

**HIV/AIDS, 'TRIPS plus' and 'Knowledge Ecology:'  
Unpacking the Semantics of Transnational Intellectual Property  
'Harmonisation'**

By Mike Upton (Goldsmiths, University of London)

**Abstract**

This article considers the semantics employed by various actors in the negotiation and contestation of processes associated with the transnational 'harmonisation' of intellectual property law, particularly as these processes impact on access to medicines for HIV/AIDS treatment. I draw on fieldwork conducted with several international organisations concerned with intellectual property in Geneva, Switzerland, to consider the ways in which a diverse set of actors discursively re-signify the practices of pharmaceutical companies that are perceived to limit access to medicines. While this semantics engages with dominant intellectual property concepts, I argue that it simultaneously presages the construction of alternative paradigms. Thus practices and concepts that may initially appear to embrace, or participate in, neoliberal processes, on closer inspection can also turn out to be sites of problematisation.

---

## Introduction

I am trying to persuade you that the word is the medium in which power works. Don't clutch onto the word, but do clutch onto certain ideas about it (Hall 1997: 299).

David Harvey (2005) has argued that a necessary condition for the rise of neoliberalism took the form of a semantic conceit: through appeals to the 'seductive' notions of 'individual freedom' and 'human dignity,' a previously obscure economic philosophy achieved orthodoxy (2005: 5). In mainstream political discourse in England, the word 'reform' has become synonymous with the application of neoliberal shock therapy to services previously designated 'public,' from pensions to the National Health Service, not to mention higher education. In this paper, I consider the importance of semantics employed by various actors in the negotiation and contestation of processes associated with the transnational 'harmonisation' of intellectual property law. In this context, 'harmonisation' is an ethnographic term denoting the convergence of national legal systems to norms and procedures of intellectual property law established through transnational legal instruments, such as the WTO's Trade-Related Aspects of Intellectual Property Agreement (TRIPS). 'Harmonisation' can relate to both substantive and procedural aspects of intellectual property law: from the standardisation of IP application procedures across jurisdictions to the codification of patentable subject matter. Intellectual property 'harmonisation' is an ongoing process that is globalising highly specific concepts of ownership, property, and authorship and represents a significant site for understanding neoliberalism as a series of political, material, and cultural processes. In this article, I seek to 'address the constitutive role of law in creating the cultural fictions through which capital enunciates the form and ensures the force of its entitlements' (Coombe 2003: 89). While many actors promoting the 'harmonisation' of intellectual property law cast the process as the inevitable product of trade and globalisation, here I analyse the transnational 'harmonisation' of intellectual property concepts and practices as a powerful socio-cultural process, one

with important material ramifications, particularly, as I will show, in relation to the problem of access to medicines.

I begin by offering an analysis of an official document I encountered during fieldwork in 2008 at the World Intellectual Property Organisation in Geneva (WIPO).<sup>1</sup> I describe the ways in which this one-page 'list of issues' indexes many of the conceptual contests concerning intellectual property 'harmonisation.' Second, I situate these contests in relation to campaigns for access to medicines for HIV/AIDS treatment in the Global South. Here I draw on the dispute between pharmaceutical companies and the South African government over exceptions to patent protections on medicines. Using this case, I argue that while opportunities to promote access to medicines do formally exist in current intellectual property regimes, their exploitation is increasingly rendered taboo.

Much anthropological attention to intellectual property has focused on bioprospecting agreements, and the particular kinds of opportunities they afford, for example the recalibration of traditional medical knowledge as 'cultural property' (Greene 2004). Here I focus on a particular semantics developed through a transnational network of advocates that I argue simultaneously deploys and disrupts the basic grammar of intellectual property. In the context of efforts to increase access to medicines, I show how this semantics powerfully re-signifies the practices of pharmaceutical firms attempting to extend the patent lives of antiretroviral drugs that would prevent cheaper generics from entering the market. Furthermore, through the construction of an alternative paradigm of 'knowledge ecology,' I argue that apparently inevitable transnational processes of intellectual property 'harmonisation' are rendered contingent. Thus, practices that may appear to embrace and operate from within

---

<sup>1</sup> Established in 1970, WIPO is the main institutional location of intellectual property expertise, as well as the home to several important committees and processes implicated in the global 'harmonisation' of IP norms. In addition to its website, where many documents are archived and freely accessible, my access to WIPO was through an internship with the South Centre, an intergovernmental organisation (IGO) with observer status at WIPO.

neoliberal notions of property, ownership, and authorship can simultaneously serve as potent sites of problematisation.

## A Paradigmatic Document<sup>2</sup>

Sitting in the cavernous conference hall of the World Intellectual Property Organisation (WIPO), the one-page ‘list of issues’ before me would seem innocuous to the casual observer, not readily distinguishable from the countless documents circulating in the corridors of any major bureaucracy (Figure 1). Whereas usually any tension between the different national delegates seemed to dissipate through the floor-to-ceiling windows and down to the cool shores of Lake Geneva, today it was trapped inside the hall. It was the twelfth session of the Standing Committee on the Law of Patents (SCP), which took place in June 2008, and this moment of ‘friction’ (Tsing 2005) offered a window onto the process of transnational intellectual property ‘harmonisation.’ Thus, for example, item seven – ‘Harmonization of basic notions of substantive patentability requirements (e.g. prior art, novelty, inventive step, industrial applicability, disclosure)’ – is the long-standing aim of ‘Group B’ countries, seeking to harmonise key intellectual property norms, largely based on their elaboration in US and European patent law.

---

<sup>2</sup> Following Riles (2006: 1–7) and others, including Harper (1997), Hull (2003), and Kelly (2008), I approach this document not only as a representation of data, but as a ‘paradigmatic’ artifact of a particular set of knowledge practices associated with bureaucratic contexts.

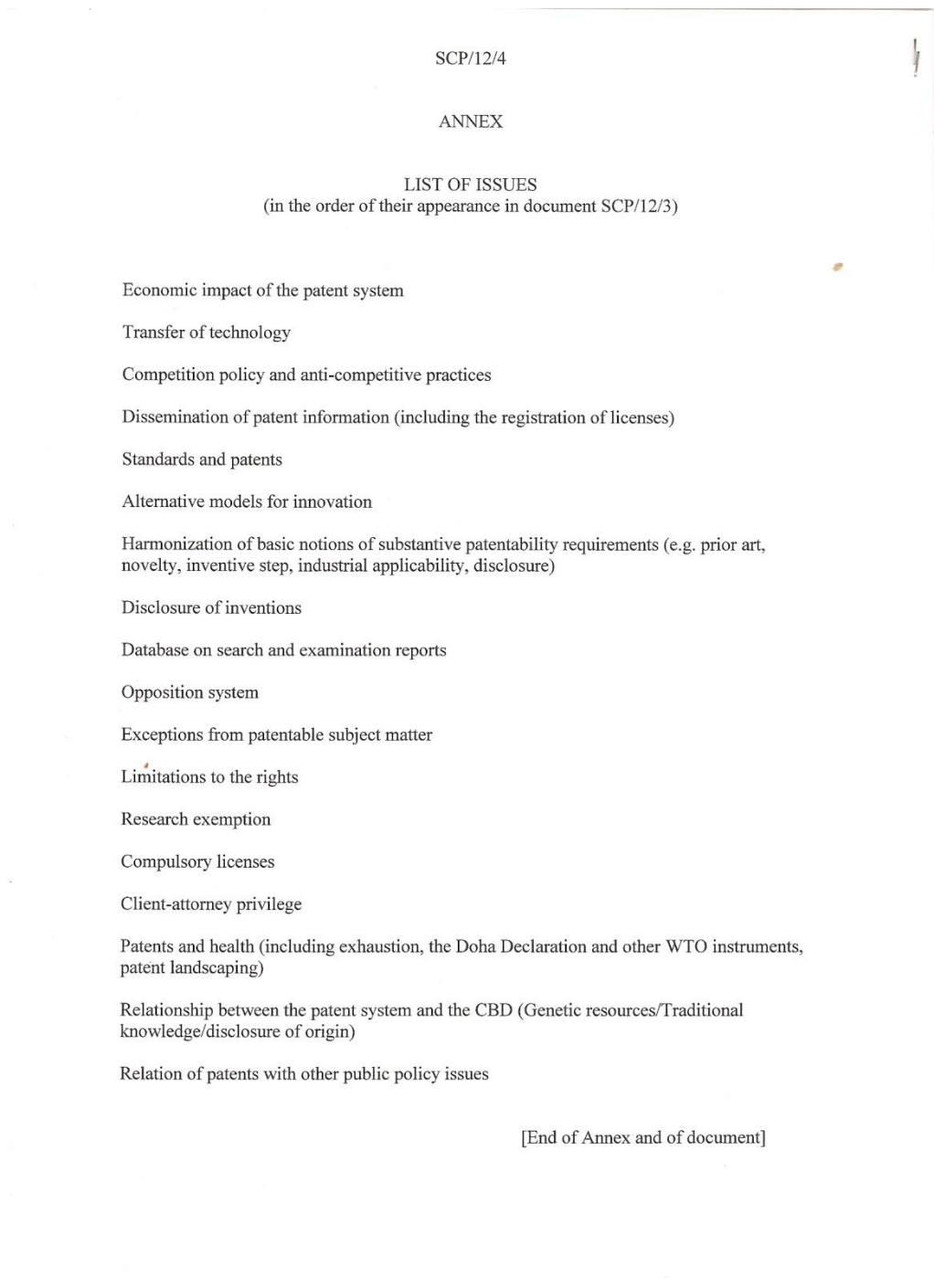


Figure 1: 'List of Issues,' Standing Committee on the Law of Patents.

At WIPO, this push for normative harmonisation has taken its most explicit form in the Draft Substantive Patent Law Treaty (SPLT), first proposed by the SCP in 2000. After years of filibustering, in 2005 ‘Group A’ countries, led by Brazil, effectively killed off this treaty. Indeed, the concept’s re-emergence on the SCP ‘list of issues’ was being hotly contested in the hall that day. Item fourteen, ‘compulsory licensing,’ is the practice whereby technologies (including pharmaceuticals) protected by patents are licensed for production by manufacturers other than the patent-holder, in effect overriding the patent for which the patent-holder is compensated with a royalty. Compulsory licensing became a significant focus of attention with respect to efforts to increase access to medicines including antiretroviral drugs for HIV/AIDS treatment, as I discuss in more detail below. Along with the practice of ‘parallel importing,’ it represents one of the ‘flexibilities’ provided for in the WTO-administered TRIPS Agreement. The inclusion of compulsory licensing in the WIPO document clearly reflects the aspirations of ‘Group A’ delegations to reaffirm the practice as a policy option within existing intellectual property law. By contrast, item six, ‘alternative models for innovation,’ introduces the possibility of a different system of incentivising technological developments altogether, a near-heretical notion for ‘Group B’ as well as groups representing pharmaceutical interests.<sup>3</sup> The document thus indexes the changing topography of risk and opportunity represented by participation in, or rejection of, processes associated with intellectual property ‘harmonisation.’ Nowhere have these risks been made more explicit than with respect to the HIV/AIDS pandemic.

---

<sup>3</sup> Based in Geneva, Switzerland, the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) is the main body representing industry interests at WIPO, although these are also vigorously pursued through relationships with national delegations, particularly Switzerland, the EU, and the US.

## HIV/AIDS: A Neoliberal Pandemic?

Emerging in the early 1980s, public awareness of HIV/AIDS coincided historically with transformations commonly associated with the rise of neoliberalism in Europe and North America (Harvey 2005: 1–4). While there are many ways in which we might analyse HIV/AIDS as a specifically neoliberal pandemic, here I focus on the role of transformations in intellectual property law and the globalisation of a specific proprietary ethics that has dramatic consequences for access to medicines. The practice of patenting originated in fifteenth-century Europe, and by the eighteenth century, it had taken over from the guild system. In most jurisdictions, patents are awarded for ideas and techniques demonstrating 'novelty,' 'non-obviousness,' and 'industrial applicability.' While the exact definitions of these concepts have shifted over the centuries and across jurisdictions, a decisive transformation took place in the early 1980s in the context of the emergence of the biotechnology and computer software industries.

A series of legal judgments in the United States presaged the dramatic expansion of 'patentable subject matter' to famously include 'anything under the sun made by man' (*Diamond v. Chakrabarty* 1980), including living organisms. The bar on what qualified as an 'inventive step' – necessary to satisfy the criterion of 'non-obviousness' – came crashing down. At the same time, the 1980 Bayh–Dole Act enabled universities, corporations and non-profits to pursue ownership of inventions produced through federally funded research, dramatically expanding the ranks of what Marilyn Strathern terms the 'new proprietors' (1999: 131–3). Similar moves followed in Europe and Japan, opening the floodgates for a veritable Gold Rush in patent claims and ushering in the new 'knowledge economy.' In the following decade, global patent awards more than tripled, granted primarily to 'inventors' based in the United States, Japan, and

Europe.<sup>4</sup> This proliferation of property claims was accompanied by efforts to globalise the ethics that underpinned it. In her account *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003), Susan Sell argues that TRIPS was the culmination of ‘lobbying by twelve powerful CEOs of multinational corporations who wished to mould international law to protect their markets,’ and represented an unprecedented victory for ‘private power,’ in particular the pharmaceutical, entertainment, and software industries (Sell 2003: 1; see also Dutfield 2003; Sunder Rajan 2006).

Patents, patenting, and the practice of compulsory licensing have been central to debates around access to medicines for HIV/AIDS treatment, most directly in terms of the affordability of antiretroviral drugs (ARVs). The high prices patent monopolies allow their proprietors to charge have historically limited access to ARVs in the Global South, where most people with HIV/AIDS live.<sup>5</sup> When the first AIDS drug, AZT, was approved for use as a treatment against HIV/AIDS, under patent from *Burroughs Wellcome* it became one of the most expensive consumer drugs in history, with an annual prescription costing between \$8,000–10,000 per patient (Epstein 1996: 199). By 1996, combination therapy had radically transformed the prognosis of people living with AIDS (PLWAs) with access to the cocktail in Europe and North America. However, as Biehl (2007) documents, it was primarily the expense of these drugs that

---

<sup>4</sup> By 1999, the United Nations Development Program reported that 97 percent of the patents held worldwide were held by individuals and companies in industrialised countries, and 80 percent of the patents granted in developing countries belonged to residents of industrial countries (‘t Hoen 2002: 37).

<sup>5</sup> The price of medicines is not the only factor affecting access. Any mass treatment programme requires a functioning health infrastructure, from personnel down to refrigeration systems for some drugs, much of which may be lacking in the resource constrained contexts (‘t Hoen 2002: 28). Drug approval also requires a substantial bureaucratic apparatus and scientific expertise to ensure quality and safety. The pharmaceutical industry may designate whole regions as too ‘unpredictable’ to warrant investment in research and development of drugs (Petryna and Kleinman 2006: 2–3). Furthermore, there may be ‘demand-side’ issues, such as patients being unable to reach health services, problems with adherence to complex drug regimens, many of which have side-effects, or simply that some people deemed to ‘need’ treatment seek non-allopathic remedies.



led the World Health Organisation (WHO) to delay their status as 'essential medicines' until 2002 (2007: 72).<sup>6</sup> This combined with corporate legal activism (see below) effectively meant that combination therapy remained unaffordable and unavailable in the Global South (except Brazil) for at least six years after its introduction in Europe and North America, a period during which millions died of AIDS-related illnesses.

Anthropologists have drawn attention to the ways that the HIV/AIDS pandemic has become the privileged site for the elaboration of a new kind of transnational biopolitics (Comaroff 2007; Nguyen 2010), one that has 'rewritten the global geopolitical coordinates in which we think and act.'

Coming as it did at the time of radical restructuring of the axes of a bipolar world, of the liberal-democratic nation-state and the workings of capitalism itself, the disease has served as both a sign and a vector of a global order-in-formation – and with it, a new sense of the nature and possibilities of the political (Comaroff 2007: 198).

Indeed, I would suggest that the HIV/AIDS pandemic has provided the terrain on which a new proprietary ethics based on increasingly prescriptive intellectual property laws has been simultaneously globalised and contested. With regard to intellectual property and HIV/AIDS, this 'order-in-formation' has manifested most explicitly in the TRIPS Agreement and the disputes that have ensued.

The TRIPS Agreement was brokered during the 1994 Uruguay Round of GATT (General Agreement on Tariffs and Trade) and formed part of the agreement that established the World Trade Organisation (WTO 1994). With the UN Convention on Biological Diversity, it remains the most important multilateral instrument concerning intellectual property law. In brief, TRIPS required many countries that did not have a patent system to implement one, as well as a standard definition of 'patentable subject

---

<sup>6</sup> The concept of 'essential medicines' is itself an example of a process of semantic re-framing analysed below. For a genealogy of this process, see Greene (2011).

matter,' which in practice meant a dramatic expansion of such matter for most jurisdictions in the Global South. For example, several countries had until then excluded pharmaceutical products and have since had to change their domestic law to include them, including India, the largest producer of generic drugs. Membership of the WTO – and access to Western markets – is dependent on the enactment of the intellectual property laws mandated by TRIPS. Furthermore, unlike other treaties on intellectual property administered by WIPO, TRIPS has a powerful enforcement mechanism.

On paper at least, TRIPS allows for a series of 'exceptions' or 'flexibilities' of which 'compulsory licensing' is one. Yet when in 1997 South Africa's post-apartheid government attempted to incorporate these 'flexibilities' into domestic legislation, the Pharmaceutical Manufacturers Association of South Africa (PMA), representing thirty-nine multinational pharmaceutical companies, took President Mandela himself to court, arguing that the legislation contravened both TRIPS and South Africa's post-apartheid Constitution. The 1997 Medicines and Related Substances Control Amendment Act (the Medicines Act) was designed to enable the Department of Health to secure access to cheaper pharmaceutical drugs, including ARVs, partly in response to South Africa's escalating AIDS crisis (Bond 1999: 767–9; Gray et al. 2002: 52–60; 't Hoen 2002: 30–1). Tom Bombelles, spokesperson for Pharmaceutical Research and Manufacturers of America (PhRMA), the industry's main lobby group in the US (many of whose members were party to the action), commented at the time: 'There are ways to make drugs available to the poor in a country like South Africa. We need to look for economic answers to economic questions [...] and not say that the answer to this economic question is we'll just steal [patents]' (cited in Bond 1999: 768). The lawsuit had the effect of delaying the Medicines Act by three years, during which time South Africa could not afford to offer treatment to the rapidly increasing population of PLWAs. In an attempt to mobilise global opinion, OXFAM estimated that during the period of the court case 5,000 people were dying of AIDS-related illness in South Africa every week (Marchant 2001).

Initially, the PMA had the active support of the US government, which from 1997 to 1999 used a combination of trade sanctions and threats to cut bilateral aid in an attempt to pressure the South African government to drop the 'offending clause' from the legislation (Bond 1999: 769–78). According to Ken Shadlen (2004), this use of trade and foreign policy represented part of a wider trend of Global North countries pushing for the global enforcement of a less flexible set of regulations regarding intellectual property protection (Shadlen 2004: 82). Indeed, for PhRMA, 'South Africa has become a "test case" for those who oppose the US government's long-standing commitment to improve the terms of protection for all forms of American intellectual property, including pharmaceutical patents' (CPTECH 1999).

Patrick Bond (1999) documents how, by mid-1999, AIDS activists had mobilised a high-profile transnational campaign against US government interventions in the ongoing dispute. In South Africa, the recently formed Treatment Action Campaign (TAC) organised demonstrations at US consulates in July that year, while in the US, Al Gore came under increasing pressure in the lead-up to his presidential campaign. The direct action group ACT UP organised a series of 'raucous demonstrations' at campaign events, with banners reading: 'No Medical Apartheid!' 'Gore's Greed Kills!' 'AIDS Drugs for Africa Now!' (Bond 1999: 788). In February 2001, the Treatment Action Campaign was admitted to the court case as *amicus curiae* ('friend of the court') to support the South African government against the PMA (Heywood 2001). The following month, the case finally came to the Pretoria High Court. Calling for the enforcement of the 'human right to access healthcare,' the Treatment Action Campaign mobilised demonstrations in scores of cities across the world. The *coup de grâce* came when it emerged during the hearing that the text of the Medicines Act was modelled on one of WIPO's own policy documents. Facing a public relations disaster, the PMA unceremoniously dropped the case ('t Hoen 2002: 31).

The South African case was followed later the same year by the WTO Doha Declaration, which restated the right of WTO member states to use TRIPS flexibilities

including compulsory licensing ‘to promote access to medicines for all’ (WTO 2001).<sup>7</sup> Yet, despite what many campaigners regard as significant victories, the conceptual tension between intellectual property rights and public health concerns remained unresolved, as the reappearance of ‘compulsory licensing’ in the Standing Committee on Patents at WIPO I observed a decade later suggests. Few countries have ever used or threatened to use the TRIPS ‘flexibilities.’ One exception is Brazil, and Biehl (2007) documents the success of its ‘activist state’ in negotiating lower drug prices, in which the threat of compulsory licensing has been a key tool (2007: 53-101). When Brazil refused to alter its intellectual property law at the request of the US administration, it was labelled a ‘pariah state,’ put on the US Trade Representative’s infamous ‘watch list,’ and taken to the WTO tribunal (‘t Hoen 2002: 32-33). But unlike Brazil, the majority of countries most affected by AIDS could not afford the threat of US and European sanctions any more than they could afford the patented drugs.

This politics of exception to intellectual property protections resonates with Agamben’s (1998) analysis of the production of ‘bare life.’ Through its ability to name and intervene upon the exception, Agamben argues, sovereign power is achieved through the paradox that the sovereign can stand outside of the very juridico-political system from which sovereign power is produced (1998: 15–9). Of interest to the anthropologist are the complex processes through which TRIPS ‘flexibilities’ are prohibited, or rendered ‘taboo’ (‘t Hoen 2002: 35), in ways that appear to exceed notions of the ‘juridico-political.’ Indeed, Talal Asad (2009) suggests that the prohibitions of intellectual property laws bear resemblance to religious notions of blasphemy to the extent that they delimit the free flow of knowledge and in so doing fundamentally define what counts as ‘freedom’ (2009: 27–8). Asad’s observation draws attention to

---

<sup>7</sup> In response to the anthrax attacks after 9/11, and fearing a wave of ‘bioterror,’ the US government threatened German pharmaceutical giant Bayer with a compulsory license on its antibiotic antidote Cipro, in order to reduce its price, this having led the campaign against the South African government to drop legislation that would allow them to do the same for antiretroviral drugs. Some commentators have suggested that it was largely to avoid the accusation of double standards that the Doha Declaration was approved at all by the WTO later that year.

the moral, or more precisely, ethical (cf. Laidlaw 2008) scaffolding that underpins the globalisation of specifically capitalist ways of imagining and practicing property.

That the prohibitions promulgated by this ethics are both increasingly stringent and global, contrasts with the highly flexible intellectual property policies pursued historically in the Global North. Indeed, the Netherlands and Switzerland both opted out of the patent system altogether during most of their industrialisation (Schiff 1971). This opt-out benefited the development of Switzerland's chemical dye industry – an industry itself dependent on colonial extractive practices (Taussig 2008) – with many of the companies involved in dye production going on to manufacture pharmaceuticals (Dutfield 2003: 73–88). When one of these latter-day Swiss companies, Novartis, took the Indian state to court demanding that the government strengthen intellectual property-holder 'rights' in its patent legislation, the historical irony seemed to be lost, despite the high stakes the challenge posed for the global affordability of medicines (Ecks 2008). Indeed, the fact that governments of the Global North are 'pulling up the ladder' of technology-led industrialisation predicated on flexible patent policies (or none at all) is one of the main arguments made by critics against the current globalisation of intellectual property standards (cf. Correa 2008).

### 'TRIPS-plus,' 'Biopiracy' and 'Knowledge Ecology'

In Geneva, opposition to intellectual property 'harmonisation' has drawn on the wider 'development agenda,' which aims to mainstream the development concerns of Global South delegations into the discussions, committees, and conventions of multilateral institutions. The South Centre is an intergovernmental organisation that has been instrumental in this process with respect to intellectual property law, and I conducted fieldwork with the organisation in 2008. While the South Centre's membership consists of a diverse range of states (from China and Brazil to Micronesia), generally acting as net-importers of patented technologies, they have historically shared an interest in limiting intellectual property 'harmonisation' even as patent claims from both foreign

and domestic ‘inventors’ in countries such as China and India have soared in recent years. The South Centre has developed close relationships with many delegations, reflected in co-ordinated interventions by South Centre member countries in WIPO committees. Indeed, during my fieldwork at the South Centre, I observed that much of its labour is devoted to identifying risks as well as opportunities of the barrage of proposals, ‘work programmes,’ and agendas put forward by country delegations from Group B countries. To this end, it draws on and contributes to a distinctive semantics through which what are often presented as technical or procedural processes become politicised, resembling a kind of anti-‘anti-politics machine’ (Ferguson 1990). Here I relate one incident that took place during my fieldwork.

In June 2007, the World Customs Organisation (WCO) established the ‘SECURE Working Group’ in order to consider intellectual property enforcement standards. Until that point, the WCO had had little to do with intellectual property concerns. In 2008, its activities came under increased scrutiny from the South Centre when it announced a meeting to consider strengthening intellectual property protection through border policing. Crucially, the WCO is located in Brussels, Belgium, where there is much less Group A representation generally, and specifically a lack of expertise or political leadership regarding IP issues. In effect, the multilateral debate around IP protections, trade, and public policy had been transferred overnight from Geneva to another organisation located hundreds of miles away, a practice known as ‘forum-shifting.’ The South Centre hastily convened a series of meetings and feverishly briefed country delegations in Geneva on the proposals, urging them to make the trip to Brussels for the meeting the following month. In the South Centre’s newsletter, the then Executive Director Dr. Yash Tandon comments:

Now that the developing countries have succeeded in getting the Development Agenda into the WIPO, the developed countries have moved to the less well-known World Customs Organization (WCO), an Intergovernmental Organisation that operates through Customs

Administrations which (so far) have limited mandate. The SECURE Working Group is dominated by a few developed countries and a core group of Northern Corporate Rights-holders (NCRs). The NCRs participate on *an equal footing* with governments. Participation by developing countries, on the other hand, is bureaucratic (mostly Officials from Customs Administrations), and not adequately (indeed not at all) guided by their political bosses. The objective of SECURE is to enlarge the powers of Customs Administrations and 'border guards' to do the work for the NCRs as watchdogs of IP enforcement, and to give them authority well beyond their current mandate [...] It represents yet another attempt by developed countries to promote a 'TRIPS-Plus-Plus' agenda on international border enforcement through the backdoor (Tandon 2008, emphasis in original).

Here Tandon frames the demands on individual nation-states to effectively develop an intellectual property border police as 'TRIPS-Plus-Plus,' meaning requirements that go beyond the standards already set down by TRIPS (and even those norms and standards that are designated TRIPS plus). In relation to pharmaceuticals, Ellen 't Hoen describes TRIPS plus as 'a non-technical term which refers to efforts to extend patent life beyond the twenty-year TRIPS minimum, to tighten patent protection, to limit compulsory licensing in ways not required by TRIPS, or to limit exceptions which facilitate prompt introduction of generics' (2002: 29). Here Tandon's use of the term 'TRIPS-Plus-Plus' works to identify the risks of such moves and unmask what is perceived to be the normative content of measures and the burdens they would place on member countries. In the face of mounting protests, the WCO disbanded the SECURE working group later that year, citing 'a perceived fear that the group's work on standard-setting might be used as a means of enlarging the obligations imposed on countries by the WTO TRIPS Agreement' (New 2009).

Tandon's use of the term 'TRIPS-Plus-Plus' could be seen as part of what Rosemary Coombe terms a 'political poetics,' through which 'the colonial categorical framework

that legitimates the international intellectual property system' is contested (2003: 286). Much anthropological attention to intellectual property practices has focused on the encounter between Eurocentric notions of property and ownership, and the worldviews of people living in biodiverse regions of the globe, as they meet in the practice of bioprospecting. Through the UN Convention on Biological Diversity (CBD), intellectual property concepts facilitate opportunities to commercialise 'traditional knowledge,' such as the medicinal use of plants, as a form of 'cultural property' (Greene 2004). Hayden (2003a) has analysed the productive character of these agreements where farmers are transformed into 'stewards' and people into 'benefit recipients.' In the process of navigating the vexed issue of benefit distribution in return for resource extraction, Hayden argues that bioprospecting agreements construct powerful idioms of inclusion (and exclusion) into market-mediated modes of 'biodiversity entrepreneurialism' (2003a: 360).

Yet, this idiom-construction is not all one-way. In her analysis of social movements campaigning on these issues, Coombe cites the significance of the term 'biopiracy' (Shiva 1997), following upon the Third World Network's characterisation of GATT as a form of 'recolonization' (Raghaven 1990) in the semantic reframing of bioprospecting (Coombe 2003: 291). Stephen Brush (1999) has argued that the notion of biopiracy participates in a specifically capitalist conceptualisation of 'Nature' to the extent that it assumes that biological resources are a form of property, albeit illicitly appropriated (1999: 537). Yet, as Coombe notes, it is precisely the appeal to hegemonic discursive forms that lends terms such as 'biopiracy' much of their power. In the case of 'biopiracy,' from being an untouched 'public' resource available for exploitation and commodification, 'Nature' is invoked as an inscribed environment in which 'local communities are recognised as employing creative agency in practices that nurture and improve natural resources' (Coombe 2003: 291). While identifying those 'communities' is itself a generative and politicised task (Hayden 2003a: 360), 'Nature' is pre-emptively redefined in ways that rhetorically, and through the CBD to varying



extents materially mediate unfettered resource extraction by biotechnology companies and their research partners.<sup>8</sup>

Further downstream the drug development process, a related discursive trend is perceptible, but here 'Nature' functions explicitly as metaphor. Thus during fieldwork I encountered a vocabulary amongst those campaigning for access to medicines, aimed at re-signifying the patenting practices of pharmaceutical companies that are perceived to restrict access to medicines. For example, the practice of making small, relatively trivial changes to existing medicines – for instance, a new dosage or delivery method – in order to extend the period of patent monopoly on a drug beyond the 'patent cliff' is known as 'evergreening.' In 2009, Indian authorities rejected patent requests on two key ARVs – Tenofovir and Darunavir – by the US pharmaceutical company Gilead Sciences on the grounds that such patents would violate Indian patent law, which prohibits patents on 'incremental inventions' (i.e. evergreening) (MSF 2009). This aspect of Indian patent law has been subject to challenge through corporate legal activism, most recently in the case brought by Novartis (Mukherjee 2012). Another example is the term 'patent thickets,' a designation that highlights the detrimental effects of surrounding products with so many patent applications (if not patents) that it becomes difficult, if not impossible, for others to develop products in the same sector without infringing the rights of the patent-holder. It is partly in response to the particular problems patent thickets pose for the research and development of medicines that the concept of 'patent pools' has been developed, whereby two or more IP-holders licence one or more of their patents to one another or to a third party. While at one level these concepts presume the basic grammar of patents and patenting, the semantics of evergreening, thickets, and pools simultaneously disrupts it. For example, the practice of pooling intellectual property unsettles the exclusive monopoly aspect of patents that might otherwise be considered their *raison d'être*.

---

<sup>8</sup> The seemingly paradoxical ways in which the construction of biogenetic materials as 'public' resources facilitate processes of commodification by 'private' actors has been explored both in relation to practices of bioprospecting (Hayden 2003b) and gene sequencing (Sunder Rajan 2006). See also Tsing (2005).

The language of patent evergreening, thickets, and pools has fed into the broader concept of ‘knowledge ecology,’ embodied by the eponymous Knowledge Ecology International, an NGO prominent in the ‘access to knowledge’ – or ‘A2K’ – movement. Through ‘ecology,’ the production, circulation, and consumption of knowledge (including technologies such as medicines) are reimagined as a carefully balanced interconnected ecosystem to be delicately nurtured, a system whose norms should reflect the conditions and needs of the specific context. This vision is clearly at odds with the linear and inexorable global march of IP ‘harmonisation.’ Returning to the document from the Standing Committee on Patents (SCP) with which I began, the concept of knowledge ecology is reflected there in the item ‘Patents and health (including exhaustion, the Doha Declaration, and other WTO instruments, patent landscaping).’ Again, ‘patent landscaping’ suggests that intellectual property policy can be actively shaped and re-shaped using ‘WTO instruments’ and the ‘Doha Declaration,’ references (albeit in diplomatic code) to the taboo TRIPS ‘flexibilities.’ That states should be able to design their patent policies to suit their public policy needs, much as one might landscape a garden, clearly represents a quite radical departure from the rubric of normative ‘harmonisation.’

After a deadlock lasting five years, on 15 October 2010, the SCP finally agreed a new ‘work programme,’ having selected four issues from the list presented in 2008. One ‘developing country official’ is quoted as saying:

‘We’re very happy,’ the work plan is ‘not just about rights and patents. It’s absolutely balanced.’ They continued: ‘This is a new world. This is not TRIPS. TRIPS was rammed down our throats.’ For their part, the report suggests that developed countries were pleased to get ‘meaningful work back on track at the multilateral level. It’s a real patent programme to work with, and not just a study,’ said an official from the Group B developed countries. ‘So we enter back into substantive work. It’s a major step’ (New and Mara 2010).

## Conclusion

In this article, I have tracked the risks and opportunities associated with the process of global intellectual property harmonisation as experienced by a range of actors concerned by its public policy impact, particularly in relation to the HIV/AIDS pandemic. I have argued that, while opportunities formally exist within current intellectual property regimes to promote access to medicines, these have been effectively rendered taboo. Indeed, as Novartis's legal campaigns in India demonstrate, intellectual property harmonisation is an ongoing and high-stakes process. In South Africa, what started as a question of public policy in the context of an escalating AIDS crisis was quickly transformed into a protracted ethical and legal dispute over intellectual property rights and systems of innovation. If 'class struggles have migrated into class actions' (Comaroff 2006: 27), then prosecuting and defending these actions requires significant amounts of expertise and resources, as the PMA dispute and the SECURE Working Group case demonstrate. This makes merely identifying the risks and opportunities embedded in highly technical vocabularies of intellectual property 'harmonisation' a significant and politicised labour in its own right. To this end, a diverse set of actors ranging from individual activists, writers and grassroots social movements through to NGOs and intergovernmental organisations have developed a lexicon by which processes represented as inexorable are made contingent and therefore contestable. I have shown how the semantics of TRIPS plus, evergreening, patent pools, thickets, and landscaping re-signify pharmaceutical practices presaging the construction of an alternative paradigm of knowledge ecology. This semantics draws on dominant conceptualisations of intellectual property whilst creating the opportunity for grammatical innovations that disrupt teleological narratives (and practices) of 'harmonisation.' Thus practices and concepts that may initially appear to embrace, or participate in, neoliberal forms on closer inspection can also turn out to be significant sites of problematisation.

## About the Author

Dr. Mike Upton is a Mildred-Blaxter Post-Doctoral Research Fellow at Goldsmiths, University of London. His interests focus on the intersection of intellectual property practices and the HIV/AIDS pandemic, particularly as they concern access to medicines and drug development.

## Acknowledgments

The author would like to thank Ainhoa Montoya, Aliaa Remtilla, and an anonymous reviewer for their comments on an earlier draft of this article. Any mistakes are of course his own.

## References

- Agamben, Giorgio. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Stanford: Stanford University Press.
- Asad, Talal. 2009. 'Free Speech, Blasphemy, and Secular Criticism', in Talal Asad, Wendy Brown, Judith Butler, and Saba Mahmood (eds.). *Is Critique Secular? Blasphemy, Injury, and Free Speech*, 20–63. Berkeley: Townsend Center for the Humanities.
- Biehl, João. 2007. *Will to Live: AIDS Therapies and the Politics of Survival*. Princeton: Princeton University Press.

Bond, Patrick. 1999. 'Globalization, Pharmaceutical Pricing and South African Health Policy: Managing Confrontation with US Firms and Politicians,' *International Journal of Health Services* 29(4), 765–92.

Brush, Stephen. 1999. 'Bioprospecting the Public Domain,' *Cultural Anthropology* 14(4), 535–55.

Comaroff, Jean. 2007. 'Beyond Bare Life: AIDS, (Bio)Politics, and the Neoliberal Order,' *Public Culture* 19(1), 197–219.

Comaroff, Jean and John Comaroff. 2006. 'Law and Disorder in the Postcolony: An Introduction,' in Jean Comaroff and John Comaroff (eds.). *Law and Disorder in the Postcolony*, 1–56. Chicago: University of Chicago Press.

Coombe, Rosemary J. 2003. 'Works in Progress: Traditional Knowledge, Biological Diversity, and Intellectual Property in a Neoliberal Era,' in Richard Warren Perry and Bill Maurer (eds.). *Globalization under Construction: Governmentality, Law, and Identity*, pp. 273–313. Minneapolis and London: University of Minnesota Press.

Correa, Carlos. 2008. *A Guide to Pharmaceutical Patents*. Volume 1. Geneva: The South Centre.

CPTECH. 1999. Time-Line of Disputes over Compulsory Licensing and Parallel Importation in South Africa. *Consumer Project on Technology*, 5 August. <http://www.cptech.org/ip/health/sa/sa-timeline.txt> (accessed 6 March 2013).

*Diamond v. Chakrabarty*, 447 US 303 (1980).

Dutfield, Graham. 2003. *Intellectual Property Rights and the Life Sciences Industries: A Twentieth Century History*. Aldershot: Dartmouth.

Ecks, Stefan. 2008. 'Global Pharmaceutical Markets and Corporate Citizenship: The Case of Novartis' Anti-cancer Drug Glivec,' *BioSocieties* 3(2), 165–81.

Epstein, Steve. 1996. *Impure Science: AIDS, Activism, and the Politics of Knowledge*. Berkeley and Los Angeles: University of California Press.

Ferguson, James. 1990. *The Anti-Politics Machine: "Development", Depoliticization, and Bureaucratic Power in Lesotho*. Cambridge: Cambridge University Press.

Gray, Andy, Thulani Matsebula, Duane Blaauw, Helen Schneider, and Lucy Gilson. 2002. *Policy Change in a Context of Transition: Drug Policy in South Africa 1989–1999*. Johannesburg: University of Witwatersrand.

Greene, Jeremy A. 2011. 'Making Medicines Essential: The Emergent Centrality of Pharmaceuticals in Global Health,' *BioSocieties* 6(1), 10–33.

Greene, Shane. 2004. 'Indigenous People Incorporated? Culture as Politics, Culture as Property in Pharmaceutical Bioprospecting,' *Current Anthropology* 45(2), 211–37.

Hall, Stuart. 1997. 'Subjects in History: Making Diasporic Identities,' in Wahneema Lubiano (ed.). *The House that Race Built*, 289–99. New York: Vintage.

Harper, Richard 1997. *Inside the IMF: documents, technology and organisational action*. London: Academic.

Harvey, David. 2005. *A Brief History of Neoliberalism*. Oxford: Oxford University Press.

Hayden, Cori. 2003a. 'From Market to Market: Bioprospecting's Idioms of Inclusion,' *American Ethnologist* 30(3), 359–71.

———. 2003b. *When Nature Goes Public: The making and unmaking of bioprospecting in Mexico*. Princeton: Princeton University Press.

Heywood, Mark. 2001. 'Debunking "Conglomo Talk:" A Case Study of the *Amicus Curiae* as an Instrument for Advocacy, Investigation and Mobilization,' *Law, Democracy and Development* 5(2), 133–62.

Hull, Matthew. 2003. 'The File: Agency, Authority, and Autography in an Islamabad Bureaucracy,' *Language and Communication* 23(3-4), 287–314.

Kelly, Tobias. 2008. 'Documents, Security and Suspicion: the social production of ignorance,' in Julia M. Eckart (ed). *The Social Life of Anti-Terrorism Laws: The War on Terror and the Classification of the "Dangerous Other,"* 109–30. Bielefeld: Transcript.

Laidlaw, James. 2002. 'For an Anthropology of Ethics and Freedom,' *Journal of the Royal Anthropological Institute* 8(2), 311–32.

Marchant, Joanna. 2001. 'Bitter Pill.' *New Scientist*, 5 March.

<http://www.newscientist.com/article/dn484-bitter-pill.html> (accessed 6 March 2013).

MSF. 2009. *India: Patent Rejection Raises Hope of Cheaper HIV/AIDS Drugs*.

Médecins Sans Frontières, 1 September.

<http://doctorswithoutborders.org/news/article.cfm?id=3912&cat=field-news> (accessed 6 March 2013).

Mukherjee, Rupali. 2012. Supreme Court starts hearing on Novartis' patent case. *The Times of India*, 11 September. <http://timesofindia.indiatimes.com/business/india-business/Supreme-Court-starts-hearing-on-Novartis-patent-case/articleshow/16350643.cms> (accessed 6 March 2013).

New, William. 2009. World Customs Organization to replace controversial IP standards body; doubts remain. *Intellectual Property Watch*, 8 January. <http://www.ip-watch.org/2009/01/08/world-customs-organization-to-replace-controversial-ip-standards-body-doubts-remain/> (accessed 6 March 2013).

New, William and Kaitlin Mara. 2010. WIPO returns to substantive patent law talks after 5 years, with balance. *Intellectual Property Watch*, 16 October. <http://www.ip-watch.org/2010/10/16/wipo-returns-to-substantive-patent-law-talks-after-5-years-with-balance> (accessed 6 March 2013).

Nguyen, Vinh-Kim. 2010. *The Republic of Therapy: Triage and Sovereignty in West Africa's Time of AIDS*. Durham, N.C.: Duke University Press.

Petryna, Adriana and Kleinman, Arthur. 2006. 'The Pharmaceutical Nexus,' in Adriana Petryna, Andrew Lakoff, and Arthur Kleinman (eds.). *Global Pharmaceuticals*, 1–32. Durham, N.C.: Duke University Press.

Raghaven, Chakravarthi. 1990. *Recolonization: GATT, the Uruguay Round and the Third World*. London: Zed Books.

Riles, Annelise. 2006. 'Introduction: In Response,' in Annelise Riles (ed.). *Documents: Artifacts of Modern Knowledge*, 1–38. Ann Arbor: University of Michigan Press.

Schiff, Eric. 1971. *Industrialisation without National Patents: The Netherlands 1869–1912; Switzerland 1850–1907*. Princeton: Princeton University Press.

Sell, Susan. 2003. *Private Power, Public Law: The Globalization of Intellectual Property Rights*. Cambridge: Cambridge University Press.



Shadlen, Kenneth C. 2004. 'Patents and Pills, Power and Procedure: The North–South Politics of Public Health in the WTO,' *Studies in Comparative International Development* 39(3), 76–108.

Shiva, Vandana. 1997. *Biopiracy: The Plunder of Nature and Knowledge*. Boston: South End Press.

Strathern, Marilyn. 1999. *Property, Substance and Effect: Anthropological Essays on Persons and Things*. London: The Athlone Press.

Sunder Rajan, Kaushik. 2006. *Biocapital: The Constitution of Postgenomic Life*. Durham, NC: Duke University Press.

Tandon, Yash. 2008. Editorial: WIPO, WCO, Intellectual Property and Border Guards. *South Bulletin: Reflections and Foresights*. Geneva: The South Centre.

Taussig, Michael. 2008. 'Redeeming Indigo,' *Theory, Culture and Society* 25(3), 1–15.

't Hoen, Ellen. 2002. 'TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha,' *Chicago Journal of International Law* 3(1), 27–46.

Tsing, Anna. 2005. *Friction: An Ethnography of Global Connection*. Princeton and Oxford: Princeton University Press.

WTO. 1994. *Agreement on trade-related aspects of intellectual property rights. Annex IC of the Marrakesh Agreement Establishing the World Trade Organization*. [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm) (accessed 6 March 2013).

———. 2001. *Declaration on the TRIPS agreement and public health*. Doha WTO Ministerial, 14 November.

[http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm) (accessed 6 March 2013).

———. 2009. *Report on the international patent system. Standing Committee on the Law of Patents*. Geneva: WIPO.

[http://www.wipo.int/edocs/mdocs/scp/en/scp\\_12/scp\\_12\\_3\\_rev\\_2.pdf](http://www.wipo.int/edocs/mdocs/scp/en/scp_12/scp_12_3_rev_2.pdf) (accessed 6 March 2013).