

Corporate-Led Regulation of Intellectual Property

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Private Power, Public Law: The Globalization of Intellectual Property Rights. By Susan K. Sell. Cambridge: Cambridge University Press, 2003. 240 pp., \$60.00 cloth (ISBN: 0-521-81914-8), \$21.99 paper (ISBN: 0-521-52539-X).

Private Power, Public Law: The Globalization of Intellectual Property Rights by Susan Sell is the first book by a political scientist to analyze the construction and impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights (better known as the TRIPS Agreement) within the context of changing patterns of private and state authority. Even though the literature on the TRIPS Agreement is extensive, most studies take a legal or economic perspective on the globalization of intellectual property rights. Comprehensive studies by political scientists on intellectual property and global governance are relatively rare. Christopher May's book, *A Global Economy of Intellectual Property Rights* (2000) considers the problematic nature of cosmopolitan justifications for the global protection of intellectual property. *Knowledge Diplomacy* by Michael Ryan (1998) explains the TRIPS Agreement as a second stage in the process of trade liberalization that began with the 1947 General Agreement on Tariffs and Trade (GATT). Sell's book picks up both these themes in order to explain, from a US perspective, the reasons for the emergence of the TRIPS Agreement at the conclusion of the Uruguay Round of Multilateral Trade Negotiations in 1994 (Blakeney 1996). The inquiry is therefore twofold. First, how did a group of private actors succeed in establishing a comprehensive framework of rules for the global protection of intellectual property? Second, what sort of factors determined the success of the enterprise as an international legislative initiative?

The focus of Sell's analysis is the knowledge-based transnational corporation. Her argument is that such corporations have a structure, resource base, and planning horizon approaching that of governments. As a result, they were capable of initiating and managing a project to promote the globalization of intellectual property rights. *Private Power, Public Law* offers a well-researched account of the formation, organization, and transnational mobilization of the Intellectual Property Committee—an ad hoc group of some twelve CEOs representing US software, pharmaceutical, entertainment, and financial services corporations that served as an agency for international legislative reform. It explains how the Intellectual Property Committee had the resources to construct a draft text and the capacity to mobilize the support of their counterparts in Europe and Japan in order to confidently present a draft agreement to the GATT Secretariat in 1988.

Chapter 1 considers various theoretical approaches that might explain the Intellectual Property Committee's role in the emergence of TRIPS. Rational choice theory is rejected because it neglects the broader causal structures encompassing capital market deregulation and international institutions, especially the World Trade Organization (WTO) and the World Intellectual Property Organization. With panoramic intent, chapter 2 adopts a morphogenetic approach to structure and agency in order to explain the emergence and impact of the new global intellectual property regime under the aegis of the WTO. This methodology allows us to see the emergence of TRIPS against a background of cyclical institutional change, consisting of a first cycle of negotiation and construction and a second cycle of reaction by public interest groups. In the first cycle, structural change is seen as a necessary but insufficient condition for the eventual emergence of TRIPS.

Structural change pushed the twelve CEOs and their Intellectual Property Committee to the forefront of global business regulation, but agency was still necessary to construct and achieve TRIPS. In the second cycle, public interest groups mobilized against the agreement's potentially adverse impact on public health in developing countries, essentially refocusing the debate from trade to health concerns.

Chapter 3, titled "US Intellectual Property Rights in Historical Perspective," explains that macroeconomic changes in the structure of global capitalism enabled industry associations to more easily persuade Congress to adopt a trade-based approach to intellectual property protection. The political astuteness of the Intellectual Property Committee, it reveals, lay in connecting industry's desire to increase returns in foreign markets by enforcing intellectual property rights with the US government's concerns about the growing trade deficit and the loss of international competitiveness. Chapter 4 reveals how the subsequent amendments to Section 301 of the Trade Act became not only a leading element of US policy to enforce intellectual property rights abroad but also, for countries that found themselves the objects of trade sanctions pursuant to that law, a strong motivating force for agreeing to multilateral norms.

Significantly, it is the institutions for enforcing intellectual property rights globally that reveal the influence of the leading transnational corporations as catalysts for global economic integration most clearly. Chapters 5 and 6 describe the domestic and international institutions that were assigned to the enforcement of TRIPS. The "web of surveillance" operates on multiple levels (Evans 2000). Even though remedies for private infringements are still pursued at the national level, TRIPS mandates that member states implement a panoply of enforcement measures previously found only in the most industrialized countries. Members who fail to comply may be brought to account before the WTO Dispute Settlement Body, which also has the power to order cross-sectoral trade sanctions. The case of *India-Patent Protection* (Appellate Body Report 1997), the first of more than six cases the United States was to bring during the first year that TRIPS was in force, is seen as a salutary signal from the Pharmaceutical Research and Manufacturers of America (PhRMA) to India's generic drug industry that it would no longer accept India's failure to adequately protect product patents.

The second morphogenetic cycle commences as the aftereffects of TRIPS become apparent. Up to this point, *The Globalization of Intellectual Property Rights* is a study of the emergence of TRIPS, emphasizing the centrality of economic and financial interests as opposed to moral considerations in influencing the shape of the law. However, the perceived inflexibility of TRIPS, Sell argues, created new agents. Chapter 6, titled "Life after TRIPS—Aggression and Opposition," highlights the rise of public interest groups as a countervailing force against private sector advocates for high protectionism. The changing environment was manifest in the violent protests during the WTO Seattle Ministerial Meeting and in the opposition of nongovernmental organizations (NGOs) and developing countries to the enforcement of intellectual property rights over medicines that were essential to the world's poorest populations. Indeed, the backlash against the global enforcement of intellectual property rights is most clearly characterized, Sell argues, by the torrent of adverse publicity surrounding the HIV pandemic in Africa. US economic coercion to keep South Africa from producing or importing generic drugs created opportunities for skilled agents to refocus the debate about intellectual property from issues of trade to those of public health. In response to these events, the WTO decision on August 30, 2003, to allow low-income countries to import cheaper generics is seen as evidence of a major political regrouping within global civil society (Matthews 2004).

In her concluding chapter ("Structured Agency Revisited"), Sell highlights the continuing conflict between the policy programs of corporate sector interest

groups, which are pursuing higher levels of intellectual property protection, and the NGO lobby, which is dedicated to promoting public health and environmental protection. Barely had the TRIPS Agreement been concluded than corporate sector activists sought to enhance the minimum standards of TRIPS with supplementary provisions contained in bilateral free trade agreements. For example, potential competitors, including developing countries, have been pressured to adopt substantive TRIPS-plus standards that are not necessarily adapted to their level of development (Reichman and Maskus 2004). Although TRIPS Article 31, concerning compulsory licensing, ostensibly permits the governments of developing countries to legislate for the production and importation of essential medicines in case of national emergency, TRIPS-plus provisions often include limitations on the measures that countries can undertake to address public health issues, such as restrictions on compulsory licensing (Dutfield and Musungu 2003).

Sell's analysis of the construction of TRIPS through the lens of morphogenetic methodology does not point conclusively to the correctness of any one particular theoretical model of the relationship between structure, agency, and law. On the one hand, morphogenetic theory is consistent with neo-Marxist perspectives in that the connection between the structuralist frame of reference in capital deregulation and changing modes of production might explain the emergence of TRIPS as the result of a regular evolutionary process. On the other hand, the response of global civil society to the impact of TRIPS on the disadvantaged is consistent with Weberian perspectives on law and social change (Roth and Wittich 1978). For example, the crisis concerning essential medicines for developing countries illustrates that the law favors different, ostensibly less powerful, parties over time.

Sell's account of the Intellectual Property Committee's lawmaking also tells a quieter but equally compelling story about the transformation of the nation-state. Although structural changes in the world economy provided a singular opportunity for corporate collectives to influence US trade policy, Sell's analysis reveals the state's de facto transfer of lawmaking power to the Intellectual Property Committee. In *Private Power, Public Law*, we see the state drawing on the expertise of the Intellectual Property Committee to make international intellectual property law and create new supranational institutions for its implementation. The Intellectual Property Committee was in a strategically useful position. The political astuteness of the state lay in sanctioning the committee to broker international norms for protecting intellectual property globally.

A prevalent view holds that "corporate rulemaking" results from the retreat of the state and constitutes proof of the decline of the state as a central actor in the political and economic game (Teubner 1997). Contrary to such assertions, Sell's analysis suggests that states have developed strong relationships of mutual dependence and support with the agents of global capitalism. Her work shows that this does not reflect a retreat of the state, but more accurately a "state-market condominium" defined as "a changing balance of public and private authority within the state, hence a changing form of state embedded in structural market transformations" (Underhill 2000:118). In other words, "the private interests of the market are integrated into the state, asymmetrically and in accordance with their structural power and organizational capacity, through their close relationship to state institutions in the policy and decision-making process and in the ongoing pattern of regulatory governance of market society" (Underhill 2000:129).

Sell's study illustrates the various points of articulation between public and private orders, whether co-involvement with the Intellectual Property Committee in the making of TRIPS or the complex sovereignty involved in the global regulation of intellectual property rights within the WTO legal framework. Her analysis shows that this is a negotiated order, involving several parallel levels of cooperation. The traditional process of international lawmaking has been transformed, she reveals, into a "multi-polar order" that emerges from the interaction of public forces (state

governments and their agencies, regional administrations), private forces (transnational corporations, industry-led consortia), and civil society forces (user groups and consumer advocates).

This tripartite order, in turn, raises the critical question of each group's participation and fair representation. Insofar as political science seeks to advance normative theses, Sell's empirical work supports policy recommendations favoring greater transparency, accountability, and representation of interest groups. Contemporary globalizing capital, it appears, not only challenges the sovereignty of the state, it also threatens to marginalize democracy. The global governance of intellectual property, Sell suggests, should be subject to the same democratic values as government at the national level: governance in the public interest, fairness, national security, and safety. The alternative approach, based on an "executive level" ordering, not only brings into question the legitimacy of the WTO as a forum for global regulation but also threatens the validity of TRIPS.

Sell's position is that the balance between private and public has shifted too far in favor of private rights at the expense of the public welfare (Drahos and Braithwaite 2000). Nevertheless, she believes that TRIPS should be preserved and that it can be reinterpreted to allow developing countries adequate flexibility to develop a local production capacity. Consistent with the classic principles of the 1947 General Agreement on Tariffs and Trade, TRIPS contains not only specific exceptions to rights in patents, copyright, and trademarks, but also expressions of general principle that allow the implementation of public policy objectives.

The flexibilities that were negotiated at the multilateral level, this study suggests, should not be taken away through bilateral trade deals. Sell's analysis reveals how the United States puts developing countries under pressure to adopt substantive TRIPS-plus standards that are neither financially nor economically compatible with their level of development (Maskus 2000). She stresses the enormous economic leverage that the United States brings to the trade negotiation table, including the ability to withdraw foreign investment and aid. For this reason, the free trade agreements that emerge are partial to US intellectual property rights. Nonetheless, Sell's analysis indicates that force alone cannot establish deference to the law of intellectual property. The ideology of justice itself is also important (Cotterell 1992). Even though flexibilities exist in the TRIPS Agreement, the key question is whether developing countries have the ability to take advantage of these immunities.

The domestic and international levels of regulation have become increasingly interdependent as the world becomes more and more closely interconnected. As the title *Private Power, Public Law* suggests, Sell's account of the construction of TRIPS shows us that, because of this connectedness, the international legal regime has an increasing influence at the national level, and domestic-based strategies have increasingly international consequences.

The story of twelve US CEOs who changed the course of world intellectual property law and policy is an engaging one: a drama with the archetypal elements of wealth, position, and power. Suitable for readers in law, politics, and the wider social sciences, *Private Power, Public Law* is an articulate, highly readable, and engaging account of the evolution and making of the TRIPS Agreement and of the impact that global norms for intellectual property have had on the welfare of the world's poorest populations. This book will appeal not only to scholars interested in law, economics, sociology, political science, sociology, and anthropology, but also to the general reader.

Sell's analysis shows that no simple shift of sovereignty from one set of actors to the other is taking place. Rather, a transformation of the notion of sovereignty is occurring that encompasses a complex mix of public and private, as well as state and civil society, representatives. The decline of the traditional conception of sovereignty, the power of private legal ordering within the global regime for the

protection of intellectual property, and the threat of an increasingly privatized public sphere prompt further research on the respective boundaries between the public and private spheres of authority.

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