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Re-Imagining WIPO:
A Global Administrative Law Approach to Emerging Innovation Paradigms

Since the negotiation of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) in 1994, the innovative landscape has undergone dramatic changes due to technological advances in fields such as biotechnology, nanotechnology, and digital communications and computation. The social role of intellectual property protection is brought into question by an explosion of innovative activity that does not fit into the sales-oriented, proprietary model which underlies intellectual property law and doctrine. The years since 1994 have seen an increasingly important role for user innovation and innovation resulting from open and collaborative processes. User-based and collaborative innovative modes are closely related, since users often innovate in communities and open and collaborative innovation processes correspondingly draw heavily on contributions from users.

In this Article, I argue that the debate over global governance of innovation should be expanded to account more fully for the implications of these changes. For the most part, criticisms of TRIPS have focused on its failure to account adequately for current needs for access to the fruits of innovative activity. In particular, the argument has focused on the agreement's failure to balance urgent public health needs appropriately against the marginal boost in the prospect of future pharmaceutical innovation supplied by patent protection in developing countries. Here I take a different (though complementary) tack. Rather than focus on the negative externalities that the globalization of high protectionism imposes on public health and other development and distributional goals, I focus on the ways in which TRIPS and related agreements enshrine an unduly narrow approach to innovation itself. In this Article I suggest that an adequate global governance system for innovation must take account of the diversity and dynamism of modes of innovation outside of the sales-motivated, sequential paradigm which underlies even the traditional balancing approach to intellectual property law. The shift toward user innovation and open and collaborative processes requires us to broaden our focus from intellectual property-based incentives to invent, which are less important for these practices, to issues of governance and private ordering involving questions of licensing and contract and competition law. The unpredictability and diversity of innovative processes counsels against an approach to intellectual property based on strong and inflexible substantive harmonization and suggests the superiority of a flexible administrative approach.