



**Deviant Globalization:  
The Next Step in the Multilateral Protection of Intellectual Property**

by

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## Abstract

Deviant globalization is a "powerful engine of wealth creation ...[P]articipating in deviant globalization is often an individual's fastest ticket out of poverty and a way for an entire community to experience economic development." Although some aspects of deviant globalization undeniably include illegal conduct, such "illegality is not necessarily criminal or even unsavory in nature. "Deviant globalization" in the intellectual property arena serves as a powerful force for the creation of revised standards of protection. It serves both a predictive and a normative function. It serves a predictive function because it incorporates the experimental standards we are already witnessing in domestic and international efforts to reinvent intellectual property standards for the 21st Century. It serves a normative function because it creates a new normative standard that incorporates social and economic norms from the informal market into formal normative values against which decisions regarding intellectual property standards can be evaluated and revised. With its emphasis on trade and innovation across socio-economic levels, and its focus on unmet consumer demands, deviant globalization based standards would bring new understandings of the relationship between compensation, access, and distributional innovation in present intellectual property debates. More effective support for distributional innovation under deviant globalization does not require that the needs of intellectual property owners be ignored. However, it does require that their interests be re-balanced with those of sellers and consumers. By focusing on compensation streams, deviant globalization puts the economic viability of piracy into play, not its moral necessity. Regulation is not the enemy of deviant globalization. Irrational regulation is. Some experiments in crafting effective deviant globalization models will undoubtedly fail. Yet even such failures will be useful in recalibrating present international norms so that intellectual property protection can continue to provide the innovative foundation for a vibrant, socially just, global marketplace for the 21st Century.

## 1 Introduction

We are leaving an era of unprecedented multilateral integration. Fueled by the twin engines of globalization and technological development, the latter decades of the 20<sup>th</sup> Century, and the first decade of the 21<sup>st</sup> Century, have cabined a period of unparalleled global integration,<sup>2</sup> leading to an exponential growth in multilateral standard-making. Plurilateral free trade agreements that reduced trade barriers and opened new markets for economic growth flourished,<sup>3</sup> while regional and multilateral treaties defined the boundaries of intellectual property rights in the digital universe.<sup>4</sup> No area seemed unaffected by the leveling affects of the integratory process unleashed by globalization and the communicative capabilities of the digital environment.<sup>5</sup>

At the same time, the challenges posed by digital distribution on the internet, including the social media networks that flourish on it, the rise of digital piracy, and increasing awareness of the inadequacy of present protection modalities to promote innovation in a developmentally diverse global economy,<sup>6</sup> created demands for recalibrations to the present global intellectual property regime that have only grown more urgent as we enter the second decade of the 21<sup>st</sup> Century. These demands are made in the context of an international legal and diplomatic environment that has itself changed in response to the economic and technological developments of the new Century. Such changes do not prevent the development of new strategies for enforcing intellectual property rights or alterations to present models to provide adequate protection for new types of innovation or breathing space for the development and regulation of social networks. But they make the realization of the necessary changes to accomplish these goals more difficult to achieve on a multilateral basis.

<sup>2</sup> See Kenneth Pomeranz & Steven Topik, *The World that Trade Created: Society, Culture and the World Economy. 1400 to the Present* (2<sup>nd</sup> ed. M.E. Sharpe 2006); Doris Estelle Long, 'Globalization: A Future Trend or a Satisfying Mirage' (2001) 49 *J.Copyright Society* 313.

<sup>3</sup> Although the major initiators of such free trade agreements were the European Union, and the United States, other countries including China and Australia also negotiated plurilateral trade agreements with other countries.

<sup>4</sup> See European Union Directive on Copyright in the Information Society, Directive 2001/29/EC; WIPO Copyright Treaty; WIPO Performances and Phonograms Treaty.

<sup>5</sup> The author has described this leveling affect previously in Long (2001) at 325-326.

<sup>6</sup> Among the types of new protection modalities are those to protect indigenous innovation, including traditional knowledge, reconfigured mechanisms to allow freer access to intellectual property protected goods and services, particularly in connection with copyrighted works, pharmaceuticals and green technologies, and greater flexibilities to encourage technology transfers to meet consumer needs and encourage sustainable economic development.

Out of the experimentation that is the necessary result of the present multilateral phase I refer to as “dis·integration”<sup>7</sup> will arise new normative modalities for protection, access and enforcement of intellectual property rights reflecting the norms of “deviant globalization.” Based on the teachings of the so-called “informal market,” and its fundamental principles, “deviant globalization” provides the opportunity to bring the social norms of the unregulated marketplace more firmly into international harmonization standards. Ultimately, the inclusion of this new normative foundation will lead to domestic and international regimes that provide a more balanced relationship between intellectual property protection, social justice and sustainable development. But to reach these new “standards,” we will first have to pass through an era of unprecedented domestic and regional experimentation where models may vary. But those that survive will reshape intellectual property rights for the 21<sup>st</sup> Century.

### 1.1 From Integratory Processes to Dis·integratory Experimentation

The official closing of the negotiations for the Anti-Counterfeiting Trade Agreement (ACTA) in 2011 signaled the end of an era of unparalleled multilateral harmonization. The forces of integration, measured generally from the beginning of the Uruguay Rounds in 1986 that established the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) to the final negotiating rounds of ACTA in 2011, combined trade, intellectual property and multinational governance into powerful tools for harmonization.<sup>8</sup> Definitional boundaries for patents,<sup>9</sup> trademarks,<sup>10</sup> geographic indications<sup>11</sup> and industrial designs<sup>12</sup> were delineated under TRIPS while enforcement procedures were strengthened;<sup>13</sup> substantive treaties regarding the protection of copyright and related rights on the internet were established;<sup>14</sup> and multilateral

<sup>7</sup> I use the accented term “dis·integration” to place the emphasis on the “dis” prefix to the critical “integration” term. Unlike the more common term “dis·in·tegration, the previous multilateral activities of the integratory periods have not disappeared (or disintegrated), but they have become less prevalent. Thus, even in stages of dis·integration, integration is still possible, although perhaps more difficult to achieve.

<sup>8</sup> See Long (2001) at 324 - 325; Peter Yu, ‘ACTA and its Complex Politics’ (2011) 3 WIPO Journal 1, 10 (juxtaposing ACTA’s non-multilateral approach with prior bilateral, plurilateral and regional trade and investment agreements and warning “if ACTA represents the future of the international norm-setting process...the world will likely go through a long period of non-multilateralism.”); Doris Estelle Long, ‘The Dis·integratory Impact of ACTA on Intellectual Property Governance Structures’ (2012)(working draft on file with author)(describing the alternate processes of integration and dis·integration in the history of international intellectual property harmonization).

<sup>9</sup> TRIPS, Arts. 27, 28 (definition of patentable invention and description of minimum rights, respectively).

<sup>10</sup> TRIPS, Arts. 15, 16 (definition of trademark and description of minimum rights, respectively).

<sup>11</sup> TRIPS, Arts. 22, 23 (definition of geographic indications and particularized treatment for wines and spirits, respectively).

<sup>12</sup> TRIPS, Art. 25 (definition of industrial designs).

<sup>13</sup> TRIPS, Arts. 41 - 61 (imposing treaty obligations to provide “effective enforcement” through civil, border and criminal measures with potential trade sanctions for failure to meet such obligations).

<sup>14</sup> WIPO Copyright Treaty (providing the exclusive right to authors to make a work “available” on the internet); WIPO Performances and Phonograms Treaty (providing similar rights to performers and phonogram producers).

treaties streamlining application obligations and procedures for patents and trademarks were created.<sup>15</sup>

On a regional level, the integratory forces of multilateralism were most obvious in the increasing size of the European Union (EU), and the number of directives and regulations aimed at intellectual property standards it adopted.<sup>16</sup> Even the treatment of domain names containing unauthorized third party trademarks was the subject of multilateral activity, albeit in the form of an agreed-upon private contractual remedy ~ the Uniform Dispute Resolution Policy adopted by the Internet Corporation for Assigned Names and Numbers (ICANN).<sup>17</sup>

History demonstrates that such integratory multilateralism, however, is not monolithic. During the immediately prior period of integration, there were also instances of regionalism and dis-integration.<sup>18</sup> Furthermore, integration itself is cyclical. There have been other periods of intense international cooperation followed by a retreat to respective “corners” until the next round of integratory multilateral activity arises again.<sup>19</sup> The current dis-integratory phase of multilateralism, however, has been propelled by forces that have never before been so prevalent in domestic and international standard-making processes.<sup>20</sup> In addition to the geographic

<sup>15</sup> See, e.g., the Patent Law Treaty (establishing multilateral standards for patent application obligations), and the Trademark Law Treaty and the Singapore Treaty on the Law of Trademarks (the same for trademarks).

<sup>16</sup> These Directives and Regulations ultimately covered almost every aspect of the intellectual property sphere. From biotechnology-based patents to copyright in the Digital Age, from community trademarks to enforcement. For a complete list of present intellectual-property centered Directives and Regulations of the European Union, see [http://ec.europa.eu/internal\\_market/copyright/acquis/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm).

<sup>17</sup> See generally [www.icann.org/udrp](http://www.icann.org/udrp). Under the Uniform Dispute Resolution Process (UDRP), registrants agree to obligate individual domain name registrants for certain Generic Top Level Domains (gTLDs) to submit cybersquatting disputes to electronic arbitration with specified institutions including the WIPO Arbitration Center.

<sup>18</sup> Examples of such dis-integratory forces include the development of regional instruments for intellectual property protection including European Union Directives and Andean Community Decisions. See Long (2001) at 329 - 334; Dr. Rafael Leal-Arcas, ‘Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?’ (2011) 11 Chicago J. International L. 598 (analyzing the impact of the proliferation of regional trade agreements on the multilateralism of the World Trade Organization); Susan Sell, ‘Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement,’ (2004) 38 Loy. LA L. Rev. 267 (discussing the repeated processes of contest and settlement in the development of international standards in intellectual property ) But cf. Ruth Okediji, ‘Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection,’ (2003-2004) 1 U. Ottawa L. & Tech. J. 125 (contending that bilateral and plurilateral agreements are the dominant forms for multinational norm making).

<sup>19</sup> Among the most notable instances in the 20<sup>th</sup> Century of this cycle of dis-integration may be the developments leading up to the negotiation of the TRIPS Agreement, see Monique Cordray, ‘GATT v. WIPO’ (1994) 76 J. Pat. & Trademark Off. Soc’y 121, and the Universal Copyright Convention, see Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008) 4.33 - 4.48; Hamish R. Sandison, ‘The Berne Convention and the Universal Copyright Convention: The American Experience’ (1986-1987) 11 Colum.-VLA J.L. & Arts 89.

<sup>20</sup> See Doris Estelle Long, ‘Exposing the Processes of Empire in the International Protection of Intellectual Property’ in *IP In Context: Law and Society Perspectives on Intellectual Property* (Cambridge U. Press 2012)(describing the historical processes that created the foundational international intellectual property conventions of the 19<sup>th</sup> Century)(forthcoming).

regionalism and glocalization that economic globalization has engendered,<sup>21</sup> new dis-integratory forces, including the waning of the Westphalian model for sovereign power,<sup>22</sup> the emerging power of civil society,<sup>23</sup> and the role of digital communications in empowering previously unempowered actors at the domestic and international level,<sup>24</sup> have altered the processes for international standard setting in ways that are still evolving.<sup>25</sup> What is most unique about this upcoming phase of dis-integration is that it has not been triggered solely by the withdrawal of developed countries from existing institutional structures. Nor has it been triggered by countries seeking higher protectionist standards. To the contrary, with the greater communicative abilities of the internet and other digital mobilizing media, and the larger array of civil society organizations seeking reduced intellectual property protection to promote greater access to information and sustainable development, the present dis-integration cycle has been equally driven by the developing world's search for innovation strategies for emerging

<sup>21</sup> See Benjamin Barber, *Jihad v. McWorld: How Globalism and Tribalism are Reshaping the World* (Ballantine 1996)(describing the conflicting trends of globalization and regional alienation); Thomas Freidman, *Lexus and the Olive Tree* (Harper Collins 1999)(same). These seeds of dis-integration, however, have been present almost since the earliest stages of the present era of globalization. See Long (2001) at 335 - 340.

<sup>22</sup> See Joseph A. Camilleri & Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmented World* (Edward Elgar 1992)(analyzing the evolving interactions between nation states, regional ethnicities and transnational actors in shaping the world political system); Joseph S. Nye, Jr., *Soft Power: The Means to Success in World Politics* (Public Affairs 2004)(exploring the impact of "soft power" in shaping world politics, including the soft power exercised by such non-governmental actors as multinational corporations); Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005)(exploring the impact of "government networks" and supranational organizations in the present global political order); Long (2001) at 328 ("Whether the erosion of sovereign power is the result of a transfer to sub-state entities on the basis of regional, ethnic or other divisions, or the result of a reconstitution of state entities into new "transgovernmental" orders, nation states no longer have the same power they exercised in the pre-globalized world."). But see Daniel Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton University Press 2007)(contending that nation states still dominate international regulatory efforts).

<sup>23</sup> See Rodney Hall & Thomas Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press 2003)(examining the erosion of power of nation states and the emergence of diverse multinational actors, including NGOs); Anna Spain, 'Who's Going to Copenhagen?: The Rise of Civil Society in International Treaty-Making' (2009) 14 ASIL Insights 25 (detailing the rise of civil society participation in international treaty making). One clear indication of the power of such civil societies is the number of NGOs accredited as observers at WIPO proceedings. For the 1996 Diplomatic Conference that led to the adoption of the WIPO Copyright Treaty no official accreditation of NGOs was made, although some delegations included "Advisors" that were members of NGOs. For the Beijing Audio Visual Treaty in June 2012, nine NGOs were accredited as observers.

<sup>24</sup> See Joseph S. Nye, Jr., *Power in the Global Information Age: From Realism to Globalization* (Routledge 2004)(describing how the internet has spread power to smaller, less structurally organized actors internationally than previously); Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006)(describing the weakening of path dependency and future empowerment of various actors through the development of the internet).

<sup>25</sup> Thanks to Peter Yu for suggesting a tri-partite division for such dis-integratory forces in the form of regionalism, rejection of Westphalian models and institutional governance. In addition to these forces, I believe that another force for dis-integration has come into significant prominence—digital communications with its ability both to enhance and to narrow international avenues of communications. See Cass R. Sunstein, *Republic.com* (Princeton University Press 2002)(warning that cyberspace threatens the exchange of information by allowing like-minded individuals to speak only to one another).

economies and models of protection that promote sustainable development and innovation.<sup>26</sup> “Dis·integration” does not mean that multilateral cooperation will cease. To the contrary, the recent creation of the Beijing Audio-Visual Performances Treaty in June 2012 (BAVT) demonstrates that older institutions may still serve as a focus for multinational standard-making processes. But a closer study of the BAVT demonstrates a lack of the potential leveling effect on international standards of earlier multilateral efforts, such as TRIPS and the WIPO Copyright Treaty (WCT).<sup>27</sup>

In this period of increasing dis·integration, a multiplicity of forums have arisen to take the place of earlier traditional institutions.<sup>28</sup> These multiple forums provide the necessary “laboratories” for experimentation that will form the critical next step in multilateral harmonization processes. This experimentation, however, may be hampered by the initial absence of institutional structures to accommodate, or even encourage, cross-forum *communication*. This absence is only heightened by the dis·integratory impact of the internet where like-minded entities talk only to each other and rhetorical excesses multiply.<sup>29</sup> This limited communication - combined with a lack of transparency that remains the shuddering norm for certain multinational standard setting efforts - including most recently ACTA and the Trans-Pacific Partnership (TPP) - may well prolong the present period of dis·integration. But if such communication difficulties are the downside of dis·integration, the concomitant rise in experimentation is the upside. Because out of the experimentation that is the necessary

<sup>26</sup> See Lawrence Helfer, ‘Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking’ (2004) 29 *Yale J. International L.* 1 (describing the movement to alternative forums to secure alternative models of protection under human rights, biodiversity and public health regimes); Joyeeta Gupta, ‘Global Sustainable Development Governance: Institutional Challenges from a Theoretical Perspective,’ (2002) in *International Environmental Agreements: Politics, Law and Economics* 361 - 388 (Kluwer Academic Publishers)(identifying multiple pathways as the most effective method for achieving global sustainable development).

<sup>27</sup> Compare Beijing Audio Visual Performances Treaty, Art. 11(3) (right to equitable remuneration for broadcasting and communication to the public subject to domestic law, including determination to reject such rights in toto) & Art. 18 (reservation allowed to Article 11(3) broadcast and public communication obligations) with WIPO Performances and Phonograms Treaty, Art. 15(3) (domestic rejection limited to equitable remuneration for broadcast and communication rights) & Article 21 (reservation limited to equitable remuneration rights under Article 15(3)). For a brief examination of the critical role that harmonized standards play in leveling global IP protection, see Doris Estelle Long, “Democratizing” Globalization: Practicing The Policies Of Cultural Inclusion,’ (2002) 10 *Cardozo J. of Int’l & Comp. L.* 217.

<sup>28</sup> These include both regional associations such as ASEAN who are increasingly addressing intellectual property issues, civil society organizations, such as the Electronic Frontier Foundation, and new forums established to deal with development and intellectual property including the World Summit on the Information Society.

<sup>29</sup> See Sunstein (2002)(describing the threat to free speech as a result of the ability to reduce discussions on the internet to those among like minded individuals); Pamela Samuelson, ‘The Copyright Principles Project: Directions for Reform’ (2010) 25 *Berkeley Technology L.J.* 1175, 1179 (“Too much discourse about copyright law in the past fifteen years has been burdened by rhetorical excesses and an unwillingness to engage in rational discourse with those having different perspectives.”). But cf Peter Yu, ‘TRIPS and its Achilles’ Heel’ (2011) 18 *J. of Intellectual Property L.* 479, 530. (“[I]f less developed countries want to drive the discussions on international intellectual property enforcement norms, they need to frame the public debate better.” (footnote omitted)).

result of dis-integration will arise the next critical stage in the development of rational intellectual property protection standards for the 21<sup>st</sup> Century—“Deviant Globalization.”

## 2 “Deviance” as the New Intellectual Property Norm

In *Deviant Globalization: Black Market Economy in the 21<sup>st</sup> Century*,<sup>30</sup> Nils Gilman, Jesse Goldhammer and Steven Weber describe “deviant globalization” as the underground corollary or “underside”<sup>31</sup> of globalization. They use the term to refer to markets which “satisfy demand for goods and services that are otherwise illegal or unavailable in the formal, licit economy.”<sup>32</sup> Included among the types of goods and services examined by Gilman et al are the global sex trade, the market for human organs, hazardous waste, arms trafficking, terrorist funding, and the “global hacker service economy.”<sup>33</sup> Interestingly, Gilman et al do not directly examine one of the most infamous examples of “deviant globalization” under their definition – the trade in counterfeit and pirated goods and services, including the rise of rogue websites on the internet that specialize in such goods and services.<sup>34</sup> Despite this limitation, Gilman et al’s description of the fundamental benefits of deviant globalization provide a useful normative background for future intellectual property standards. The “dynamic process of creative destruction”<sup>35</sup> that deviant globalization harnesses; its ability to “chang[e] the landscape and distribution of power in the world economy” by altering concepts of “what is do-able in economic life”<sup>36</sup> and to materially improve the economic well-being “of hundreds of millions of people;”<sup>37</sup> make it a useful paradigm for incorporating social justice considerations more clearly into intellectual property norms. In fact, deviant globalization is “a powerful engine of wealth creation

<sup>30</sup> Nils Gilman, Jesse Goldhammer & Steven Weber, *Deviant Globalization: Black Market Economy in the 21st Century* (Continuum International Publishing Group 2011)

<sup>31</sup> Gilman (2011) at 1.

<sup>32</sup> Gilman (2011) at 3. They go on to define “deviant globalization” as “the ultimate arbitrage activity, growing at the intersection of ethical difference and regulatory inefficiency. Wherever there is a fundamental disagreement about what is right as well as a connection to the global market, deviant entrepreneurs are there to meet the unfulfilled demands.” Gilman (2011) at 3. See also Moisés Naim, *Illicit: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy* (Doubleday 2005) at 226 (describing “illicit trade networks” whose “clear goal” is “profit by breaking laws.”).

<sup>33</sup> See Scott Berinato, ‘Inside the Global Hacker Service Economy’ (2011) in Gilman (2011) at 215 – 232.

<sup>34</sup> *Digital Music Report 2012: Expanding Choice. Going Global.* (2012)(available at <http://www.ifpi.org/content/library/DMR2012.pdf>)(describing the scope of global digital piracy including peer-to-peer networks, blogs, cyberlockers, forums, websites, streaming sites, smartphone-based applications and stream ripping applications and estimating that “one in four... of internet users access unauthorized services on a monthly basis”) 16.

<sup>35</sup> Gilman (2011) at 2-3.

<sup>36</sup> Gilman (2011) at 5.

<sup>37</sup> Gilman (2011) at 5.



...[P]articipating in deviant globalization is often an individual's fastest ticket out of poverty and a way for an entire community to experience economic development."<sup>38</sup>

The potential positive economic and developmental effects of deviant globalization do not exist in a vacuum. For every instance of an individual surviving by virtue of hard work and creative efforts in the informal market of deviant globalization, there are also those who are in virtual slavery to the organizations that control counterfeit distribution markets in which street vendors earn a subsistence wage, at best. In a five year observation of the pirate market in Florence, Italy, I have discovered that, while deviant globalization may provide economic benefits to some, it also presents serious human rights challenges when pirate markets are tied to immigration issues. Additional risks posed by the informal economy include: 1) the lack of a formal social security network with the result that inability to work due to health or other reasons translates into even greater poverty; 2) abuses of the workers at the lowest rung who are part of a process that includes undeniable human rights abuses;<sup>39</sup> 3) a strong undercurrent of violence in connection with certain organizational structures;<sup>40</sup> and 4) enhanced financial support for organized crime and paramilitary operations since the ultimate purposes of the monies raised through this alternative economy can include funding of such operations.<sup>41</sup> Yet focusing solely on the "abusive" or "immoral" aspects of this "underground" economy ignores broad aspects of it whose illegality arises simply because it does not conform strictly to legal

<sup>38</sup> Gilman (2011) at 3-4. Gilman *et al* also acknowledge the "dark side" of deviant globalization on the poor, recognizing that it is also "a symbol of their exclusion and abjection" because deviant globalization not only often entails harrowing individual suffering, but it can also provide money and power to self-dealing government officials, brutal warlords and fanatical terrorists." Gilman (2011) at 4. See also OECD, *The Economic Impact of Counterfeiting and Piracy* (2008). See generally Willem van Schendel & Itty Abraham, *Illicit Flows and Criminal Things: States, Borders and the Other Side of Globalization* (Indiana University Press 2005)(describing the distinctions between criminal syndicates and other illicit flows of goods and services globally).

<sup>39</sup>These abuses do not only occur in cases of human organ or sex trafficking, but are also apparent in the treatment of street sellers of counterfeit goods, particularly where such distributors have other legal issues connected to their status, such as immigration status.

<sup>40</sup> See Naím (2005)(describing the violence that often accompanies smuggling and human trafficking enterprises); Tim Phillips, *Knockoff: The Deadly Trade in Counterfeit Goods* (Kogan Page 2007)(describing the use of violence to maintain counterfeit networks).

<sup>41</sup> See Ronald K. Noble, Testimony before the US House Committee on International Relations, 'The Links Between Intellectual Property Crime and Terrorist Financing,' 108<sup>th</sup> Congress (July 16, 2003)(describing a developing trend of paramilitary organizations to use intellectual piracy as a preferred form of fundraising); Doris Estelle Long, 'Strategies for Securing the Cyber Safety Net Against Terrorists: A Multi-Disciplinary Approach' (2009) in *Terrorism and Global Insecurity: A Multidisciplinary Perspective* (ed. Clint Alexander. Linton Atlantic Books, Ltd.)(exploring the burgeoning role that cyberspace plays in supporting funding activities to support diverse paramilitary and terrorists groups); Gregory F. Treverton, Carl Matthies, Karla J. Cunningham, Jeremiah Goulka, Greg Ridgeway, Anny Wong, *Film Piracy, Organized Crime and Terrorism* (RAND 2009)(describing the links between film piracy as a funding source for terrorist groups). But cf Joe Karaganis, 'Rethinking Piracy' (2011) in *Media Piracy in Emerging Economies* (Social Science Research Council)(identifying lack of price competition as the key factor in the rise of media piracy).

regulatory obligations, such as obtaining marketing permits or paying taxes.<sup>42</sup> Such “illegality” is not the same as the “moral deviance” of engaging in sex, arms or even human organ trafficking that underlies Gilman et al’s analysis. Although some aspects of deviant globalization undeniably fit within these categories, the informal market, as a whole, is not necessarily criminal or even unsavory in nature.

Consequently, I have used the term “deviant globalization” in this Article to refer to a broader underground (or informal) globalization. This globalization is “deviant,” not in the sense of moral deviancy, or criminality. Instead, it is “deviant” because this globalized market *deviates* in significant ways from the globalization that has been the focus of scholars, economists and popular writers for the past several decades.<sup>43</sup> These “traditional globalization studies have largely focused on the impact of the regulated, lawful market.<sup>44</sup> (The sole exception may be the treatment of the informal economy that has developed as part of the e-commerce explosion on the internet.) The term “deviant globalization” not only acknowledges that an unregulated, informal, underground, black market has existed for as long as the regulated one,<sup>45</sup> it acknowledges that this “alternative” market, in all its hard goods and digital forms, is worthy of serious study. More to the point, the term “deviant globalization” acknowledges that these non-traditional, under-regulated markets provide normative values that can be used to shape the outcome of a wide-range of present debates over intellectual property rights in the 21<sup>st</sup> Century in ways that harness the “creative destructive” power of deviant globalization to create more socially just regimes. These regimes assure balanced protection for intellectual property owners and those who seek access to the goods and services protected by such rights by placing the norms of the underground economy at the heart of the regime.

“Deviant globalization” in the intellectual property arena, as I define it, serves both a predictive and a normative function. It serves a predictive function because it incorporates the

<sup>42</sup> See Van Schendel (2005) at 4 (“Many transnational movements of people, commodities and ideas are illegal because they defy the norms and rules of formal political authority, but they are quite acceptable, “licit,” in the eyes of participants in these transactions and flows.”).

<sup>43</sup> See also Ryan Matthews & Watts Wacker, *The Deviant’s Advantage: How Fringe Ideas Create Mass Markets* (Crown Business 2002) at xvi (“By definition, everything that is different is deviant. Of course there is a positive and negative deviance – the former a force for transformation the latter a source of unspeakable evil.”).

<sup>44</sup> Although there are innumerable studies by economists and others of the impact of globalization, among the most noteworthy works in the area, all of which focused on the regulated marketplace are David Held, Anthony McGrew, David Goldblatt & Jonathan Perraton, *Global Transformations: Politics, Economics and Culture* (Blackwell Publishers Ltd. 2000); Joseph E. Stiglitz, *Globalization and its Discontents* (WW Norton 2002); A.G. Hopkins, *Globalization in World History* (W.W.Norton and Company 2002). Even historians of global trade focused primarily on regulated cross-border trade through the ages. See Kenneth Pomeranz & Steven Topik, *The World that Trade Created: Society, Culture and the World Economy. 1400 to the Present* (2<sup>nd</sup> ed. M.E. Sharpe 2006).

<sup>45</sup> In fact, there is some indication that in recent years this underground, informal economy may actually have grown larger than the traditional global marketplace. Robert Neuwirth, *Stealth of Nations: The Rise of the Informal Economy* (Pantheon Books 2011) at 18 - 19, 26 - 28; Naím (2005) at 4-5. Some economists have claimed that the informal economy actually pre-dates the regulated formal economy we associate with globalization. See Neuwirth (2011) at 24.

experimental standards we are already witnessing in domestic and international effort to reinvent intellectual property standards for the 21<sup>st</sup> Century. It serves a normative function because it creates a new normative standard that incorporates social and economic norms from the informal market into formal normative values against which decisions regarding intellectual property standards can be evaluated and revised.

## 2.1 A Brief Primer on Deviant Globalization

Similar to the traditional hard goods market, no single instance of deviant globalization operates in precisely the same way; but every informal market shares certain characteristics that make deviant globalization a valuable source for intellectual property norms. From the markets operated by the inhabitants of the favelas of Brazil, to the garbage pickers of Lagos; from the sellers of counterfeit purses in Italy, to the bazaars of the Middle East, these informal markets fulfill consumer needs unmet by the regulated marketplace. Although some of these needs may well be for illicit goods and services, others are filled by goods the government is unable or unwilling to provide. Thus, for example, in the underground market described by Neuwirth in *Stealth of Nations*<sup>46</sup> are the individuals who sell legitimate products at discounted wholesale prices in the early morning markets, street vendors of legitimate, but cheaply priced, tourist souvenirs, and those who provide food and beverages to such vendors out of the back of trucks and food carts. All of these vendors share common traits of selling goods below the prices of traditional brick and mortar sellers because they do not have to maintain permanent housings or pay taxes on their business earnings. Some of these sellers earn significant incomes that allow them to expand their businesses. All of them are earning monies that would not be available through the regulated market.<sup>47</sup> Similarly, garbage pickers in various countries locate recyclable materials and create an unregulated supply network for these goods that not only has potential environmental benefits,<sup>48</sup> but also provide income to those at the lowest economic rungs of society.

<sup>46</sup> Neuwirth (2011) at 1-16. See also OECD, *Competition Policy and the Informal Economy* (2009)(describing various ways in which the informal economy interacts with the formal economy, including as an alternative outlet for product of the formal sector).

<sup>47</sup> Neuwirth (2011)(describing diverse markets where the participants in the informal economy earn monies otherwise unavailable to them); Naim (2005) ) at 109-130 (describing the incomes earned through trade in counterfeit and pirated goods). But see OECD (2009) at 33- 35 (contending that despite its size in developing countries the informal economy harms competition because informal firms are less productive and unable to achieve economies of scale).

<sup>48</sup> The environmental benefits secured by these untapped avenues for recycling and other forms of green technology must, of course, be contrasted with environmentally dangerous informal markets in toxic waste exports and computer waste. See Jennifer Clapp, 'Toxic Exports: Despite Global Treaty, Hazardous Waste Trade Continues' (2011) in Gilman (2011); Naim (2005) at 167 - 169.

These unregulated efforts highlight a critical element of deviant globalization – its innovative nature. Such innovation is amply demonstrated by the development of new technological models for distributing content on the informal markets of the internet. From the early file trading software of Napster, to websites such as ThePirateBay that provide global digital access to streaming content, the unregulated economy of the internet has been a hallmark of distributive innovation. Distributive innovation, however, is not limited to the technologically proficient. To the contrary, deviant globalization encourages innovation at all levels of the socio-economic strata. Among the oil workers in Lagos, Nigeria, for example, there was an unfulfilled need for inexpensive, but safe, drinking water. Individuals began selling water in plastic bags to meet this need. This new business has proven so successful some sellers have even developed names and symbols to mark their water as reliable.<sup>49</sup>

## 2.2 The “Norms” of Deviant Globalization

With its emphasis on trade and innovation across socio-economic levels and its focus on unmet consumer demands, deviant globalization based models would bring new understandings of the relationship between compensation, access, and distributional innovation in present intellectual property debates. These new understandings would bring social norming principles in a more direct manner into the creation of formally recognized intellectual property norms.<sup>50</sup> Although every informal market is different, there are four over-arching operational principles of deviant globalization that are most useful in recalibrating present intellectual property norms. They are:

1. fair compensation fuels the market;
2. consumers matter;
3. innovative business models deserve adequate breathing space to flourish; and
4. markets necessarily require regulation.

As discussed more fully below, each of these has potentially wide application in the creation of new experimental models for intellectual property rights protection during this present dis-integratory phase of multilateral standard-making.

<sup>49</sup> Neuwirth (2011) at 42-43.

<sup>50</sup> See Steven A. Hetcher, *Norms in a Wired World* (Cambridge University Press 2007)(analyzing the various roles of norms, including social norms, in setting conduct rule on the internet); Ned Snow, ‘Copytraps’ (2009) 84 *Indiana L.J.* 285 (advocating for revisions to US copyright law that more accurately reflect the social norms of end users).

### 2.3 Fair Compensation Fuels the Market

Fair compensation is the bedrock goal of a functioning informal market. The foundational principle of deviant globalization is filling market demand through *fair* prices for desired goods and services. The underground market is uniquely sensitive to competitive demands. Yet at the heart of the informal economy is compensation – or more specifically the financial and other rewards available for providing desired goods and services. Any effort to redefine distributional rights for intellectual property, including terms of access and use, must begin by addressing the question of compensation – who, when, where and for what activities. Placing compensation at the center of normative considerations does not obligate that all uses of intellectual property require monetary rewards. But it does require a principled examination of the impact of any exceptions or limitations on such rewards, as well as the adverse impact on the market if more than monetary compensation is required.

If the goal of deviant globalization is to fill market demand, then eliminating the availability of a demanded product is less desirable than assuring reasonable compensation to the IP owner, so long as that product is not potentially harmful to the public. The norms derived from deviant globalization suggest that present compensation boundaries must be recalibrated to support a *fair* return for the use of intellectual property based goods and services. Such fairness may well require an alteration in methods for licensing intellectual property rights globally, including reconsideration of exhaustion and remedial relief.

The most obvious applications of the fair compensation principle arises in the context of intellectual property licensing, including compulsory licenses on reasonable terms. Yet the compensation principle actually alters the shape of the debate over access rights. By placing the initial focus on fair compensation, deviant globalization changes the issue from one about compensated access to one about the nature of a *rational* compensation system. Thus, for example, debates over P2P file trading or methods for dealing with so-called “rogue websites” such as The Pirate Bay, change from demands for greater enforcement<sup>51</sup> to new methods that follow the money trail to rebalance the economic harms of piracy.<sup>52</sup> The elimination of consumer access to websites is replaced as the focus of enforcement efforts.<sup>53</sup> Instead, as discussed in greater detail below, advertisers and website operators who earn money from the illegal activity become the focus, with monetary relief for the copyright owner as the basis for remediation.

<sup>51</sup> See Anti-Counterfeiting Trade Agreement; Stop Online Piracy Act (SOPA), H.R. 3261, 112<sup>th</sup> Cong., 1<sup>st</sup> Sess. (October 26, 2011).

<sup>52</sup> See Online Protection and Enforcement of Digital Trade Act (OPEN Act), H.R. 3782, 112<sup>th</sup> Cong., 2d Sess. (January 18, 2012).

<sup>53</sup> See 17 USC § 512(c) (providing for removal of end user access to internet service providers as a remedy for unauthorized posting of copyrighted content).

Alternatively, future deviant globalization models may well create new licensing models to deal with the problems of P2P file trading or the use of trademarks as keyword buys.<sup>54</sup> Although initial attempts to treat P2P file trading as a form of communication to the public for which license fees were owed initially failed in the United States,<sup>55</sup> new models may be less restrictive in their efforts to rebalance access with compensation. Radio stations and other broadcast entities currently pay composers and performers for their broadcast/public performance of copyrighted music.<sup>56</sup> Similar payment obligations could readily be imposed for websites earning money from hosting copyrighted content.

More radically, fair use and compulsory licensing systems may be imposed to allow broader uses of trademarks for non-source designating purposes – the “information asset” nature of a mark.<sup>57</sup> Briefly, the term “information asset” refers to the “informational values” of a mark unrelated to consumer product information (the traditional search-designating function of trademarks most closely associated with the concept of “goodwill.”).<sup>58</sup> Such informational value may develop from the same types of investments and uses that give rise to the source-designating function protected under traditional trademark-rights analysis. But the information content that is valued is not directly related to individual purchaser decision making. To the contrary, similar to copyrighted works, these information-asset marks have value due to their expressive or emotive content.<sup>59</sup> Because this informational value of a mark is the creature of investment,

<sup>54</sup> See Google AdWords at <https://adwords.google.com>. Any such licensing scheme would necessarily have to overcome potential limitations including the general prohibition against the compulsory licensing of marks. Doris Estelle Long, ‘Rebooting Trademarks for the 21st Century’ (2011) 49 U. Louisville L. Rev. 517 (suggesting that such limitations might be dealt with by recognizing a new type of trademark – the information asset mark – which lacks a source designation function).

<sup>55</sup> See *United States Of America v. American Society Of Composers, Authors And Publishers (ASCAP)*, 627 F.3d 64 ( 2<sup>nd</sup> Cir. 2010).

<sup>56</sup> See generally WIPO Performances and Phonograms Treaty, Art. 11 ; Beijing Audio Visual Performances Treaty, Art. 15.

<sup>57</sup> Long (2011) at 523.

<sup>58</sup> Long (2011) at 541- 543. 552- 553.

<sup>59</sup> Long (2011) at 541 – 542.

third party uses of such “information assets” may warrant compensation.<sup>60</sup> They may also be subject to compulsory licenses or even fair use/fair dealing style exceptions.<sup>61</sup>

Conceivably the most direct impact the adoption of deviant globalization models may have is on the issue of remedial rights for intellectual property violations. Injunctive relief that prevents access is already being replaced by judicially mandated compulsory licenses in certain situations.<sup>62</sup> Denials of injunctive relief are becoming increasingly prevalent where there is evidence of consumer harm if the injunction issues.<sup>63</sup> Such denials should increase under new deviant globalization models.

Considering the issue of fair prices and fair trade, deviant globalization models may create a one-item-one-payment system that supports *international* exhaustion for certain intellectual property based goods. Limitations on such exhaustion would be premised primarily on the harm to the *consumer*. Thus, copyrighted goods would generally be subject to exhaustion. By contrast, trademarked goods might be excluded from such exhaustion, at least in instances where the same mark represents different consumer meanings or different goodwill.<sup>64</sup>

Deviant globalization will provide critical guidance on the question of intellectual property and “fair trade,” particularly in connection with the issue of access to medicines and critical technologies at reasonable prices. The recent decision by the Controller of India's Patent Office in granting Natco Pharma Ltd. a compulsory license to sell SORAFENIB, the generic version of the German-based Bayer AG's (Bayer) patented kidney and lung cancer drug NEXAVAR,

<sup>60</sup> Long (2011) at 550.

<sup>61</sup>Since the closest analogue to the information-asset mark is a digital copyrighted work, digital licensing models for such works, including for example, the present Sound Exchange performing rights and Creative Commons licensing schemes, could serve as beneficial models. Sound Exchange is a performing rights organization that collects and distributes digital performance rights royalties in the United States. Creative Commons is a nonprofit organization that offers several types of model licenses to permit the uncompensated licensing of copyrighted materials. Long (2011) at 548-552. See generally About the Licenses, Creative Commons, <http://creativecommons.org/licenses>; Katie Pimentel, “Trademark Use as Keywords: A Comparative Look at Trademark Use as Keywords in Paid Search and Digital Public Performance Rights for Sound Recordings” (2010) 9 J. Marshall Rev. Intell. Prop. L. 553, 573 (suggesting a compensation model under which keyword buys are compensated similar to digital copyrights).

<sup>62</sup> *Ebay Inc. v. MercExchange LLC*, 547 US 388 (2006). Although many countries do not presently allow judges to deviate from statutory remedies, as such remedial actions are modified in the face of deviant globalization norms, judges would be given the right to deny injunctive relief in certain cases where such denial serves distributional innovation goals.

<sup>63</sup>*Ebay*, 547 US 388. Cf. *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10 [2012] E.C.D.R. 4 (ECJ (3<sup>rd</sup> Chamber))(injunction denied in connection with unauthorized peer-to-peer file trading).

<sup>64</sup> Because of the unique nature of patents, that only exist in the event of a domestic grant, international exhaustion is arguably less applicable. But cf 35 US §§271(f)(imposing liability for the supply of “any component of a patented invention” combined outside the United States “in a manner that would infringe the patent if such combination occurred within the United States) & 271(g)(imposing liability for the importation of a product “made by a process patented in the United States”).

reflects the increasing concern about the cost of patent protected medicines.<sup>65</sup> In support of his decision to grant a compulsory license to a local manufacturer, the Controller cited the high prices Bayer charged for the drug, (US\$5,600 per month as opposed to Natco's claimed \$177 per month), the small amounts of the product Bayer had imported to meet domestic needs, and Bayer's failure to manufacture the drug in India. Under Indian law, a compulsory license can be granted if the patent owner fails to make the drug available "on reasonable terms."<sup>66</sup> According to the Controller, these terms are not met "[i]f the drug is so highly priced that the ordinary public cannot afford it."<sup>67</sup> In establishing lack of affordability, the Controller relied on the limited amount of the drug Bayer sold in light of anticipated need: "It stands to common logic that a patented article ... was not bought by the public due to only one reason, *i.e.*, its price was not reasonably affordable to them."<sup>68</sup> Ultimately, the Controller granted Natco a non-exclusive license to manufacture and sell the drug in India for \$177 per month in exchange for a 6% royalty. What is most notable about this decision is the Controller's grudging recognition that the fairness of the price charged was not solely a matter of price comparison between the generic manufacturer and the patent holder who had incurred substantial research and development costs. Although the Controller held that a "reasonably affordable price has to be construed *predominantly* with reference to the public,"<sup>69</sup> the term "predominant" is significant. It represents a partial acceptance of Bayer's argument that reasonableness must be judged at least in part with consideration of an inventor's right to recoup its investment. Ultimately, the royalty the Controller established reflected this recoupment principle.<sup>70</sup> Considerations of consumers needs, balanced with consideration of the inventor's need to recover costs of innovation and testing, which second comers never incur, reflects the beginning stages of a deviant globalization model. By combining the foundational principles of reasonable compensation for intellectual property owners with fair trade norms this case presages the benefits and future paths deviant globalization provides in configuring a *rational* balance between compensation and access. In determining the reasonableness of a particular price or royalty rate, however, given the increasing emphasis on global trade, determinations of the adequacy of the return on investment under deviant globalization principles will most likely consider the *global* sales history for the product. This expanded treatment of global sales data

<sup>65</sup> *In the Matter of Natco Pharma Ltd and Bayer Corporation*, Application for Compulsory License Under Section 84(1) of the Patents Act, 1970, in Respect of Patent No. 215758 (Controller of Patents, Mumbai)(March 9, 2012).

<sup>66</sup> *Natco*, India at 15.

<sup>67</sup> *Natco*, India at 16.

<sup>68</sup> *Natco*, India at 36.

<sup>69</sup> *Natco*, India at 36

<sup>70</sup> *Natco*, India at 59. Section 90 of the relevant Indian law required the Controller to consider "the expenditure incurred by the patentee in making the invention, the expenditure incurred by the patentee in making the invention or in developing it and obtaining a patent and keeping it in force" as well as "other relevant factors." Section 90(1) of the Indian Patents Amendment Act of 2002. Lack of evidence from Bayer regarding actual development costs prevented the Controller from reaching a more accurate determination of the amount of recoupment required.



underscores the significance differential pricing should play in future compensation determinations under future deviant globalization models.<sup>71</sup>

## 2.4 Consumers Matter.

For markets to flourish, consumers must have trust in the goods they buy. No one knowingly buys a counterfeit drug with the expectation that it will not work. Goods and services which physically harm people are not part of an effectively working marketplace. While you can buy novelty items as part of the informal market that break after a few uses,<sup>72</sup> sellers of day-to-day items generally do not sell defective goods if they are seeking repeat business. Thus, the woman who sells food to the workers in the informal market in Sao Paulo does not knowingly sell them contaminated food. Similarly, sellers of pirated videos in the indoor markets of Lima, do not sell defective DVDs.<sup>73</sup> Because consumers need to be protected, enforcement of intellectual property rights under deviant globalization models will increasingly be tiered to focus initially on methods for dealing effectively with the unauthorized manufacture and distribution of physically harmful goods, then on economically harmful ones.

For developing countries, limited budgets necessarily give rise to variable enforcement modalities. This present reality under deviant globalization models will be acknowledged as a permissible (legal) choice. Issues of “effective enforcement” under TRIPS<sup>74</sup> and other multinational instruments,<sup>75</sup> will place consumer health and safety issues as a baseline against which the effectiveness of enforcement efforts may be judged. Countries that focus primarily on the eradication of physically harmful goods in the initial stages of enforcement capacity building will not be distracted by potential threats of WTO sanctions for ineffective enforcement activities. For developing and least developed countries with limited enforcement budgets, deviant globalization supports public enforcement efforts, including enhanced

<sup>71</sup> Such differential pricing models will need to be supported by recalibrations of obligations by customs and other authorities for controlling the diversion of such differentially-priced goods away from the consumers in the countries for which they were distributed.

<sup>72</sup> Tourist goods are notoriously unreliable given the transitory nature of the consuming public. I have witnessed countless sales of outdated, damaged or used goods to unwitting tourists. For example, in Venice, Italy, I watched tourists pay full price for fake rubberized tomatoes that splat into squishy blobs when thrown on the pavement. Tourists would buy tomatoes which failed to splat after two or three throws because the seller has used them as the “demonstration” version he’d been using to secure sales. Of course, by the time the buyer discovered the shoddy workmanship, the vendor had already moved on.

<sup>73</sup> By contrast, based on my personal experiences, the quality of other items sold in the market, which fell outside local DVD labeling requirements, including non-prescription medicine, were more questionable.

<sup>74</sup> TRIPS, Art. 41 (imposing an obligation on Member countries to provide “effective enforcement” of intellectual property rights).

<sup>75</sup> See ACTA, Art. 6.1 (requiring “enforcement procedures ... to permit effective action against any act of infringement of intellectual property rights”). Cf. WIPO Copyright Treaty, Art. 11 (requiring “effective legal remedies against the circumvention of effective technological measures”).

penalties, that are first directed to removing potentially harmful goods from the marketplace. Under deviant globalization models, such “harm” will first be defined as those goods which present *potential* threats to public health and safety. Thus, counterfeit medicines, ingestible goods, cosmetics, automobile parts and other products whose quality is critical to public health and safety should be the subject of strong sanctions. Furthermore, to adequately protect the public, these sanctions should not be applied solely on proof of actual harm. Instead, they should be applied to remove the *potential* for such harm so that consumers can be assured that only safe goods are being offered in the market.

The removal of harmful goods from local markets, however, will form only one portion of more directed means to stop the flow of counterfeit goods across borders. New modalities for regulating such flows will emerge. Customs standards may be revised to permit the seizure of harmful counterfeit goods in transit.<sup>76</sup> When dealing with the issue of pirate websites, distinctions may initially be made based on the types of goods offered by the websites. Music and copyrighted works might be subject to monetary compensation while purveyors of potentially harmful goods, such as counterfeit drugs, would be subject to removal and coordinated efforts to prevent their re-appearance. This could include an array of methodologies such as access blocking by ISPs and/or better monitoring of the accuracy of domain name registrant identities for commercial websites to support stricter prohibitions against re-registration of prohibited websites. These prohibitions will be enforced by alternatives to present notice and take down provisions.<sup>77</sup> Such alternatives, however, will not be limited to notice and notice options,<sup>78</sup> but will undoubtedly include diverse streamlined administrative/court processes that ensure that only sites that provide counterfeit goods are removed.<sup>79</sup>

As countries move farther along the development curve, “harm” from counterfeit goods will be defined as including the “economic harms” posed by counterfeiting. These harms would

<sup>76</sup> Presently TRIPS does not require in-transit enforcement measures. Even ACTA only treats in-transit enforcement as an optional choice. ACTA, Art. 16(2)(“A Party *may* adopt or maintain procedures with respect to suspect in-transit goods...”)(emphasis added).

<sup>77</sup> See 17 USC § 512(c)(establishing procedures for ISP takedowns of infringing materials on notice from copyright owners); Canadian Modernization Act, C-11 §41.25 (establishing procedures for notice to ISPs of infringing materials with subsequent notice to end users).

<sup>78</sup> See Canadian Copyright Modernization Act, C-11, §§41.25 – 4.126 (describing notice and notice procedures for removal by ISPs of allegedly infringing third party content; compliance is unrelated to safe harbor status).

<sup>79</sup> These stricter provisions will most likely include stronger evidentiary proofs of counterfeit activity. See *London-Sire Records, Inc. v. Doe 1 et al*, 542 F. Supp.2d 153 (D. Mass. 2008)(court requires “concrete showing of a prima facie claim of actionable harm; specificity of the discovery request; the absence of alternative means to obtain the requested identity disclosure; a “central need” for the information; and no undue harm to end user’s expectations of privacy); *Bonnier Audio AB v. Perfect Communication Sweden AB*, Case No. C-461/10, [2012] ECJ EUR-Lex LEXIS 452 (ECJ (Third Chamber)(upholding national law that required “clear evidence that someone has committed an infringement” for disclosure of identity of allegedly infringing party and that further limited disclosure “only if the reasons for the measure outweigh the nuisance or other harm which the measure entails for the person affected by it or for some other conflicting interest)(Swedish copyright law).

include adversely affecting the ability to grow local industries that support the manufacturing and distribution of legitimate products. As “glocalization” becomes more significant, early focus on economic harm may be directed to those industries that have a purely local presence, or to goods which fill uniquely local needs. Subsequent development, however, should also include protection against economic harm for all brands, and not merely local ones.

This re-emphasis on protecting consumers will also support a re-examination and re-emergence of the parallel market. Sustainable development and technology transfer have long been recognized as critical linchpins to the growth of effective local markets.<sup>80</sup> They have even been memorialized as part of the international intellectual property regime under TRIPS.<sup>81</sup> Since the heart of the parallel market is the provision of goods and services at affordable prices to those under-served by traditional markets, the renewed focus on compensation rights described above will be combined with consumer protection concerns to redefine the limitations on the importation and distribution of grey market goods. For example, the importation of grey market medicines might be allowed to combat a local pandemic, so long as the efficacy of such drugs is unquestioned.<sup>82</sup>

As we obtain more experience in striking realistic enforcement modalities, concerns over economic harm may be further refined by models that make more nuanced distinctions between socially beneficial uses and other deviant globalization norms. To provide fair access to consumers, courts may make more realistic appraisals of consumer need for low cost compulsory licenses in the face of countervailing IP owners’ rights. Thus, medicine to treat pandemics or even diseases, such as diabetes, that affect the quality of life, and/or its longevity, are more likely to be subject to defensible compulsory licenses than those that treat male pattern baldness. Similarly, compulsory licenses for operating software or smart phone

<sup>80</sup> See TRIPS, Art. 7 (providing that protection and enforcement of intellectual property rights “should contribute to the promotion of technological innovation and to the transfer and dissemination of technology...”); UN System Task Team on the Post-2015 UN Development Agenda, *Science, technology and innovation and intellectual property rights: The vision for development* (May 2012)(advocating for creation of improved platforms through which scientific and other developmental knowledge can be shared).

<sup>81</sup> See TRIPS, Art. 7 (“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the *transfer and dissemination of technology*, to the mutual advantage of producers and users of technological knowledge and *in a manner conducive to social and economic welfare*, and to a balance of rights and obligations.”) & Art. 66(2)(“Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and *encouraging technology transfer to least developed country Members* in order to enable them to create a sound and viable technological base.”)(emphasis added in both).

<sup>82</sup> See TRIPS, Art. 31bis (providing for compulsory licenses for importation of patented drugs to meet domestic needs); William W. Fisher III & Cyrill P. Rigamonti, *The South Africa AIDS Controversy: a Case Study in Patent Law and Policy* (2005)(available at <http://cyber.law.harvard.edu/people/tfisher/South%20Africa.pdf>)(case study of AIDS pandemic in South Africa and dispute over importation of grey market generics). In order to meet the efficacy concerns of consumers, definitions of acceptable grey market pharmaceuticals may need to be refined to assure that the sources for such goods are legitimate ones. Thus, the importation and sale of legitimate generic drugs should be permissible while counterfeit goods (which are not subject to quality control) would remain excludable.

technology may be more readily defensible than those that allow the continuing provision of illegal music, films or videogames.

## 2.5 Innovative Business Models Deserve Adequate Breathing Space to Flourish.

One of the strengths of deviant globalization is that it allows people at the lowest economic rung of economic development to earn a living through innovative actions. In deviant globalization, “innovation” includes entrepreneurial innovation such as that recognized in the Task Force on Science, Technology and Innovation of the U.N. Millennium Project.<sup>83</sup> The complex interplay of factors that leads to successful innovation is beyond the scope of this Article. Yet what appears abundantly clear is that successful entrepreneurial innovation necessarily includes distributional processes and techniques as well as new goods and services. More effective support for distributional innovation under deviant globalization models does not require that needs of intellectual property owners be ignored or given short shrift. But it does require that their interests be re-balanced with those of sellers and consumers. Thus present “free access” demands for the sake of encouraging innovation or creativity<sup>84</sup> have less importance than the economic significance of permitting alternative avenues of distribution.

So-called “rogue sites” that offer either unauthorized downloadable or streaming, unedited copyrighted content, are located at the point of greatest intersection between deviant and traditional globalization. The fair trade norms of deviant globalization offer the most likely sources for rational solutions to this knotty problem. There is no question that rogue sites that provide copyrighted content in a digital format represent a *distributional* innovation. This distributional innovation is arguably supported by deviant globalization norms because it provides goods consumers demand, in a form and with use limitations that meet their reasonable needs. At the same time, compensation flow considerations require that copyright owners receive *some* compensation for the communication to the public of their content.

<sup>83</sup> UN Millennium Project, Task Force on Sci., Tech., and Innovation, *Innovation: Applying Knowledge in Development* (2005) (prepared by Calestous Juma & Lee Yee-Cheong), available at <http://www.unmillenniumproject.org/documents/Science-complete.pdf>. This report emphasized the entrepreneurial foundations of innovation and its critical role in helping transform countries from reliance on the exploitation of natural resources to technological innovation as a basis for development.

<sup>84</sup> These demands include heightened fair use rights for the display of user generated content derived from the unauthorized use of third party works. As noted above the resolution to such challenges using deviant globalization norms to create intellectual property standards would not necessarily establish predictable exceptions under fair use/fair dealing doctrines. Instead, such issues might well be resolved by revised compulsory licensing regimes that treat posting as equivalent to broadcasting, requiring compensation to the copyright owner by the website operator, *not* the end user.

Present efforts that focus on going after the compensation earned by rogue website owners and third parties who provide advertising and sales support for such compensation streams<sup>85</sup> represent a deviant globalization based solution. The innovative approach of these websites gives consumers access to digital content that would otherwise be unavailable. Such distributive innovations, similar to peer-to-peer (P2P) file trading software, may be worth encouraging. The monies earned from such innovations, however, should form a source of compensation for the copyright owners whose content fuels the popularity of these unauthorized distribution sources. Compensation streams can also form a potent source for eliminating rogue sites that are merely freeloaders as opposed to valuable, if low-cost, economic actors. Alternatively, they can also be used to eliminate pirate sites whose social benefit is outweighed by the economic harms caused to content owners and related local industries, including authorized distributors. By focusing on compensation streams, deviant globalization puts the economic viability of piracy into play, *not* its moral necessity.

As economics comes more clearly into focus, deviant globalization analysis will lead to greater differentiations in treatment between websites providing access to useful technologies, as opposed to those which merely meet consumer desires for inexpensive luxury or non-essential goods. While consumers may desire free, unlimited access to movies and music, these demands for access raise distinctly different economic and social justification issues than demands for similar access to computer operating software. While the first may be dealt with through outright prohibition or compensation streams to IP owners from the money trail; the second may trigger a greater reliance on compulsory license and differential pricing supports to meet fair trade needs of consumers, and investment returns for innovators.

I would also expect more useful licensing models for both content owners and providers of intellectual property based goods and services to develop in the next decade of deviant globalization. Creative Commons<sup>86</sup> has undeniably expanded the licensing modalities for copyrighted works to allow authors to permit unlimited uses of their works. As authors become more familiar with the benefits and perils of blogs, content branding and other distributive innovations, they, however, are revising the types of licenses they need. Present popular licensing models have evolved from unlimited uses to limited reproduction rights, supported by full original source accreditation. Such distributive licensing innovations should continue in all areas of open source and open access modalities.

Micropayments, limited field, limited country, copy forward and other technological supported limitations and methodologies will continue to develop to rationalize compensation streams and access rights under deviant globalization models. New compensation flows to support

<sup>85</sup> See Online Protection and Enforcement of Digital Trade Act (OPEN Act), H.R. 3782, 112<sup>th</sup> Cong., 2d Sess. (January 18, 2012)(establishing potential liability of advertising agencies, credit card companies, and others who earn money as a direct result of the provision of pirated copyright content; this technique has been referred to as “following the money trail”).

<sup>86</sup> See Creative Commons website at [www.creativecommons.org](http://www.creativecommons.org).

creative uses of copyrighted works to produce goods and services that form part of an economically viable new market will be developed that reflect the economic focus of deviant globalization. For example, utilization of Western movies to create a local movie industry, such as in Nigeria,<sup>87</sup> creates new product for underserved markets. Some form of compensation may be required for such derivative works,<sup>88</sup> but local experimentation should develop more rational economic models. These models will not only reflect different compensation methodologies – including micropayments and post production royalty streams<sup>89</sup> – but will also differentiate between substantial uses with minimal transformational aspects on one hand, which would arguably require compensation,<sup>90</sup> and insubstantial uses (such as minimal sampling) and transformational new works that require no such compensation.<sup>91</sup> These innovative licensing models will be matched by expanded exceptions that give new business models room to develop before intellectual property owners close them down.<sup>92</sup> It will also require new considerations of the territorial boundaries of present collective rights licensing models. Experimentation in this area is already underway.<sup>93</sup> It should gain greater momentum as the treatment of orphan works, new models for such licensing webhosting facilities that serve as the present equivalent of

<sup>87</sup> See Olufunmilayo Arewa, ‘The Rise of Nollywood: Creators, Entrepreneurs and Pirates’ (2012) UCLA Irvine Legal Research Paper Series No. 2012-11 (examining the role of piracy in the creation of the Nigerian film industry and in its distribution networks).

<sup>88</sup> For example, adapting a novel into a screenplay may require compensation. By contrast, creating parodies or other original (non-superseding) derivative works may not require such compensation under deviant globalization norms. See Doris Estelle Long, ‘Dissonant Harmonization: Limitations on Cash ‘n Carry Creativity’ (2007) 70 Albany L. Rev.1163 (advocating a more nuanced approach to the right of copyright owners’ ability to control adaptive uses of their works).

<sup>89</sup> Such post-production royalty streams support local development by sharing investment risks with intellectual property owners. Under this model, only successful works would give rise to a compensation obligation.

<sup>90</sup> Such minimal transformational uses are at variance with the fair use principles recognized under *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), and its progeny and are closer to the virtual copying that is the keystone of pirated material on the internet.

<sup>91</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)(fair use applies where work is transformative and does not supersede the original). US courts are inconsistent in their treatment of sampling. While the court in *Bridgeport Music Inc. v. Dimension Films*, 410 F.3d 792 (6<sup>th</sup> Cir. 2005), found arguably minimal sampling of four notes qualified as infringing, other courts have recognized that sampling may qualify as non-infringing if the amount is quantitatively or qualitatively insignificant. See *Newton v. Diamond*, 349 F.3d 591 (9<sup>th</sup> Cir 2003)(sampling of 3-note sequence qualified as de minimis infringement).

<sup>92</sup> An interesting foreshadowing of this treatment occurred in a case in the United States involving a claimed fair use defense of infringing conduct based on unauthorized P2P file trading. In *Sony BMG Music Entertainment v. Tenenbaum*, 672 F. Supp.2d 217, 236 (D. Mass. 2009), the court specifically recognized that copyright infringement based on new business models might qualify for a fair use defense until the issues surrounding such new uses have been clarified: “The Court can also envision a fair use defense for a defendant who shared files during a period before the law concerning file sharing was clear and paid outlets were readily available. ...A defendant who shared files online during this interregnum, sampling the new technology and its possibilities, but later shifted to paid outlets once the law became clear and authorized sources available, would present a strong case for fair use.”

<sup>93</sup> See Phil Hardy, *Online Music Licensing – A Way Out of the Maze*, WIPO Magazine (February 2011)(describing various approaches of European Union collective rights organizations to the challenge of digital cross border music licensing).

traditional broadcasting facilities and workable models for global collective licensing rights are created.

## 2.6 Markets Necessarily Require Regulation.

Even in the “wild frontier” of deviant globalization, rules exist. They may be unspoken; but they are based on the need to allocate space and supply lines in a transparent manner. Critically for intellectual property owners, these regulations often represent consensus-based concepts of economic and/or social fairness. Such consensus may become more difficult to achieve in the multi-forum era of dis·integration, but the norms that will be created using deviant globalization models should ultimately reflect a consensus based on the economic realities of the whole economy.

In his discussion of the System D market in Sao Paolo in *Stealth of Nations*,<sup>94</sup> Neuwirth describes a woman who cooks pastries at night, and arrives in the early morning hours to sell those pastries and hot coffee to the early traders in the underground wholesale market that occurs before the early morning street vendors arrive. She sells the goods out of the back of her truck, which is always parked in the same location. When Neuwirth asked her about the availability of the spot everyday she told him that she “holds it by custom and ... will continue to operate there until she chooses to leave the business.”<sup>95</sup> There are rules - even in the markets of deviant globalization. “Vendors pay no rent to occupy the curbside, and there’s no protection money, taxes, or other fees... ‘You simply ask, ‘Can I set up next to you?’ and if it’s okay, you do it.’ (If it’s no, and you set up anyway, you will surely have a fight.)”<sup>96</sup> Regulation is not the enemy of deviant globalization. Irrational regulation is. Under deviant globalization, such irrationality should be minimized by the guiding norms that place economic opportunity for all - IP owners, developing economies and consumers—at the center of the analysis.

## Conclusion

The emerging period of dis·integration provides an unparalleled opportunity for experimentation at the domestic and regional level - shorn of the strictures of multilateral institutionalism of the previous integratory period. Yet such experimentation is not without its perils. Just as the earlier period of integration was purportedly co-opted by the interests of

<sup>94</sup> Neuwirth (2011).

<sup>95</sup> Neuwirth (2011) at 15.

<sup>96</sup> Neuwirth (2011) at 14 - 15.

multinationals and other intellectual property holders,<sup>97</sup> the present era may be co-opted by emerging powers of the anti-integration regime, including Google, concert promoters,<sup>98</sup> and others who have opposed any extension of intellectual property protection to the digital universe.<sup>99</sup> Moreover, the experimentation that is the natural result of dis-integration will only be successful if such experimentations are created and shared in a transparent manner so that early efforts can be refined in the face of practical experiences. Eventually, a new institutional structure to promote such sharing should emerge. This structure should be designed to facilitate the creation and refinement of deviant globalization based solutions to a panoply of issues that can only be imagined in this Article.

At its heart, deviant globalization – with its focus on the operational and economic norms of the informal economy – is about balancing the competing interests of intellectual property owners, consumers and the general public in an economically and socially just manner. Some experiments in crafting effective deviant globalization models will undoubtedly fail. Yet even such failures will be useful in recalibrating present international protection norms so that intellectual property protection can continue to provide the innovative foundation for a vibrant, socially just, global marketplace for the 21<sup>st</sup> Century.

<sup>97</sup>See Michael Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (Brookings Institute 1998); Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press 2003).

<sup>98</sup> In an era where the music industry holds less sway, concert promoters have emerged as the new power.

<sup>99</sup> This includes the organizations that created the successful STOP SOPA campaigns in the United States and the STOP ACTA campaign in Europe. The ability to generate such widespread internet power in the face of largely rhetorical claims – that ACTA will “destroy the internet” – demonstrates the power that is at least equivalent to that ascribed to multinationals during globalization.