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Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet

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Considered Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, “Global” Intellectual Property, and the Internet

KEITH AOKI*

INTRODUCTION

The Internet is not a threat to sovereignty, and sovereignty is not a threat to the Internet. By rejecting the formulation of the question, “Is the Internet a threat to sovereignty”, I do not mean to suggest that our notions of sovereignty are not currently undergoing profound transformations (they certainly are) or that the Internet has had no role in bringing about those transformations (it certainly has). My intent is instead to point out how certain liberal assumptions about the Internet under the “Rule of Law” may be hard-wired into our information policy and legal discourse. Consequently, there is a marked trend toward favoring ideas like “upward harmonization” and other universalizing moves and a concomitant discounting or erasure of the “local”, with disturbing effects on the political economy of information that flows through global networks such as the Internet.¹

There is no single monolithic concept of sovereignty to be threatened—we already live in a world of multiple, overlapping, contradictory, and oftentimes intensely contested sovereignties.² Professor Ethan Katsh writes:

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[N]ationality, or, as one might prefer to put it in view of that word's multiple significations, nation-ness, as well as nationalism, are cultural artefacts of a particular kind. . . . [W]e need to consider carefully how they have come into historical being, in what ways their meanings have changed over time, and why, today, they command such profound emotional legitimacy. I will be trying to argue that the creation of these artefacts towards the end of the eighteenth century was the spontaneous distillation of a complex “crossing” of discrete historical forces; but that, once created, they became

443
We are in an interconnected and overlapping set of spaces rather than in a world where territory discretely and definitively separates sovereign states. While the ability to move information across borders at electronic speed will not replace either political entities or manufacturers of durable goods, it does change our experience with political and economic entities, our relationship with them, and the relationships between and among such entities.

The issue of boundaries, and the impact of the new media on boundaries of all kinds, is one of the core issues of cyberspace. The blurring of physical boundaries occurs because communication is no longer dependent upon transportation. Those in control of physical boundaries—nation-states—lose some ability to control communication that might, quite literally, have been stopped at the border. Boundaries of power are affected in several other ways, each of which places pressure on models of regulation that exist. As boundaries are crossed, as overlapping jurisdictions are established, and as information sharing occurs, the application of concepts such as sovereignty and the use of distinctions such as public/private, ownership/access, foreign/local; external/internal, and economic/political will raise more questions than they did in the past. New spaces are being created and, with considerable imagination, new maps will be drawn to represent new spheres of authority and new models of state/nonstate relationships.

Granted, the liberal vision of sovereignty and idea of the traditional nation-state underwrite Professor Perritt's well-made argument that, far from heralding the death of the nation-state, the Internet may actually contribute to shoring up...

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"modular," capable of being transplanted, with varying degrees of self-consciousness, to a great variety of social terrains, to merge and be merged with a correspondingly wide variety of political and ideological constellations.

Id.

traditional concepts of sovereignty. However, that vision may fail to account completely for a number of convergent trends that are occurring outside of the traditional liberal cleavage of the world into the public sphere (the state) and the private sphere (the market, the family, the individual). Rather than rejecting Professor Perritt's cogent arguments, I would suggest that we might usefully supplement his arguments with a chastened awareness of the complex ways that sovereignty has fractured and is undergoing important mutation at the twentieth century's end.

I will briefly review Professor Perritt's arguments, then discuss three tendencies: (1) reconfiguration of the public/private distinction; (2) loss of faith and disillusionment in political institutions and ideals; and (3) multiplication of different types of spaces. These tendencies, on certain levels, underlie Professor Perritt's point that rapidly globalizing information flows may strengthen the salience and sovereignty of national boundaries, although in problematic ways. I will then argue that the powerful discourses of globalization and "difference" problematically use "information" and cross-border "information flows" as a heuristic category closely related to the idea of "property"—in such a way that consistently favors certain types of sovereignty and disfavors others. The distributive patterns produced by the intersection of a particular form of the sovereign nation-state (and their related intellectual property and other laws) and the Internet may tend to favor the "public" sovereignties of developed nations such as the United States. These patterns may also favor the "private" sovereignty of firms that function in a transnational mode but that are economically linked to the nations of the developed world. This favoritism occurs at the expense of poorer nations, groups, and individuals in the developing regions of the world and in pockets of immiseration within the developed world. This article will conclude that, if we are to develop an equitable global, or rather planetary, economy of information, traditional concepts of sovereignty. However, that vision may fail to account completely for a number of convergent trends that are occurring outside of the traditional liberal cleavage of the world into the public sphere (the state) and the private sphere (the market, the family, the individual). Rather than rejecting Professor Perritt's cogent arguments, I would suggest that we might usefully supplement his arguments with a chastened awareness of the complex ways that sovereignty has fractured and is undergoing important mutation at the twentieth century's end.

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4. Duncan Kennedy describes the "liberal" vision of the "Rule of Law":

In the liberal model, law plays a major role in the form of "the rule of law," a defining element in the liberal conception of a good society. But the content of the background of legal rules is seen to flow either as a matter of logic from regime-defining first principles (rights of bodily security, private property, freedom of contract) or from the will of the people, or from both together in some complex combination. The distributive issue is present, but understood as a matter of legislative intervention (for example, progressive taxation, labor legislation) to achieve distributive objectives by superimposition on an essentially apolitical private law background.

we must find a representational (political and otherwise) grid that manages to
describe these heretofore largely invisible and plural sovereignties.

I. PROFESSOR PERRITT'S REJECTION OF THE IDEA THAT THE INTERNET IS A
THREAT TO SOVEREIGNTY

Professor Perritt rejects the view voiced by Walter Wriston (and others)\^5
that sovereignty is seriously eroded by the rise of global networks such as the
Internet. These critics, whom Professor Perritt refers to as "realists" (as opposed to "liberals," in whose ranks Professor Perritt counts himself), advance
four interrelated arguments to support their thesis that sovereignty is imperiled
by the Internet: (1) that the spread of information and communication
technology embodied by the Internet erodes sovereign power over economic
activity;\^6 (2) that international cooperation is undermined due in large part to
jurisdictional conundrums on the formal level as well as substantive differences
in culture, value, and legal norms of different nations;\^7 (3) that the Internet
seriously threatens a sovereign state's ability to control political or social events
occurring within its boundaries;\^8 and (4) that nettling questions of
extraterritorial jurisdiction and effects of national legal regimes pose
insurmountable obstacles to international cooperation.\^9

Instead, Professor Perritt argues that the Internet strengthens both national
and international governance, shoring up the "Rule of Law" by: (1)
strengthening international law by making treaties and other documents widely
available, thus paving the way for "virtual" diplomacy;\^10 (2) promoting
increasing economic interdependence among nations and giving rise and
supporting institutions such as the World Bank and the World Trade

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5. See, e.g., WALTER WRISTON, THE TWILIGHT OF SOVEREIGNTY: HOW THE INFORMATION REVOLUTION
IS TRANSFORMING OUR WORLD (1992); David R. Johnson & David Post, Law and Borders—The Rise of Law
in Cyberspace, 48 STAN. L. REV. 1367 (1996); Anne Wells Branscomb, Jurisdictional Quandries for Global
Networks, in GLOBAL NETWORKS: COMPUTERS AND THE INTERNATIONAL COMMUNICATION (Linda M. Harasim
ed., 1993). See also Carl S. Kaplan, Finding Government's Role in a Global Network, CYBER L.J. (July 10,

6. Henry H. Perritt, Jr., The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in

7. Id. at 429-30.

8. Id. at 428.

9. Id. at 429.

10. Id. at 439.
Organization;\textsuperscript{11} (3) empowering non-governmental organizations (NGOs) in the market context;\textsuperscript{12} and (4) supporting international security mechanisms.\textsuperscript{13}

The main point of this article is that the Internet is not a threat to sovereignty and, that properly understood, the Internet is part of a constellation of factors that are multiplying and transforming our traditional ideas of territorial-based, nation-state sovereignty. Furthermore, such transformations may have extraordinary distributive and political effects, some of which may be to reinforce and strengthen aspects of national sovereignty and supranational governance.

It is vital to grasp the paradoxical aspects of such a transformation of sovereignty as well—the world is increasingly homogenous, but the world is also increasingly full of difference. In some ways this is parallel to the question early twentieth-century physicists faced when pondering quantum phenomenon—is light a “wave” or a “particle”? The answer was “both” or, rather, “it depends.” Similarly, when pondering sovereignty at the close of the century, one must be able to conceive of the idea as simultaneously imperiled and robust (albeit at different levels).

Professor Perritt acknowledges that his arguments are “expressly based in the acceptance of the liberal vision of domestic and international politics . . . [and that] [t]his vision is not universally accepted.”\textsuperscript{14} However, I believe that in addition to the dichotomy that Professor Perritt sees between liberalism and realism with regard to theories of international relations, there are several other positions that are on the table. As Professor Perritt says, “[c]yberspace has not escaped the vortex of politics at the domestic or international level.”\textsuperscript{15} Furthermore, certain perspectives outside of either liberalism or realism tend to critique the incompleteness and ideological effects of such analytical approaches. For example, both the realist and the liberal visions seem unable to give a satisfying account of the tense intersection of what happens when the discourse of globalization encounters the discourse of difference. This article will discuss three contemporary fronts on which the traditional concept of sovereignty has been contested—fronts that have produced multiplying, overlapping, and mutating sovereignties in ways that challenge both the liberal and realist perspectives. First, there is the pervasive and ongoing

\begin{itemize}
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} Id. at 440.
  \item \textsuperscript{14} Id. at 441.
  \item \textsuperscript{15} Id. at 442.
\end{itemize}
reconfiguration of public and private spheres. Second, there is the widespread disillusionment and loss of faith in political institutions and ideals. Finally, there is the multiplication of spaces and loss of “place” that is characteristic of this moment.

II. SOVEREIGNTY: THREE CONTESTED FRONTS

A. Rethinking the Public/Private Distinction

The pronouncement of the demise of the public/private distinction has been going on for some time now, bringing to mind Mark Twain’s observation that reports of his death were greatly exaggerated. Since at least the Legal Realist critique of the public/private distinction from the 1920s and 1930s that underwrote the rise of the American bureaucratic administrative state, the idea that the public/private distinction is incoherent at best and pernicious at worst has passed from iconoclasm to common sense to cliche. What are we to make of the public/private distinction’s long shelf-life, reports of its demise notwithstanding?

First, one should note the interpenetration of public and private that has been occurring on levels from the local to the international. This functional interpenetration greatly complicates traditionally conceived forms of sovereignty, whether of local governments or nation-states—that is, public institutions wielding sovereign power.

17. See Laura Kelman, Legal Realism at Yale 1927-60 (1986); Morton J. Horwitz, The Transformation of American Law 1870-960 (1992); American Legal Realism (Thomas Reed et al. eds., 1993).
18. See Kaplan, supra note 5.
19. Kennedy, supra note 4, at 114.
entities and institutions have assumed aspects of sovereignty, and hybrid institutions have arisen that are neither fully public nor fully private. On the local level, one need only observe phenomena such as the rise of limited equity co-ops, Community Development Corporations, Community Land and Housing Trusts, or even the historical beginnings of the Internet and its interrelationship with the National Telecommunications and Information Administration to see that the line between public sphere initiatives and private markets has become increasingly blurred. On the international level, as Professor Perritt points out, one should note that the rise of NGOs of all sorts as well as industry-wide consortiums (such as SEMATECH) demonstrate this blurring.

Alternately, Duncan Kennedy describes a vision, based on that of the 1930s U.S. Legal Realists, in which the public is not seen as illegitimately “usurping” the prerogatives of actors in the private sphere, but instead is thought of as creating, maintaining, and indeed underwriting its very existence. In the following quotation, one might easily imagine intellectual property rights as a jointly produced social product which combines creative labor of an individual or group with pre-existing works and ideas:

The state uses force to ensure obedience to the rules of the game of bargaining over a joint product. To the extent that these rules affect the outcome, forcing the parties to settle for \( x \) rather than \( y \) percent of the joint product, the state is implicated in the outcome. It is an author of the distribution

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actors in the institutional/professional sector, who do a great deal of “disciplinary” ordering under broad grants of legal authority.

Second, the Law-as-Sovereign theory overestimates the autonomy of private actors who delegate power to the state, because it leaves out of account the processes not just of control but also of “subject-creation” that are located in the liminal institutions.


even though that distribution appears to be determined solely by the "voluntary" agreement of the parties.\textsuperscript{22}

However, this trend toward recognition of this functional interpenetration of public and private is not without its critics. The Sagebrush Rebellion, "Wise Use", and "County Rights" movements in the western United States insist on reconstructing a strict demarcation between public and private spheres, underwritten by a strongly conservative paleo-libertarianism that views government intervention as an unmitigated evil.\textsuperscript{23} One may also note the pervasiveness of libertarian rumblings in cyberspace.\textsuperscript{24} Furthermore, it is important to distinguish between the ideological claims of "liberalism" and the more radical "libertarian" claims. The "liberal" vision posits a somewhat sanguine and relatively stable division between public and private spheres. The "libertarian" vision posits the public and private spheres locked in a battle to the death—the "libertarian" vision is driven by paranoia at the prospect of the public realm "usurping" and smothering the private sphere.\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{22} KENNEDY, supra note 4, at 85-86. See also Duncan Kennedy & Frank Michelman, Are Property and Contract Efficient?, 8 HOFSTRA L. REV. 711 (1980).
\end{itemize}
The rhetoric of "usurpation"—that government has usurped the prerogatives of the people—is an ideological claim. The claim that the public sphere threatens to overwhelm the private—the reality that the reverse may be occurring, rhetorically as well as actually—is masked. The demonized Austinian-Hobbesian Absolutist state may be merely an ideological strawperson hiding the serious normative and distributive effects such "usurpation" claims may have. To show the power of this libertarian construct, think for a moment about the literal history of the Internet—it began as an ARPAnet, which was paid for and subsidized by government monies. That it can be plausibly advanced that the Internet is private and "pre-political" in a libertarian sense evidences the imaginative grip this particular ideological formation has.

There is something to the point that a clear distinction between public and private spheres reflects fundamental differences in the types of tasks and missions that institutions operating in either public or private realms undertake. However, the libertarian critique of government more often than not claims that public entities should be strictly held to the same standards (such as pareto optimality) as those that govern private firms—that is, that government should be run like a private business. The rhetoric of privatization and market discipline thus becomes itself a tool in eliding the distinction between public and private—private standards of efficiency should drive all our institutions, and those institutions that do not adhere to those standards should be considered illegitimate. Unfortunately, what this valorization of the private obscures is the
fact that, in important ways, public and private institutions do have different and not always contiguous functions. These institutions are significantly mutually constitutive—public institutions such as legislatures, courts, and agencies underwrite and make possible market transactions in the so-called private sphere. Additionally, private institutions using pareto-maximizing criteria do not always produce or accurately assess the value of things such as environmental integrity, democratic governance, or a republican form of government. Thus, rather than trumpeting the decomposition of the public/private distinction, perhaps we should think of ways to reconstruct it in an ideological climate that seeks to delegitimate public initiatives and valorize a private realm filled with voracious, utility-maximizing, self-interested (and newly-digitized) monads.

B. Addressing the Loss of Faith in Political Institutions and Disillusionment in Ideals

The current loss of faith and disillusionment in political institutions and ideals relates to the prior-mentioned reconfiguration of the public/private distinction. One might start by noting that the United States has one of the lowest proportions of eligible voter turnout in the world. Notwithstanding Ross Perot's invocations of "electronic town halls", the Internet does not seem imminently to herald a revived civic sphere. Fueled by angry and relentless paleo-conservative and libertarian attacks bent on "getting government off our backs and out of our pockets", it is unsurprising that many people and groups are extremely cynical about public institutions on many different levels, from the Internal Revenue Service to the local zoning board. Indeed, part of the appeal of electronic cash systems, anonymous remailers, and strong encryption is tinged with not-so-hidden libertarian politics: if the state cannot identify you, then for all practical purposes, it cannot tax you either. Cyberpundit and co-founder of the Electronic Frontier Foundation, John Perry Barlow, speculated

31. Ironically, as Professor Boyle points out, even as cyber-libertarians may try to cloak their financial identities with encryption and anonymity, they may discover that "[t]here is a difference between speech being constitutionally protected and practically unregulable, indeed the latter situation may in some cases undermine the former protection." Boyle, Foucalt in Cyberspace, supra note 25, at 178. See also Bruno Giussani, Germany, Advancing Communications Law, Seeks to Give Internet Legal Framework, N.Y. TIMES (June 17, 1997) <http://www.nytimes.com/library/cyber/week/061797germany.html> (discussing Germany's new multimedia legislation that has "four main points [that] address the protection of children; the establishment of a certification scheme for electronic transactions called "digital signature"; the tightening of rules for collecting personal data, and the question of liability for illegal content circulating over digital networks.").
at a conference in Oregon in late 1995 that the moment e-cash becomes viable, taxes become voluntary—with predictable consequences for the tax-and-transfer policies of the contemporary state.\textsuperscript{32}

On the domestic front, this disillusionment may be seen in: (1) the emerging arguments about “reverse racism”, formalist equality, “colorblindness”,\textsuperscript{33} and cynical redeployment to contrary ends of the rhetoric of the U.S. Civil Rights struggles of the 1960s in Post-Civil Rights America;\textsuperscript{34} (2) initiatives such as California’s Propositions 187 and 209;\textsuperscript{35} and (3) judicial decisions such as \textit{Hopwood v. University of Texas Law School}.\textsuperscript{36} On the global level, one may note the decoupling of trade and human rights by the Clinton Administration, with particular reference to United States-China relations. Or one may note that while there is much to celebrate about the end of Apartheid in South Africa, Apartheid’s end may have been purchased at the expense of substantive economic reforms—the same multinational firms that were major market actors before the end of Apartheid are the same firms controlling the lion’s share of resources today.

As Professor Perritt suggests, the outlook here may not be totally bleak, as the Internet makes possible interventions by NGOs in terms of dissemination of information and monitoring efforts with regard to environmental compliance and human rights initiatives. However, as noted below, initiatives on both these fronts are not unproblematic in their “universalizing” tendencies. The point of noting this widespread disillusionment is not to say that the rhetoric of either domestic civil rights or international human rights is exhausted.\textsuperscript{37} Quite the opposite. In the context of thinking about three generations of human rights, efforts to extend and create a third paradigm are critical at this juncture.

\textsuperscript{32} See Symposium, \textit{Innovation and the Information Environment}, 75 OR. L. REV. (1996). Barlow’s comments were from an unpublished keynote address he presented at the conference.


Many international law scholars recently refer to the idea of three generations of human rights.\textsuperscript{38} Digital speech and communication raise important questions about the iterations of these rights. The first generation consists of what might be thought of as “negative” rights—that is, rights against state interference with free speech and expression, search and seizure without a warrant, imprisonment without due process.\textsuperscript{39} In essence, these are “freedom from” unjustified exercises of state power against one’s person and property. In the digital environment, what are we to make of the troublingly incomplete export of U.S. norms?\textsuperscript{40} While we are eager to “internationalize” the reach of our domestic intellectual property laws in agreements such as the TRIPs component of GATT, NAFTA, or treaties promulgated under the aegis of organizations such as WIPO, where is the concomitant desire to export free speech norms of the First Amendment and the idea of “fair use”? The second generation of human rights involves “affirmative” rights—that is, rights that an individual may have that flow from an entitlement to state benefits, such as food, education, medical care, clothing, or housing.\textsuperscript{41} These rights arise in conjunction with the growth and spread of the mid-twentieth century bureaucratic administrative state and often involve a particular individual’s right to a hearing (or some type of due process) prior to termination of such affirmative entitlements.

Legal formulation of the third generation of human rights has been the most contentious. The third generation of human rights involves what might be loosely characterized as group, or solidarity rights—rights possessed by a group or groups within a society.\textsuperscript{42} Some of these rights challenge the individualist assumptions that underlie much of the liberal discourse of “rights.” For example, how does one make a legal claim for redress for injury to the right to a clean and healthy environment? How about a right to peace? Or a right to development? One might look to some of the claims arising over environmental


\textsuperscript{40} Indeed, John Perry Barlow has said that “in cyberspace, the First Amendment is a local ordinance.” John Perry Barlow, \textit{Leaving the Physical World} (last visited April 8, 1998) <http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/leaving_the_physical_world.html>

\textsuperscript{41} See generally Iglesias, supra note 38.

racism as an iteration of some of these third generation human rights issues. Why should the United Nations send observers to ensure “free and fair elections” in Haiti but not Bossier Parrish, Louisiana, or Cook County, Illinois?

An important additional aspect of these new analyses of multiple and overlapping sovereignties is the recognition of the complexity and contingency of political boundaries—the very political units that constitute political representation. Critical inquiry into the preconditions for democratic empowerment and process is yet another link in this area between the local and the global.43

Importantly, the chastened awareness of multiple and overlapping sovereignties gives rise to the realization that there may be no “Democracy” with a capital “D” or “Markets” with a capital “M”, but that these institutions have an extremely wide and variable spectrum of iterations and meanings. For example, there are the social democracies of Western Europe and Canada, the individualist vision of the United States, and the authoritarian markets of Singapore or Hong Kong—at the least, contingency is the watchword.

Against this backdrop, crucial terms such as “democracy”, “autonomy”, and “community” are being contested and are mutating rapidly. To the extent that the rise and spread of global networks such as the Internet open these terms to contestation, we are not witnessing the demise of sovereignty, but its transformation.

C. Multiplication of Space(s) and the Loss of Place

To pull the two earlier strands together, one needs to grasp a central paradox of globalization—the world is increasingly the same, but the world is increasingly full of difference.44 A McDonald’s Big Mac is the same in Oshkosh or Kuala Lumpur, right? What understanding this paradox entails is the realization that we are living in a world comprised of a dynamically shifting matrix of overlapping, multiple, competing, and at times, contradictory sovereignties—some private, some public, some tagged to a particular nation-state, others without any clear geographic locus. It is unsurprising that there

has been a multiplication of space(s). The world is increasingly the same, yet the world is increasingly filled with difference.

There are five homologous trends related to the multiplication of space and the loss of place that are in play here. First, the connection between geography and sovereignty has been disrupted, though to what extent is yet unclear. At the very least, the collapse of the former Soviet Union and related East-West geopolitical mapping of power relations suggests the disruption is great. Traditionally, the connection between geography and sovereignty dealt with fixed subjects in space—location is no longer a fixed or particularly stable referent. Even the North-South mapping of the globe and related critiques of underdevelopment and dependency turned in important ways on distinctions between the First (the industrialized West), Second (the former Soviet Union and its allies), and Third (the rest) Worlds.

Paulo Friere has pointed out how the periphery has folded into the metropole, the margins have instantiated themselves in the center, and vice-versa.45 Immiseration within South Central Los Angeles may have more in common (socially, economically, and even politically) with sweatshops in Malaysia than with the downtown L.A. financial district. The map of the globe at the end of the twentieth century is not of a planet blanketed by a reassuring web of communications and transportation technology—the global is not planetary in any sense of the word.46 Whole continents are spanned or bypassed by the supposed global Internet, as are entire regions within countries and within cities. This map of the globe is notable for its lumpiness, its unevenness, and its extremely bifurcated and patchy distribution of resources both within countries and between countries, on every level, from the local to the international. How and why these sharply differentiated spaces came into being are pressing questions.

Second, the continuation and acceleration of transnational global capitalism and related economic restructuring challenge traditional notions of nation-state sovereignty.47 In treaties and agreements such as GATT and NAFTA, the

46. Aoki, (Intellectual) Property and Sovereignty, supra note 1, at 1298.
47. Some of these macro phenomena involve wars, trade disputes, and IMF and World Bank investment decisions affecting development. See Tariq Banuri, Development and the Politics of Knowledge: A Critical Interpretation of the Social Role of Modernization Theories in the Development of the Third World, in DOMINATING KNOWLEDGE 29, 63-65 (Frederique A. & Stephen A. Marglin eds., 1990) (noting how modernization and development in the Third World has been extremely lumpy, producing heightened levels of unemployment and immiseration with significant “push” effects for immigration). For a description of the changing dynamics of transnational capital flows, see David Slater, Contesting Occidental Visions of the
traditional role of nation-states-as-sovereigns is challenged. Driven by free-trade and market ideology, goods and capital increasingly flow relatively freely across national boundaries—however when people try to cross those same borders, at least for some, the national borders suddenly freeze shut. Additionally, in an increasingly borderless world, what are we to make of environmental and labor regulation “races-to-the-bottom,” in which capital flight is driven (or enticed) by the presence of ever cheaper labor and low or nonexistent regulation elsewhere. Such capital flight also works to drive down

Global: The Geopolitics of Theory and North-South Relations, 10 MASA ALLA DEL DERECHO—BEYOND LAW 97, 108 (1995). “[W]ithin the poorer nation states of the world, the hegemony of the IMF and the World Bank, and the privatization and liberalization they legitimize incorporates political mechanisms for representing the interests of the industrialized West and their transnational corporations.” Id.


49. Shifts from older Fordist models of standardized mass production to an emerging post-Fordist mode of flexible accumulation fundamentally transform the relationship of a nation’s economy with its territory. Fordism was a relatively stable period in the U.S. when relatively high wages were paid to assembly line workers, enabling them to purchase more consumer goods. Fordism describes the brief period of equilibrium where increasing mass production capability because of new technology (increasing supply) was balanced by increasing consumption (increasing consumer demand for manufactured goods)—the workers in a Ford Motor plant could afford to buy the Model T’s they produced. As modes of production (because of transportation or communications advances) became more “flexible” and specialized, the ability of capital to “flexibly accumulate” was enhanced. Input costs, such as wages, energy cost, and state regulation could be reduced or avoided by moving production to other regions or offshore to other countries where inputs were cheaper. This creates a flexible accumulation race-to-the-bottom in terms of a search by multinational capital for areas where labor unions are nonexistent, without minimum wage, employee safety, and environmental regulations. The word “PostFordism” captures this shift to regimes of flexible accumulation. See Michel Aglietta, A Theory of Capitalist Regulation: The U.S. Experience 122-130 (David Fernbach trans., 1976); David Harvey, The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change (1984); Charles F. Sabel, Flexible Specialisation and the Re-emergence of Regional Economies, in REVERSING INDUSTRIAL DECLINE? INDUSTRIAL STRUCTURE AND POLICY IN BRITAIN AND HER COMPETITORS 17, 17-19 (Paul Hirst & Jonathan Zeitlin eds., 1989).

wages within the United States and can be a significant hinderance to environmental or labor regulation as well as to union organizing.\textsuperscript{31}

The third trend is homologous with the rest—the end-of-the-century communications "tsunami" that is sweeping across the planet. At the very least, the "wired" experience of life in cyberspace gives rise to a sense of identity and affiliation that is shifting, multiple, fluid, and overlapping. We are also witnessing an emergence of a transnational, cosmopolitan\textsuperscript{52} "information class" of symbolic analysts that reside in "metropoles", or "global cities." This information class, through its lightning-fast communications technology, directs and redirects the flows of vast amounts of capital and resources across the globe to varying and oftentimes disturbing ends. The spaces of these information age metropoles are important for what they tell us about the distribution of and access to scarce resources.

The fourth trend involves what might be thought of as postcolonial struggles that involve challenges, direct or otherwise, to the state monopoly on the use of force. Groups such as the Zapatistas, led by Subcommandante Marcos in the Chiapas region of Southeastern Mexico,\textsuperscript{53} the First Peoples of Canada,\textsuperscript{4}\textsuperscript{4} or the various permutations of the Native Hawaiian Sovereignty Movement\textsuperscript{55} represent challenging reassertions of sovereignty, particularly when


\textsuperscript{52} See SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 83-84 (1996).


many sophisticates have declared that sovereignty is dead, or at the least, has become seriously “unbundled.” In some ways, these assertions of sovereignty by indigenous peoples resemble the claims by women and people of color who claimed the mantle of “authorship” in their efforts to open up the Western literary canon, only to be told by some poststructuralist critics that “authors” were dead. Sovereignty (and “authorship”) are important, and often empowering, claims to make, involving notions of self-proprietorship and autonomy. However, one must also recognize that our received accounts of sovereignty are fracturing, eroding, multiplying, and splintering before our very eyes.

Closely related to reconfiguration of the idea of sovereignty is the idea of nationalism. Benedict Anderson has written about the “imagined communities” of the traditionally understood nation-state—a nation may be understood as a group of persons that are unified by a “text”, the nation-state. We are watching the multiplication of texts of the nation-state. How are we to understand the claims of Queer Nation, White Trash Nation, Pan-Islam, Christian Fundamentalism, the Kurds, the Catalanians, or the Montana Freemen? What is the connection between sovereignty and identity politics? Notwithstanding the attenuation of the connection between geography and sovereignty, we must consider what the claims of people who do not possess or occupy a legally recognized geographic space mean—particularly when identity may be iterated or announced in the spacelessness of cyberspace.

The fifth and final trend is a concatenation of the prior homologous trends and involves the spectre of imminent and increasing environmental disruptions.

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56. See generally WHAT IS AN AUTHOR? (Maurice Biriotti & Nicola Miller eds., 1993); JONATHAN CULLER, ON DECONSTRUCTION (1982).
58. ANDERSON, supra note 2, at 4.
59. See Margaret Chon, Radical Plural Democracy and the Internet, 33 CAL. WEST. L. REV. 143, 145 (1997).
60. On distribution of environmental risks and burdens, see Banuri, Development and the Politics of Knowledge, supra note 47, at 30-31.

[There] is the increasing association of modernization and development with ecological disasters: the devastation of tropical rain forests and mountain watershed, the deleterious (and unanticipated) ecological consequences of large dams and large irrigation systems,
On a macro level, this involves cross-boundary issues such as global warming and oceanic degradation. On more micro levels, consider the environmental disruption entailed by the spread of American patterns of lifestyle and consumption in the developing world. For example, there has been a steady decline in the practice of subsistence farming and agricultural practices in the developing world that are being pushed out by big transnational agribusiness. Newly dispossessed and displaced, former subsistence farmers head for urban areas in search of work. These new urban migrants put increasingly heavy burdens on basic public services, such as water, police, fire, medical, and educational needs. However, many governments in the developing world are simultaneously under serious pressure from institutions such as the World Bank and the International Monetary Fund (IMF) who have made massive development loans to such countries to cut back on "unnecessary" social services and to "privatize." This places public institutions in these countries in the middle of a nasty squeeze. On one hand, there is the risk of serious social disturbance and civil unrest if too many vital services are withheld or cut back. On the other hand, the solvency of the national economy is put in jeopardy if the government cannot meet IMF or World Bank-imposed "austerity" measures.

These three tendencies—the reconfiguration of the public/private distinction, loss of faith in political institutions, and the multiplication of space(s)—have converged to produce overlapping and plural sovereignties. Properly understood, the Internet is an important element in these trends, but cannot be singled out as a unique threat to sovereignty.

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the loss of subsistence agricultural land to desertification in Africa and to water-logging and salinity in Asia, and the high energy-requirement and vulnerability of modern technologies.

Id. See also William A. Plummer, Immigration Project, The Big Push: Emigration in an Age of Environmental Catastrophe, 4 IND. J. GLOBAL LEGAL STUD. 231 (1996) (describing the links between development policies that produce ecological and social shifts that work to drive people, particularly poor people, out of the developing world as environmental refugees).

61. See John Williamson, The Progress of Policy Reform in Latin America (1990) (discussing neoliberal economic policies advanced by the IMF and World Bank including fiscal discipline, involving trade and foreign investment liberalization, privatization, and domestic market deregulation).

III. THE INTERNATIONAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY AND THE PROBLEMATIC NATURE OF "UPWARD HARMONIZATION"

Moving from general observations about ongoing changes occurring to our concept of sovereignty, the area of intellectual property law is as good a field as any to examine some of the ideological and legal transformations wrought by the discourse of globalization. Problems in international protection of intellectual property rights on the Internet raise the question—how to assert the stability of territorial borders against technological advances that render those borders porous and problematic? Perhaps our traditional concepts of sovereignty are being asked to carry more freight than they can bear, or at least bear without deep transformation. The United States tends to privilege and expand the rights of domestic intellectual property owners in the face of assertions of political sovereignty of other nations, such as China. Global accords and treaties seeking to harmonize intellectual property laws (via "upward harmonization" as the standards of protection ratchet up) further underwrite the sovereignty of domestic U.S. intellectual property owners.


64. See, e.g., Steven Erlanger, U.S. Set to Impose Limited Trade Sanctions on China, N.Y. TIMES, Feb. 21, 1996, at A9 ("With conflicts bubbling over intellectual property rights ... Administration officials say they cannot ignore the violation of China's vows on cooperating to prevent the spread of nuclear weapons ... "). See also Fareed Zakaria, China: Appease ... Or Contain?: Speak Softly, Carry a Veiled Threat, N.Y. TIMES, (Magazine), Feb. 18, 1996, at 37 ("To avoid sparking crisis after crisis, Washington should ask itself what Chinese actions would threaten its core interests and values.").

At first glance, a uniform international standard for intellectual property protection seems like an eminently sound idea in the abstract (at least to those in the developed world who control growing numbers of increasingly valuable intellectual property rights). However, as the discussion turns from the abstract to the specific, problems emerge over definitions of seemingly elementary questions such as what is a "fixed original work of authorship", or, for that matter, who or what is (legally) an author. Even within the United States, answers to these questions may vary wildly. Note that the very concept of intellectual property, particularly with respect to the digital information environment, has an extremely wide range of iterations and possible definitions ranging from the strongly maximalist recommendations of the Commerce Department's failed 1995 White Paper to the radically nonprotectionist (and somewhat hallucinatory) views of John Perry Barlow. Variations one might find between countries such as the United States and China—with sharply different political, historical, legal, cultural, and social understandings regarding the meanings of cultural production—can be striking. The discourse of globalization collides with the discourse of difference. Widely divergent concepts of property and ownership, originating in extremely diverse political,

67. Barlow writes:

Since we don't have a solution to what is a profoundly new kind of challenge, and [we] are apparently unable to delay the galloping digitization of everything not obstinately physical, we are sailing into the future on a sinking ship.

This vessel, the accumulated canon of copyright and patent law, was developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry. . .

Legal efforts to keep the old boat floating are taking three forms: a frenzy of deck chair rearrangement, stern warnings to the passengers that if she goes down, they will face harsh criminal penalties, and serene, glassy-eyed denial. . . We will need to develop an entirely new set of methods as befits this entirely new set of circumstances.

1998] CONSIDERING MULTIPLE & OVERLAPPING SOVEREIGNTIES 463

economic, and social circumstances, provide the fuel for hotly contested and seemingly unresolvable disputes.  

Because legal regimes differ sharply from country to country, trying to establish an international baseline for intellectual property protection proves problematic. The question quickly turns into one of deciding whose national baseline and standards of protection will become the international default. Even as the TRIPs component of GATT has established certain baseline standards of protection, the baseline of United States domestic copyright law may be in the process of being drastically raised. In turn, this racheting up of domestic standards of intellectual property protection has the potential to change TRIPs into an agreement that underwrites an international copyright grab by United States intellectual property industries.

Recently, there has been a spate of calls for adoption of internationalized versions of U.S. intellectual property standards of protection on a global scale, but with paradoxical effects. Traditional territorial and political notions of sovereignty are undermined by moves toward providing rights in information qua information. As information flowing across borders through global networks such as the Internet is reconceived as intellectual property and becomes less embedded in physical objects like books, the scope of property

68. See William P. Alford, To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization 3 (1995) ("American policy regarding intellectual property law has been based on fundamental misconceptions about the nature of legal development and is therefore in need of major reformulation"); Marcus W. Brauchli, Chinese Flagrantly Copy Trademarks of Foreigners, WALL ST. J., June 20, 1994, at B2 ("Pirated music accounts for half of China's nearly $700 million a year in recording sales. And the software industry estimates that 94% of the software sold in China is fake, a loss [the] industry puts at $595 million."); Seth Faison, Razors, Soap, Cornflakes: Pirating Spreads in China, N.Y. TIMES, Feb. 17, 1995, at D2 (quoting Joseph T. Simone, a Hong Kong attorney: "In most countries, if you have 10 pirates, you can go after one, expect seven to stop, and then figure out how to get the remaining two.... But in China, when you go after one, the other nine see exactly what you're doing. Not only do they keep pirating, but you invite 10 more to join in."). On February 27, 1995, the day that the People's Republic of China and the United States signed a Memorandum of Understanding that China would more stringently enforce its recently enacted copyright law, the New York Times ran a story describing how test versions of Windows 95, not released in the United States until August 1995, were selling for forty dollars a copy in Hong Kong. See Edward A. Gargan, Pirate's Bazaar Thrives in Hong Kong, N.Y. TIMES, Feb. 27, 1995, at D1. See also Seth Faison, U.S. and China Sign Accord To End Piracy of Software, Music Recordings and Film: Washington Drops Plan to Impose $1 Billion in Trade Sanctions, N.Y. TIMES, Feb. 27, 1995, at A1.

69. Rochelle Cooper Dreyfuss, Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together, 37 VA. J. INT'L L. 275, 276 (1997).


rights steadily expands. At the urgings of members of the intellectual property industry, many decision makers begin opting for international intellectual property protection norms and frameworks. This contributes to the transformation and reconfiguration of national and territorial sovereignty that we are witnessing in the current period—particularly because entities holding increasingly large blocks of intellectual property rights are not nations but private multinational corporations. However, rather than positing the Internet as a threat to such sovereigns, the rise of the Internet, as Professor Perritt points out, may represent a reinforcement of national sovereignty, albeit ironically. The irony is that such entities must then return to assertions of the sovereignty of domestic intellectual property laws to underwrite their ownership claims.72 Transnational corporate entities, whose fortunes are built on protecting their intellectual properties, need to turn to nation-states to ensure protection for their private rights.

The pattern in expanding intellectual property protection that has emerged has been to “whipsaw” domestic and international protections against each other. The United States will first sign onto a multilateral treaty like GATT, which provides for “minimum standards” of intellectual property protection. Next, there are moves to ratchet up similarly domestic levels of protections, which in turn exerts pressure on other treaty nations to likewise increase protections.73 The end result is that minimum standards of protection become driven by a maximalist domestic intellectual property protection agenda.

A. The False Dichotomy Between “Free” Traders and “Fair” Traders

Treaties such as the TRIPs component of GATT discuss the more neutral-sounding “removal of barriers to trade” when dealing with intellectual property protection. The architecture of GATT says to the countries of the developing world, “In exchange for reducing or eliminating tariffs on goods like cotton, so you can export them, you must agree to protect the intellectual properties of the developed world.” Thus, the cotton that goes into a Mickey Mouse T-shirt will pass out of Malaysia at, say, one dollar a pound and returns as a T-shirt emblazoned with a trademarked image selling for twenty-five dollars.

72. Aoki, (Intellectual) Property and Sovereignty, supra note 1, at 1293.
73. For example, see the recently enacted “No Electronic Theft Act” signed by President Clinton on Tuesday, December 16, 1997, “that targets Internet software piracy by making it a criminal act to share copyrighted materials—even if there was no profit involved.” Jeri Clausing, Clinton Signs Internet Copyright Act, N. Y. TIMES, CYBER TIMES (Dec. 17, 1997) <http://www.nytimes.com/library/cyber>.
These types of results and arrangements implicate the "ideology of harmonization."\textsuperscript{74} This ideology works to mediate tensions between "free" traders and "fair" traders in discussions of international trade policy with regard to intellectual property protection (or international environmental, labor, or human rights discourses). The free/fair trader dichotomy is closely related to a "non-normative"/"normative" dimension applied to the claims of the respective proponents of free and fair trade. Both the free and fair trade claims have a disturbing capacity to work toward discounting and disfavoring the articulation of pockets of significant domestic difference that should, at the very least, be approached with respect rather than disdain. Why is it that when there is a conflict between the global and the local, the local iterations and differences tend to be discounted and subordinated to the idea of upward harmonization?\textsuperscript{75}

There is an acute tension between "autonomy" and upward harmonization with regard to standards of intellectual property protection in the TRIPs component of GATT or with regard to the environmental protection provisions of NAFTA. The supposedly non-normative arguments of free traders for ostensibly "neutral" converging standards of intellectual property protections (as articulated by experts in ostensibly non-political international institutions such as the World Intellectual Property Organization) seem to be involved intimately with the project of reducing international difference—all to assure the maximization of supposedly non-normative "free flow" of cross-border trade. Ostensibly autonomy and sovereignty of individual states are respected, but it is only when one begins examining patterns of distributive results that a troubling bias towards the interests of the developed world becomes apparent.

On the other hand, there are the arguments of the fair traders who, in a perverse version of "public choice" exit theory, argue for harmonization of rules so as to prevent intellectual property law "races to the bottom"—this argument is also invoked with regard to labor or environmental regulatory policy. There is the fear voiced by countries such as the United States or Western European nations (perhaps justifiable, but nonetheless troubling) that if developing nations are able to enter into competition with them for easily relocatable capital and manufacturing plants, the countries of the developing world will be able to


\textsuperscript{75} Ileana M. Porras, Resisting the Irresistible: Difference Under Pressure in the Age of Fair Trade—Finding the Limits of Harmonization (unpublished paper, on file with author).
underbid the developed nations because of lower levels of intellectual property protection that such firms have in the developed nations (particularly with regard to the ease of copying that digital technologies and transborder networks such as the Internet provide). These fair traders then argue that intellectual property protections (or in many cases, labor or environmental regulatory standards) must be upwardly harmonized so as to place the developed and developing world on a “level playing field.”

This rhetorical move has a certain force. Poor and developing nations, who come to the global table with a pre-existing, uneven distribution of resources (particularly with regard to information economies that have a large component of intellectual property) are constructed in international trade agreements such as GATT (or NAFTA) as partaking of “unfair competitive advantage” because they do not adhere to the “fair” trader-nation’s higher levels of intellectual property protection or other regulatory standards (and concomitant higher costs, which are then reflected in higher-priced goods that comport with prices of goods from developed nations and which are, ostensibly, more “competitive”). When critics of this international version of “blame-the-victim” raise the point that these “fair” regimes may play a large role in perpetuating existing distributive inequities between nations of the developed and developing world, they are often told they are obstructionist advocates of inefficient (and harmful) domestic/local difference. Under this analysis, free trade and fair trade are not polar terms—fair trade is not an oppositional regime to free trade, but an extension of it.

Prevailing constructions of harmonization are advanced by individuals, firms, institutions, and NGOs promoting international social-welfare objectives—human rights, labor, and environmental agendas. Because these groups (to varying degrees) make universalizing claims, a byproduct and consequence of their successful efforts may be the reduction of significant domestic/local/international difference. Without rejecting these initiatives out of hand, one must note the synergy between “social-welfare” driven harmonization (which needs to surmount the set of arguments about national

autonomy and sovereignty) and "trade-efficiency" driven harmonization. With regard to the agendas advanced by proponents of both "free" and "fair" trade, nations will sometimes allow their "sovereignty" to be breached if such breach is seen as in a nation's economic interest.

As Professor Ilena Porras has pointed out, the ideology of "harmonization seem[s] to offer simultaneously convergence and difference . . . . [However] appearances are deceptive and the promise is an empty promise. Harmonization does not favor difference; rather it takes account of the fact that it will take time to eliminate difference altogether and is willing to accommodate deviance temporarily." Rather than leaving us with the deflated, empty husk of a demystified harmonization, this article suggests that there is much work to be done in the important project of developing a limiting counterprinciple to harmonization, such as the European Union's limiting principle of "subsidiarity."

B. Embedded Norms of Global Intellectual Property Protection

What are we to make of the patterns of distribution produced by the political economy of intellectual property, and how do they relate to legal regimes tied into the liberal vision of globalization? The intersection of intellectual property protection and the discourse of globalization privileges six dominant (but somewhat contradictory) norms and presumptions within Anglo-American legal thought: (1) a supposedly clear distinction between categories of public and private; (2) a sharp, but troubled distinction between the categories of property and speech/expression; (3) an Enlightenment-
derived, linear, "onward-and-upward" vision of "progress;\(^{84}\) (4) a deeply-held commitment to and belief in an open "marketplace of ideas" in which a pluralism of views proliferate;\(^{45}\) (5) a faith (at least up until fairly recently) in the transparency of language;\(^{84}\) and (6) a foundational belief in the commensurability of all things—that is, that all things may be reduced to a common metric understood by all, whether they are widgets, dollars, or bytes

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85. See Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting)

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id. See also JOHN STUART MILL, ON LIBERTY (1859); Letter from James Madison to W.T. Barry, August 4, 1822, in THE COMPLETE MADISON (Saul K. Padover ed., 1953). "A popular Government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; and people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Id.

of information. To varying degrees, on a very deep level, our narratives of globalization incorporate these assumptions.

There is a circular quality to the constitutive tension between national and the international standards of intellectual property protection because each depends on the other for integrity. A territorially-based intellectual property system like that of the United States needs to be reinforced by the equivalent of reciprocity in a global economy, or U.S. sovereignty suffers. Alternately, arm-twisting by the United States regarding compliance with rising standards of intellectual property protection may be viewed as deleterious to the sovereignty of a foreign legal regime to determine its own standards of protection. In traditional international law terms, the dilemma of international intellectual property protection might be characterized by referring to the increasingly threatened ability of sovereign nation-states to make autonomous policy choices regarding appropriate levels of intellectual property protection within their own territorial boundaries. Moves by the developed nations such as the United States toward generally liberalized global trade (including greater reciprocity of intellectual property protection) might also be cast in terms of national capitulation to the inexorable and unavoidable march of globalization.

Treaties such as GATT potentially shift responsibility for setting standards of intellectual property law and policymaking away from national/local sites into less democratic, international arenas. However, one must be aware that such an analysis has serious limitations. Dichotomizing the international and


the national implies an illusory separation between the two that obscures the constitutive role of sovereign nation-states in constructing and participating in these supra-national arenas. One must also be careful about reifying the idea of the "processes of globalization"—doing so makes globalization appear as a largely unproblematic, homogeneous unitary phenomenon following some kind of pre-ordained course, notwithstanding the six assumptions attendant to globalization set out earlier, as well as to the three tendencies noted in Section II. If globalization is not a transhistorical unitary process but is instead a heterogeneous, lumpy, incomplete, and uneven set of tendencies with large regions of the world bypassed, then a "one-size-fits-all" approach towards international intellectual property protection may reproduce, on a global scale, problematic and sharp inequalities that currently exist with regard to access and information. These sharply bifurcated inequalities are already characteristic of much development on the domestic, regional, or national scale with regard to questions of distribution of information access and resources.

By focusing on international multilateral solutions to current dilemmas, questions regarding appropriate levels of intellectual property protection that recognize certain industry-specific considerations and constraints (such as those pertaining to computer programs, which are different from those pertaining to television broadcasts transmitted by satellite or from digitized music or film) within the Global Information Infrastructure\footnote{91. Jane C. Ginsburg, Global Use/Territorial Rights: Private International Law and Questions of the Global Information Infrastructure, 42 J. Copyright Soc'y 318, at 316 (1995) ("A key of the G.I.I. is its ability to render works of authorship pervasively and simultaneously throughout the world. The Principle of Territoriality becomes problematic if it means that posting a work on the G.I.I. calls into play the laws of every country in which the works may be received when these laws differ substantively... [and] for works on the G.I.I., there will be no physical territoriality; no way to stop works at the border, because there are no borders."). But c.f. Coombe, Left Out on the Information Highway, supra note 44, at 237.} risk being suppressed or lost entirely by a near-automatic reflex toward more and higher standards of intellectual property protection. This tendency seeks to "universalize" information at the lowest common denominator and seemingly blames rapidly-advancing communications technology for much of what is politically controversial and contradictory about the "global information economy"\footnote{92. This term has been frequently used both in journalistic and scholarly writing to encompass some of the dramatic economic changes that have occurred in most countries in recent decades. As in the case of globalization, widespread usage has not led to a more precise definition. See Anne Wells Branscomb, Who Owns Information?: From Privacy to Public Access (1994); Cox, Global Restructuring, supra note 48, at 45-59. See also John Huey, Waking Up to the New Economy, FORTUNE, June 27, 1994, at 36; Jane C. Ginsburg, supra note 91, at 318.}—is the Internet a threat? Thus the politics of global change in specific places are
never seriously examined or confronted. Indeed, such places are marginalized and exceptionalized, which is particularly ironic given that such spaces are produced in great part by the international political economy of intellectual property in the first place.

The much-vaunted "spacelessness" and seemingly decentralized nature—culturally, politically, and economically—of various electronic communication networks are seen as promoting an equalization of economic and social disparities, both within the United States and globally, at least on a superficial level. This profoundly ideological vision of radical decentralization seems to rely on a belief in the determinacy of technology—decentralized communications networks will perforce produce decentralized economic and political forms, sooner rather than later. In important ways, this over-sanguine view overlooks how mapping electronic space as "private" creates conditions under which a "privately constructed and owned electronic information system...embod[ies] the essential features of a private enterprise economy: inequality of income along with the production of goods and services for profit."93 This structural inequality is deepened and accentuated by the added capabilities of digital information technologies (mobility, flexibility, simultaneity) along with the fact that market forces will tend to offer greatest incentives for those parties that cater to the needs and tastes of consumers with the highest incomes in the most developed sectors of the economy in the most developed nations and regions. Generally and unfortunately, liberal legal thought has a very difficult time seeing this as a problem, let alone responding affirmatively.

CONCLUSION

With regard to the intersection of the discourse of globalization and the discourse of difference, Rosemary Coombe has written that globalization entails an articulation of local and non-local forces given voice in cultural idiom. The world is increasingly connected, but it is increasingly also full of difference. We need representational vehicles that enable us to remain sensitive to

diversities of meaning, even as we acknowledge the shaping power of processes that at first seem monolithic, homogenizing, and all-encompassing.94

The liberal vision of globalization, as partially articulated by Professor Perritt, presupposes a representation of our world in which there exists a discrete and demarcated “public sphere” that rational, autonomous individuals (“citizens”) may access and in which they exchange information and ideas. While such a presumption may be both ethnocentric and culture-bound, it may also be built into our legal system and discourse at a very deep level. However, such a presumption about a public sphere inhabited by citizens is in acute tension with other presumptions contained within the idea of globalization, such as the idea that globalization implies a meaningful dialogue with “others”—a “talking with”, rather than a “talking to”—the intersection with the discourse of difference. This further presumes that there is both a willingness as well as an ability on “our” part to take such dialogue seriously. However, because this also involves a serious commitment to critique and transform our legal categories in response to such dialogue, such meaningful communicative dialogues with “others” may rarely occur. That this does not seem to be occurring often, if at all, is troubling, especially when we use universalizing and transhistorical rhetoric in our discussions about globalization. As increasing pressures are brought to bear on our received visions of sovereignty and intellectual property, whether arising on the Internet or elsewhere, the increasingly pervasive intersections and interactions between the global and the local desperately need to be reconceived as opportunities rather than obstacles to a more equitable global intellectual property regime.

This article has examined some of the issues raised by Professor Perritt’s observations regarding the idea that the Internet might be viewed as a threat to sovereignty. While agreeing with Professor Perritt’s rejection of the idea that the Internet is a threat, as well as with his observation of the “double-sidedness” and slipperiness of arguments in this area, this article parts company with Professor Perritt on several points. First, the reconfiguration of the public/private distinction, the loss of faith in political institutions and ideals, and the multiplications of spaces in our contemporary situation are insufficiently accounted for by prevailing liberal legal ideology, and these gaps may have significant policy consequences. Secondly, the liberal vision of the global tends to have a deep bias toward “universalizing” strategies, as well as a tendency to

disguise relative distributive inequities (at least in the area of international intellectual property protections). Finally, while this article agrees with Professor Perritt that the Internet is not a threat to sovereignty, and that sovereignty is not a threat to the Internet, it is important to understand the deep and fundamental transformations our idea of sovereignty is undergoing at the end of the twentieth century, the rise of the Internet notwithstanding.