

The Washington Declaration on Intellectual Property and the Public Interest

The Global Congress on Intellectual Property and the Public Interest, August 25-27, 2011, convened over 180 experts from 32 countries and six continents to help re-articulate the public interest dimension in intellectual property law and policy. This document records the conclusions from the Congress and is now open for endorsements and comments at <http://infojustice.org/washington-declaration>

Preamble

Time is of the essence. The last 25 years have seen an unprecedented expansion of the concentrated legal authority exercised by intellectual property rights holders. This expansion has been driven by governments in the developed world and by international organizations that have adopted the maximization of intellectual property control as a fundamental policy tenet. Increasingly, this vision has been exported to the rest of the world.

Over the same period, broad coalitions of civil society groups and developing country governments have emerged to promote more balanced approaches to intellectual property protection. These coalitions have supported new initiatives to promote innovation and creativity, taking advantage of the opportunities offered by new technologies. So far, however, neither the substantial risks of intellectual property maximalism, nor the benefits of more open approaches, are adequately understood by most policy makers or citizens. This must change if the notion of a public interest distinct from the dominant private interest is to be maintained.

The next decade is likely to be determinative. A quarter century of adverse changes in the international intellectual property system are on the cusp of becoming effectively irreversible, at least in the lives of present generations. Intellectual property can promote innovation, creativity and cultural development. But an old proverb teaches that “it is possible to have too much of a good thing,” and that adage certainly applies here. The burden falls on public interest advocates to make a coordinated, evidence-based case for a critical reexamination of intellectual property maximalism at every level of government, and in every appropriate institutional setting, as well as to pursue alternatives that may blunt the force of intellectual property expansionism.

We begin our statement of the Congress’s conclusions with two overarching points:

- International intellectual property policy affects a broad range of interests within society, not just those of rights holders. Thus, intellectual property policy making should be conducted through mechanisms of transparency and openness that encourage broad public participation. New rules should be made within the existing forums responsible for intellectual property policy, where both developed and developing countries have full representation, and where the texts of and forums for considering proposals are open. All new international intellectual property standards must be subject to democratic checks and balances, including domestic legislative approval and opportunities for judicial review.
- Markets alone cannot be relied upon to achieve a just allocation of information goods — that is, one that promotes the full range of human values at stake in intellectual property systems. This is clear, for example, from recent experiences in the areas of public health and education, where intellectual property has complicated progress toward meeting these basic public needs.

Informed by these two broad points, the Congress adopted a series of specific recommendations for action, which are expressed below.

Putting Intellectual Property in Its Place

Intellectual property systems are designed to serve human values and must be tailored to this end. Expansion of intellectual property rights and remedies may conflict with legal doctrines that express and safeguard these values, including human rights, consumer protection, competition and privacy laws. These laws provide a framework within which intellectual property rights must be drafted, interpreted and enforced. In particular, we should act to:

- Promote and protect rights to freedom of expression, and to seek, receive and impart information, in the face of expansions in copyright and trademark scope and enforcement, including in the digital environment.
- Respect the rights to due process and a fair trial in the face of rapidly escalating intellectual property enforcement measures. We must insist on the provision of adequate evidentiary thresholds, fair hearings, impartial adjudicators, rights to submit evidence and confront accusers, proportionality in penalties, and strict scrutiny of public enforcement responsibilities delegated to private actors.
- Use human rights, including civil and political and social and economic rights, to scrutinize expansions of intellectual property rights that threaten access to essential knowledge goods and services.
- Use all available regulatory frameworks for controlling abuses of intellectual property rights, including mechanisms that protect consumers, control excessive pricing, prevent anti-competitive conduct, regulate licensing and contractual terms and open access to essential facilities.
- Protect traditional knowledge and cultural expressions against misappropriation through intellectual property rights.

Valuing Openness and the Public Domain

Copyrights and patents are time-limited rights because the public interest requires that creative and innovative works ultimately become free for all to use as part of the public domain. The public domain serves as a foundation of cultural heritage and scientific knowledge from which future creators and inventors necessarily draw. A group of related civil society movements has emerged to promote the benefits of the public domain or openness, including through open licensing, open access, open educational resources, open data, open standards, open government, and related open information policies. To further these efforts, and those like them, we should:

- Advocate for a permanent moratorium on further extensions of copyright, related rights and patent terms.
- Call for government procurement and education policies to place Free/Libre/Open Source Software on an equal competitive footing with proprietary software.
- Support private initiatives to increase access through licenses or terms of use that enable widespread public use or through alternative publication and distribution models.
- Support the values of interoperability and long-term preservation by requiring use of open standards for information produced by or for public entities.
- Support the use of open educational resources through government procurement policies for textbooks and other educational materials, and through incentives to generate open resources at all levels of education.

- Insist on policies that grant the public free and unrestricted access to all government funded endeavors, such as output of publicly funded research, government-collected data, cultural works supported by public funds and publicly funded collections and archives.

Strengthening Limitations and Exceptions

Limitations and exceptions are positive enabling doctrines that function to ensure that intellectual property law fulfills its ultimate purpose of promoting essential aspects of the public interest. By limiting the private right, limitations and exceptions enable the public to engage in a wide range of socially beneficial uses of information otherwise covered by intellectual property rights — which in turn contribute directly to new innovation and economic development. Limitations and exceptions are woven into the fabric of intellectual property law not only as specific exceptional doctrines (“fair use” or “fair dealing,” “specific exemptions,” etc.), but also as structural restrictions on the scope of rights, such as provisions for compulsory licensing of patents for needed medicines. Despite their importance in countering expansive trends in intellectual property, limitations and exceptions are under threat, especially from efforts to recast international law as a constraint on the exercise of flexibilities in domestic legislation. The signatories strongly support efforts to defend and expand as appropriate the operation of limitations and exceptions in the years to come. Specifically, we should work to:

- Continue efforts to assure that international law is interpreted in ways that give States the greatest possible flexibility in adopting limitations and exceptions that are appropriate to their cultural and economic circumstances.
- Support the development of binding international agreements providing for mandatory minimum limitations and exceptions.
- Promote discussion of employing “open-ended” limitations in national copyright legislation, in addition to specific exceptions.
- Develop legal regimes that address directly the needs of persons with specific medical conditions and disabilities, including those with print disabilities.
- Promote limitations and exceptions that enable libraries, museums, archives and other “institutions of memory” to fulfill their public interest missions, while assuring that cultural and educational institutions take advantage of existing flexibilities.
- Enable teaching and learning at all levels, including through measures that assure fair access to and use of educational materials from early literacy acquisition in the family setting through institutions of primary, secondary and higher education.
- Defend the principle of domestic “exhaustion” (or “first sale”) in national law, and the freedom of countries to choose to implement international or regional exhaustion to facilitate parallel importation.
- Facilitate public use of “orphan” and out-of-print works, and other difficult-to-access categories of content, and assure the freedom of researchers to engage in large-scale text-mining (or “non-consumptive”) research.
- Explore the benefits of maintaining or reintroducing formalities requirements (such as notice and registration) for individuals and entities claiming the benefit of copyrights.
- Advocate for appropriate limits on the use of unfair contracts or technological protection measures that override limitations and exceptions.

Setting Public Interest Priorities for Patent Reform

In a period of rapid technological change, the patent system has serious problems. In some industries, very low patenting standards and a proliferation of patents of questionable validity have fueled a culture of competition by intimidation and litigation, rather than innovation. Even when patentability requirements are applied strictly, the international patent system has become too rigid and too unitary to accommodate the diverse needs of a complex world. A more effective and manageable system for fostering technological and scientific innovation should be built around a more diverse structure of incentives for innovation. Specifically, we should work to:

- Dedicate public resources to non-patent-based incentive models, such as prizes for innovation, especially in areas where patent incentives have proved weak, such as for research on neglected diseases and the provision of cost-effective access to medicines in developing countries.
- Implement reforms that limit the granting or maintenance of patent rights where they are not justified by net benefits to the public, including through the introduction or preservation of opportunities for challenges to pending and issued patents; stronger scrutiny of patentable subject matter, including ending patents based on discovery rather than invention (including patents on human DNA sequences and disease associations); and more rigorous determination of inventiveness
- Ensure that inventions that result from publicly funded research are available for public use.
- Introduce meaningful exemptions for research and for educational uses into national laws.
- Promote transparency in the documentation of patent ownership and licensing, particularly with respect to key technologies like medicines.

Supporting Cultural Creativity

Maximizing opportunities for creativity and maximizing access to creative works are the two sides of the public interest in cultural life. It is increasingly clear, however, that the existing intellectual property system does poorly on both fronts, especially in regard to digital technologies. As business models based on sales of recorded media come under pressure from new technologies, a broader mix of models for rewarding and empowering authors and artists may be needed. More generally, we should encourage broad experimentation in the marketplace and—at a minimum—policy neutrality with regard to old and new business models. Such innovation can help to end today's fruitless disputes over practices like non-commercial file-sharing, and to prevent new ones from emerging. In this context, we should support initiatives to:

- Encourage experimentation with, and research on, systems of indirect rewards, such as levies on media, equipment, or usage.
- Require greater transparency, accountability, internal democracy and public oversight on the part of collective rights management organizations.
- Recognize the continued role of public funding for types of production deemed socially valuable and systematically under-provisioned by the market, such as small-market audiovisual, musical and artistic culture.
- Strengthen the contractual position of authors and artists vis-à-vis producers through such means as providing opportunities to re-negotiate terms and reclaim rights in case of non-use or after a defined period of time, and requiring greater transparency in contracts.

- Build the capacity of authors and artists to license their works directly to the public.
- Encourage the establishment of publicly accessible systems of rights management information which ensure that authors and artists can be identified.

Checking Enforcement Excesses

The maximalist intellectual property agenda includes a push at all levels for stronger enforcement -- in courts, on the street, at borders, and now on the Internet. Government and private IP enforcement are commandeering greater social resources in order to impose stricter penalties than ever before, with fewer safeguards and less procedural fairness. This trend in enforcement brings IP into ever-sharper conflict with other rights and public policy objectives, including protecting privacy and freedom of expression, providing due process, and promoting health and education. It creates new risks of wrongful searches and seizures. And it threatens the Internet's original—and enormously valuable—decentralized architecture, as Internet service providers are increasingly being drafted to act as enforcement agents. Recognizing the importance of reasonable enforcement of properly-bounded intellectual property rights, we should work to:

- Ensure that legal penalties, processes, and remedies are reasonable and proportional to the acts of infringement they target, and do not include restrictions on access to essential goods and services, including access to the Internet or to needed medicines and learning materials.
- Promote proportional approaches to enforcement that avoid excessively punitive approaches to enforcement, such as disproportionate statutory damages; undue expansion of criminal and third party liability; and dramatic increases in authority to enjoin, seize and destroy goods without adequate procedural safeguards.
- Ensure that countries retain the rights to implement flexibilities to enforcement measures and to make independent decisions about the prioritization of law enforcement resources to promote public interests.
- Limit the duties, rights, or abilities of Internet service providers to monitor or control the communications of their users based on the content of these communications.
- Ensure that agreements and protocols between individuals, intermediaries, rights holders, technology providers, and governments relating to enforcement on the Internet are transparent, fair and clear.
- Ensure that public authorities retain and exercise rigorous oversight of critical enforcement functions, including policing, criminal enforcement and ultimate legal judgments.

Implementing Development Agendas

Development is now widely recognized as a central concern in global intellectual property debates. History and experience teaches that every increase in intellectual property protection, especially in developing countries, does not necessarily lead to increases in investment, innovation or well-being. However imperfectly, the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) preserved some policy space for countries to tailor intellectual property protection to their domestic policy priorities, as affirmed in the 2001 Doha Declaration on TRIPS and Public Health. In 2007, the World Intellectual Property Organization (WIPO) Development Agenda further highlighted the need to fully integrate the development dimension into intellectual property policy and norm-setting. Beyond this, there is a need for development agendas to infuse all levels of international and national intellectual property policy making. We therefore should:

- Insist that current proposals for global copyright and patent reform fully integrate development concerns and assess implications on developing countries.
- Ensure that the WIPO Development Agenda recommendations are fully implemented in all areas of the organization's functioning in a manner that results in tangible changes in the organization's institutional culture.
- Insist on full transparency and accountability from bilateral, regional and multilateral providers of intellectual property technical assistance.
- Encourage the efforts of developing countries to make greater use of flexibilities, limitations and exceptions to intellectual property to advance public policy objectives in areas such as health, education, agriculture, food, and technology transfer.
- Invite countries that are considering the adoption of intellectual property strategies to ensure that such strategies are the result of an inclusive process of consultation and are fully consistent with national priorities and development objectives.
- Support extension of the TRIPS transition-period waivers for Least Developed Countries.
- Call upon developed countries to take more effective measures to implement their multilateral commitments in relation to technology transfer, including through monitoring mechanisms and addressing possible barriers created by intellectual property rights.
- Encourage South-South cooperation in the areas of intellectual property and innovation so that countries with similar levels of development can benefit from one another's experiences.
- Call for an independent assessment of the development effects of intellectual property commitments in bilateral, regional and plurilateral agreements.
- Promote a thorough review of TRIPS for possible amendments to ensure the effective operationalization of its objectives and principles.

Requiring Evidence-based Policy Making

Most would agree that research used in policy making should meet basic standards of transparency. Yet the intellectual property policy debates of the past two decades have not done so. Industry-funded research dominates the intellectual property policy conversation, yet virtually none of the major industry-sponsored studies document their methods, assumptions, or underlying data in any detail. The institutions responsible for intellectual property policy making have failed to exert enough pressure for either transparency or quality—and in many cases have relied on discredited statistics in their own statements. The weakness of evidence in this area is now widely recognized and calls into question the legitimacy of much of the expansionist intellectual property policy of the past quarter century. Developing countries are doubly disadvantaged in this context, due to wider gaps in domestic research on intellectual property. In this context, we should act to ensure that:

- Policy making is based on research rather than faith or ideology.
- Research used in policy making is fully transparent, with publicly documented methods, assumptions, funding sources, and underlying data.
- Governments and international organizations invest in data collection to enable better estimates of the costs and benefits of intellectual property rules, including the public and private costs of enforcement.
- Efforts to quantify the economic value of intellectual property should reflect the economic value attributable to activities enabled by limitations and exceptions to intellectual property rights, openness policies and practices, and the public domain.

The Global Congress was organized by American University Washington College of Law's Program on Information Justice and Intellectual Property, Fundação Getulio Vargas's Center for Technology and Society (Brazil), the American Assembly at Columbia University and the International Centre for Trade and Sustainable Development (Geneva). The Congress was sponsored by the International Development Research Centre, Google Inc., Open Society Foundation, the Institute for Global and International Studies at George Washington University, and Seattle University School of Law. Additional information on the Congress including online libraries of background materials that reflect on the themes articulated in this Declaration, is available at <http://infojustice.org/public-events/global-congress>