

Research Article

Contesting Intellectual Property Norms in Global Digital Economy

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Abstract

This study will analyze the dialectical interaction between the global South and North in redefining intellectual property (IP) norms in the digital era, specifically by situating them in norm contestation. The main question is on how existing IP norms are challenged and redefined in response to the socio-economic transformation of the digital economy where information and knowledge become more decentralized. The focus of the research is on Joint Statement Initiative (JSI) on E-Commerce with reference to the G20 as a norm-setting forum. Drawing on constructivist theory, the study applies the concept of norm contestation with the extension of entrepreneurs and antipreneurs to map out the different positions and strategies of these countries. The study argues that digital economy has become an opportunity for norm entrepreneurs to contest the domination of protectionist IP norms, mainly through domestic regulation and forum shopping. Despite the challenges to existing protective IP norms with alternative views of knowledge access, the norm antipreneurs are able to maintain their domination in the global economy due to their strategic network and knowledge. The study will probe how Brazil and India as norm entrepreneurs pursue a more flexible IP norm, while those of the antipreneurs, the U.S and Japan, seek more protective IP norms. Despite the uncertainties, these contestations provide opportunities for the global South to restructure the normative architecture of intellectual property, though with limited success.

Keywords: norm contestation; intellectual property; norm antipreneurs; norm entrepreneurs

Introduction

The digital economy has brought opportunities as much as challenges to the current global economic arrangement. On one hand, the digital economy increases market exposure, accelerates efficiency in the global value chain, and expands access to a job with the gig economy; on the other hand it creates polarization among and within countries (Amuso et al., 2020). In facing these challenges, countries across the globe have called for discussion and collaboration, pursuing global digital governance. For instance, the Joint Statement Initiative at the World Trade Organization or G20 Ministerial Meeting is explicitly dedicated to setting principles on the conduct of digital economic interaction. Nevertheless, these efforts are blocked, with countries unable to agree on several fundamental issues: data flow and localisation, tax on digital goods and services, and intellectual property rights. Specifically on the last issue, intellectual property undeniably plays an influential role in determining the success of a country in the digital economy considering its role in accelerating knowledge and innovation. Indeed, in this data-driven economy, it is the protection of innovation that enables countries and firms to monetize, granting them the freedom to operate as well as denying this freedom to other competitors (Ciuriak, 2021).

Since it was first introduced, intellectual property has always been presented with the language of protection and exclusive rights to the creator in the name of public interest (Okediji, 2006). While intellectual property rights encourage innovation, it could also limit people's access to the very innovation leading to the concentration of knowledge. It explains why despite the growing innovations in the past few years, most of them occurred in high-income countries such as Switzerland, Sweden, the United States, the Netherlands and the United Kingdom (WIPO, 2019). Additionally, the protective IP norms were also complemented with policies that put the first-mover in a superior position through Standard Essential Patents (SEP) (Neeraj, 2019). Setting a high standard on technological innovation, SEP has maintained revenue for its innovation and hindered disruptive technologies from thriving. For instance, the current digital market for the Business to Consumer scheme is dominated by technological giants: Alphabet, Amazon, Facebook and Microsoft (UNCTAD, 2019).

Nevertheless, the digital economy has disrupted the normative basis of intellectual property as protective rights by expanding access to information and the capacity to create and disseminate knowledge. According to Yanisky-Ravid (2020) the presence of an upload filter has demonstrated the irrelevancy of existing IP norms by presenting the challenge of protecting innovation in the face of counterfeits, while also promoting global online availability of works and access to content. Similarly, the pandemic has also proven the significance of data and knowledge sharing in accelerating the development of solutions and successful products (Marr, 2020). Considering the rise of digitalization and our system's vulnerability to crisis, it becomes increasingly questioned whether the IP norms based on protective rights remain relevant in a world where knowledge sharing is just as crucial to incentivize rapid development.

The concerns against protectionist IP norms have been brought up since e-commerce entered the World Trade Organization agenda at the second ministerial conference in 1998. The Global North, namely Switzerland, Australia, European Union and the United States, proposed a discussion on emerging issues of IP in the digital era ranging from enforcement, extension, copyright protection and choice of law (Ido, 2019). These countries further advanced the proposal with a maximalist agenda or known commonly as WTO+, which seeks to extend the scope of IP protection to prohibit disclosure of trade secrets and data localization which are evident in the current Joint Statement Initiative (JSI) on e-commerce. While these proposals affect the Global South, especially regarding their access to innovation, there has been nominal participation on their side, with only Brazil actively asserting the need for technology transfer and territoriality of copyright in the digital environment (Ido, 2019). Specifically, on data localization, China and India have been persistent in maintaining their data localization law in the name of security and development (Irfan, 2019).

Despite the tension and interest at stake, the contestation of IP norms in the digital economy is inadequately explored. Previous studies have mainly discussed the norm contestation in the digital governance context, focusing on discursive efforts and regulatory instruments to control the internet on issues such as human rights, representativeness, and cybersecurity (Radu et al., 2021). Meanwhile, on the subject of intellectual property rights, the research mainly surrounds the challenges of the digital economy to the existing IP regime (Yanisky-Ravid, 2020), the expansion of IP coverage in WTO+ (Ido, 2019; Menezes, 2018) and the debate on access to source code which relates to the ongoing discussion of global data governance (Reid-Smith, 2017). Therefore, this research will combine the two spheres of studies to understand **how existing IP norms are challenged and redefined in response to the socio-economic transformation of the digital economy where information and knowledge become more decentralized**. The question will be situated in the dynamics between the North and the South, where the former has been dominating both the material and knowledge sphere of the digital economy while the latter is in the process of "catching up".

Therefore, by answering the aforementioned question, this research seeks to contribute in two ways. First, by situating IP within norm contestation, this research will unveil the political economic interaction behind state and non-state actors in setting the standard and practice of knowledge dissemination in current technological

disruption. This will add nuance to the current discussion of intellectual property rights in the digital economy where legal and technical aspects remain most dominant. Instead of asking how intellectual property rights should adapt to the digital economy, this research is more interested in how countries redefine intellectual property outside liberalism (Steele, 2017). Secondly, by including the concepts of antipreneurs and entrepreneurs in the analysis, this research is capable of mapping out strategies and responses among actors in a dialectical manner to understand how current normative architecture is maintained, challenged, and possibly transformed.

Norm Contestation in Intellectual Property Regime

According to the classic reading of international relations studies, norms are the standard of appropriate behaviour of an actor with a given identity (Finnemore & Sikkink, 1998). It contains a prescriptive or evaluative quality to determine what an individual should do by the standard of the community or society. Finnemore and Sikkink (1998) further developed the Norm Life Cycle Model to explain the process of which norms are produced, contested and internalised. In the context of the digital economy, Kettemann (2020), who draws on foundational work by Forst & Günther (2011), understand the normative order of the internet to be "a complex of norms, values and practices that relate to the use and development of the Internet, and with which the activities of, and relationships among, states, private companies and civil society, about the use and development of the Internet, are legitimated."

Nevertheless, it needs to be acknowledged that norms are not static with the varieties of actors ranging from state to non-state, seeking to set the standard of what is "right" in the current digital era. This is where the concept of contestation becomes relevant. The rapid development of technology and cyberspace have outgrown the status quo norms and encouraged critical dialogue where contestation is possible (Lantis and Bloomberg, 2018). Antje Wiener defined contestation as "interventions on the normative structure of world politics" (Wiener, 2004). This understanding treats international politics as a battlefield of different values where actors engage in contentious battles over norms, their creation, interpretation, and application which the more powerful group wins at a specific moment (Zimmermann et al., 2017). In her understanding of norm contestation, Wiener (2014) argued that norms are meaningful only when they are applied which produce the so-called meaning-in-use. However, considering the distinguished social relations within and outside national state boundaries, norms are constantly challenged as it rises to power with formal validation and social recognition (Wiener, 2017).

It is especially true in the context of intellectual property which incorporated copyright norms from the Berne convention in 1886 and institutionalized in the WTO TRIPS agreement later in 1994. According to the agreement, protection and enforcement of intellectual property rights contribute to innovation and enforcement mechanisms for violation of copyright are essential to ensure both social and economic welfare (Okediji, 2006). Nevertheless, this conception of IP norms is not independent from the existing asymmetrical power relations in the global trade regime. As argued by May (2000), the high protectionist IP norm is a form of knowledge commodification endorsed by the powerful capitalist group to enclose the public access to knowledge and ensure the preservation of power in the information society. Being a norm, IP differentiates what is fair and unfair in trade regimes under TRIPS, enforces a mechanism of compliance through the World Intellectual Property Organisation (WIPO), thus consequently influences the way actors act by either conforming or challenging the norm (Sell, 2003). Indeed, the TRIPS agreement brought up a new era of IP regime by globalising protectionist IP norms (Sell, 2003; Okediji, 2006).

Despite emerging as the dominant norm, the protectionist IP norm is constantly challenged even when it has been internalised in the domestic realms. Nevertheless, there has been a selection bias in norm dynamic literature where norm contestation occurs linearly (towards a peaceful liberal future) and norm entrepreneur

(who all happened to be Western) reach a success in normative change (Bloomfield and Scott, 2017). This bias not only undermines the agency of normative targets, but also obscures the possibility of these targets to become norm entrepreneurs themselves. Zarakol (2014) criticised how internalisation is seen as parallel to compliance while in reality it is possible that internalisation be coupled with a rejection, especially when the norm is embodied in ways that the national society finds highly problematic (Steele, 2017, p. 133). Similarly, Acharya (2013) argued how local actors reject the normative change because they do not share the same view with the norm entrepreneurs. Contrary to Wiener who argued how normative rejection can lead to normative change, Acharya (2013) believed that their resistances are creative only to the extent that they reformulate the global norms to fit the local normative understanding, thus reinforcing the same normative architecture.

For instance, China who on one hand has reformed its IP legislative to meet the standard set by TRIPS, on the other hand also developed its own IP norms based on Chinese culture with "one base, two goals and three principles", placing equal important to the knowledge access which has been undermined under the protectionist IP norm (Shao, 2006)¹. The case of China has added another nuance in norm contestation where internalisation and opposition occur simultaneously because the norm is contradictory to "their supposedly exceptional nature and/or their own culture" (Steele, 2017, p.134). Therefore, referring to the work of Wiener, Zarakol, and Acharya, this research will look at norm contestation in IP norms not only from the process in which it is validated, through internalisation or adoption, but also on how it is rejected in a specific context and alternative norm outside of the liberal structure is offered though not necessarily lead to transformation.

In doing so, this article will also adopt the concept of norm antipreneurs, developed by critical constructivists Bloomfield & Scott (2016). The concept of antipreneurs unveils specific strategies and actors, ranging from individuals, coalitions and states in a contestation process (Lantis & Bloomberg, 2018). In relation to norm entrepreneurs, whose ultimate aim is to produce a norm, norm antipreneurs seek to defend the status quo. Antipreneurs resist change creatively by refining status quo norms and proposing them in opposition to the entrepreneur's alternative norm. Nonetheless, in resisting change through discursive battle, antipreneurs themselves tend to shift dynamic understandings of norms in what is understood as "normative flux" (Lantis & Bloomberg, 2018). A circumstance where actors may agree on the need to revise the norm but are reluctant to agree on its content and application. Therefore, the tension and contestation between entrepreneurs and antipreneurs continue in challenging, defending and transforming the existing norm architecture.

Furthermore, in the context of IP norms, the framework of norm contestation along with the entrepreneurs and antipreneurs dynamic will enrich the discussion by shedding light on the agency of the governed. Rather than treating norm diffusion as a linear process where the North dictates the South to oblige, compel and adapt to existing IP norms, the norm contestation framework elucidates the latter's role in challenging the domination of the former. Equally important, the identification of antipreneurs as prominent actors in norm contestation will also reveal how the North responds to the emergence of alternative norms to maintain its normative and material power in the digital economy. Ultimately, with the dialectical understanding of norm contestation, this research will make visible the latent dynamic between the North and South in redefining innovation and access to knowledge. As Radu et al. (2021, p. 3) have asserted, "grasping who has the means and the capacity to stimulate, promote, and sustain normative change, and under what conditions this process takes place, is central to taking forward debates on governance reform in the digital environment".

¹The base is to respect and reasonably protect IPRs; the two goals are the transmission of knowledge and distribution of the welfare of knowledge accumulation; lastly the three principles include an IP system that is inclined to the status quo, public health over private right and national interest over private one (Shao, 2006).

Methodology

The research is conducted with a qualitative case study method to understand how norms operate in our international system. The reasons for choosing this method are two-fold. First, it reveals the meaning-in-use of IP norms to show the sphere of divergence or convergence of interpretations among actors. As Wiener (2009) has argued, formal validation (institutional rule) and social recognition (individual interpretation) are decoupled in norm contestation thus the gap between the two will tell us about the intensity of conflict. Qualitative case study in this regard will unveil this gap by centring on individual meaning-in-use, mostly by countries leaders and elite, that is meditated in both international and domestic levels. Second, the qualitative case study method is also used to capture the dynamic between structure and agency in shaping the norm architecture. This research treats IP norm as the product of structured agency where both the structure and agency influence mutually constitute what kind of norms and rules are applied in transnational institutions such as WTO. For this consideration, the qualitative case study method becomes relevant to explain the interaction between agents (state and non-state) and structures (capitalist economic) to produce a particular outcome and change overtime (Sell, 2003).

Moreover, the case study analysis focuses on the WTO Joint Statement Initiative on E-commerce with reference to the G20 forum as an agenda for norm-setting. Despite having different organisational forms and membership, these two forums complement each other when it comes to constructing the global economic regime. The latter has significance as a norm-setter or agenda-setter through consensus building and networked governance as evident in the aftermath of the 2008 global financial crisis (Gorlich & Stein-Zalai, 2020). Meanwhile, the former performs as an institution where regulations, surveillance and compliance mechanisms are enacted. Looking from a norm contestation perspective, WTO is a social construct resulted from a dynamic process of mutual constitution which drives the global business regulation in intellectual property rights (Sell, 2003). The JSI on E-Commerce in this regard becomes particularly worth noting as it presents the effort by which both structure and agency respond to the disruption caused by the rise of digital economy. Lastly, these two forums include the participation of both Global South and Global North who would be treated as respective norm entrepreneurs and antipreneurs in this research.

In situating the participating countries as either norm antipreneurs and entrepreneurs in the contestation of IP norms, this research will use the framework that has been elaborated in the theoretical framework section above. The entrepreneurs are characterised for those who reject the dominant IP norm and offer an alternative norm outside the western liberal value inspired by local value (Bloomfield and Scott, 2017; Steele, 2017). This category includes Brazil, India and China who redefine intellectual property in terms of public access to knowledge. On the other hand, norm antipreneurs are those who are identified as defendants of the status quo, rejecting the possible alternative norm and possessing the benefits of incumbency (Bloomfield and Scott, 2017; Legro, 2000). These characteristics are present in both United States and Japan as the proponents of intellectual property rights (Sell, 2003).

There will be two sources of data, that are primary and secondary data. The primary data is sourced from minutes of meetings and speeches at the G20 forum on Digital Economy since 2015 and JSI on E-Commerce at WTO. For the secondary data, this research will generate information from prior journals, publications, institutional and government reports as well as media publications which cover matters such as source code, trade secret and data flows.

Norms Dynamics of Intellectual Property (IP) at the WTO

The urgency to redefine IP norms in the face of the digital economy was first brought up at the World Trade Organisation (WTO) Second Ministerial Conference in 1998. Indeed, WTO has been the main institution where IP

norms are produced, contested, and disseminated. The disruption that digital economy has caused with knowledge expansion and technological disruption had ignited the debate whether or not existing IP rules are relevant. Through the so-called Declaration on Global Electronic Commerce, the WTO gave a mandate to four WTO councils: the Council for Trade in Goods, the Council for Trade in Services, the Council for TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) and the Committee for Trade and Development to establish a rule regarding e-commerce. Specifically to the TRIPS Council, the Declaration demanded a discussion on copyright protection, trademarks, technological innovation, and access to technology.

Early discussion of adapting IP rules in the digital economy era centred on increasing the protectionist measure of new technology and innovation by the antipreneurs, namely the United States and Japan. From 1991 to 2001, several developed countries such as Switzerland, Australia, the European Union and the United States advanced the protectionist agenda in E-Commerce discussions by proposing an extension of the copyright and patent protection to new technologies, such as Big Data, Artificial intelligence and Machine Learning (Ido, 2019). It was not until the Nairobi Ministerial Meeting in 2015, that the narrative for protectionist IP shifted to accommodate alternative framing from the developing countries. The domination of developed countries in the TRIPS Council came as no surprise due to the benefits of incumbency that they possess, granting them both formal validation and social recognition. Their positions are also favoured by the nominal changes of the digital economy, which on one hand challenges existing IP norms with the ease of knowledge access, and on the other hand also grants power to those technologically advanced countries. Meanwhile, for the condition of normative transformation, the norms need to fail catastrophically, otherwise people will just shrug and muddle thus maintaining the normative status quo.

Challenging The Status Quo through Alternative Norms

Furthermore, one of the most notable manifestation of protectionist IP norm in the digital economy is the classification of source code or algorithm of digital product as trade secrets, meaning that they cannot be disclosed to the government nor to the public. Previously, source code and algorithm are not classified as trade secret but instead as part of the technology protected by patent which will be transferred once the patent expires. The disclosure of source code through patent is a common method of technology transfer for developing countries. Nevertheless, by classifying source code as trade secret, the developing countries' chance for technology transfer will be more restricted thus benefitting the patent-monopoly holder than the countries receiving the technology (Reid-Smith, 2017).

Responding to this, Brazil showed its opposition to the protectionist IP norms by submitting a proposal on e-commerce and copyright at the Nairobi Ministerial Conference in 2015. The proposal claims that IP norms should not produce technological protection measures that come at the cost of developing countries' access to innovation (Ido, 2019). Along with Argentina, Brazil argued how "recent advancements in technology enable the 'intellectual goods' to be transferred in the digital environment" and proposed to maintain "an appropriate balance between the interests of right holders and users of protected works in the digital environment" (WTO, 2016, p.2).² These proposals came as a response to the antipreneurs' defensive act by criticizing protectionist IP norms in the digital era and offering an alternative for knowledge sharing, in line with the ease of access to innovation and information in the digital economy. Herewith an alternative vision of IP in digital economy is presented, where access to innovation becomes as crucial as protection.

²Communication from Brazil on Electronic Commerce and Copyright at General Council for Trade-Related Aspects of Intellectual Property Rights in 2016, the document can be accessed on <https://www.tralac.org/images/docs/11367/electronic-commerce-and-copyright-communication-from-brazil-general-council-trips-december-2016.pdf>

The main reason why Brazil was the first to respond to the antipreneurs' protectionist agenda was certainly their historical opposition against protectionist IP norms which are not in line with their local norms of knowledge as public goods. The contradiction was mainly evident in the pharmaceutical industry where the implementation of TRIPS in Brazil was highly conflicted (Eimer et al., 2016). Indeed, since IP was introduced to the global trade regime in the Uruguay Round, Brazil spearheaded the fight against the inclusion of intellectual property on GATT (Sell, 2003) and demanded readjustment of the international patent system to their developmental needs. Paradoxically, Brazil also possess the most sophisticated IP system among their fellow developing countries, enabling them to comprehend and strategize against highly technical issues of IP (Serrano Oswald & Burri, 2021).

For Bloomfield (2016), to optimize its strategic advantage, Brazil as a norm entrepreneur has to carry these two-pronged strategies: "first they need first to persuade others there is a problem and delegitimize the existing norm; second they must offer a workable solution (i.e. a viable new norm)". The first strategy was marked by the creation of counter-framing that question the legitimacy of existing norms by the norm followers, which in this case is the Global South (Bloomfield and Scott, 2017). Specifically, in the digital economy context, Brazil has criticised the risk of increased protectionism, especially for innovation, which is necessary for the development pursuit of developing countries in the Nairobi Ministerial Meeting in 2015. Using the same counter-narrative of development, Brazil also submitted a proposal on IP and Development in the Digital Environment at the 23rd session of the Committee on Development and Intellectual Property. The proposal declared the need for knowledge sharing for development by supporting the exchange of experiences in implementing new technologies and improving human resource capacity (CDIP, 2019).

Along with Brazil, the problematisation of the current normative structure is also carried by India who was also fellow opponents of protectionist IP norms. Contrary to Brazil who expressed its opposition by participating in JSI on E-Commerce talks, India opts to boycott the plurilateral talks by arguing it as a threat to the spirit of multilateralism in WTO and the risk of producing a digital divide. India used development framing as argued by Piyush Goyal, India's Minister of Trade and Commerce, at the G20 Meeting in 2019, the principle of "Data Free Flow with Trust" is neither well understood nor comprehensive enough to accommodate the need of developing countries. Moreover, considering the substantial digital divide among countries, the minister defends the need for policy space for developing countries because "data is a potent tool for development and equitable access of data is a critical aspect for us." (Mishra, 2020). Herewith there appears at least three counter-framings in challenging protectionist IP norms in digital economy: development needs, the weakening spirit of multilateralism and the diminishing policy space of developing countries.

Moreover, in challenging the domination of protectionist IP norms, the norm entrepreneurs need to go beyond problematising to also presenting an alternative norm that is feasible. One of such alternative norm is the open knowledge principle where access to knowledge is inherent in innovation, hence serving the public goods. As it has been argued by Acharya (2011), normative community might show resistance by adapting the dominant norm into pre-existing local normative framework within which this rejection can turn into norm-making. One such instance is the promotion of flexible IP norms in Brazil. Despite being the country with the most established IP rules as standardised by TRIPS, Brazil also simultaneously develops an alternative norm that allows for knowledge-sharing which has been undermined by current dominant IP norms. Various local activists commonly used the term *cultura livre* (free culture)–rather than open culture–to refer to the "loosely organized movement that seeks to apply free software strategies to the broader realm of cultural production" (Shaver, 2010). This principle of free culture manifests in what is known as open intellectual property (IP) licenses in Brazil where creative works and innovation are made to be accessible for public (Lippmann, 2014).

Similarly, India also adopts more flexible IP norms especially in areas that are essential to its development such as pharmaceuticals and agriculture (Serrano, 2016). This approach needs to be contextualised in India in its post-colonial transformation, especially in its developmentalist, anti-imperialist and non-aligned identity (Miller, 2013). In the digital economy context, the developmentalist and anti-imperialist norms are reflected in its data governance which maintains government access to data and promotes data sharing for domestic development objective. India's digitalisation is carried through a flagship programme known as "Digital India" which views data as the cornerstone of development that needs to be treated as public goods instead of a mere commodity as the protectionist IP norms has promoted (Basu, 2021). One notable example is Non-Personal Data Framework highlighting the potential of monetising data derived from the public, private and community through personal data sharing among companies (Mishra, 2021).

Furthermore, in disseminating the alternative of knowledge sharing, both Brazil and India have carried a strategy known as "forum shopping". An institutional manoeuvre where normative agents create discussion, generate support and build coalition with the potential allies (Bloomfield & Scott, 2017; Murphy & Kellow, 2013). For instance through the India, Brazil and South Africa (IBSA) forum where members declared opposition against protectionist IP norms and defends the crucial role of flexibilities to balance IP rights and access to knowledge (Menezes, 2018). Additionally, Brazil and India are also part of South Centre who has been actively engaged in IP debates in the digital economy. For instance their recent statement on the need to maintain IP exceptions and limitation and access to knowledge "including, but not restricted to education, research and creative exploration" to support "the continuous progress of all societies." (South Centre, 2022). The two forums have become not only a place where India and Brazil express their opposition to the protectionist agenda, but also a place to disseminate norms through South-South Cooperation in a form of knowledge exchange and training of experts.

Nevertheless, while the manoeuvre against protectionist IP norms is evident outside the WTO, in the JSI forum on E-Commerce, the issue of intellectual property is under-explored especially by the Global South. Brazil remains the only country from the Global South who actively engages in the discussions of IP rules. In addition to its proposal submitted at the Nairobi Ministerial Meeting, Brazil also defended flexible IP norms in the General Council in 2019 through communication number JOB/GC/200/Rev.1 which reaffirmed the "extension of exception and limitation to the digital environment, possibility to develop new exceptions and limitations to copyrights and related right to the digital environment and exception and limitation for beneficiaries in legislation where there is specific protection against the circumvention of technological protection mechanism." (Ido, 2019, p.4). While India can be an avid supporter for Brazil's proposal on JSI on E-commerce, India believes JSI is a threat to the principle of multilateralism held by the WTO, hence it remains a non-participant in the WTO thus weakening the norm-making capacity of the entrepreneurs.

Defending the Protectionist IP Norms in the Digital Era

Despite the challenge and opposition by the norm entrepreneurs in the IP regime, the proponents of protectionist IP norms or what will be termed as norm antipreneurs have strategized in advance to maintain its domination. As it has been stated before, when digital economy was first brought to the WTO TRIPS Council in 1999, it was the antipreneurs who responded by proposing higher IP rules protection. Through Communication number IP/C/W/149, the United States affirmed that "adequate and effective intellectual property protection and enforcement are key elements of the effective transparent legal environment that is necessary for fostering the continued growth of electronic commerce." (WTO, 1999).³

³Communication from the United States for Work Programme on Electronic Commerce, aside from affirming IP protection in digital economy, the communication also promoted expansion of IP protection in several areas: exclusive rights for sound recording producers

Herewith, the communication from the U.S seeks to refute the claim of entrepreneurs if there is a problem in protectionist IP norms, if anything the protection needs to be strengthened in the era where innovation is prone to theft and piracy.

There are at least two framings that can be indicated from the antipreneurs: first is the logic on how IP protection is essential to innovation thus inherent to development of digital economy. The argument mainly target the policy practices of most developing countries in disclosure of trade secret and technology transfer as a condition for market access such as India, China and Nigeria. This is evident in the communication submitted by United States Delegates through the WTO Joint Statement on Electronic Commerce Initiative in 2018 number JOB/GC/178:

*"Firms should not have to share their source code, trade secrets, or algorithms as a condition of market access. Conditioning market access on forced technology transfers deters foreign investment and prevents local firms from accessing world-class digital services. Trade rules can prohibit requirements to transfer technology, trade secrets, or other proprietary information."*⁴

The second framing is the argument of how disclosure of source code and requirement for technology transfer is a trade barrier, a sin to current free trade regime and has potential to impede development of new technologies and business opportunities. This view was presented by Japan who has been a close ally to the United States in the construction of protectionist IP norms (Sell, 2003). Japan's statement in the proposal number JOB/GC/177 argued specifically on the protection of intellectual property by prohibiting disclosure of information such as trade secrets and source code, forbidding the use of particular technology including encryption technology and banning improper access to trade secrets by the government (WTO, 2018). To complement the U.S effort as an antipreneur, Japan argued how any alternative to protectionist IP norms, especially those that open access to knowledge and innovation, is worse than maintaining the status quo.

In addition to the two framings, the antipreneurs also adopted the strategy known as "bolstering" in order to deny any alternative interpretations of protectionist IP norms (Lantis and Bloomberg, 2018). This strategy is done mainly by strengthening IP rules at the domestic level through the protection of source. For instance, in the United States, the source code is categorized as a trade secret and protected under Defend Trade Secret Act (DTSA) as a federal law and Uniform Trade Secrets Act (UTSA) as a state law. Similarly, Japan has been a long ally of the United States and a prime mover in technological innovation, safeguarding source code under trade secret protection. Furthermore, according to the Unfair Competition Prevention Act, source code is necessary technical information for business operation; thus, forced disclosure of it will harm the business. Japan and the United States governments also gain favourable support from domestic private actors to maintain the existing IP norms by limiting access to source code. According to the research by Banga and Saha (2021), lobbying by information and communications technology (ICT) firms in the U.S. shot up to almost \$80 million by 2020 with an agenda beyond domestic ones to seek free cross-border data flows and ban data localization and source-code sharing.

for on-line transmission of their recordings; term of protection for copyrighted works, sound recordings and other objects of neighbouring rights not protected as works; delivery and production of optical media; the use of electronic filing to acquire rights in patents, trademarks, geographical indications; and protection for industrial designs and integrated circuit layout-designs.

The document can be accessed on [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_5009-](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_5009-DP.aspx?language=E&CatalogueIdList=233488,232275,228997,46383,3141,2252,18842,13715,5481,10824&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)

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⁴Joint Statement on Electronic Commerce Initiative, Communication by United States in 2018, the documents can be accessed on [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_5009-](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_5009-DP.aspx?language=E&CatalogueIdList=244489,244495,244488,244469,244463,244471,244470,244437,244474,244472&CurrentCatalogueIdIndex=6&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=False)

[DP.aspx?language=E&CatalogueIdList=244489,244495,244488,244469,244463,244471,244470,244437,244474,244472&CurrentCatalogueIdIndex=6&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=False](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_5009-DP.aspx?language=E&CatalogueIdList=244489,244495,244488,244469,244463,244471,244470,244437,244474,244472&CurrentCatalogueIdIndex=6&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=False)

Additionally, the antipreneurs also carried what is called the stalling and diversion strategy, which attempts to block any direct challenges to existing IP norms by diverting the debate from its course in the TRIPS Council (Lantis and Bloomberg, 2018). The United States adopted a diversion strategy by bringing the urgency for expanding IP protection in the name of cybersecurity to the G20 summit in Antalya in 2015. The leaders' statement from the Antalya forum, as endorsed by the United States, stated that "*international law applied to state conduct in cyberspace and committed that all states should abide by norms of responsible state behaviour in cyberspace, and affirmed that no country should conduct or support cyber-enabled theft of intellectual property with the intent of providing competitive advantages to companies or commercial sectors.*" (The White House, 2016). Having tied intellectual property rights with cybersecurity, the United States instilled a biased perception of the private actors on how the digital economy has increased IP violation, hence the need for the enforcement and rights and the protection of new and emerging technologies (Menezes, 2018).

Moreover, the G20 continued to be the forum for IP norm-setting by the antipreneurs. Indeed, recent works suggest that the great powers tend to favour policy coordination in bilateral, mini-lateral, or informal forums with lesser transaction and information costs than the multilateral (Hughes et al., 2014). Considering its powerful position in the G20, the United States framing managed to successfully shape the norm narrative in consecutive G20 meetings where the expansion of IP protection, especially towards algorithm and source codes, is endorsed as the safeguard against the uncontrolled flow of information in the digital economy. These are evident from the G20 leader statements from the period of 2015 until 2019, intellectual property rights is treated as the safeguard for digital economy - the narrative that has been reflected in the United States statement in Antalya. The peak of protection IP domination in the G20 was the introduction of "Data Free Flow with Trust" principles by the United States and Japan in the G20 forum in 2019. The so-called "Osaka Track" declared (G20, 2019):

"Cross-border flow of data, information, ideas, and knowledge generates higher productivity, greater innovation, and improved sustainable development while raising challenges related to privacy, data protection, intellectual property rights, and security. By continuing to address these challenges, we can further facilitate data free flow and strengthen consumer and business trust. In this respect, it is necessary that legal frameworks, both domestic and international, should be respected. Such data free flow with trust will harness the digital economy's opportunities."

This declaration gained a mixed response from the entrepreneurs, namely Brazil and India, who are also members of the G20. Brazil decided to be the signatories of the Osaka Track while also maintaining a view of multilateralism and data for development through its BRICS alliances in the forum. While some argued that Brazil's support in the Osaka Track is not necessarily a shift in its normative position (Greenleaf, 2019). Serrano (2021) believed that there is a weakening developmentalist agenda resulted from the shift in public administration thus making Brazil's position to be less conflictual with the international norm and limiting its potential to be the norm-entrepreneur. Meanwhile, India was outright opposing Osaka Track in the name of development. This is mainly related to the concern of data governance of which India believes to be the national asset as opposed to individual rights that should be commodified through IP protection (Greenleaf, 2019). Along with Indonesia and South Africa, India decided not to sign Osaka Track and maintain the principle of multilateralism in the digital economy discussion. Therefore, due to the conflicting position in G20, the potential win of norm entrepreneurs to challenge the domination of protectionist IP norms is near impossible.

Further, the domination of protectionist IP norms is reflected in the current JSI on E-Commerce. More countries, mainly the North, have expressed their support and proposed a restriction on the disclosure of source. This includes the United States, Japan, the European Union, the Republic of Korea, Singapore, and Ukraine. Brazil on the other hand has not submitted any proposals on source code and intellectual property, further proving its shifting position from a previous norm-entrepreneur to a norm follower. As of March 2021, the regulations on

intellectual property and source code accommodated only the demand of the antipreneurs which is to prohibit the disclosure of a transfer of source code and algorithm, thus maintaining the concentration of knowledge in the hand of the capitalist class.

Therefore, despite the many efforts of norm entrepreneurs, the opposition by Brazil and India has met with limited success, and the current normative IP structure remains intact. The norm entrepreneurs have more strategic and tactical advantages as a range of networks support them, from elites to non-governmental organizations (Bloomfield, 2016). Additionally, antipreneurs have the upper hand in blocking progress on norm change in highly technical policy areas, such as intellectual property rights, where other actors have limited knowledge or resources (Lantis & Bloomberg, 2018). It is evident, for instance, in the debate of access to source code and algorithms in both the JSI and G20 forums, where the discussions are dominated by the United States and Japan, who pursue an agenda of protection. Despite the concerns of developing countries regarding flexibilities, limitations and technology transfer, the rules promoted under global digital governance remain favourable towards the patent-monopoly holder (Reid-Smith, 2017; UNCTAD, 2021).

Conclusion

The digital economy has indeed disrupted the stability of the current IP normative structure by reigniting the contestation between knowledge protection and access. The disruptions have allowed norm entrepreneurs to redefine existing IP norms with various strategies taken at the domestic and global levels. At the domestic level, the norm entrepreneurs present their opposition through adaptation of dominant norm in the local context. Brazil develops open intellectual property system as inspired by its national identity of *cultura livre*. While organised its resistance in data governance where data is treated as a national treasure for serving public goods of socio-economic development as opposed to the practice of data commodification under protectionist IP norm. To complement these effort, the norm entrepreneurs also organised themselves forum shopping mainly under the scheme of South-South Collaboration. Through this strategy, norm entrepreneurs were able to not only exchange knowledge but also persuade a critical mass on the problems of protectionist norms and the potential of flexible IP norms. While these alternative norms and practices have the potential to challenge the existing normative architecture, the success of norm entrepreneurs are nominal.

These are for two main reasons. First is the lack of participation from the Global South in the JSI on E-Commerce, especially in the subject of intellectual property rights resulted from the diverging concern between the norm entrepreneurs. Brazil's early proposals for flexible IP norms was not followed up as the shift in national government has made them more conforming towards the protectionist IP norms. Meanwhile, India's persistence on boycotting JSI on E-Commerce for its developmentalist and value for multilateralism has weakened the Global South as a norm entrepreneur, thus backfiring the effort to challenge existing asymmetrical power relations in the digital economy.

The second reason is certainly the strategic move carried by the antipreneurs who possess the benefits of the incumbent: network and knowledge. The early strategies include refuting the claim by norm entrepreneurs about the problem in protectionist IP norms and convincing the normative agents how the alternatives, such as disclosure of source code and technology transfer, which are incompatible with current global trade regime. Moreover, the antipreneurs also practiced bolstering, which is to generate domestic support in forging the protectionist IP norms. Lastly, the antipreneurs use the G20 forum to stall and divert the discussion of IP as G20 is more conducive to advance their agenda of maintaining the status quo. This is evident with the creation of the "Data Free Flow with Trust" Principle under the Osaka Track in G20 Summit in 2019. With its capacity as a norm setting forum, the G20 normative stance on protectionist IP norms is later reflected on the JSI on E-Commerce. Therefore, despite the digital economy disruption and opportunities for change, it is more likely that the current normative architecture will remain intact.

With protectionist IP norms in power, the access to knowledge will be more restricted especially for the Global South whose technological progress relies on flexibilities and technology transfer under the current IP regime. Therefore it is necessary for the Global South to go beyond the traditional issue of taxation and engage in IP rules negotiation across multilateral forums such as the WTO and G20. The Global South needs to make sure that the new IP rules in the digital era will enable an upgrading in their digital ecosystem instead of entrapping them in the same pattern of the lower value chain in this knowledge economy. Equally important is for the Global South to develop alternative normative strategies and IP policies that can serve its need for development and innovation. To do so, the Global South can look at the potential for collaboration with like-minded countries, such as South-South Cooperation. Despite the diverging policy interest and priorities, it is indeed necessary for the Global South to discover its mutual concern and solidarity to shape the future IP norm in the digital era.

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