungry for innovative local content.⁸⁵ Such diverse output reaffirms the world's rich cultural heritage and rebuts outdated narratives of cultural imperialism. If the economic benefits of such creative output have not always been shared equitably, such concerns only underscore the need to strengthen domestic commercial capacity.⁸⁶ Moreover, by giving voice to fresh perspectives and rediscovered traditions, the value of these emerging creative industries transcends their economic bottom line.⁸⁷ Their success has become a source of pride and identity and a locus of democratic discourse.⁸⁸

84. See, e.g., OCTAVIO KULESZ, ALLIANCE INTERNACIONAL DES ÉDITEURS INDÉPENDANTS, DIGITAL PUBLISHING IN DEVELOPING COUNTRIES 89, 124 (2010) (describing how the growth of digital networks in China has led to the emergence of online literature portals that facilitate new genres of expression); *The East Is Read: The Internet Is Changing Chinese Literature*, ECONOMIST, Mar. 10, 2012, <http://www.economist.com/node/21549989> (describing how, in China, the recent outpouring of online fiction has come to include both “newly popular online genres, such as romance,” and fiction possessing traditional “Chinese characteristics,” such as grave-robbing stories).

85. Vikas Bajaj, *In India, New Life for Comic Books as TV Cartoons*, N.Y. TIMES, July 20, 2009, <http://www.nytimes.com/2009/07/20/business/global/20comics.html?pagewanted=all> (describing how multimedia platforms have given new life to Indian comic strips based on historical and religious traditions); Tristan McConnell, *Shujaaz: More Than Just a Comic Book*, GLOBAL POST (Nov. 17, 2011, 11:00 AM), <http://www.globalpost.com/dispatches/globalpost-blogs/africa-emerges/shujaaz-more-just-comic-book> (describing how distribution of *Shujaaz*, a Kenyan comic strip, spans platforms ranging from leading national newspapers to the radio and the Internet); Emily Wither, *Kenyan Youth Find Their Superhero*, CNN (Apr. 12, 2011), http://articles.cnn.com/2011-04-21/world/kenya.radio.comic.shujaaz_1_kenyan-youth-radio-show-bright-ideas?_s=PM:WORLD (describing how Boyie, a character on the *Shujaaz* radio show, educates the program's young listeners on such everyday topics as farming, making money, human rights, and “staying out of trouble”).

86. See J. Michael Finger, *Introduction* to POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 2–4 (J. Michael Finger & Philip Schuler eds., 2004) (arguing that improving domestic capacity in developing countries to empower indigenous innovation would lead to a more balanced distribution of benefits from global IP rights).

87. Barrowclough & Kozul-Wright, *supra* note 83, at 12, 30; *Folklore 2.0*, *supra* note 60.

88. Sean Pager, *Digital Content Production in Nigeria and Brazil: A Case for Cultural Optimism?*, in TRANSNATIONAL CULTURE IN THE INTERNET AGE 262, 273

Underlying this diversification of global media flows are powerful forces rooted in technology and globalization. Digital technologies have dramatically altered the economics of cultural industries. Even last-generation technology, available in inexpensive, off-the-shelf packages, can provide dramatic efficiency gains in the production and distribution of creative content.⁸⁹ Digital media enable decentralized patterns of distribution, allowing producers to reach isolated or rural audiences long excluded from consumption of analog media.⁹⁰ “By lowering barriers to entry, such technologies allow creative industries to flourish in developing countries in ways that were unimaginable decades earlier.”⁹¹

Globalization has also fostered consumer interest in exploring the world’s diverse cultural traditions. Global migration patterns have distributed pockets of diverse populations with a particular interest in maintaining ties to the cultural production of their homelands.⁹²

(Sean A. Pager & Adam Candeub eds., forthcoming 2012) [hereinafter *Digital Content Production*] (“By providing members of . . . historically excluded groups the technical skills and equipment to create, record, and publish original digital content, [the Brazilian Culture Points program] confer[s] recognition, pride, and a sense of belonging to the multiple subcultures that make up Brazil’s incredibly diverse populace.”); see also Singh, *supra* note 81, at 51 (explaining that creative artists in developing countries have played a major role in “destabilizing existing power relations,” such as in the case of albino singer Salif Keita, who has “explicitly challenged Malian cultural notions that viewed albinos as bearers of evil”).

89. See *Beyond Culture vs. Commerce*, *supra* note 76, at 122 (detailing how the lower-cost thresholds for digital filmmaking “make it possible to recoup investments on a much smaller revenue than a few decades prior,” as exemplified by Nigeria’s “Nollywood” film industry and its reliance on home video distribution).

90. Digital technologies also enable outsourcing of cultural production by artists in the developed world to lower-cost producers in developing countries. Animation work and music videos are increasingly done in this manner. See Ben Sisario, *Needing an Artist, and Calling on India*, N.Y. TIMES, Feb. 16, 2012, <http://www.nytimes.com/2012/02/17/business/media/outsourcing-extends-to-creative-work.html> (describing how independent musician Drew Smith contracted a dance school in India to create a music video for his song “Smoke and Mirrors,” which cost a mere \$2,000 to produce and received more than 179,000 views on the Internet).

91. *Digital Content Production*, *supra* note 88, at 266.

92. See Singh, *supra* note 81, at 49–50 (stating that Bollywood, India’s film industry, “now considers South Asian diaspora markets as a major source of revenue”); Bajaj, *supra* note 85 (stating that half of the purchases from Indian

Moreover, digital technology has enabled new decentralized pathways for content distribution, allowing producers to tap such “diversity markets” through physical disks (CDs, DVDs) offered in ethnic groceries, or via online platforms, both specialized and general (YouTube, Facebook).⁹³

Yet the story of these emerging creative industries is as much about unrealized potential as it is about commercial success. Even as digital technologies enable new forms of production and distribution that unlock markets and empower creative expression, they also undermine content producers’ ability to control and profit from such distribution. Artists in developing countries confront market conditions in which commercial piracy is pervasive. Unable to recoup their creative investments, fledgling industries struggle for survival. The developmental potential such creative industries represent remains hamstrung by this persistent market failure.⁹⁴

Creative industries in developing countries are hardly unique in facing challenges from digital piracy. In this respect, their position mirrors that of their Big Content counterparts in the West. Yet their positions are hardly symmetrical when it comes to copyright enforcement. Western multinationals can amortize losses to piracy across multiple markets and rely on branding and other alternative revenue sources to recoup their investments. Content producers in developing countries are typically small entities with far more limited resources and clout.⁹⁵

publishing company Amar Chitra Katha’s website, featuring “Indian-style Aesop’s fables, religious parables, and biographies of historical figures,” are shipped abroad to Indian immigrants in the United States hoping to use the books to help connect their children to their cultural roots).

93. *Beyond Culture vs. Commerce*, *supra* note 76, at 122 (claiming that, in addition to ethnic grocery stores and mail-order services like Netflix, which cater to diaspora audiences and specialty interests, “the advent of on-demand video streaming could potentially bring even greater revenues”).

94. Schultz & van Gelder, *supra* note 50, at 127–30 (identifying harms attributable to piracy that include “preventing creators from securing capital to finance their work, pushing the surviving recording industry to developed countries, and undermining local trade”).

95. See BURAMA K. SAGNIA, INT’L NETWORK FOR CULTURAL DIVERSITY, STRENGTHENING LOCAL CREATIVE INDUSTRIES AND DEVELOPING CULTURAL CAPACITY FOR POVERTY ALLEVIATION 13 (2005), *available at* <http://www.incd.net/docs/Sagnia%20Report%20-%20Strengthening%20Local%20>

Such asymmetries are particularly glaring when it comes to export markets. For Big Content, copyright enforcement in emerging markets is primarily a rule-of-law issue. In theory, creative industries from emerging markets should not face reciprocal handicaps in enforcing their rights in the West. Mature economies such as the United States have well-defined norms that empower copyright owners to target infringers through a variety of enforcement mechanisms, backed by a legal infrastructure that functions efficiently to translate rights into remedies. Yet emerging-market rightsholders face other handicaps, including (a) unfamiliarity with intellectual property norms generally; (b) unfamiliarity with the specific legal regimes established in Western countries; (c) limited resources to devote to rights management and enforcement; and (d) lack of distribution networks to negotiate licenses, monitor infringement, and undertake enforcement. As a result, producers of creative content in developing countries often forgo potential profits from Western markets, and much of the distribution of such content remains, by default, unauthorized.⁹⁶

As Part IV will elaborate, more effective capacity building could help emerging content producers overcome these obstacles. It is easy to see how such measures could benefit the industries concerned. However, can such investments be justified in terms of the public interest as a whole? Answering this question requires a more contextualized cost–benefit analysis. The following section provides a framework to guide that analysis.

Creative%20Industries.pdf (stating that, in developing countries, most of the activities classified under creative industries tend to be small and medium-sized enterprises that operate largely within the informal economy); Schultz & van Gelder, *supra* note 50, at 130 (explaining that most African musicians lack access to effective collective rights organizations and face threats to their independence from their own governments).

96. See Adrian Athique, *The Global Dynamics of Indian Media Piracy: Export Markets, Playback Media and the Informal Economy*, 30 MEDIA, CULTURE & SOC'Y 699, 713–14 (2008) (describing how the bulk of Indian film distribution overseas is conducted by informal, pirate networks); DE BEER & OGUAMANAM, *supra* note 43, at 22 (describing unauthorized distribution of Nigerian movies in diaspora markets in the developed world).

B. WEIGHING COSTS VS. BENEFITS

Many developing countries are skeptical of intellectual rights and rightfully so. Some remain convinced that the costs of IP protection vastly outweigh the benefits. A handful of domestic artists and inventors may experience private gains, but what about the costs of restricted access to technology and textbooks, the strain on judicial and administrative resources, and the drain of foreign royalty payments siphoned off-shore? Developing countries face many pressing needs: education, public health, transportation, etc. Can they really justify commandeering scarce social resources to enforce IP rights?

Moreover, can developing countries realistically expect to compete in global innovation markets? At first blush, the statistics are daunting. Not only do Western countries lead global patent procurement tables, but they also dominate trade in copyrighted media and claim the world's most valuable brand names.⁹⁷ Given such dominance, how can developing countries possibly stand to gain from investing in IP when the lion's share of benefits will be claimed by foreigners?

These are valid questions. On the public vs. private concern, it is worth noting that the benefits generated by IP systems extend beyond private gains to rightsholders. Innovation-based enterprises generate economic multiplier effects through employment, productivity gains, secondary consumption and investment, tax revenues, follow-on innovation, and so forth. The full value of such societal spillovers is hard to quantify. However, such multiplier effects are more likely to be generated from homegrown creativity than from imports. The cumulative benefits of innovation are better appreciated in the context of technology than copyright. However, policy-makers elsewhere have recognized that homegrown media contribute to public discourse and cultural development in ways that clearly

97. See Bashir & Primi, *supra* note 67; *2011 Rankings of the Top 100 Brands*, INTERBRAND <http://www.interbrand.com/en/best-global-brands/best-global-brands-2008/best-global-brands-2011.aspx> (last visited Aug. 31, 2012) [hereinafter *2011 Rankings*] (showing that developed countries claimed ninety-nine of the world's top hundred most valuable trademarks in 2011, with the United States monopolizing all of the top ten spots and Mexico's Corona Beer constituting the only entry from a developing nation (ranking eighty-sixth)).

transcend their economic bottom line.⁹⁸

At the same time, we should be forthright in acknowledging that intellectual property regimes carry costs—both direct and indirect. Some of these costs can be recovered through pricing structures built into the IP system.⁹⁹ However, societal costs include higher prices, restrictions on access to knowledge, and risk of anti-competitive abuses.¹⁰⁰ There are also opportunity costs to weigh—both public and private.¹⁰¹ For some—maybe most—developing countries, the intellectual property system will entail a net drain on fiscal resources in the short-to-medium term. Yet, just because something has costs does not mean it is not worth doing.

Reaching an informed decision to invest in IP capacity requires weighing costs and benefits carefully. Such appraisal should ideally proceed from a comprehensive assessment that considers both public and private interests, over short-term and long-term horizons. Striking this balance appropriately depends heavily on context; each

98. See *Beyond Culture vs. Commerce*, *supra* note 76, at 71 (describing benefits from homegrown creative industries, which facilitate an internal discourse that enables “each culture to evolve on its own terms rather than having the process driven by cultural imports”).

99. See LEESTI & PENGELLY, *supra* note 21, at 39–41 (stating that, in some developing countries, the revenue from service fees for IP rights administration exceed operating expenditures). Indeed, IP systems in the developed world routinely operate as profit centers that generate surplus revenues from registration fees. *Patents on a Shoestring*, *supra* note 11, at 795 (arguing that rather than merely defraying expenses, patent fees “represent an important policy lever regulating the dispensation of monopoly rights and ensuring that such rights are put to economic use”). Developing countries could arguably be far more aggressive in exploiting such revenue potential while minimizing the adverse impact of higher fees on domestic innovators. See *id.* at 790–801 (recommending that developing countries should implement “a broader research subsidy program of which funding to secure IP rights locally . . . and internationally would comprise but one component”).

100. Charging hefty maintenance fees can also serve to partially mitigate such external costs by encouraging rightsholders to let economically unproductive rights lapse. *Patents on a Shoestring*, *supra* note 11, at 789 (offering empirical evidence suggesting that many developing nations have under-utilized the potential policy that maintenance fees afford).

101. See Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 487–88 (1996) (identifying opportunity costs associated with intellectual property regimes, including lost access to existing or future works of authorship and the siphoning of labor and capital from other economic sectors for the production of copyrighted works).

country has its unique circumstances and will assess its priorities and values differently. As noted, developing countries span a wide spectrum. Some are well on their way to developing creative clusters and technology hubs that can already benefit from IP rights. Others face less promising prospects. However, even developing countries whose outlook is clouded with doubt should not overlook the potential for silver linings.

Four general considerations should guide this analysis. First, the inquiry should focus on marginal gains from undertaking *specific* incremental measures. Even if intellectual property as a whole represents a losing proposition, there may still be cost-effective ways to realize an upside. Second, the focus should be on prospective advantage. Where returns on IP investments require longer-term commitments, appropriate discounting for the time-value of money should be applied. However, expecting immediate payoffs is unrealistic. Third, IP systems should not be viewed as a zero-sum equation. The extent to which benefits accruing to foreign rightsholders translate into losses at home varies significantly according to the specific sector of IP concerned. That being said, countries should not hesitate to employ “nativist” measures that disproportionately favor domestic firms where feasible and appropriate. This leads to the fourth consideration: rather than viewing IP as a holistic system, investments in capacity building, where possible, should be targeted on a sector-specific basis. The following paragraphs elaborate on each of these points in turn.

1. Incremental Investments

First, most developing countries are legally obligated to enforce IP rights under treaty commitments to which they are bound. Even countries unconvinced of the value of IP regimes have likely gone some way toward meeting their international obligations, if only to appease foreign pressure. Such sunk costs represent opportunities. Developing countries should think creatively about how to maximize the benefits they derive from their investments in institutional capacity, especially where the incremental costs of doing so appear modest. Rather than building costly white elephants solely to appease foreign *demandeurs*, they should think about turning such institutions and expertise to their advantage—putting their

institutional resources and expertise to work on behalf of their own nationals, helping domestic creators to exploit their IP rights and navigate the global IP system.¹⁰² Moreover, developing countries can defray their capacity-building investments through registration and maintenance fees.¹⁰³

Second, such opportunistic policies can piggyback on resources provided by third parties. As Part IV details, a variety of external providers already offer capacity building and technical assistance to developing countries.¹⁰⁴ Developing countries should be much more proactive in soliciting assistance targeted to their specific needs and priorities. Similarly, capacity-building investments facilitating exports shift the costs of IP exclusivity onto foreign jurisdictions and may also take advantage of external enforcement capabilities.¹⁰⁵ Finally, an “incremental gain” approach serves, in part, to answer concerns about Western dominance. A developing country does not need to challenge Hollywood’s hegemony over global blockbusters to realize the benefits of a national film industry. Where specific investment in copyright capacity building could help such a film industry develop in ways that generate positive marginal returns, then such investments can be justified on their own terms.

2. *Prospective Gains*

A focus on prospective benefits supplies a further answer to concerns over Western dominance. As investment brochures routinely caution, past performance is no guarantee of future results. Today’s global hegemon may become tomorrow’s also-ran, supplanted by more nimble upstarts. The point of IP protection is to

102. For relevant suggestions with respect to patent institutional design, see *Patents on a Shoestring*, *supra* note 11, at 777–78, 797–806 (exploring patent-protection policy levers such as tiered fee pricing, subsidies to local producers, and ancillary service charges).

103. While such fees could be treated as a source of general revenue and be reinvested elsewhere, reinvesting the proceeds internally in IP capacity would arguably position developing countries to justify charging much higher fees. See *Patents on a Shoestring*, *supra* note 11, at 794 (arguing that where developing countries can justify higher fees “as necessary to recover the underlying expenses of their patent system,” they have a stronger basis for asserting compliance with TRIPS’s prohibitions against “unnecessary costliness”).

104. See *infra* notes 228–237 and accompanying text.

105. See *infra* notes 138–139 and accompanying text.

create prospective incentives, which means the focus should be on net benefits going forward (while applying appropriate discounting for the time-value of money and other opportunity costs).

Digital technologies are exerting powerful leveling effects on innovation. Leapfrog technologies such as cloud computing and mobile Internet put cutting-edge capabilities within reach of Southern entrepreneurs.¹⁰⁶ As Part III elaborates, the lowering of entry barriers to commercial content industries has been even more dramatic.¹⁰⁷ Moreover, other extrinsic factors are also narrowing the innovation gap. Global investors, including technology-focused venture capital funds, are also increasingly looking for growth opportunities in emerging markets.¹⁰⁸ The growth of South–South commerce holds particular promise to boost innovative capabilities.¹⁰⁹

106. Aerni & Rügger, *supra* note 69, at 441 (noting that, in sub-Saharan Africa, improved efforts to connect people to the Internet via cell phones, Internet cafes, school laptops, and other resources are likely to allow small entrepreneurs to “overcome the physical and institutional bottlenecks which were created largely by omission”); Labbe, *supra* note 69, at 421–24 (asserting that, as a result of the increasing expansion of the Internet and mobile networks in developing countries, even people in the least-developed economies will have access to sophisticated e-commerce platforms); *Digital Revolution: Makers of Mobile Devices See a New Growth Market*, ECONOMIST, Apr. 7, 2011, <http://www.economist.com/node/18008202> [hereinafter *Digital Revolution*] (describing how the cell phone is “swiftly becoming Africa’s computer of choice”); *Not Just Talk: Clever Services on Cheap Mobile Phones Make a Powerful Combination – Especially in Poor Countries*, ECONOMIST, Jan. 27, 2011, <http://www.economist.com/node/18008202> (predicting that rapidly growing Internet accessibility will “boost the continent’s information and entertainment business and allow African media houses . . . to expand their businesses around digital content tailored to local languages and markets”); *Tanks in the Cloud: Computing Services Are Both Bigger and Smaller Than Assumed*, ECONOMIST, Dec. 29, 2010, <http://www.economist.com/node/11797794> (explaining that emerging digital technologies allow developing countries to benefit from advanced computing services without having to build expensive infrastructure).

107. See *infra* Part III.

108. See Seema Mody, *Why Are VCs Investing in Emerging Markets? Mobile Innovation*, CNBC (Nov. 21, 2011, 4:04 PM), http://www.cnbc.com/id/45389717/Why_Are_VCs_Investing_in_Emerging_Markets_Mobile_Innovation.

109. See Aerni & Rügger, *supra* note 69, at 437–39 (describing how investors from developing countries have experience overcoming the challenges of operating in emerging markets); *From Russia with Bandwidth: A Russian Start-Up Shows How 4G Wireless Might Work*, ECONOMIST, Aug. 19, 2010,

Furthermore, even if IP protection initially favors foreign rightsholders, one should not view such asymmetric benefits as permanently ordained. The failure to commercialize Southern innovation partly springs from a lack of familiarity with the IP system as well as a lack of supporting infrastructure.¹¹⁰ More effective capacity building would reduce such handicaps. More generally, much of the disadvantages that developing countries face in global innovation markets result from their late entry. Knowledge economies are dynamic and depend on cumulative investments over time.¹¹¹ IP regimes likewise require a host of supporting institutions and practices to function effectively.¹¹² As developing countries develop the capacity to mobilize their innate creative resources, the benefits they realize from IP protection will increase. However, opting into IP systems requires more than just flipping a switch.¹¹³ Some investment in IP capacity building now can therefore be justified as a down payment toward the future.

3. *Non-Zero-Sum Calculus and Nativism*

Furthermore, even if Western firms continue to reap the lion's share of benefits from the global IP system, this does not mean developing countries cannot benefit as well. Such non-zero-sum calculus is easiest to illustrate with respect to trademark law. As noted, Western firms possess the world's valuable brand names.¹¹⁴

<http://www.economist.com/node/16846752> (stating that Yota, a Russian start-up that has already expanded to provide 4G wireless service to Belarus, Nicaragua, and Peru, hopes to add two more countries each year); *Internet Investment's New Champions: The Emerging Online Giants*, ECONOMIST, July 8, 2010, <http://www.economist.com/node/16539424> (describing how Cape Town-based Naspers, Africa's biggest media group, has the largest portfolio of Internet firms in developing countries, including Brazilian comparison-shopping site BuscaPé and Indian social network ibibo).

110. Saez, *supra* note 68 (arguing that a lack of infrastructure in developing countries hampers their ability to translate indigenous innovation into commercial gain).

111. Sean Coughlan, *Battle of the Knowledge Superpowers*, BBC NEWS (Sept. 28, 2011), <http://www.bbc.co.uk/news/education-14949538> (describing European plans to invest "innovation clusters").

112. See Yu, *A Tale of Two Development Agendas*, *supra* note 25, at 567.

113. See Yu, *TRIPS and Its Discontents*, *supra* note 48, at 377 (describing the risk that entrenched "pirate industries" will block investments in IP protection).

114. *2011 Rankings*, *supra* note 97.

Does this mean that trademark protection is a bad deal for developing countries? In fact, trademark registration by domestic companies in most developing countries vastly outnumbers registration by foreigners.¹¹⁵ Such companies stand to benefit from protection of their marks at home, even if they never mature into global brands. Moreover, consumers also stand to benefit to the extent that trademark law safeguards them against deceptive practices by competitors. Such consumer benefits occur even where foreigners hold the marks being enforced.¹¹⁶ Therefore, so long as the anticompetitive effects of trademark protection are held in check, the domestic gains are fairly unambiguous.¹¹⁷

By contrast, the benefits of patent protection are far less certain. Foreigners are far more likely to dominate patent procurement, and the societal costs are likely to outweigh any gains. In theory, according patents to foreign inventors could encourage technology transfer or lead to specific investments in innovation tailored to the needs of developing countries. In practice, such gains are likely to prove modest and be dwarfed by the dead-weight losses that patent exclusivity engenders.¹¹⁸ These include licensing fees, restraints on technological development, and diminished competition.¹¹⁹ Accordingly, foreign domination in the patent domain is far more likely to translate directly to domestic losses, in a classic zero-sum scenario.

Copyrights fall somewhere in between trademarks and patents. The blocking power conferred by copyrights is far less robust than

115. See Int'l Chamber of Commerce [ICC], *Making Intellectual Property Work for Developing Countries*, at 1–2, ICC Doc. No. 450/1003 (July 19, 2005).

116. Cf. Daniel Chow, *Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries*, 51 VA. J. INT'L L. 785, 800 (2011) (noting that the proliferation of unsafe and hazardous counterfeit drugs and substandard food presents serious health and safety hazards to consumers in developing countries).

117. Cf. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1695–97 (1999) (criticizing U.S. trademark law for exceeding its traditional pro-competitive moorings).

118. See *A Link Too Far?*, *supra* note 6, at 240 & n.109.

119. See *Patents on a Shoestring*, *supra* note 11, at 756–57 (describing concern that patents may impinge on the economic prosperity of developing countries by limiting their access to vital technology and thereby “relegating them to a future of economic dependency”).

with patents.¹²⁰ The entry barriers for domestic authors and publishers are far less daunting. For some categories of copyrighted works, the costs of exclusivity still merit concern. Software, scientific publications, and educational materials all generate significant societal spillovers; diminished access due to copyright protection may translate into societal detriments.

However, not all copyrighted works justify the same degree of societal concerns. Increased costs of entertainment, for example, merely shift consumption patterns to rival goods. In the case of foreign media, such shifted consumption due to copyright may be beneficial. Reducing piracy of imported media raises prices but also levels the playing field for domestic producers.¹²¹ Critics of media imperialism have long objected to Hollywood's practice of "cultural dumping"—i.e., undercutting local producers through cut-rate pricing.¹²² From the standpoint of domestic competitors, piracy is the ultimate form of cultural dumping. Just as governments erect protectionist barriers or direct subsidies to their cultural industries to shield them from competition, placing a "copyright tax" on imported media can have the effect of subsidizing local production.¹²³

The costs of copyright enforcement—both direct and indirect—can thus be partly justified as investments in cultural diversity.¹²⁴

120. Unlike patent, copyright does not allow rightsholders to block independent creations, nor does it confer exclusivity in ideas or methods.

121. For example, sales of works by U.S. authors were undercut by piracy of British works in the nineteenth century. Their protests were instrumental in Congress's decision to extend U.S. copyright protection to foreign authors. *See Golan v. Holder*, 132 S. Ct. 873, 893 (2012).

122. *See, e.g., HARRY REDNER, CONSERVING CULTURES: TECHNOLOGY, GLOBALIZATION, AND THE FUTURE OF LOCAL CULTURES* 77 (2004).

123. *See Matilda Bilstein, South Africa's Movie Piracy Challenge*, 1 AM. U. INTELL. PROP. BRIEF 27, 31 (2010) (arguing that local creators will benefit from greater domestic copyright protections since the market for local work will otherwise be undermined by pirated foreign works).

124. This link between copyright enforcement and cultural diversity explains why France has led the way in implementing a "graduated response" to crack down on file sharing. The French justify their "three-strikes" law based on the belief that online piracy hurts local industries in their struggle against Hollywood. *See Lyombe Eko, American Exceptionalism, the French Exception, Intellectual Property Law, and Peer-to-Peer File Sharing on the Internet*, 10 J. MARSHALL REV. INTELL. PROP. L. 94, 146–48 (2010) (stating that France's law criminalizing unauthorized peer-to-peer file sharing was aimed at creating "a French cultural

Substituting homegrown cultural expression for foreign-made content is also associated with a variety of positive societal externalities.¹²⁵ Moreover, increasing the supply of locally produced content not only benefits consumers through increased choice, but over time it exerts downward pricing pressure on imported media.¹²⁶ In sum, enforcing copyright on entertainment goods has strong non-zero-sum attributes. Even where the most immediate benefits go to foreigners, society may emerge better off. Arguments against a zero-sum calculus do not, however, mean developing countries should be indifferent to local vs. foreign benefit. On the contrary, domestic innovation is far more likely to generate positive spillovers and should be prioritized wherever possible.¹²⁷ Such a “nativist” perspective implies a selective, opportunistic approach to capacity building. Open discrimination in favor of domestic firms may violate the national treatment provisions enshrined in TRIPS and other international agreements.¹²⁸ That being said, countries should not hesitate to work within the legally permissible framework to favor domestic firms where feasible. Some forms of capacity building can be more readily targeted than others. For example, an efficient judiciary benefits foreign and domestic rightsholders alike. However, national governments retain discretion in targeting enforcement efforts and can prioritize sectors of concern to local firms.¹²⁹ Charging tiered fees according to firm size can

imprint on the online multi-media distribution industry”).

125. See *Beyond Culture vs. Commerce*, *supra* note 76, at 71 (noting that defenders of cultural protection highlight national identity, democratic discourse, and cultural diversity as justifying support of domestic cultural production).

126. Karaganis, *supra* note 27, at 58–61; *Beyond Culture vs. Commerce*, *supra* note 76, at 71.

127. See *supra* note 48 and accompanying text.

128. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement] (stipulating that each Member State shall afford to the nationals of other Member States treatment “no less favourable than it accords to its own nationals with regard to the protection of intellectual property”); Berne Convention, *supra* note 74, art. 5 (providing that “an author [who] is not a national . . . shall enjoy . . . the same rights as national authors”).

129. Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter *China – Measures*]. Informal discriminatory practices appear fairly common. See Karaganis, *supra* note 27, at 28.

generally ensure that foreigners shoulder a higher share of the operating expenses that IP systems incur.¹³⁰ Subsidies can also be directed to local firms with only minimal constraints under WTO law.¹³¹ Moreover, some intellectual property regimes may fall outside non-discrimination commitments entirely.¹³²

4. Sector Specificity

Developing countries should therefore be strategic in their decisions to latch on to the affirmative potential of IP rights. The decision to invest in IP capacity building should not be viewed as a holistic “all-in” commitment. And it certainly does *not* entail acceding to the maximalist agendas being pushed by developed countries.

Instead, the challenge is to devise appropriate strategies to maximize gains and minimize costs. Countries should look at IP as more of an à la carte menu and determine where their priorities lie. A minimum level of trademark and trade secret protection will likely prove advantageous in any context.¹³³ Beyond that, for many developing countries, creative industries offer attractive developmental potential; copyright law also offers a more accessible regime to domestic creators than patent. Yet, even within the realm of copyright law, countries should be discriminating: they can condemn commercial, industrial-scale verbatim copying as piracy,

130. *Patents on a Shoestring*, *supra* note 11, at 798-800 (asserting that such a tiered fee system may be advantageous to developing countries given that small entities will be primarily local whereas larger ones will be “overwhelmingly” foreign, “resulting in de facto price discrimination that can tax and deter foreign applicants through high prices without disadvantaging local ones” as well as ensure that foreigners fund the bulk of operational costs and capacity-building investments in developing country patent systems).

131. Agreement on Subsidies and Countervailing Measures art. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments — Results of the Uruguay Round, 1867 U.N.T.S. 14 (allowing nonagricultural domestic subsidies so long as they do not cause “adverse effects to the interest of other Members”).

132. *See Patents on a Shoestring*, *supra* note 11, at 805–06 (describing how *sui generis* intellectual property regimes “could be structured to discriminate de facto without much cause for objection”).

133. Almost every country has commercial entities with proprietary information and established trademarks. Therefore, protecting these interests will inure to the benefit of domestic stakeholders. Moreover, a modest level of protection in these areas should not significantly encumber third-party interests.

for example, while carving out liberal exceptions for transformative works and access-to-knowledge needs.¹³⁴

To be sure, treaty commitments impose substantive minima and forbid overt discrimination. Yet national governments retain substantial discretion as to how they implement these commitments.¹³⁵ Developing countries therefore can and should be strategic in their policy choices. They should play to their strengths, emphasizing forms of intellectual property in which they hold potential advantages and prioritizing capacity building to develop those sectors.¹³⁶ This might mean, for example, choosing to concentrate enforcement efforts on particular sectors (e.g., film but not software).¹³⁷

Finally, even where domestic IP capacity lags (for example, due to systemic institutional weaknesses), developing countries should not overlook the potential afforded by global IP regimes externally. Helping domestic authors and inventors exploit their IP in overseas markets shifts the costs of IP exclusivity onto other countries while internalizing the benefits. It takes advantage of other countries' existing institutional capacity (funded at the expense of foreign taxpayers) and allows domestic authors to piggyback on foreign

134. International copyright law allows many avenues to exercise such flexibility, such as through expansive fair-use allowances, compulsory licenses for linguistic translations, price regulation of educational materials, and open-source licensing. See Margaret Chon, *Intellectual Property "From Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 847–54 (2007).

135. TRIPS Agreement, *supra* note 128, art. 1 (declaring that states party to TRIPS “shall be free to determine the appropriate method of implementing the provisions” of the agreement “within their own legal system and practice”); *accord China – Measures*, *supra* note 129, at XX (rejecting the United States’ claim that China’s numerical threshold for criminally prosecuting stockpiles of illicit copies fell short of its obligation under the TRIPS Agreement to pursue adequate enforcement measures against “commercial-scale counterfeiting and piracy”).

136. Conversely, countries should not hesitate to employ the full array of levers within their sovereign discretion to “minimize the negatives” in sectors where they do not anticipate IP rights serving their interests.

137. Or vice versa. See Jishnu Guha, Note, *Time for India’s Intellectual Property Regime to Grow Up*, 13 CARDOZO J. INT’L & COMP. L. 225, 241, 255 (2005) (describing India’s selective-enforcement practices as sectorally targeted, with the government concentrating on software piracy while largely neglecting the entertainment industry).

enforcement initiatives.¹³⁸ E-commerce sites offer their own platform of services with similar benefits.¹³⁹

Even modest investments in external capacity building can pay lasting dividends. The viability of domestic industries in a global marketplace often hinges on capturing economies of scale through exports.¹⁴⁰ Yet the costs of developing transnational capabilities deter private firms from venturing overseas.¹⁴¹ Governments can help by providing technical and informational assistance to help domestic rightsholders navigate foreign IP systems more effectively and facilitate connections with overseas partners. Public-private initiatives to support transnational commercialization of IP can thus overcome what is otherwise a collective-action problem.

The bottom line is that global IP regimes exist; they are here to stay. Developing countries should therefore think about how they can use them to their own advantage. They should act strategically and opportunistically to maximize gains by prioritizing capacity building in sectors that offer the most favorable prospects. Applying the preceding criteria, we can generally conclude that trademark offers a better deal than patent for most developing countries, with copyright perhaps a more ambiguous case. However, within the copyright realm, the case for encouraging homegrown creative industries is more robust and arguably under-appreciated.¹⁴²

138. For example, the U.S. government provides a variety of enforcement services to IP rightsholders, including non-U.S. citizens. See NAT'L INTELLECTUAL PROP. RIGHTS COORDINATION CTR., <http://www.iprcenter.gov/> (last visited Sept. 1, 2012). Local prosecutors can also be enlisted on behalf of foreign content owners. See, e.g., Kareem Fahim, *Pirated Films from Nigeria Are Seized in Brooklyn*, N.Y. TIMES, Nov. 4, 2010, <http://www.nytimes.com/2010/11/05/nyregion/05nollywood.html> (describing how, in November 2010, local New York officials seized more than 10,000 counterfeit DVDs of Nigerian movies from nine stores in Brooklyn).

139. See Gurry, *supra* note 26, at 6 (describing YouTube's content-filtering services to detect infringement and share revenues); YouTube Help, *Other Legal Issues*, YOUTUBE, http://support.google.com/youtube/bin/request.py?contact_type=otherlegal (last visited Sept. 1, 2012) (providing YouTube users with a mechanism by which they can report potential copyright infringement).

140. See *Beyond Culture vs. Commerce*, *supra* note 76, at 126–27 (describing how scale economies achieved by export-oriented creative industries can support production of smaller-scale content aimed at domestic audiences).

141. *Id.* at 124.

142. The gap in trademark capacity in developing countries also appears less

The potential of creative industries has been widely recognized by policy-makers outside the realm of IP law, and a plethora of initiatives aim to encourage their development.¹⁴³ Yet such initiatives typically neglect the IP dimensions. Conversely, IP policy-makers tend to regard creative industries as the province of Western media conglomerates and ignore prospects for homegrown development. Debates over IP & Development often center on patents and technology, to the exclusion of other subject matters.¹⁴⁴ To the extent copyright issues are addressed, the focus tends to be on access-to-knowledge concerns, which implicate subtractionist agendas.¹⁴⁵ The positive potential for copyright law to serve as a driver of development is overlooked.¹⁴⁶

Such comparative neglect reflects a variety of biases that privilege “industrial” over “cultural rights” in global IP policy. Because copyright regimes do not require *ex ante* formalities, there is a misperception that copyright regimes can be self-executing. By contrast, patent and trademark regimes require more extensive administrative infrastructure, which is prioritized for capacity-building investments.¹⁴⁷ The subject matter of patents—technology—

acute, arguably making investments here less of a pressing need. See LEESTI & PENGELLY, *supra* note 21, at 32–33 (noting, in particular, the greater availability of legal expertise in the trademark field).

143. See *infra* notes 267–268.

144. See, e.g., *infra* note 270 and accompanying text.

145. See, e.g., Pedro Nicoletti Mizumaki & Ronaldo Lemos, *Exceptions and Limitations to Copyright in Brazil: A Call for Reform*, in ACCESS TO KNOWLEDGE IN BRAZIL 67, 68–69 (Lea Shaver ed., 2008); Chon, *supra* note 134.

146. See, e.g., WIPO, Comm. on Dev. & Intellectual Prop. (CDIP), *An External Review of WIPO Technical Assistance in the Area of Cooperation for Development*, at vii, WIPO Doc. CDIP/8/INF/1 (Sept. 1, 2011) (by Carolyn Deere Birkbeck & Santiago Roca) [hereinafter *External Review*], available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=182842 (criticizing WIPO’s focus on patents and trademarks instead of copyright).

147. See WIPO, CDIP, *Management Response to the External Review of WIPO Technical Assistance in the Area of Cooperation for Development*, 9th Sess., 29, WIPO Doc. CDIP/9/14 (Mar. 14, 2012) (explaining that WIPO spends more on “industrial rights” than copyright because of the cost of infrastructure). Moreover, the global crisis over access to medications arguably concentrated the minds of policy-makers on the patent sphere to the detriment of other IP priorities. See *Patents on a Shoestring*, *supra* note 11, at 756 (citing the conflict over access to AIDS medication as increasing awareness of the effect of patents on global health); cf. General Council Decision, *Implementation of Paragraph 6 of the Doha*

is also perceived as more important than copyrighted media, which are stereotyped as “frivolous” entertainment goods. Policy-makers often regard creative industries as more a cultural realm than the focus of commercial enterprise.¹⁴⁸ Such viewpoints arguably reflect the lingering influence of “cultural imperialism” theories, which view local cultures as threatened by the hegemony that Western “culture industries” exert in global media markets. Such pessimistic outlooks ignore the effect of digital technologies in lowering entry barriers and enhancing the commercial viability of domestic content.¹⁴⁹

III. NOLLYWOOD: A CASE STUDY

To appreciate the potential for digitally empowered creative industries to flourish in developing countries, Part III examines Nigeria’s video film industry—popularly known as Nollywood. The Nollywood case study serves not only to illustrate the developmental benefits of creative industries, but it also provides a test case to evaluate the tradeoffs between copyright protection and alternative policies.

A. DEVELOPMENTAL PROMISE

Nollywood illustrates both the potential and the predicament that many emerging creative industries face. A testament to the enterprising spirit of Nigerians overcoming countless obstacles, Nollywood has, in less than two decades, grown to become Africa’s dominant film industry and one of the world’s leading producers.¹⁵⁰

Declaration on the TRIPS Agreement and Public Health, WT/L/540 and Corr. 1 (Sept. 1, 2003), available at http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm (calling for international capacity building to support regional patent organizations).

148. See, e.g., Frank J. Penna et al., *The Africa Music Project*, in POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 95, 96 (J. Michael Finger & Philip Schuler eds., 2004) (discussing how the World Bank’s culture program drew criticism based on the perception that it “did not advance the Bank’s poverty reduction and economic development objective”); *Beyond Culture vs. Commerce*, supra note 76, at 90, 116 n.319 (describing European and Indian focuses on filmmaking as a cultural endeavor instead of a commercial product).

149. *Digital Content Production*, supra note 88, at 266.

150. Ramon Lobato, *Creative Industries and Informal Economies: Lessons from*

Its films are watched all across Africa, outselling Hollywood imports made with far higher budgets and more sophisticated production values.¹⁵¹ Nollywood's success belies narratives of cultural imperialism that deem developing countries incapable of competing on a commercially significant scale. Moreover, as the world's first fully digital film industry, Nollywood exemplifies the potential for developing countries to leapfrog outdated technologies.¹⁵²

Beyond these symbolic achievements, Nollywood also generates direct benefits to Nigeria. With annual revenues numbering in the hundreds of millions (in U.S. dollars), Nollywood has become Nigeria's largest private employer.¹⁵³ Perhaps more importantly, it serves as a "model of indigenous entrepreneurial achievement" in a country plagued by corruption and dysfunctional management.¹⁵⁴

The economic contribution of Nollywood, while substantial, arguably pales in comparison to its cultural significance. Africa has a deeply ingrained storytelling tradition, but it has long lacked the

Nollywood, 13 INT'L J. OF CULTURAL STUDIES 337, 341 (2010). Obstacles to Nigerian enterprise include political and social instability, crime, corruption, failing infrastructure, frequent power outages, and dysfunctional legal institutions. *Nigeria's Prospects: A Man and a Morass*, ECONOMIST, May 28, 2011, <http://www.economist.com/node/18741606>; Andrew Rice, *A Scorsese in Lagos: The Making of Nigeria Film Industry*, N.Y. TIMES MAG., Feb. 26, 2012, <http://www.nytimes.com/2012/02/26/magazine/nollywood-movies.html?pagewanted=all>.

151. Lobato, *supra* note 150, at 345, 348; see also *Nollywood: Lights, Camera, Africa*, ECONOMIST, Dec. 18, 2010, <http://www.economist.com/node/17723124/print> [hereinafter *Nollywood*] (describing how Nigerian films have become so popular that other African countries fear Nigerian cultural imperialism).

152. *Folklore 2.0*, *supra* note 60, at 23.

153. See Rice, *supra* note 150 (valuing the Nigerian film industry at \$500 million); *Nollywood*, *supra* note 151, at 85 (stating the film industry is the second-largest employer after the government). The industry also generates indirect benefits such as road construction by film crews in rural villages. John C. McCall, *Nollywood Confidential: The Unlikely Rise of Nigerian Video Film*, 13 TRANSITION 98, 101 (2004) [hereinafter *Nollywood Confidential*].

154. John C. McCall, *Madness, Money, and Movies: Watching a Nigerian Popular Video with the Guidance of a Native Doctor*, 49 AFR. TODAY 79, 81, 92 (2002) [hereinafter *Madness, Money, and Movies*] (noting that the Nigerian industry arose without government support and despite a generally investment-starved economy); see also *Nollywood Confidential*, *supra* note 153, at 102 (describing how Nollywood "has laid the groundwork for what might be called the Nigerian Dream—a genuine opportunity for legitimate financial success and even celebrity, open to just about anyone with talent and imagination").

means to harness its creative energies through the media of popular culture. For the first time, African stories told by Africans can be shared by audiences across the continent.¹⁵⁵ Nollywood films draw on West Africa's rich folkloric heritage, imbuing new meaning and relevance to cultural traditions while projecting complex visions of African modernity.¹⁵⁶

Furthermore, whereas celluloid film production in Africa typically depended on patronage from government or foreign funders, Nollywood's revenues flow directly from sales to consumers. As such, the industry enjoys an independent stature to poke fun at establishment figures via populist works of entertainment.¹⁵⁷ Despite its commercial orientation, Nollywood films routinely explore provocative topics that expand the boundaries of public debate.¹⁵⁸ Moreover, far from advancing a single monolithic industry viewpoint, Nollywood's decentralized structure ensures that a multiplicity of perspectives compete for consumer patronage. Whereas celluloid filmmaking imposed prohibitive barriers to entry, digital technology has not only made domestic filmmaking economically viable, it has greatly democratized access.¹⁵⁹

155. Brian Larkin, *Itineraries of Indian Cinema: African Videos, Bollywood, and Global Media*, in MULTICULTURALISM, POSTCOLONIALITY, AND TRANSNATIONAL MEDIA 170, 180 (Ella Shohat & Robert Stam eds., 2004) (noting that, previously, "African cinema" referred to films produced in Africa but "more readily available in festivals in London, Paris, and New York, than they are in Abidjan, Lagos, or Mombasa"); *Nollywood Confidential*, *supra* note 153, at 109 (stating that Nigerian films capture the "hopes and fears" of modern African people); Jonathan Haynes, *Introduction to NIGERIAN VIDEO FILMS 4* (Jonathan Haynes ed., 2000) (arguing that Nigerian films are an expression of the contemporary culture and imagination of Africa's largest nation).

156. *Folklore 2.0*, *supra* note 60, at 24, 25, 27.

157. John C. McCall, *Juju and Justice at the Movies: Vigilantes in Nigerian Popular Videos*, 47 AFR. STUD. REV. 51, 55 (2004) (describing films that depict Nigerian leaders as conspiring against members of the community).

158. Nollywood films address everything from polygamy, prostitution, teenage pregnancy, and AIDS to crime, drugs, police corruption, and coup d'états in an energetic, no-holds-barred fashion. Nigerian directors "even manage to use religion to make people laugh, in a country where fanaticism and interdenominational confrontations are rife." Pierre Barrot, *Audacity, Scandal & Censorship*, in NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA 43, 44 (Pierre Barrot ed., Lynn Taylor trans., 2008) [hereinafter *Audacity, Scandal & Censorship*].

159. Tunde Kelani, *Spielberg & I: The Digital Revolution*, in NOLLYWOOD: THE

Nollywood produces films in multiple languages and geographic locales. “Virtually anyone who can rent the equipment . . . can become a Nollywood producer.”¹⁶⁰ Digital distribution affords a low-cost means to bypass government censors. Given the tight control over public media hitherto exercised by the African state, Nollywood’s contribution to public discourse in Africa has been significant and virtually unprecedented.¹⁶¹

While the benefits of such creative enterprise are manifold, its commercial prospects are less rosy. Nollywood’s growth remains hampered by piracy.¹⁶² Without exclusive control over the distribution of such copies, producers are forced to recoup their investments during the brief window during which they can beat pirates to market.¹⁶³ Such restricted revenues impose a straightjacket on artistic ambitions and investment.¹⁶⁴

To be clear, Nollywood’s “piracy problem” has nothing to do with

VIDEO PHENOMENON IN NIGERIA 90, 90–91 (Pierre Barrot ed., Lynn Taylor trans., 2008) (describing the benefits of digital film technologies that enable the production of high-quality films with low-cost equipment).

160. John C. McCall, *The Pan-Africanism We Have: Nollywood’s Invention of Africa*, 5 *FILM INT’L* 92, 96 (2007). A significant number of Nollywood directors and producers are women, who were excluded from traditional filmmaking. *Madness, Money, and Movies*, *supra* note 154, at 81 (2002).

161. Commentators have hailed the industry as unveiling a new era in democratic accountability. *See, e.g., Audacity, Scandal & Censorship*, *supra* note 158, at 44, 46 (describing the license for openly discussing religion and government corruption in Nollywood films that is unmatched in other media); Brian Larkin, *Hausa Dramas and the Rise of Video Culture in Nigeria*, in *NIGERIAN VIDEO FILMS* 209, 211 (Jonathan Haynes ed., 2000) (same); Foluke Ogunleye, *Preface* to *AFRICAN VIDEO FILM TODAY* ix, x (Foluke Ogunleye ed., 2003) (arguing that the rise in political awareness brought by Nigerian films will awaken and empower the Nigerian people).

162. The World Bank estimates that Nollywood loses \$1 billion in revenue annually to piracy. World Bank, *Integrated Safeguards Datasheet*, at 6, Report No. AC5285 (May 19, 2010), *available at* <http://documents.worldbank.org/curated/en/2010/05/12283885/nigeria-nigeria-growth-employment-states-nigeria-growth-employment-states-project>.

163. *Nollywood*, *supra* note 151 (stating that filmmakers have a two-week “mating season” before their products become pirated commodities).

164. *See* Patrick J. Ebewo, *The Emerging Video Film Industry in Nigeria: Challenges and Prospects*, 59 *J. FILM & VIDEO* 46, 54 (2007) (arguing that piracy might grind the industry to a halt because it robs producers and artists of their financial incentive).

peer-to-peer file sharing or Internet mash-ups.¹⁶⁵ It involves commercial enterprises whose verbatim, wholesale copying and distribution on an industrial scale directly competes with and supplants filmmakers' own sales in their primary market.¹⁶⁶ This is the core market failure that copyright law was designed to remedy. Addressing it need not entail advancing any "maximalist" agenda beyond adherence to traditional copyright norms, nor does it pose undue risks to freedom of expression. And unlike pharmaceuticals or educational textbooks, access to movies for entertainment hardly presents a human rights concern.

Even a modest increase in copyright enforcement would yield palpable benefits. Because filmmakers reap only a fraction of the total revenue that their movies generate, the industry suffers from chronic underinvestment. Assembly-line productions with formulaic scripts, wooden acting, and crude production values are the predictable result of the skinflint budgets and breakneck schedules on which Nollywood operates.¹⁶⁷

Lack of copyright protection also introduces perverse incentives. Filmmakers are forced to pursue a churn strategy that rushes new videos to market weekly to beat the pirates.¹⁶⁸ Such high-volume, low-revenue production restricts the creative ambition that could be invested in developing any single project. Moreover, without enforceable copyrights in their work, filmmakers cannot offer collateral to obtain financing. Instead, they must rely on informal short-term lenders at punitive interest rates—reinforcing the "rush to market" mentality that fosters slap-dash productions.¹⁶⁹

165. File sharing was also *not* the impetus for Nigerian musicians to launch a hunger strike in 2009 protesting unauthorized commercial exploitation of their works. See *infra* notes 177–178 and accompanying text.

166. See Will Connors, *Nollywood Babylon*, WALL ST. J., May 22, 2009, <http://online.wsj.com/article/SB10001424052970203771904574177472683696390.html>.

167. See Jonathan Haynes & Onookome Okome, *Evolving Popular Media: Nigerian Video Films*, in NIGERIAN VIDEO FILMS 51, 57 (Jonathan Haynes ed., 2000).

168. See Pierre Barrot, *The Italians of Africa*, in NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA 12, 15 (Pierre Barrot ed., Lynn Taylor trans., 2008) (linking the "draconian schedule for shooting" pursued by Nollywood filmmakers to the need to recoup profits quickly before pirates can divert revenues).

169. See Ebewo, *supra* note 164, at 52 (explaining that entrepreneurs with no

Lack of clear ownership rights breeds distrust at all levels of the industry. Bickering between producers and distributors is legendary.¹⁷⁰ Fear of script piracy has even led some directors to withhold scripts from their actors; instead, actors are only given their lines for individual scenes as they are shot.¹⁷¹ Copyright failures therefore increase industry transaction costs and hamper creativity.¹⁷² If we accept that intellectual property should serve “human values,” we must reckon with these non-economic costs of piracy as well. Yet existing discourse on intellectual property and development seldom acknowledges such drawbacks. Instead, many commentators assume that intellectual property rights represent a losing proposition for developing countries and rarely look past this global assessment.

Nor is the problem purely a matter of domestic concern. Distribution of Nollywood videos outside Nigeria is predominantly unauthorized, with very little revenue flowing to content producers.¹⁷³ Unauthorized distribution of Nollywood films occurs even in developed-country markets that have functioning copyright

training in film dictate a shooting schedule that creates films in a “fast-food-style”); *see also* Paul Salopek, *Nigeria Goes Hollywood*, CHI. TRIB., Nov. 27, 2005, http://articles.chicagotribune.com/2005-11-27/news/0511270301_1_video-stores-south-africa-movie-crew (describing the amateur nature of many Nigerian film productions).

170. Pierre Barrot, *Selling Like Hot Cake: Box Office & Statistics*, in *NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA* 32, 34–36 (Pierre Barrot ed., Lynn Taylor trans., 2008) (stating that distributors and producers often cheat each other out of profits or accuse the other of doing so).

171. *See* Haynes, *supra* note 155, at 57 (arguing that lack of opportunity for actors to rehearse leads to the shallow characterizations prevalent in Nigerian films).

172. *See* WIPO, *Information Meeting on Intellectual Property Financing: WIPO Information Paper on Intellectual Property Financing*, 75–76, Doc. WIPO/IP/FIN/GE/09/07 (Oct. 9, 2009), available at http://www.wipo.int/edocs/mdocs/copyright/en/wipo_ip_fin_ge_09/wipo_ip_fin_ge_09_7-main1.pdf [hereinafter *WIPO Information Paper*] (explaining how a lack of copyright formalities inhibits access to formal finance). *See generally* Paul J. Heald, *A Transactions Cost Theory of Patent Law*, 66 OHIO ST. L.J. 473, 474–77 (2005) (arguing, in a patent context, that lowered transaction costs provide an alternative justification for IP protection beyond traditional incentive theories).

173. *See, e.g.*, Madu Chikwendu, *Inside the Industry*, WIPO MAG., June 2007, at 9 (explaining that piracy of Nigerian films outside the country includes unauthorized broadcasts on television and Internet piracy).

regimes.¹⁷⁴ As a result, Nollywood producers have largely failed to translate the enthusiastic demand for their products among wealthy African diasporal communities into tangible revenues.¹⁷⁵

As an export industry, Nollywood's interest in cross-border copyright enforcement is obvious. Less intuitive is the interest that countries that are *recipients* of pirated content have in blocking such unauthorized distribution. Yet imported copies of pirated content undercut the market for legitimate sales by domestic producers. Other emerging African film industries have complained that pirated Nollywood films represent a form of unfair competition.¹⁷⁶

B. COPYRIGHT VS. ALTERNATIVES POLICIES

Is copyright law the solution to such complaints? As an industry, Nollywood is virtually unanimous in clamoring for increased protection. Musicians across Africa have voiced their agreement, taking to the streets to protest piracy.¹⁷⁷ But perhaps these artists and entrepreneurs are misguided, clinging to an outdated paradigm out of ignorance.¹⁷⁸ In Western academic and policy circles, the merits of relying on the copyright system to underwrite Africa's emerging creative industries remains a subject of debate.

174. See Stevina Evuleocha, *Nollywood and the Home Video Revolution: Implications for Marketing Videofilm in Africa*, 3 INT'L J. EMERGING MARKETS 407, 409 (2008).

175. DE BEER & OGUAMANAM, *supra* note 43, at 22 (asserting that illicit copying of Nollywood films in wealthy developed markets may constitute the majority of the industry's losses to piracy).

176. *Nollywood*, *supra* note 151 (describing how other countries have instituted protectionist measures and how Congo tried to ban Nigerian films). Such complaints accord with the theoretical point made above about piracy of foreign works as a form of unfair competition disadvantaging domestic authors. See *supra* note 173 and accompanying text.

177. Schultz & Gelder, *supra* note 50, at 79 (recounting protests by African musicians focused failures of their legal systems that allow rampant piracy, corruption, and non-collection or diversion of royalties). Nigerian musicians in 2009 went on hunger strike, underscoring the threat to livelihoods that piracy poses. Charles Okogene, *Nigeria: Musicians Begin Hunger Strike Tuesday*, ALL AFR. (Aug. 24, 2009), allafrica.com/stories/printable/200908240174.html.

178. See, e.g., *A Hunger Strike Isn't a New Business Model and It Won't Stop File Sharing*, TECHDIRT (July 14, 2012, 1:32 PM), <http://www.techdirt.com/articles/20090827/0302056018.shtml> (faulting the failure of musicians to adopt a new business model).

Some commentators observe that piracy has also benefited Nollywood by supplying a ready-made distribution network that has helped the industry unlock markets.¹⁷⁹ True, but a motion picture industry cannot survive solely on the “brand recognition” that such unauthorized distribution generates. Unless producers can monetize their creative investments more directly, artists will not get paid. Without mechanisms to share the proceeds from pirate distribution, Nollywood is denied the revenues needed to develop, and it remains trapped in a low-rent prison of grade “C” filmmaking.¹⁸⁰

Other critics accuse copyright law of inhibiting diversity by conferring excess market power to industry conglomerates.¹⁸¹ There is some merit to these claims. The diversity of Nollywood’s output may partly reflect weak copyright norms that inhibit studios from investing in blockbuster productions. However, Nollywood’s current structure lies so far to the other end of this spectrum that a modest tradeoff of quantity for quality seems more than tolerable.¹⁸² Nigeria’s situation in this regard is hardly unusual among developing countries.¹⁸³

Admittedly, copyright law is not the only policy tool that could

179. See, e.g., Kaitlin Mara, *Open Business Systems Fill Gap in Mainstream Entertainment Industry*, INTEL. PROP. WATCH (Sept. 12, 2008, 11:35 AM), www.ip-watch.org/2008/09/12/open-business-systems-fill-gap-in-mainstream-entertainment-industry (recounting the view that piracy “created an audience” and desire for more Nigerian films).

180. See Connors, *supra* note 166.

181. See Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright’s Diversity Externalities*, 76 S. CAL. L. REV. 1067, 1092–95 (2003) (arguing that excessive copyright protection encourages forms of cultural commodification that decrease the “cultural space” left for smaller producers).

182. See Mark Schultz, *The Nigerian Film Industry and Lessons Regarding Cultural Diversity from the Home-Market Effects Model of International Trade in Films*, in TRANSNATIONAL CULTURE IN THE INTERNET AGE 251–52 (Sean A. Pager & Adam Candeub eds., forthcoming 2012).

183. See, e.g., Floyd Whaley, *New Ambitions in Philippine Film Business*, N.Y. TIMES, May 8, 2012, <http://www.nytimes.com/2012/05/08/business/global/new-ambitions-in-philippine-film-business.html?pagewanted=all> (stating that, in the Philippines, “rampant piracy” has undercut investment in the local film industry, “as in many other developing Asian countries,” and describing how the resulting climate of depressed revenues and increased risk inhibit filmmakers from taking chances on innovative productions).

underwrite such creative investments. IP skeptics often characterize copyright as reflecting an outdated scarcity paradigm now obsolete in the digital era. The Washington Declaration envisions a future in which the “existing intellectual property system” gives way to “a broader mix of models” based on indirect rewards, public funding, and disintermediarized distribution.¹⁸⁴ Other commentators proffer equally enticing visions of a future powered by web 2.0 platforms, long-tail economics, flat-rate licenses, and alternative revenues that make creative content freely available to all.¹⁸⁵ Experimentation is welcome and should be encouraged. However, these alternative models will take time to develop and refine. In the short-to-medium term, Nollywood—and other emerging creative industries like it—would arguably be better served by measures to make the ostensibly “existing” copyright system actually function in the manner intended.

Furthermore, there are serious questions both as to viability and desirability of many alternative models. While copyright is a proven model subject to well-known tradeoffs, the drawbacks of many of the alternatives remain inadequately explored. For example, some argue that IP-based businesses should rely on performance revenues, treating creativity as a service, rather than a product.¹⁸⁶ Performance models generally offer a more viable option for music than film because production costs are lower and the experience can be more

184. *Washington Declaration*, *supra* note 17, at 4.

185. See CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 88–89 (2006) (describing how economies of scope allow e-commerce vendors to efficiently cater to niche content markets); YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 15 (2006) (hailing networked technology as enabling the rebirth of a digital “folk culture”); WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 202–58 (2004) (reimagining the copyright system as a government-run collective license regime); CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* 20–22 (2009) (contending that web 2.0 platforms support the provision of free content funded by innovative business models that tap alternative revenue sources).

186. See Pedro Nicoletti Mizukami & Ronaldo Lemos, *From Free Software to Free Culture: The Emergence of Open Business*, in *ACCESS TO KNOWLEDGE IN BRAZIL* 25, 40 (Lea Shaver ed., 2008) (describing how Brazil’s *tecnobrega* music genre makes its revenue from live concerts and interactive experiences); Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 696–701 (2009) [hereinafter *Live Performance*] (critiquing the concert revenue model).

spontaneous and interactive. Films designed for theatrical exhibition require much higher production values than typical Nollywood productions. While Nollywood has attempted recently to move in this direction, the market for such films remains unproven.¹⁸⁷

Furthermore, even in the music business, concert revenues are unlikely to offset lost sales of copyrighted media.¹⁸⁸ For emerging creative industries such as Nollywood, sales of copyrighted media remain the most viable means to reach widely dispersed audiences across Africa and African diaspora communities.¹⁸⁹ By contrast, theatrical exhibitions offer a poor substitute. Rural populations in developing countries often lack access to conventional cinema. Even in urban settings, potential revenues from theatrical exhibition can be limited.¹⁹⁰ Moreover, women are often excluded from such public

187. Schultz, *supra* note 182, at 258. Moreover, bootleg taping at film premiers exposes filmmakers to a new avenue for piracy that could undermine subsequent sales of recorded media. Lack of copyright enforcement also means Nollywood largely forgoes revenues from licensing TV broadcast rights. See Chikwendu, *supra* note 173, at 9 (stating that other African countries broadcast pirated DVDs without paying for the rights).

188. See *Live Performance*, *supra* note 186, at 722, 762 (describing how the practical limits of scarcity and timing limit potential concert revenues). Nor is it clear that a performance model works for all music: not all composers are performers; not all performers want to tour; not all artists can attract sufficient concertgoers in a single location. *Id.* at 755, 759–60.

189. See *Nollywood Confidential*, *supra* note 153, at 98 (explaining impediments to film distribution in Africa); Olivier Bartlet, *Is the Nigerian Model Fit for Export?*, in *NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA* 121, 125 (Pierre Barrot ed., Lynn Taylor trans., 2008) (estimating turnover generated by exports of Nollywood videos at \$950,000); Evuleocha, *supra* note 174, at 410–11 (relating the popularity of Nigerian films among African migrants overseas). The advent of mobile Internet networks in Africa will open up new distribution channels. See *Digital Revolution*, *supra* note 106 (explaining how expansion of mobile Internet in Africa has quadrupled data speeds and lowered cost by ninety percent, preparing the market for growth in online entertainment using products such as tablet computers). But technological capacity alone is useless unless content producers benefit. That cellular phone operators in Nigeria continue to rebuff demands to share revenues with musicians whose work is sold as ringtones does not bode well in this regard.

190. Many developing countries face a declining stock of poorly maintained cinemas, as home-viewing drains revenues. In theory, small-scale video parlors could offer a solution, but to reap the benefits, rightsholders would need the means to enforce performance rights. Schultz, *supra* note 182, at 261.

spaces, particularly in conservative Muslim regions.¹⁹¹

Other alternatives to IP rights present their own drawbacks. For example, the Washington Declaration's call for "systems of indirect rewards, such as levies on media, equipment, or usage,"¹⁹² assumes the existence of functioning, transparent institutions to operate them—an assumption implicitly called into question by the Declaration's own call for greater oversight of collective rights organizations ("CROs") that immediately follows.¹⁹³ African CROs, in particular, have a far-from-inspiring track record. Their record of inefficiency and cronyism and their unwillingness to adapt to modern technologies casts doubt on the efficacy by which newfangled levies and/or flat-rate licenses could be implemented.¹⁹⁴

Similarly, the Declaration's call for public funding for "small-market audiovisual, musical and artistic culture"¹⁹⁵ raises concerns over the government bureaucracies and ideological biases associated with public patronage.¹⁹⁶ The Washington Declaration wisely limits its focus to "types of production deemed socially valuable and

191. Brian Larkin, *House Dramas and the Rise of Video Culture in Nigeria*, in *MULTICULTURALISM, POSTCOLONIALITY, AND TRANSNATIONAL MEDIA* 209, 226–27 (Ella Shohat & Robert Stam eds., 2004) (describing how television and video "revolutionized" the participation of women in the Nigerian public sphere by bringing media to the home).

192. *Washington Declaration*, *supra* note 17, at 4.

193. *Id.* (calling for "greater transparency, accountability, internal democracy and public oversight on the part of collective rights management organizations").

194. See Schultz & van Gelder, *supra* note 50, at 131–32 (contending that African musicians are unable to reap the benefits of their copyrights due to grossly inefficient or corrupt CROs). Nor is Africa atypical in this regard. See Ariel Katz, *Copyright Collectives: Good Solution but for Which Problem?*, in *WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY LAW* 395, 411–15 (Rochelle C. Dreyfuss et al. eds., 2010) (debunking the notion that CROs offer an efficient model by which to commercially exploit creative content); Sibylle E. Schlatter, *Copyright Collecting Societies in Developing Countries: Possibilities and Dangers*, in *NEW FRONTIERS OF INTELLECTUAL PROPERTY LAW* 53, 56–60 (Christopher Heath & Anselm Kamperman Sanders eds., 2005) (documenting the failures of governance and dystopian track record of CROs in the developing world).

195. *Washington Declaration*, *supra* note 17, at 4.

196. See *Beyond Culture vs. Commerce*, *supra* note 76, at 85–86 (attributing the decline of European cinema, in part, to bureaucratic selection pressures exerted by state patronage regimes).

systemically under-provisioned by the market.”¹⁹⁷ Yet, for many developing countries, what is “under-provisioned” is locally produced content of *any* kind. Rather than relying on state patronage to fill the gap, we should look to encourage independent voices.¹⁹⁸ Whereas state support in Africa has often come at a price of heavy censorship,¹⁹⁹ digital technologies have opened the door to alternative sources of homegrown expression. Nollywood’s unique style of filmmaking has attracted widespread imitation, with fledgling video film industries popping up across the African continent.²⁰⁰ Digital creativity has revitalized other media as well,

197. *Washington Declaration*, *supra* note 17, at 4.

198. A similar critique applies to suggestions that state-funded innovation would be preferable to patent monopolies. We should be wary of empowering government bureaucrats to usurp control at the expense of markets. Governments have a terrible track record of picking winners, and public funding is often inefficient, susceptible to fads and political influence, and plagued by cronyism (if not outright corruption). *See, e.g., From Brawn to Brain: If China Is to Excel at Innovation, the State Must Give Entrepreneurs More Freedom*, *ECONOMIST*, Mar. 10, 2012 (arguing that state-controlled investments in product innovation have not been successful); Steven Mufson, *Before Solyndra, A Long History of Failed Government Energy Projects*, *WASH. POST* (Nov. 13, 2011), http://www.washingtonpost.com/opinions/before-solyndra-a-long-history-of-failed-government-energy-projects/2011/10/25/gIQA1xGOCN_story.html (linking failures in U.S. federal government investment in new energy technologies to a larger pattern of misallocated public funding).

199. *See Audacity, Scandal & Censorship*, *supra* note 158, at 44–46; Haynes, *supra* note 155, at 8. Even in the absence of affirmative censorship, state patronage can supplant private markets, introduce biases toward elite culture, or be vulnerable to corruption. *See Beyond Culture vs. Commerce*, *supra* note 76, at 78–90 (describing the deterioration of the European film industry through a “self-indulgent” focus on state-subsidized, art-house cinema at the expense of commercial projects).

200. *See, e.g.,* Helena Barnard & Krista Tuomi, *How Demand Sophistication (De-)limits Economic Upgrading: Comparing the Film Industries of South Africa and Nigeria*, 15 *INDUSTRY & INNOVATION* 647, 660 (2008) (describing how Uganda’s “Ugwood” and Kenya’s “Riverwood” show that the Nigerian model can operate in smaller African countries); Foluke Ogunleye, *Video Film in Ghana: An Overview*, in *AFRICAN VIDEO TODAY* 1, 3–6 (Foluke Ogunleye ed., 2003) (discussing the rise of video movies in Ghana and exploring parallels with the Nigerian industry); *Nollywood*, *supra* note 151, at 88 (stating “South African, Tanzania, and Cameroon are now producing hundreds of films a year”). That such industries can flourish even in much smaller domestic markets than Nigeria testifies to the extent of digital technologies’ democratizing potential. Kenya’s “Riverwood,” in particular, is said to produce more than 1,000 films per year and “is now beating Nigeria at its own award ceremonies.” *Nollywood*, *supra* note 151;

from Ugandan hip-hop to Senegalese animation.²⁰¹ A more effective copyright system would go a long way toward sustaining and encouraging such creative upstarts. In this manner, copyright functions to sustain democratic discourse independent of state funding.²⁰²

Nor does advertising offer much of a panacea. While Nollywood producers increasingly rely on *private* sponsorship—a revenue model often touted as an alternative to intellectual property rights—such sponsorships come with strings attached.²⁰³ Marketers are unwilling to put up significant funds unless they gain substantial creative control over content, demanding blatant product placements that effectively transform movies into infomercials for everything from beer to Christianity to AIDS prevention to political campaigns.²⁰⁴ Far from enabling democratized expression, private

see also *Riverwood: Kenyan Super-Fast, Super-Cheap Filmmaking*, NOWPUBLIC (Dec. 26, 2008, 12:38 PM), <http://www.nowpublic.com/world/riverwood-kenyan-super-fast-super-cheap-filmmaking> (examining the rise of Kenya's \$13 million "Riverwood," named after a bustling creative hub in Nairobi, and its appeal as "reflecting the Kenyan way of life and entertaining Kenyans").

201. *See, e.g., Hip-Hop in Uganda: The Dance in the Night-time*, ECONOMIST, Feb. 26, 2011, <http://www.economist.com/node/18226575> (discussing the popularity of hip-hop dance in Uganda underwritten by digital media); *Putting Africa on the Animation Map: The Story of Pictoan, Senegal*, WIPO MAG., Sept. 2005, at 10 (relating the global success of homegrown African cartoon series made using digital production techniques); *Magic Cellar*, MORULA PICTURES, http://www.morula.co.za/productions_magic_cellar.html (last visited Aug. 11, 2012) (describing a South African 3D cartoon series based on African folktales that has won twenty-nine international awards since 2006). Such developments are not limited to Africa. *See* Kimberly Christen, *Balancing Act: The Creation and Circulation of Indigenous Knowledge and Culture Inside and Outside the Legal Frame*, in *TRANSNATIONAL CULTURE IN THE INTERNET AGE* (Sean A. Pager & Adam Candeub eds., forthcoming 2012) (describing the use of digital media by indigenous groups in Australia and North America); *Digital Content Production*, *supra* note 88 (explaining how Brazil's Culture Points initiative has empowered diverse creative expression including video filmmaking by Amazonian Indians).

202. *See* Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 228–30 (1998) (describing how the copyright system promotes democratic self-governance by ensuring independent outlets for public expression insulated from government control).

203. *Nigeria's Film Industry: Nollywood Dreams*, ECONOMIST, July 27, 2006, <http://www.economist.com/node/7226009>.

204. *See* Gabriel A. Oyewo, *The Yoruba Video Film: Cinematic Language and the Socio-Aesthetic Ideal*, in *AFRICAN VIDEO TODAY* 141, 147 (Foluke Ogunleye

patronage effectively substitutes a form of private speech control for public censorship.²⁰⁵

Focusing solely on economic losses to piracy, therefore, may understate the true harm to the cultural and informational ecologies that copyright-based industries sustain: a functioning copyright system that ensures an outlet for independent voices. This, too, represents a societal value that must be tallied in the positive ledger when accounting for the public interest in upholding intellectual property rights. Enforcing copyrights may “commandeer” public resources, but the benefits generated are not solely private.

While “free culture” models offer alternative means to secure some of these benefits, their potential remains unproven and subject to drawbacks. It would thus be foolish to presumptively reject copyright as a policy tool. Suggestions to the contrary from Northern digerati often reflect fundamental misconceptions about creative industries in developing countries. Notwithstanding its digital pedigree, Nollywood remains wedded to a twentieth-century business model based on sales of creative content embodied in physical copies. Alternative distribution models remain limited for the foreseeable future.²⁰⁶ Cyber-libertarian dogmas about embracing file sharing or monetizing YouTube mash-ups are beside the point.

ed., 2003) (recounting Nigerian politicians’ use of propaganda-filled films to influence the electorate); Evuleocha, *supra* note 174, at 410 (describing a program where the BBC World Service Trust funded sixteen films designed to focus public attention on issues such as the benefits of condom use and discrimination against people living with HIV/AIDS).

205. Such private censorship exposes the fallacy of web 2.0 assumptions that advertising is a benign substitute for intellectual property. *Cf.* Ivan Reidel, *The FCC’s Anti-Payola Enforcement: A Policy at War with Itself*, HARVARD UNIV. (John M. Olin Ctr. for Law, Econ., & Bus. Fellows’ Discussion Paper Ser. No. 36, 2010), at 2–8 (arguing that reliance on advertising reduces audience welfare by inducing radio stations to select songs that facilitate the sale of products to particular demographics but which correlate weakly with audience preferences). Similarly, concerns about privacy dog e-commerce business models based on harvesting personal data for marketing purposes. *See* Jaron Lanier, *The False Ideals of the Web*, N.Y. TIMES, Jan. 19, 2012, <http://www.nytimes.com/2012/01/19/opinion/sopa-boycotts-and-the-false-ideals-of-the-web.html> (asserting that pursuit of advertising encourages web companies to engage in practices contrary to consumer welfare).

206. Internet access in Africa is growing, but it remains far from mainstream, with bandwidth capacity limited. *See Digital Revolution, supra* note 106.

Nor should modest investments in strengthening the copyright system be seen as posing an obstacle to alternative models. Making copyright more “open” or fairer to authors need not mean abandoning enforcement against commercial piracy. Rather, content producers should retain the option to experiment with content distribution under a variety of different licensing models. Copyright should be part of the mix.

Copyright incentives only function, however, when content producers are ensured adequate enforcement mechanisms.²⁰⁷ And enforcement is only one of the mechanisms required for a fully functioning copyright system; others include registration, licensing, and clearance. In many developing countries, such mechanisms remain underdeveloped, if they exist at all. Part IV examines the scope for capacity building to tackle such deficiencies.

IV. BUILDING CAPACITY FOR CREATIVE DEVELOPMENT

Building on the Nigerian example, this part first examines measures that could be implemented at the level of national policy and then shifts focus to the international dimension of capacity building.

A. NATIONAL POLICY

The Nigerian government has come to recognize the importance of copyright to Nollywood’s fortune and has made some efforts to invest in capacity building.²⁰⁸ However, its recent efforts to crack down on copyright piracy have yielded mixed results.²⁰⁹ Nigeria’s

207. Schultz & van Gelder, *supra* note 50, at 91 (arguing that the ability to enforce intellectual property rights laws is a “key factor[]” in determining whether IP rights “actually serve to encourage development”).

208. See DE BEER & OGUAMANAM, *supra* note 43, at 23 (describing Nigerian enforcement campaigns and education initiatives to reduce piracy).

209. See Sylvie Castonguay, *STRAP and CLAMP: Nigeria Copyright Commission in Action*, WIPO MAG., Sept. 2008, at 21 (relating that the first two years of a Nigerian anti-piracy initiative resulted in the seizure of more than eight million pirated works and fifteen court cases). *But see* Benjamin Njoku, *Nigeria: NCC Wants Kelani’s N1.7 Million to Raid Alaba Pirates*, ALL AFR. (July 10, 2010), <http://allafrica.com/stories/201007160203.html> (describing the demand that a film director pay an exorbitant fee before the government would act to enforce

weak state institutions and lack of rule-of-law culture limit the extent to which wholesale reforms can be realized. A good place to start would be focusing on providing quick remedies in clear-cut cases of commercial-scale piracy through streamlined judicial procedures and specially trained and dedicated staff.²¹⁰

Given the pan-African distribution of Nollywood movies, Nigerian efforts to strengthen the copyright system need to extend beyond Nigeria's borders. Investments in regional capacity could yield tangible benefits. Enforcement is not the only issue. Proving ownership poses a key obstacle to exploiting copyrights in Africa as well. The informal manner in which Nollywood operates makes it difficult to determine who has authorization to distribute films or, in many cases, even who is the copyright owner.²¹¹ This problem underscores the need for a more effective system of copyright registry, preferably operating on a regional basis.²¹² Recent efforts to develop the digital capabilities of the West African Copyright Network represent a promising first step.²¹³ However, there remains substantial scope to further enhance regional cooperation.²¹⁴

his copyright).

210. Cf. Randy Berholtz et al., *Improving Patent Adjudication: An Updated and Revised Survey of Practitioners' Experience and Opinions*, 32 T. JEFFERSON L. REV. 223, 239 (2010) (describing various international models of specialized IP courts or judges).

211. See *Audacity, Scandal & Censorship*, *supra* note 158, at 15 (providing examples of people remaking other directors' films or marketing their films under the names of competitors).

212. *WIPO Information Paper*, *supra* note 172, at 76 (arguing that linking copyright registration "to an IP rights database would greatly facilitate third-party film financing"). The Washington Declaration's suggestion in this regard is therefore extremely well taken. Cf. *Washington Declaration*, *supra* note 17, at 4 ("Encourage the establishment of publicly accessible systems of rights management information which ensure that authors and artists can be identified."). That this suggestion was motivated by concerns for user access rather than for rightsholders only goes to show that "negative" and "positive" agendas for IP law need not conflict.

213. WIPO, *WIPO Director General Announces Rights Registry Project for West African States*, WIPO Doc. PR/2011/691 (June 8, 2011), available at http://www.wipo.int/pressroom/en/articles/2011/article_0017.html (reporting development of a rights registry program for West African states to streamline administrative costs).

214. The West African Copyright Network focuses narrowly on facilitating allocation of royalties between member state music CROs. It does not address

Perhaps the greatest gains in regional cooperation have been informal agreements forged between Nollywood “marketers” and similar distribution networks in neighboring countries.²¹⁵ Such informal cooperation continues Nollywood’s pattern of co-opting pirate networks to distribute locally produced goods. As a general strategy, there is much to commend in co-opting pirate networks, and it has been successfully applied in other contexts.²¹⁶ At the same time, where distribution remains entirely consigned to informal “grey market” networks, the inability to tap into conventional market structures of financing and distribution severely limits the potential for future growth.²¹⁷

Such constraints help to explain the failure of Nollywood and other emerging creative industries to exploit diaspora markets, despite the presence of comparatively wealthy expatriate populations eager to maintain ties to their ancestral homeland. While the United States and Europe have well-established mechanisms for IP enforcement, the transaction costs of long-distance enforcement actions—both informational and legal—often deter content producers from developing countries from pursuing valid claims.²¹⁸

other copyrighted media. *Id.* It is worth noting that the main global CRO focused on audiovisual works, AGICOA, does not appear to have any African members. See *Members*, AGICOA, <http://www.agicoa.org/english/about/members.html> (last visited Sept. 1, 2012) (showing no African members). The other regional IP organizations in Africa, ARIPO and OAPI, focus on patent and trademark rights, and Nigeria is not even a member of either. See generally Zion H. Park, *What the PCT Can Learn from Two African Systems*, 6 J. MARSHALL REV. INTELL. PROP. L. 693, 702–08 (2007) (comparing one system granting individual national patents with another where “a single patent law is applied to all . . . member nations”).

215. See Lobato, *supra* note 150, at 340–41 (explaining that the success of cooperative distribution in neighboring countries is “based on a complex balance of credit and trust”).

216. See Karaganis, *supra* note 27, at 64–65 (noting that industries in South Africa, Brazil, India, Russia, and Bolivia have all looked to the superior distribution methods of informal markets); Lobato, *supra* note 150, at 347 (noting that parallels exist between Nollywood and early Hollywood, as both share anarchic and pirate cultures).

217. See *Digital Content Production*, *supra* note 88, at 285 (“Governments should encourage creative industries to operate on a more formal [financial] basis by easing regulatory barriers and offering affirmative assistance to professionalize operations.”).

218. See Evuleocha, *supra* note 174, at 409 (noting that Nigerian firms cannot afford the litigation costs to enforce their copyrights abroad); see also Athique,

Moreover, difficulties in arranging authorized distributors often leave pirate networks as the default providers. The transaction costs of long-distance enforcement are a serious deterrent, particularly for small producers. Nigerian producers do not even pursue simple, low-cost measures such as registering U.S. copyrights in their works or taking advantage of YouTube ContentID filtering mechanisms—not because these measures cost too much, but because Nigerian producers either do not appreciate the benefits of such precautions for enforcement or doubt the utility of even trying to enforce their rights.²¹⁹

Furthermore, basic mechanisms for copyright clearance need to be instituted before Nollywood films can enjoy distribution through conventional channels.²²⁰ Global distributors are unwilling to assume liability for films that incorporate unauthorized content and typically require extensive warranties, documentation, and insurance. Such clearance mechanisms are routine in developed countries and need not entail undue costs. However, developing the institutional

supra note 96, at 704 (noting similar constraints apply to Indian film industries).

219. The American affiliate of the Filmmakers Association of Nigeria has launched a campaign to register U.S. copyrights for African films and to coordinate U.S. enforcement efforts. See *US Copyright Registration and Enforcement for African Films and Music*, FILMMAKERS ASSOCIATION OF NIGERIA U.S.A. (Sept. 10, 2008), <http://www.fanmovieland.com/site/copyrightinitiative.htm>. Timely registration of U.S. copyrights enables rightsholders to seek statutory damages—up to \$150,000 per act of willful infringement—without the need to prove actual injury. 17 U.S.C. § 504(c) (2006). The availability of such relief can be crucial to making infringement actions viable. However, without a credible means to pursue such infringement actions, the culture of impunity surrounding pirate distribution of African media remains daunting.

220. See Pierre Barrot, *Epilogue*, in *NOLLYWOOD: THE VIDEO PHENOMENON IN NIGERIA* 130, 133–34 (Pierre Barrot ed., Lynn Taylor trans., 2008) (citing use of pirated music in movie soundtracks as deterring foreign distribution deals). In addition to copyright issues, trademark and publicity rights may also present potential obstacles that require clearance. Conversely, trademark licensing also presents opportunities in the form of product placement. Nollywood already relies on product placement for revenues but typically does so through informal mechanisms that could present obstacles should its films be distributed abroad. See Augusta Okon, *The Untapped Power of Product Placement in Nollywood Movies*, NIGERIAFILMS.COM (Dec. 4, 2010), <http://www.nigeriafilms.com/news/9942/12/the-untapped-power-of-product-placement-in-nollywo.html> (describing the rise of product placement in Nollywood). Major Western sponsors are unlikely to engage with Nollywood until it cleans up its act.

capacity to generate the requisite paperwork requires expertise generally lacking in Nigeria and other developing countries.²²¹

Finally, Nigeria would benefit from more effective regulation of its CROs. The music industry has been stymied by a regulatory dispute between rival claimants.²²² Film distribution is controlled by a shadowy group of “marketers,” one step removed from outright pirates.²²³ Introducing more competition, dynamic leadership, and technological innovation could greatly expand the revenue potential of Nigerian creators.²²⁴ More effective interface with international CROs could also lead to a net inflow of revenues from exploitation of Nigerian content overseas.²²⁵

221. See WIPO, *From Script to Screen: The Importance of Copyright in the Distribution of Films* 42–57, WIPO Pub. No. 950(E) (2011) (by Rob H. Aft & Charles-Edouard Renault), available at http://www.wipo.int/export/sites/www/ip-development/en/creative_industry/pdf/950.pdf (relating that potential distributors need basic documents “to know with certainty” that relevant copyright permissions have been secured according to a transparent chain of title); *Beyond Culture vs. Commerce*, *supra* note 76, at 124 n.364 (noting that assembling the requisite paperwork and learning to work within global distribution networks can be daunting for emerging filmmakers).

222. *COSON Illegal Until...*, VANGUARD (Mar. 10, 2011, 7:47 PM), <http://www.vanguardngr.com/2011/03/coson-illegal-until/> (reporting a conflict between the Copyright Society of Nigeria and the Musical Copyright Society of Nigeria, which has been referred to the WIPO by the Nigerian Attorney General).

223. Rice, *supra* note 150, at 39.

224. ADEJOKE O. OYEWUNMI, TOWARDS THE SUSTAINABLE DEVELOPMENT OF NIGERIA’S ENTERTAINMENT INDUSTRY IN THE DIGITAL AGE—WHAT ROLE FOR COPYRIGHT LAW AND ADMINISTRATION? 13–14, 28–29 (unpublished manuscript, on file with the author). The state’s own role in overseeing and regulating CROs also needs to be carefully structured. See Schlatter, *supra* note 194, at 57–69 (describing pitfalls of both private and public models).

225. See Jeff Price, *How They Legally Steal Your Money*, TuneCore (July 7, 2011), <http://blog.tunecore.com/2011/07/how-they-legally-steal-your-money.html> (noting substantial sums of money rightfully due to artists and publishers from overseas CROs often go uncollected). Alan Story worries that gains to African musicians would be dwarfed by payments flowing out to global record labels. Story, *supra* note 26, at 775–76. Yet, his analysis underestimates the strong preference in many developing countries for locally produced content. See Omar Lizardo, *Understanding the Flow of Symbolic Goods in the Global Cultural Economy*, 45 INT’L J. CONTEMP. SOC. 13, 24–25 (2008) (explaining the strong preference in many developing countries for locally produced content); Tyler Cowen, *Economic Scene; For Some Developing Countries, America’s Popular Culture Is Resistible*, N.Y. TIMES, Feb. 22, 2007, <http://www.nytimes.com/2007/02/22/business/22scene.html> (same). Conversely, music from developing countries

The bottom line is that there is substantial scope for copyright-related capacity building in Nigeria. The Nigerian experience is hardly atypical in this regard.²²⁶ Given the manifold benefits that homegrown creative industries supply, cultivating such capacity should become a developmental priority. We should not expect copyright law to work miracles overnight. Building a thriving ecology of creative industries may require other supportive policies to improve distribution and financing.²²⁷ However, well-targeted investments in copyright capacity can play an important role in that mix.

While establishing appropriate priorities and overseeing their implementation remains a national responsibility, the international community has a role to play as well. In the following section, the focus shifts to explore this international dimension.

B. INTERNATIONAL CAPACITY BUILDING

International capacity building typically functions across a North–South axis and, as such, is subject to many of the broader tensions endemic to global IP relations.²²⁸ For better or worse, much

is increasingly aired on “world music” radio programs, demonstrating a growing appetite for such music internationally. See Megan Romer, *Reader Submissions: World Music Radio Show List*, ABOUT.COM, <http://worldmusic.about.com/u/sty/radiostationsprograms/WorldMusicRadioShows/> (last visited Aug. 11, 2012) (listing a variety of world music radio stations that showcase music from developing countries).

226. See Athique, *supra* note 96, at 704 (noting initiatives taken by the Indian government to reduce losses to piracy); Schlatter, *supra* note 194, at 57–61 (underscoring the need for better governance of CROs in developing world); Schultz & van Gelder, *supra* note 50, at 143–46 (arguing that more effective copyright enforcement mechanisms could fuel creative development across Africa).

227. Karaganis, *supra* note 27, at 65; see also *Digital Content Production*, *supra* note 88, at 283–86 (arguing for an indirect subsidy model based on investments in creative infrastructure); *Beyond Culture vs. Commerce*, *supra* note 76, at 127 (proposing a global “diversity quota” to encourage investment in alternative cinema).

228. See CAROLYN DEERE-BIRKBECK & RON MARCHANT, INT’L CTR. FOR TRADE & SUSTAINABLE DEV., THE TECHNICAL ASSISTANCE PRINCIPLES OF THE WIPO DEVELOPMENT AGENDA AND THEIR PRACTICAL IMPLEMENTATION 1 (ICTSD Issue Paper No. 28, 2010), available at <http://ictsd.org/i/publications/74518/> (noting that debates about capacity building between developed and developing nations turn on fundamentally different

of the relevant expertise remains concentrated in developed countries. The key is to translate this expertise into technical-assistance programs that make sense for developing countries.

This is not a new problem. WIPO's capacity-building efforts date back several decades, and the 1994 TRIPS Agreement made providing technical assistance to developing countries a legal duty of developed member states.²²⁹ WIPO today has developed an extensive repertoire of capacity-building initiatives.²³⁰ It continues to dominate the field and has a hand in coordinating efforts by many others. However, a fair amount of assistance is also provided by developed countries on a bilateral basis. Moreover, other international organizations have their own programs, and private industry groups and NGOs are important players as well.²³¹

Ideally, such programs would communicate a broad range of perspectives and options. They would provide balanced information covering both rights and limitations that takes into account each country's specific needs and goals.²³² The aim would be to empower developing countries to set their own priorities in the IP field, while equipping them with the technical know-how to both implement and adapt established models.²³³

conceptions "about the role of IP in development").

229. *Id.* at 3 (observing that funding for technical assistance has increased over the years); TRIPS Agreement, *supra* note 128, art. 67 ("[D]eveloped country members shall provide . . . technical and financial cooperation in favour of developing and least-developed country Members.").

230. *WIPO Building Respect for IP Newsletter: March 2011*, WIPO, http://www.wipo.int/enforcement/en/news/2011/enforcement_03.html (last visited Aug. 12, 2012) (providing a list of capacity-building activities).

231. See DEERE-BIRKBECK & MARCHANT, *supra* note 228, at 4–5 (noting efforts to improve collaboration between NGOs and private industry); DE BEER & OGUAMANAM, *supra* note 43, at 6, 22 (discussing technical support offered by such varied organizations as WIPO, the African Regional Intellectual Property Organization, the U.S. Department of Justice, the European Patent Office, Microsoft, and the Ford Foundation).

232. See WIPO Development Agenda, *supra* note 7, nos. 13, 14 (explaining that WIPO's collaboration shall be "development-oriented" and take "into account the priorities and special needs of developing countries").

233. *External Review*, *supra* note 146, at 38–39 (defining "development-orientation" as assistance that is "effective, relevant, and locally-owned," and listing a number of essential elements such as "systematic needs assessments" and "choice of projects and providers"); DEERE-BIRKBECK & MARCHANT, *supra* note

It is clear that much international capacity building and technical assistance falls short of these ideals. A lack of transparency and accountability raises questions as to the value of the assistance conferred.²³⁴ Conflicts of interest undermine confidence in the objectivity of advice; bias toward rightsholder interests seems pervasive.²³⁵ A focus on treaty compliance has led to rigid “one-size-fits-all” prescriptions.²³⁶ An emphasis on domestic enforcement gives short shrift to other priorities.²³⁷

228, at 13–17 (discussing how governments must be engaged in the process of advancing IP law).

234. DEERE-BIRKBECK & MARCHANT, *supra* note 228, at 6–7 (lamenting lack of transparency as to how technical-assistance programs operate and where the money is actually spent); Kirsten M. Koepsel, *How Do Developed Countries Meet Their Obligations Under Article 67 of the TRIPS Agreement?*, 44 IDEA 167, 205–07 (2004) (describing the lack of oversight by the TRIPS Council in regulating the delivery of technical assistance).

235. *External Review*, *supra* note 146, at vii, xii (contending that WIPO remains more responsive to rightsholder interests than to civil society representatives); DEERE-BIRKBECK & MARCHANT, *supra* note 228, at 7–9 (observing that IP officials in developing countries seldom communicate with other government agencies and often develop stronger relationships with foreign donors than they do with domestic policy-makers focused on economic development); William New, *WIPO Defends Involvement in IP Enforcement Meeting in the Philippines*, INTELL. PROP. WATCH (Oct. 24, 2001, 7:29 PM), <http://www.ip-watch.org/2011/10/24/wipo-defends-involvement-in-ip-enforcement-meeting-in-the-philippines/> [hereinafter *WIPO Defends*] (reporting criticism of WIPO for being perceived as overly beholden to foreign rightsholder interests); *cf.* WIPO Development Agenda, *supra* note 7, no. 6 (calling for technical assistance staff to avoid potential conflicts of interest). While most critiques of international capacity building have focused on WIPO's efforts, anecdotal evidence (and common sense) suggests technical assistance provided by national governments is even more susceptible to such biases. *See* Peter Drahos, “Trust Me”: *Patent Offices in Developing Countries*, 34 AM. J.L. & MED. 151, 160–163 (2008) (critiquing the technocratic trust developed between patent officials in developing countries with their counterparts in developed countries creating a bias toward foreign rightsholder interests); William New, *US, WIPO Training Programme on IP Rights in Africa Comes Under Fire*, INTELL. PROP. WATCH (Feb. 12, 2012, 12:43 PM), <http://www.ip-watch.org/2012/02/12/us-wipo-training-programme-on-ip-rights-in-africa-comes-under-fire/> (criticizing the perceived bias in a U.S.-sponsored IP Forum in Africa).

236. DE BEER & OGUAMANAM, *supra* note 43, at vi (criticizing “one-size-fits-all” prescriptions, “which tended to prevail in the design of IP norms and the delivery of IP technical assistance”); CHRISTOPHER MAY, *THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA* 61–65 (2007) (same).

237. DE BEER & OGUAMANAM, *supra* note 43, at 22 (noting that WIPO's

Such an unbalanced emphasis is hardly surprising because, from the standpoint of developed-country providers, inducing developing countries to enforce IP rights is the whole point. Noble sentiments about incentivizing innovation are all very well, but the main goal remains stopping “those people from stealing our stuff.” More effective enforcement directly benefits the export interests of content and technology industries in developed countries. Therefore, expert consultants drawn from these industries or furnished by their governments naturally push enforcement to the fore. Perhaps not coincidentally, a focus on domestic enforcement is also built into the language of TRIPS article 67.²³⁸

A constant refrain of capacity building critics and reformers is that technical assistance should be more “demand driven” and “development oriented.”²³⁹ The first phrase, “demand driven,” speaks largely to process concerns. It calls for formal needs assessments and consultations with public and private stakeholders to determine priorities and increase local “buy-in.”²⁴⁰ By contrast, “development oriented” speaks to substantive concerns; however, the meaning of this mantra remains ill defined.²⁴¹

technical and capacity-building support is essentially enforcement oriented); *WIPO Defends*, *supra* note 235 (describing a recent WIPO meeting dedicated to enforcement issues); William New, *Lines of Global Enforcement Debate Surface at WIPO Meeting*, INTELL. PROP. WATCH (Dec. 5, 2011, 9:05 AM), <http://www.ip-watch.org/2011/12/05/lines-of-global-enforcement-debate-surface-at-wipo-meeting/> (reporting concerns over enforcement emphasis in global IP discourse).

238. TRIPS Agreement, *supra* note 128, art. 67 (calling for developed countries to assist with the “*protection and enforcement of intellectual property rights . . . [which] shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters*” (emphasis added)).

239. See WIPO Development Agenda, *supra* note 7, no. 13 (“WIPO’s legislative assistance shall be, *inter alia*, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries”); DEERE-BIRKBECK & MARCHANT, *supra* note 228, at 13 (positing that technical assistance should promote local business and take into account other development needs such as public health); *External Review*, *supra* note 146, at vi (noting that the idea of “demand-driven” needs to emphasize mutual contributions).

240. See DEERE-BIRKBECK & MARCHANT, *supra* note 228, at 14–15 (recommending that governments should include industry representatives in its discussions with WIPO). *But see External Review*, *supra* note 146, at 39 (cautioning that demand-driven assistance does not require WIPO to blindly acquiesce to requests that would be harmful).

241. DEERE-BIRKBECK & MARCHANT, *supra* note 228, at 7–8 (observing that the

Advocates of a development-oriented approach contemplate a holistic vision that integrates IP rights with broader developmental objectives, taking full account of local circumstances.²⁴² Proponents of development-oriented technical assistance also seek a more balanced approach to the IP system. To some, such “re-balancing” means placing more emphasis on the flexibilities that IP treaties enable. Development-oriented capacity building, in this view, essentially follows the subtractionist template described at the outset of this article.²⁴³

However, such “negative” strategies do not exhaust the gamut of development-oriented reforms. There is ample scope to “accentuate the positive” by redirecting “affirmative” IP capacity building toward more development-oriented goals. The overarching challenge is for developing countries to develop IP regimes that serve their own interests. This means ensuring that, where rightsholder interests align with societal goals, they are supported by well-designed institutions that function effectively.

A paramount priority should be empowering domestic innovation. This would entail a fundamental reorientation of existing capacity-building efforts, which, as noted, tend to prioritize domestic enforcement mechanisms. Developing countries share an interest in strengthening their domestic enforcement capabilities to some degree. However, enforcement is only one way to “latch on to the affirmative” potential of IP law. For many developing countries, the real need is to support local entrepreneurs in navigating the IP system across all its facets—acquisition, licensing, *and* enforcement,

WIPO “has not developed a comprehensive program or methodology” for its technical-assistance programs); *External Review*, *supra* note 146, at vi (noting “confusion . . . about the meaning of the term ‘demand-driven’”).

242. *External Review*, *supra* note 146, at 39 (emphasizing that WIPO assistance must consider how intellectual property laws create opportunities within the larger development process). Such contextual sensitivity lends itself to the strategic priority setting suggested in the preceding section—making IP capacity building more of an “a la carte” exercise than a totalizing commitment. See DEERE-BIRKBECK & MARCHANT, *supra* note 228, at 15 (arguing that IP can only promote innovation and development as part of a holistic approach that integrates other policies related to economic development).

243. See DEERE-BIRKBECK & MARCHANT, *supra* note 228, at 6 (describing the view that technical assistance should focus on “technology transfer, compulsory licensing regimes, and countering anti-competitive behaviour by IP right-holders”).

both offensively and defensively, at home and abroad.²⁴⁴ To implement such a nativist approach to development, technical assistance needs to adopt a system-wide approach to the IP system. The overarching aim should be to empower domestic stakeholders to exploit both the rights and flexibilities of IP law to their full advantage.

Such efforts are perhaps most advanced in the patent realm. WIPO devotes the lion's share of its technical assistance budget to building "industrial" IP capacity and offers a rich array of patent and innovation-related services.²⁴⁵ Moreover, several developing countries have implemented their own technology-transfer programs to move research from the laboratory to the market.²⁴⁶ Some have also devised innovative initiatives to support domestic entrepreneurs by, for example, charging specific government agencies with helping inventors procure and enforce patents, search for existing patents, and learn about potentially useful technology.²⁴⁷ Such proactive uses

244. See *id.* at 6 (noting that "many developing countries . . . emphasise the need for greater support for local companies, scientists, and artists to make use of the IP system to boost local development and protect their own inventions and creations on the international market.").

245. *External Review*, *supra* note 146, at v, vii (criticizing the emphasis on industrial property given the neglected potential of creative industries); *cf.* *Patents*, WIPO, <http://www.wipo.int/patentscope/en/> (last visited Sept. 2, 2012) (describing various patent-related services and resources provided by WIPO); *TISC Technology and Innovation Support Centers*, WIPO, <http://www.wipo.int/patentscope/en/programs/tisc/index.html> (last visited Sept. 2, 2012) (describing the network of WIPO Technology and Innovation Support Centers).

246. See, e.g., Chunjuan Luan et al., *Patent Strategy in Chinese Universities: A Comparative Perspective*, 84 *SCIENTOMETRICS* 53, 59 (2010) (noting legislation encouraging universities to file patents on government-funded research); Saez, *supra* note 68 (same).

247. See *Promotion of Inventiveness*, *supra* note 71, at 486–88 (describing role of patent office in disseminating information on existing patents and alerting domestic industry to potentially relevant technology); *Christina the Alchemist*, *ECONOMIST*, Nov. 5, 2011, <http://www.economist.com/node/21536542/print> (describing Argentina's program to help domestic inventors secure foreign patent rights and defray overseas procurement and enforcement costs); Mike Masnick, *How China Is Boosting Patents: Make Professors File Free Patent Applications to Get Tenure*, *TECHDIRT*, <http://www.techdirt.com/articles/20110203/05001812940/how-china-is-boosting-patents-make-professors-file-free-patent-applications-to-get-tenure.shtml> (Mar. 1, 2011, 4:50 AM) (reporting that the Chinese government is encouraging professors to file patents by tying those filings to their chances of

of patent institutions should be emulated in the copyright domain.

Far less effort has been devoted to copyright-related capacity building either domestically or internationally.²⁴⁸ As noted, such comparative neglect reflects a complex of biases that privilege industrial over cultural rights in global policy.²⁴⁹ As a result, WIPO appears to have been less proactive in engaging with the needs of emerging creative industries than it has with its patent and technology initiatives. WIPO does offer an impressive array of copyright-focused materials on its website.²⁵⁰ However, while these materials provide useful descriptions of how IP rights function in creative industries generally, they arguably give short shrift to the practical problem solving required to implement such models in developing countries.²⁵¹ Such neglect is troubling in light of the comparative advantage that most developing countries have in developing copyright-reliant industries compared with patent.²⁵²

receiving tenure); Saez, *supra* note 68 (describing steps to facilitate intellectual property in the Philippines that include education about which inventions are patentable and how to commercialize the patent); NAT'L OFFICE FOR TECH. ACQUISITION & PROMOTION, <http://notap.gov.ng/content/activities> (last visited Aug. 12, 2012) (stating that the Nigerian National Office of Technology Acquisition and Promotion will draft patents on behalf of inventors).

248. *External Review*, *supra* note 146, at vii, xxxi. *But see id.* at 104 (describing WIPOCOS and AFRICOS initiatives to improve CRO efficiency).

249. *See, e.g., supra* note 147–149 and accompanying text.

250. *See, e.g., Publications*, WIPO, http://www.wipo.int/ip-development/en/creative_industry/publications.html (last visited Aug. 12, 2012) (offering informational booklets on different aspects of copyright law).

251. *Cf.* Steven Jamar, *A Lawyering Approach to Law and Development*, 27 N.C. J. INT'L L. & COM. REG. 31, 33–34 (2001) (lamenting approaches to legal development based on institution building and arguing instead for a “bottom up” focus on developing practical skills that lawyers can use to solve real-world problems). Much of WIPO’s recent energy appears to have focused on measuring the economic contribution of creative industries rather than investigating the practical challenges that such industries face in exploiting their copyrights. *Cf.* WIPO, WIPO STUDIES ON THE ECONOMIC CONTRIBUTION OF THE COPYRIGHT INDUSTRIES 26 (2012), available at http://www.wipo.int/ip-development/en/creative_industry/pdf/economic_contribution_analysis_2012.pdf. Such research undoubtedly holds considerable value for informing high-level policy. However, such “top-down” efforts need to be supplemented with more pragmatic assistance to bolster the legal and commercial capabilities such emerging industries require.

252. *External Review*, *supra* note 146, at 119 (noting that “[i]n the copyright area, [developing countries] called on WIPO to boost attention to the modernization of copyright offices and collective management societies.”). None

Given the developmental potential afforded by creative industries already described, a shift in emphasis seems overdue. Hopefully, WIPO's recently announced African audiovisual initiative will prove a harbinger of broader changes in this direction.²⁵³

As the Nollywood case study showed, there is ample scope for capacity building in the copyright realm. Copyright regimes may not require formalities as a precondition for protection; however, *using* copyrights effectively is a different matter. Exploiting creative content in a sophisticated manner requires substantial legal, technical, and commercial expertise. Such know-how remains in short supply in most developing countries. Governments should look to bolster their own internal capacity and then develop mechanisms to leverage such expertise on behalf of industry. Copyright offices and cultural ministries need to bring the same proactive, client-oriented focus to building creative industries as their patent-oriented counterparts have begun to do in technology sectors.²⁵⁴

This may include stepped-up enforcement but also maintaining voluntary registries for rights management information, conducting outreach to local authors and publishers, educating the public on the copyright system, and providing assistance with the copyright clearance paperwork required for foreign distribution. Such efforts should eschew ideological stances in favor of pragmatic, real-world solutions; for example, providing guidance on open-licensing models as well as closed ones would present rightsholders with a broader

of this is to discount the critical importance of technology for development. The point is merely that, for many developing countries, the relative benefits of investing in patent systems as a means to facilitate technological development are less manifest. *See Patents on a Shoestring, supra* note 11, at 762 (noting concern that patents impede access to technology). By contrast, copyright does not exert nearly the same blocking effects, and the competitive playing field is more level.

253. *Cf.* WIPO, CDIP, *Strengthening and Development of the Audiovisual Sector in Burkina Faso and Certain African Countries*, 9th Sess., WIPO Doc. CDIP/9/13 (Apr. 4, 2012) (describing a major WIPO capacity-building initiative to strengthen Africa's film industry).

254. *Cf.* Adebambo Adewopo, *Intellectual Property Regime and the Global Financial Crisis: Lessons from Nigeria*, 14 J. MONEY LAUNDERING CONTROL 183, 186–89 (2011) (praising Nigeria's STRAP initiative as a proactive, multifaceted program); DE BEER & OGUAMANAM, *supra* note 43, at 23–25 (criticizing enforcement bias of STRAP, while praising other Nigerian copyright initiatives).

array of options.²⁵⁵ Nor should governments necessarily occupy the central role in such initiatives. Where industry associations offer more effective conduits, capacity building should encompass them.

Developing such internal capacity-building initiative will likely require external help; outside consultants can supply critical expertise. Developing countries need to be discriminating consumers, drawing upon a diverse range of advisers and viewpoints, drawn from both Northern and Southern providers.²⁵⁶ Moreover, developing countries should not hesitate to question the received wisdoms reflected in such advice. Existing models need to be adapted to local contexts, and IP rights need to serve development interests. IP institutions need to be configured accordingly. To do so will require sustained effort and experimentation. There is also a need for development-oriented research and scholarship that moves beyond ideological debates to focus on practical problem solving.

Copyright systems, in particular, need to take into account digital challenges that have upended existing models. Just as mobile technologies have allowed developed countries to leapfrog wired infrastructure and develop innovative e-commerce models, so too, developing countries have an opportunity to bypass outdated legal standards and pioneer twenty-first-century models.²⁵⁷ Concrete measures such as implementing digital rights-management systems

255. DE BEER & OGUAMANAM, *supra* note 43, at 25–27 (noting efforts to improve training on IP in developing countries to include areas such as open IP licenses).

256. DEERE-BIRKBECK & MARCHANT, *supra* note 228, at 16 (describing “vast quantities of assistance, training, and international travel opportunities available” as enabling countries to “select their source of [technical assistance], choosing providers they deem most likely to address their needs”); *External Review*, *supra* note 146, at xxii (proposing that WIPO adopt guidelines to ensure transparency in the selection of technical assistance advice from a wide variety of experts).

257. See Labbe, *supra*, note 69, at 424 (noting that Kenya’s embrace of mobile banking was facilitated by a lack of preexisting regulations that would have encumbered such innovation). Digital challenges admittedly remain complex and imperfectly understood. Devising appropriate responses has bedeviled commentators and policy-makers everywhere. However, developing countries have a potential advantage. Because they can approach IP systems essentially as “green field construction,” they have less need to maneuver around regulatory barriers and vested interests in reaching for innovative solutions. Capacity building to encourage such innovation could thus yield lessons of global value.

would be a useful start.²⁵⁸ There is also scope for experimentation with novel business models facilitated through digital intermediaries, which comprise options for both distribution²⁵⁹ and enforcement.²⁶⁰

To support such innovative approaches to building development-oriented IP systems, there is also room for innovation in the means by which international capacity-building assistance is supplied. We should think more carefully about where specific IP capabilities would be most efficiently located: at the multinational, national, or local levels, as well as public vs. private sectors.²⁶¹ We should

258. See *supra* note 38 and accompanying text; see also Gurry, *supra* note 26, at 10 (suggesting that WIPO implement a digital rights regime).

259. See, e.g., Claire Miller, *YouTube Ads Turn Videos into Revenue*, N.Y. TIMES, Sept. 2, 2010, <http://www.nytimes.com/2010/09/03/technology/03youtube.html> (describing a YouTube program to share revenue from advertisements with copyright holders); Ben Sisario, *Out to Shake Up Music, Often with Sharp Words*, N.Y. TIMES, May 6, 2012, <http://www.nytimes.com/2012/05/07/business/tunecore-chief-shakes-up-music-with-his-own-words.html?pagewanted=all> (describing TuneCore's "revolutionary" flat-rate distribution model).

260. See Eriq Gardner, *The Righthaven Experiment: A Journalist Wonders if a Copyright Troll Was Right to Sue Him*, ABA J., May 2012, http://www.abajournal.com/magazine/article/the_righthaven_experiment_a_journalist_wonders_if_a_copyright_troll_was_rig/ (describing the Righthaven business model based on purchasing litigation rights and launching mass-volume enforcement actions against copyright infringement online). See Karaganis, *supra* note 27, at 27 (noting the ability of corporate enforcement groups to "self-finance through settlements"); Nate Anderson, *The RIAA? Amateurs. Here's How You Sue 14,000+ P2P Users*, ARSTECHNICA (June 1, 2010, 8:38 PM), <http://arstechnica.com/tech-policy/news/2010/06/the-riaa-amateurs-heres-how-you-sue-p2p-users.ars> (noting the effectiveness of private action peer-to-peer file-sharing lawsuits compared to those brought by the Recording Industry Association of America). There are legitimate questions regarding the way some of these firms have played fast and loose with procedural niceties. See *Copyright Trolls*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/copyright-trolls> (last visited Sept. 2, 2012) (reporting how IP enforcement suits will often lump disparate defendants together and implicate massive damages to force settlements). However, the point is that outsourcing enforcement can be cost-effective, and rightsholders should not hesitate to explore its potential for legitimate aims.

261. Rather than replicate a full spectrum of capabilities within every national system, some tasks are more effectively outsourced to centralized providers—WIPO's PATENTSCOPE and Patent Information Services offer a case in point. *TISC Technology and Innovation Support Centers*, *supra* note 245 (noting that projects to advance access to technology services are done in cooperation with national and regional governments within the framework of an international agenda). In other contexts, distributed arrangements that push capabilities to the

develop more flexible delivery mechanisms. Top-down models of technical assistance should be supplemented by more flexible, decentralized arrangements. For example, e-mentoring and *pro-bono* counsel can deliver context-specific expertise on demand, directly to private stakeholders.²⁶² Professional development through internships in government and industry can also supply practical training and insight into real-world problem solving.²⁶³ Collaboration between similarly situated developing countries should be similarly encouraged.²⁶⁴

In addition, IP capacity building should be better integrated with broader development initiatives. Rather than a narrow technical domain monopolized by specialists, IP rights should be viewed holistically as functioning within broader creative, commercial, and technological ecologies.²⁶⁵ Creative industries in developing countries are already the recipients of a diverse array of assistance. Many countries have specific policies to support cultural enterprises, for example. Indeed, developing countries have been innovators in this field.²⁶⁶ Various NGOs and intergovernmental organizations also

local level or focus on industry clusters may be preferred. Sisario, *supra* note 259.

262. Aerni & Rügger, *supra* note 69, at 440–44 (highlighting how e-mentoring can help overcome bottlenecks in providing IP education); PUB. INTEREST INTELLECTUAL PROP. ADVISORS, www.piipa.org (last visited Sept. 2, 2012) (describing Public Interest Intellectual Property Advisors' efforts to provide IP expertise to both public and private stakeholders in developing countries).

263. See Peter Yu, *How to Design Development-Oriented Intellectual Property Training* 18 (draft manuscript) (on file with author).

264. *External Review*, *supra* note 146, at xii (explaining that partnerships between similarly situated countries can create mutual support as parties learn from each other). Because existing templates need to be adapted to the development context, other developing countries may harbor expertise and experience in grappling with common issues and challenges entailed. Cf. Aerni & Rügger, *supra* note 69, at 437–38 (describing tacit knowledge and practical problem solving harbored in developing countries). The Washington Declaration's call for greater South–South cooperation in this regard is thus extremely well taken. Cf. *Washington Declaration*, *supra* note 17, at 5.

265. DEERE-BIRKBECK & MARCHANT, *supra* note 228, at 13 (emphasizing that technical assistance should not be merely reactive to developments in international treaty law).

266. See *Beyond Culture vs. Commerce*, *supra* note 76, at 119–20 (describing indirect subsidies to Indian regional film industries); *Digital Content Production*, *supra* note 88, at 271–74 (describing Brazil's Culture Point initiative to empower digital creativity).

operate a plethora of programs to nurture the growth and diversity potential of creative industries.²⁶⁷ Yet such cultural and commercial initiatives often betray either an ambivalent attitude to or a simplistic understanding of intellectual property rights.²⁶⁸ Conversely, providers of technical assistance on the IP side often operate in an isolated silo that ignores such cultural and commercial initiatives.²⁶⁹

Furthermore, more should be done to develop transnational IP capabilities to support creative industries whose content is distributed abroad. As noted, technical assistance can overcome critical export bottlenecks. Here too, advising on transnational licensing and enforcement should be integrated with commercial and technological strategies. That said, there is plenty to do within purely legal

267. See, e.g., SAGNIA, *supra* note 95, at 1; *Creative and Cultural Economy*, BRITISH COUNCIL, <http://creativeeconomy.britishcouncil.org/> (last visited Sept. 2, 2012); *Projects*, THE GLOBAL ALLIANCE FOR CULTURAL DIVERSITY, http://portal.unesco.org/culture/en/ev.php-URL_ID=31465&URL_DO=DO_TOPIC&URL_SECTION=-477.html (last visited Sept. 2, 2012).

268. The staff employed by such agencies typically has a background in economics or international relations. As such, they may lack detailed knowledge of the nuances of IP law, let alone practical experience grappling with the real-world challenges that IP rightsholders must navigate. The 2010 UNCTAD/UNDP report offers a revealing example: its 300-plus pages encompass a superficially impressive chapter on IP rights. Yet closer examination reveals this chapter to be nothing more than a descriptive primer on the sources and scope of IP law. When the report gets down to advising on the use of these rights, its recommendations are confined to two solitary paragraphs, which acknowledge that “copyright is of little economic value if these rights cannot be enforced.” Sadly, the report offers zero guidance on how to combat the piracy problem other than a bizarre call for “transparency.” UNCTAD Report, *supra* note 76, at 177.

269. DEERE-BIRKBECK & MARCHANT, *supra* note 228, at 9 (charging that a lack of contextual awareness feeds into the misconception that IP issues are not connected with broader development concerns); *External Review*, *supra* note 146, at 12 (pointing out that the contemporaneous shift of WIPO’s focus toward development activities and UNDP’s reduction of its own IP programs effectively separated WIPO from broader U.N. goals on development). A notable exception is the World Bank’s African Music Project, which—in its initial conception—demonstrated an admirably holistic approach that integrated an IP rights management strategy with its commercial and technological initiative. As such, it supplies a template from which successor initiatives could draw useful lessons. See generally Frank J. Penna et al., *The African Music Project*, in POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 95–112 (J. Michael Finger & Phillip Schuler eds., 2004) (highlighting that the project has improved the musicians’ methods of revenue collection and has reduced piracy).

domains. Regional IP organizations have typically focused on patents and trademarks, not copyright.²⁷⁰ As digital content flows increasingly disregard borders, legal mechanisms need to adapt.²⁷¹ Even rudimentary steps to promote greater regional and transnational cooperation and to move toward standardized record keeping could pay dividends.²⁷²

Moreover, there is ample scope for more targeted solutions. The “transnational” challenges developing countries face often center on specific developed-country markets with concentrated expatriate populations.²⁷³ Accordingly, capacity building can be designed to take advantage of established IP infrastructure in these countries. Bilateral initiatives to build transnational licensing and enforcement capacity in such diaspora export markets would allow emerging producers of creative content to tap into a comparatively wealthy customer base.

While Western content producers may be understandably reluctant to offer support for potential competitors to enter their home markets, emerging-market producers are not really competing for the same audiences. Licensed distribution of Tamil films to the overseas Tamil community, for example, would primarily displace pirated consumption, not Hollywood blockbusters. Accordingly, a coalition of interests could be exploited. Developing countries should demand transnational assistance in return for their commitment to enforce copyright norms.²⁷⁴ For their part, Western governments and content

270. See, e.g., Park, *supra* note 214, at 698–708 (describing the industrial property focus of two regional African organizations).

271. See Neil Conley, *Future of Licensing Music Online*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 482–85 (2008) (noting that CROs justify their territorial licensing by arguing that closeness to rightsholders allows for better services, but arguing that allowing for multi-territorial licensing would create better music platforms).

272. See, e.g., *CISAC Trains MCSN Staff*, VANGUARD (Nov. 20, 2009), <http://www.vanguardngr.com/2009/11/cisac-trains-mcsn-staff/> (noting that collaboration between the International Confederation of Societies of Authors and Composers and the South African Recording Rights Association Limited to standardize copyright data, allowing interoperable record-keeping between sister societies).

273. Athique, *supra* note 96, at 713–14; DE BEER & OGUAMANAM, *supra* note 43, at 23.

274. Cf. JR Reichman & David Lange, *Bargaining Around the TRIPS*

industries would reap public relation dividends by showing that they take *all* piracy seriously everywhere, as opposed to just piracy of *their* products overseas.²⁷⁵ In the long run, Hollywood may have more to gain from enlisting allies among emerging creative industries than it would lose from increased competition.²⁷⁶

Finally, attention should be directed toward broader structural reforms to make the global copyright system more hospitable to the diverse content emanating from developing countries. Such a project implicates many components on which space here does not permit elaboration. However, one logical focus of such efforts would be reforms directed at collective rights management regimes to ensure greater openness to diverse constituents and a more transparent allocation of benefits.²⁷⁷ Ensuring that creativity is thereby rewarded

Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions, 9 DUKE J. COMP. & INT'L L. 11, 15–16 (1998) (suggesting that intellectual property rules should be subject to ongoing bargaining between public and private actors in developed and developing countries, based on mutual interests).

275. Drawing on their existing staff and expertise, the Big Media trade lobbies could buy much-needed goodwill by lending assistance to their emerging market peers. Simply setting up an information clearinghouse to address basic registration and enforcement issues would be a start.

276. Hollywood already partners with film industries around the world in co-production deals driven by short-term profit. However, capacity-building partnerships focused on strengthening its partners' commercial capabilities would entail an investment with a longer-term payoff. The idea would be, for example, as the Tamil film industry benefits from increased sales, it will lobby Indian policy-makers and help shape public opinion to oppose piracy and support heightened protection. *See* Karaganis, *supra* note 27, at 28 (noting that “domestic companies and artists are often better able to mobilize attention from local authorities—even when representing products embedded in global circuits of investment and distribution For obvious reasons, the politics of copyright enforcement on behalf of domestic producers are more attractive . . . than enforcing Microsoft or Disney licenses.”).

277. *Cf.* Ivan Reidel, *The Taylor Swift Paradox: Superstardom, Excessive Advertising and Blanket Licenses*, 7 NYU J.L. & BUS. 731 (2011) (arguing that blanket licenses by CROs impoverish content diversity, reduce audience welfare, and jeopardize the livelihood of artists); Kaitlin Mara, *Panelists: Copyright Law's 'Byzantine Maze' Stalling New Business Models*, INTELL. PROP. WATCH (Nov. 9, 2010 11:30 AM), <http://www.ip-watch.org/2010/11/09/panellists-copyright-law%E2%80%99s-%E2%80%98byzantine-maze%E2%80%99-stalling-new-business-models/> (reporting the view that outdated copyright laws have led to fragmented rights that inhibit digital innovation); Price, *supra* note 225 (arguing that CROs operate needlessly opaque structures that privilege the interests of

more equitably would benefit developing countries, which are disadvantaged under the present order. It would also bring the practice of the copyright system in closer alignment with its theoretical rationales.

C. TOWARD A PRO-IP DEVELOPMENT AGENDA

Efforts to remake capacity building in a more development-oriented guise are already under way, and the need to encourage domestic innovation has been recognized. The WIPO Development Agenda included several recommendations on technical assistance and capacity building that focus on helping developing countries harness the affirmative potential of intellectual property law.²⁷⁸ These recommendations reflect the strong interest among many developing countries, particularly those in Africa, in exploring IP's upside.

However, the Development Agenda, while promising, remains incomplete. It pays too little heed to the need for transnational capacity building. It fails to rectify the misplaced emphasis on patent vs. copyright. Moreover, it has left ambiguous the meaning of "development orientation." This lodestar requires both substantive elaboration and concrete implementation.

Subtractionists seek to "balance" capacity building by addressing concerns over conflicts of interest, transparency, and accountability. They advocate a "holistic approach" to IP that places more emphasis on flexibilities and limitations, and less on enforcement. However, framing an effective development agenda for IP requires more than injecting balance and eliminating conflicts. Whatever "balanced" package of IP rights emerges will be wasted unless they can be used in practice. Foreign multinationals should not remain beneficiaries of the IP system by default.

I have argued for a "nativist" approach to development that would reorient capacity building around the needs of domestic innovators, with a particular focus on creative industries. I agree that the current focus on domestic enforcement needs to be rebalanced toward a

publishers and record labels over artists).

278. See WIPO Development Agenda, *supra* note 7, nos. 2–4, 11 (providing for, among other recommendations, assistance to small business and research institutions and strengthening capacity for national enforcement of IP rights).

more holistic approach to IP. However, my conception of such a holistic approach would focus less on substantive norms and more on practical problem solving, providing the institutional expertise for domestic authors and inventors to commercialize their innovation.

By focusing solely on flexibilities and technology transfer without acknowledging the potential for affirmative capacity-building measures, subtractionists perpetuate the misguided impression that innovation is something that happens outside the developing world. They present IP rights as a threat to development, as opposed to a potential contributor. Such one-sided approaches to IP & development do a disservice to the developing countries whose welfare they ostensibly champion.

Subtractionists claim to support reasonable levels of IP protection and only target “IP maximalism.” Yet, as noted, in the development context, “reasonable IP” cannot be assumed as the baseline norm. It will take real, sustained effort to realize this ideal. Refocusing existing capacity-building initiatives around domestic innovation is only the start. The same fresh thinking and openness to experimentation that subtractionists demonstrate in proposing alternative models to IP rights is needed to adapt the conventional IP system to the needs of development. There is likewise a need for more evidence-based policies and research to inform existing initiatives. Embracing such positive strategies as well as negative ones would lend credibility to self-styled advocates of the “public interest” by demonstrating their willingness to engage the public interest both *for* and *against* IP protection.

V. CONCLUSION

In opposing agendas for IP maximalism, public interest advocates issue a powerful call for sanity and balance. When it comes to framing a development agenda, however, their preoccupation with the excesses of IP law may itself prove “too much of a good thing.” The same rebalancing that subtractionists advocate for the global IP system could usefully be applied to their unduly narrow vision of the “development interest.” Making IP work for developing countries requires a holistic approach that engages both the positive and negative potential of IP rights. I have argued that the developmental

potential of creative industries is particularly promising. Yet copyright has been perversely neglected by existing capacity-building initiatives, and there is an urgent need to refocus technical assistance around the needs of domestic innovators. I hope that future articulations of the public interest “development agenda” will undertake this challenge in a more even-handed fashion.