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The Access to Knowledge Mobilization and the New Politics of Intellectual Property

ABSTRACT. Intellectual property law was once an arcane subject. Today it is at the center of some of the most highly charged political contests of our time. In recent years, college students, subsistence farmers, AIDS activists, genomic scientists, and free-software programmers have mobilized to challenge the contours of intellectual property (IP) law. Very recently, some from these groups have begun to develop a shared critique under the umbrella of “access to knowledge” (A2K). Existing accounts of the political economy of the field of IP have suggested that such a mobilization was unlikely. This Article takes the emergence of the A2K mobilization as an opportunity to develop a richer and less deterministic account of the contemporary politics of IP. It draws upon “frame mobilization” literature, which illuminates the role that acts of interpretation play in instigating, promoting, and legitimating collective action. The frame-analytic perspective teaches that before a group can act it must develop an account of its interests and theorize how to advance these interests. These acts of interpretation are both socially mediated and contingent. Ideas can be a resource for those engaged in mobilization, but one that is not fully in their control. Frames thus can lay the scaffolding for a countermovement even as they pave the way for a movement’s success. Law is a key location for framing conflicts because it provides groups with symbolic resources for framing, and because groups struggle within the field of law to gain control over law’s normative and instrumental benefits. Law thus exerts a gravitational pull on framing processes. Engagement with law can influence a group’s architecture, discourse, and strategies, and can also create areas of overlapping agreement and—as importantly—a language of common disagreement between opposing groups. The Article closes by suggesting some implications of this point, which should be of interest to those who design legal institutions and who engage in social mobilization. Most intriguing, perhaps, is the role it suggests that law may play in the creation of global publics and politics.

AUTHOR. This Article has benefited greatly from the suggestions of more readers than I can thank here. I owe a special debt of gratitude to my colleagues at U.C. Berkeley School of Law and Yale Law School, and particularly to Professors Catherine Albiston, Jack Balkin, James Boyle, Yochai Benkler, Lauren Edelman, Terry Fisher, Oona Hathaway, David Lieberman, Peter Menell, Robert Merges, Robert Post, Carol Rose, Pamela Samuelson, Reva Siegel, and Molly S. Van Houweling. I note, finally, that I have engaged in advocacy work around access-to-medicines issues in connection with some of the groups discussed herein. All views expressed here are, of course, my own.



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INTRODUCTION

Intellectual property law was, until recently, an arcane subject. Over the last decade or so, however, that has begun to change. College students in the United States have formed organizations to challenge the scope of copyright law. AIDS activists have provoked arrest to challenge laws about drug patents. Computer programmers have led street demonstrations and lobbying campaigns against software patents. Farmers in developing countries have protested in the hundreds of thousands against seed patents and the licensing practices of multinational seed companies. Whether their object is generic drugs or a free genome, free software or free culture, a disparate collection of groups is thematizing new conflicts between property in knowledge and human efforts to create, develop, communicate, and share knowledge in our increasingly informational society.

Very recently, some from these groups have begun to seek to affiliate and make common cause under the rubric of “access to knowledge” (A2K). This has occurred most notably through a recent campaign to press the World Intellectual Property Organization (WIPO) to adopt a “development agenda.” Advocacy groups from North and South joined forces to support this call, demanding that the agency become more receptive to the needs of developing countries and more open to mechanisms of innovation that do not rely on exclusive rights. WIPO agreed to consider the shift, and advocates made use of the political opening to draft a model Access to Knowledge Treaty.¹ This treaty is less a completed proposal than a protean campaign platform. Its central aims are to embed a set of users’ rights in information at the international level and to create international mechanisms to protect and sustain open models of innovation.

As they formulate these demands and work together, those involved are also seeking to develop a shared identity and a common critique of the existing intellectual property system. This “A2K mobilization”² has had some notable

1. Treaty on Access to Knowledge (May 9, 2005) (draft), http://www.cptech.org/azk/azk_treaty_may9.pdf [hereinafter A2K Treaty].

2. I use the term “social mobilization” instead of “social movement” to avoid the confusion generated by the different views that scholars have about the proper definition of a “social movement.” Definitions of social movements vary substantially across the sociological literature. Speaking broadly, “most are based on three or more of the following axes: collective or joint action; change-oriented goals or claims; some extra- or noninstitutional collective action; some degree of organization; and some degree of temporal continuity.” Davis A. Snow, Sarah A. Soule & Hanspeter Kriesi, *Mapping the Terrain*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 3, 6 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004). Some scholars emphasize the importance of disruptive acts of political

successes. Access-to-medicines campaigners secured the first ever amendment to a core World Trade Organization (WTO) agreement, in this case the Trade-Related Aspects of Intellectual Property (TRIPS) Agreement. They also helped to bring down the prices of AIDS medicines in developing countries by more than ninety-five percent, embed significant procedural protections and substantive limits in the new Indian Patent Act (and thereby potentially affect the prices of medicines globally as well as in India), and persuade the World Health Organization (WHO) to consider proposals for new international mechanisms to better align medical research and development (R&D) with

protest and urge a definition of social movements that distinguishes them sharply from interest groups. See, e.g., Frances Fox Piven & Richard A. Cloward, *Normalizing Collective Protest*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 301 (Aldon D. Morris & Carol McClurg Mueller eds., 1992); see also Snow et al., *supra*, at 7-8 (arguing that interest groups and social movements overlap, but are “positioned differently in relation to the polity or state”). But see Paul Burstein, *Social Movements and Public Policy*, in *HOW SOCIAL MOVEMENTS MATTER* 3 (Marco Giugni, Doug McAdam & Charles Tilly eds., 1999) (questioning the value of distinguishing between interest groups and social movements). For others, the key element of a social movement is “the mobilization of previously unorganized or non-political challengers.” See DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970*, at xxv (2d ed. 1999). Sometimes the term social movement is used to designate “popular” as opposed to “elite” contention. *Id.* at xxxi (emphasis omitted). Still others have defined social movements as groups that act in the cultural and social realm, but that do not make claims on the state through traditional political means. See Eduardo Canel, *New Social Movement Theory and Resource Mobilization Theory: The Need for Integration*, in *COMMUNITY POWER AND GRASSROOTS DEMOCRACY: THE TRANSFORMATION OF SOCIAL LIFE* 189, 196 (Michael Kaufman & Haroldo Dilla Alfonso eds., 1997) (describing the arguments of “new social movement” theorists). Today, the term is subject to so many competing definitions that it arguably sheds less light than heat. See Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 *ANN. REV. L. & SOC. SCI.* 17, 23 (2006) (noting that “several leading scholars [have] abandon[ed] the concept for the broader, more inclusive label of contentious politics”). Some A2K participants look like more traditional social movement actors (for example, AIDS activist groups), while others look like elite actors or interest groups (for example, businesses engaged in open-source projects, D.C.-based NGOs). Developing-country governments themselves have played a significant role in the A2K mobilization, as will become clear. Nothing in the Article that follows turns on whether the A2K mobilization meets one or another definition of a social movement. I therefore use the term “social mobilization,” which is intended to focus attention on acts of claiming and struggle in the political arena, rather than on particular institutional or organizational forms. The Article will at times, to avoid monotony, use the term “movement” and “coalition” interchangeably with “mobilization,” but throughout what is intended is a reference to the broader concept of political action and claims making. The term “transnational advocacy network” might also be appropriate to describe the A2K mobilization. I do not adopt it here because it tends to be identified predominantly with professionalized NGO advocacy (which is a part, but not the whole, of the A2K mobilization), and because the term has evolved more in relation to political science literature than to the social movement literature central to my inquiry here. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

global health needs. Free-software programmers, supported by major corporations with investments in open-source software models, helped prevent the passage of a directive that would have codified the availability of a broad range of software patents in the European Union. The private ordering schemes introduced by proponents of free software and “copyleft” licenses have proliferated rapidly. Free software is well integrated into the IT industries, and Creative Commons copyright licenses govern more than sixty million works around the world today.

Significant changes are also underway at WIPO. The development agenda process has led to institutional changes within the agency, such as the creation of a new standing committee on IP and development, and has been credited with derailing the negotiation of a Substantive Patent Law Treaty—an effort that has been a high priority for the United States and European Union. In the United States, the Supreme Court has recently and repeatedly intervened to diminish the strength of patent rights, though just how substantially is not yet clear. The U.S. Congress is seriously considering patent reform that would have the same effect. These signs suggest that the tide of expansion in IP law that has characterized the past thirty years may be slowing, and in some areas, even ebbing.

All of this ought to be somewhat surprising. The public choice accounts developed in IP scholarship to explain the strengthening of IP law over the last thirty years suggest that such a countermobilization is highly unlikely, or even impossible.³ How, then, can we account for the new A2K mobilization and its apparent successes?

This Article addresses this question, and in doing so contributes to two fields that are rarely if ever discussed together: IP scholarship and law-and-social-movements scholarship. The Article has several aims. First, it offers an account of the A2K mobilization and shows why this new mobilization should lead us to supplement existing theories of the political economy of IP law with theories that can elucidate the mediating role of interpretation in political mobilization. Second, it demonstrates the importance of what sociologists call “framing processes” to the dynamics that are shaping this area of law and the sometimes perverse effects that these processes have on both A2K activists and those who oppose them. Third, it uses the A2K case study to illustrate the “gravitational” pull that law can exert on framing processes and to hypothesize some of the kinds of effects that this force can exert on those engaged in mobilization.

3. See *infra* Part II.

To fully describe, understand, and ultimately intervene in IP law today, we must, I contend, turn to the literature on “frame mobilization” that has developed in the discipline of sociology. This literature investigates how social actors engage the field of ideas to theorize their interests, build alliances, mobilize support, and discredit their opponents. Using framing theory, we can see that recent flux in IP law has been filtered and organized by conceptual frames in ways that are nontrivial. Frames affect what the players understand to be their interests, whom they believe to be their allies, and how they justify the change they seek. These frames direct as well as reflect material circumstances, and as a result, the domain of the political cannot be mathematically reduced to the domain of the material.

Many of those who offer public choice explanations of the state of IP law in fact acknowledge this. My contribution is not to introduce the notion that acts of interpretation matter to the field of IP, but to offer a theoretical paradigm that permits us to systematize and extend this insight, and to relate it formally to existing public choice accounts of the politics of IP. Framing theory helps us see how groups engage in socially mediated acts of interpretation to theorize their interests and the ways these interests can be realized.

Importantly, the imperative of interpretation applies not only to those engaged in social movements, but also to actors in more rationalized institutional contexts, including in the domain of business. This Article thus applies framing theory not only to the A2K mobilization, but also to the mobilization of industry that preceded it. It is unusual to use the tools of framing theory to understand collective action in the corporate domain, perhaps because businesses are often excluded by definition from the social movement literature. But corporate actors also need accounts of their interests and theories of how to advance them, as the frame-analytic perspective helps to show.

Framing theory also illuminates the paradoxical effects that interpretive processes can have on groups engaged in framing contests. By examining the evolution of the A2K mobilization, we can see concretely how engagement with law can bring actors locked in a struggle over law into alignment with one another. This illustrates the “gravitational” pull that law can exert over framing processes. Law can exert this power because it is a key location for normative and symbolic meaning making, and because it links norms and language to force in a manner that is somewhat—but not fully—permeable to the claims of social actors. Law thus holds out the possibility that those who speak in its terms can translate their ideas and interpretations into concrete change. But it also has a historical and institutional weight, one that exerts a pull on those who operate within its field. Using the A2K mobilization as a case study, we can begin to identify different kinds of effects that law can have on framing

processes, including what I call “architectural,” “discursive,” and “strategic” effects. Building on these examples, the Article explicates some of the possible implications of law’s gravitational pull. Engagement with law can, I contend, have an integrative effect on social actors, creating areas of overlapping agreement and—as importantly—a language of common disagreement between opposing groups. “Disagreement” here means something very specific: the circumstance where “interlocutors both understand and do not understand the same thing by the same words.”⁴

The Article closes by theorizing some of the implications of this point. The integrative effect that engagement with law can have will be of interest to those who design legal institutions because it suggests that social actors struggling over the terms of law can end up strengthening and legitimating law in the process. It should also be of interest to those who engage in social mobilization because it suggests that engagement with law can change the language and aims of a movement, bringing it into outward alignment with its opponents. This may be undesirable from a movement’s perspective, although it is important to note that the Article neither presumes nor seeks to demonstrate that movement actors should invariably wish to resist law’s gravitational pull. If those involved in the A2K mobilization do, however, the frame-analytic perspective suggests several possible strategies, which are described below. Lastly, if law helps bring competing groups into areas of agreement as well as common disagreement, then international and transnational law may be part of the answer to the question of how political discourse moves beyond the borders of the nation state. Analyzing the A2K mobilization thus can help us begin to theorize the relationship between law and the creation of global publics and polities.

Part I offers a brief introduction to sociological framing theory and situates this theory in relation to alternative theories of social movements and collective action. It also describes recent attempts to incorporate law into theories of framing. Part II demonstrates the power of framing theory to elucidate the dynamics of mobilization among IP industries and A2K actors. It shows why we need theories of the role of interpretation in political action, and not public choice theory alone, to account for the rapidly fluctuating politics of the field of IP. Part III articulates the effects of law on the A2K mobilization, elucidating the gravitational pull that law can exert on framing processes and some of its possible implications.

4. JACQUES RANCIÈRE, *DISAGREEMENT*, at xi (Julie Rose trans., 1999).

I. COLLECTIVE ACTION AND FRAME MOBILIZATION

In 1965, Mancur Olson intervened in discussions of politics and collective action with a simple, even elegant, argument: rational people with interests in common will, in many instances, be unwilling to act with others to advance these common interests.⁵ His hypothesis drew upon the behavioral assumptions of rational choice theory,⁶ and on theories of the dysfunctions of collective action developed in the study of markets, such as the “free rider” problem. One of Olson’s main conclusions was that large collectivities with diffuse interests will be systematically disadvantaged in the political process as compared to smaller groups with more acute interests because larger groups face higher organizing costs and are affected more severely by incentives to free ride.⁷ These insights were the foundation for public choice theory, which applies economic analysis to politics and treats “the legislative process as a microeconomic system in which ‘actual political choices are determined by the efforts of individuals and groups to further their own interests.’”⁸

Around the same time, sociologists and political scientists began to develop new theories of social movements to engage a parallel set of questions about collective action. They shared with Olson the premise that collective action was a puzzle, and they positioned themselves against previous theories that tended

5. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

6. Olson’s theory, that is, presumes that humans are by their nature self-interested and act purposively to advance their interests. The definition of “interest” that Olson intends, however, is more obscure. On the one hand, he insists that his theory applies “whenever there are rational individuals interested in a common goal,” and not only to “monetary or material” interests. *Id.* at 159. But he also notes that it is not “especially useful” to define everything that humans do, including giving money to a charity, as being in their individual self-interest, because this definition is tautological. *Id.* at 160 n.91. He therefore concedes that his theory is “not at all sufficient where philanthropic lobbies” or groups that work for “lost causes” are concerned. *Id.* at 160-61. This presents a dilemma that persists in public choice theory. If “interests” are not defined only as material and monetary interests, but cannot be permitted to encompass things such as “feeling[s] of personal moral worth,” *id.* at 160 n.91, where does one draw the definitional line? Public choice theory loses its parsimony and tractability if its definition of “interest” is untethered from the material domain. For that reason, this Article will treat interests in public choice theory as referring to material interests alone. For further discussion of interest definition in public choice theory, see *infra* Section II.B. See also Myra Marx Ferree, *The Political Context of Rationality: Rational Choice Theory and Resource Mobilization*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY*, *supra* note 2, at 29 (discussing these issues in relation to resource mobilization theory, which draws heavily on Olson’s work).

7. OLSON, *supra* note 5, at 46-48, 165-67.

8. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 14-15 (1991).

to treat “the passage from a condition of exploitation or frustration to collective action aimed at reversing the condition [as] a simple, direct, and unmediated process.”⁹ They instead began from the recognition that “collective actors come and go. Some show up when not anticipated. Others fail to mobilize and press their claims, even when they appear to have a natural constituency. And those that do show up vary considerably in how successful they are.”¹⁰ Like public choice theorists, social-movement theorists began to try to explain why social mobilization does not follow directly or predictably from the existence of individual or collective disparities.

Three dominant schools of social movement theory emerged in sociology. The first two were the “resource mobilization” and “political process” traditions, which focused attention on the role of internal and external resources in facilitating collective action.¹¹ Then, in the late 1980s, in line with “the broader ‘cultural turn’ in the social sciences,” scholars began to attend more closely to the influence of structures of meaning on political action.¹² The result was the “frame-analytic” perspective, which focuses on the role of

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9. Canel, *supra* note 2, at 189, 190; see also John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, in SOCIAL MOVEMENTS: PERSPECTIVES AND ISSUES 149, 150 (Steven M. Buechler & F. Kurt Cylke, Jr., eds., 1997) (cataloguing “[a] number of studies [that] have shown little or no support for expected relationships between objective or subjective deprivation and the outbreak of movement phenomena and willingness to participate in collective action”); Mayer N. Zald, *Looking Backwards To Look Forward: Reflections on the Past and Future of the Resource Mobilization Research Program*, in FRONTIERS IN SOCIAL MOVEMENT THEORY, *supra* note 2, at 326, 328 (noting that earlier approaches to social movements “all more or less assumed an increase in grievances as the major engine of social movements”).
 10. David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 478 (1986) [hereinafter Snow et al., *Micromobilization*]; see also David A. Snow, *Framing Processes, Ideology, and Discursive Fields*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 2, at 380, 382 [hereinafter Snow, *Discursive Fields*] (“History is replete with examples of aggregations of individuals who are deprived relative to their neighbors, who are exploited economically, or who are objects of stigmatization and differential treatment, but who have not mobilized in order to collectively challenge the appropriate authorities regarding their situation.”).
 11. For an elaboration of resource mobilization theory, see J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527 (1983); McCarthy & Zald, *supra* note 9; and Zald, *supra* note 9. For an explanation of the political process model, see SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* (2d ed. 1998); and David S. Meyer, *Protest and Political Opportunities*, 30 ANN. REV. SOC. 125, 127-28 (2004).
 12. Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women’s Movement in the 1960s*, 111 AM. J. SOC. 1718, 1720 (2006).

interpretation in social mobilization.¹³ Proponents of frame mobilization theory urged attention to the “fact that grievances or discontents are subject to differential interpretation, and the fact that variations in their interpretation across individuals, social-movement organizations, and time can affect whether and how they are acted upon.”¹⁴ Drawing on the work of theorists such as Erving Goffman, they sought to build a new account based on the “readily documentable observation that both individual and corporate actors often misunderstand or experience considerable doubt and confusion about what it is that is going on and why.”¹⁵

Framing theory emerged out of the recognition that one cannot organize in concert with others to alter a set of material conditions without an interpretation of one’s interests or grievances and theories of how to advance them. A key task of movement actors, then, is “produc[ing] and maint[aining] . . . meaning for constituents, antagonists, and bystanders or observers.”¹⁶ Such acts of “meaning construction” have been termed “framing,”¹⁷ drawing on Goffman’s definition of a “frame” as a “schemata of interpretation” that allows people to “locate, perceive, identify, and label” experiences and events.¹⁸ Frames can be distinguished from ideologies in their degree of particularity and in their orientation toward action.¹⁹ Framing theory, in turn, calls attention to

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13. Snow et al., *Micromobilization*, *supra* note 10, at 465. For a description of framing theory written by two of its progenitors, see Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 614 (2000).
 14. Snow et al., *Micromobilization*, *supra* note 10, at 465.
 15. *Id.* at 466. Although it is beyond the scope of this paper, it is worth noting that empirical and theoretical work in the field of cognitive linguistics has led scholars in that field to conclude that cognitive frames play a central role in human understanding and political discourse. See, e.g., GEORGE LAKOFF, *MORAL POLITICS* (2d ed. 2002); GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS* (1987).
 16. Benford & Snow, *supra* note 13, at 613.
 17. *Id.* at 614.
 18. ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 21 (1974).
 19. Mayer N. Zald, *Culture, Ideology, and Strategic Framing*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS* 261, 262 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996); see also David A. Snow & Robert D. Benford, *Clarifying the Relationship Between Framing and Ideology*, in *FRAMES OF PROTEST: SOCIAL MOVEMENTS AND THE FRAMING PERSPECTIVE* 205, 209 (Hank Johnston & John A. Noakes eds., 2005) (“[F]rom a framing perspective, ideologies constitute cultural resources that can be tapped and exploited for the purpose of constructing collective action frames and thus function simultaneously to facilitate and constrain framing processes.”); Snow, *Discursive Fields*, *supra* note 10, at 397 (characterizing the concept of ideology as more blunt, mechanistic, and totalizing than the concept of frame mobilization); Zald, *supra*, at 262 (“[I]deology is the set of beliefs that are

the signifying work that collective actors undertake and avoids the more static and totalizing models often associated with the concept of ideology.²⁰

An example can illustrate the initial premise of framing theory: a poor person who is asked to pay ten times his daily wage for a medicine could come to many different conclusions using many different frames. He might decide that his wages are too low (a workers' rights frame), that the price of medicine is too high (a consumers' rights frame), that God is angry with him (a religious punishment frame), or that the price is the unavoidable result of the expense of medical innovation (a market-innovation frame).²¹ Each frame is socially mediated, which is to say, each act of framing represents a process of interpretation that takes place between rather than strictly within individuals. Each also implies a different form of action and different potential allies and opponents.

Whether a particular frame is adopted, or successful, is likely to depend on contextual factors that vary across space and time. Frames are not fashioned out of whole cloth by individuals; like language itself, frames are essentially social in nature. They draw on (and contribute to) the existing "cultural stock" of ideas and images.²² In order to succeed, frames must resonate with their intended audience.²³ The key insight of framing theory, then, is that the existence and success of collective action is affected not only by political and material resources, but also by the ability of social actors to frame problems and solutions in particular ways and to "align" their frames with those used by potential adherents and bystanders.

used to justify or challenge a given social-political order and are used to interpret the political world; frames are the specific metaphors, symbolic representations, and cognitive cues used to render or cast behavior and events in an evaluative mode and to suggest alternative modes of action.").

20. See Snow & Benford, *supra* note 19, at 206. Framing processes are arguably also easier to analyze empirically than theories of ideology. See *id.* at 210; see also Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 AM. J. SOC. 304, 308 (2003) ("The concept of a frame as an 'interpretive package' with an internal structure organized around a central idea provides a unit of analysis to track over time and in specific contests over meaning.").
21. These do not, of course, exhaust the possibilities, and an individual could hold several of these beliefs at once. As Goffman argued, "during any one moment of activity, an individual is likely to apply several frameworks." GOFFMAN, *supra* note 18, at 25.
22. Zald, *supra* note 19, at 266. Zald offers the example of the feminist claim that "[a] woman's body is her own," which "makes sense only in a cultural discourse that highlights notions of individual autonomy and equality of citizenship rights." *Id.* at 266-67.
23. See David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, in FRONTIERS IN SOCIAL MOVEMENT THEORY, *supra* note 2, at 133, 141 (hypothesizing various determinants of the potency and resonance of particular frames).

The framing perspective is intended not to deny that material resources or political opportunity structures matter to the success of a mobilization, but to account for how groups inspire and legitimate action, and how they come to view some actions and events as more or less desirable, risky, or costly.²⁴ Those who adopt a frame-analytic perspective seek to integrate considerations of meaning into structural and material accounts by treating meaning as another factor that reflects and shapes the availability of resources and external opportunity structures.²⁵

Framing theorists have proposed a typology of framing processes that social actors use to garner support and build a sense of their collective interests.²⁶ They have also identified three “core framing tasks” that are central to successful collective action: diagnosis (identifying a problem and attributing causes or blame), prognosis (suggesting a means to resolve the problem and allocating responsibility for action), and motivation (calling upon others to act against the problem).²⁷ Framing theory thus helps us see that all collectivities face not one but many interpretive tasks. They must, at a minimum, develop a theory of their joint interests, determine how these interests can be advanced, and articulate these interests in a way that garners support.

The framing literature has grown rapidly since its inception.²⁸ Recently, frame-analytic perspectives also have been applied to the emergence of transnational social movements.²⁹ As framing theory has evolved, it has also been challenged and revised. Early framing theory adopted a largely instrumental conception of frames, tending to describe them as external to social actors and relations.³⁰ More recently, critics have stressed that acts of framing cannot be understood as entirely externalized or volitional. This is because “[c]ultural practices do not have the same ‘thingness’ that lends to their acquisition, exclusivity of control and dispersion that material resources have.”³¹ As critics have pointed out, acts of framing are necessarily “dialogical”;

24. *Id.* at 151-52.

25. See Benford & Snow, *supra* note 13, at 631.

26. These include “frame bridging,” “frame amplification,” “frame extension,” and “frame transformation.” Snow et al., *Micromobilization*, *supra* note 10, at 467, 469, 472, 473.

27. Benford & Snow, *supra* note 13, at 615.

28. *Id.* at 612; see also Pedriana, *supra* note 12, at 1721 n.3 (“[F]raming has arguably emerged as the central cultural perspective on social movements.”).

29. See KECK & SIKKINK, *supra* note 2, at 2-3, 17; SIDNEY TARROW, *THE NEW TRANSNATIONAL ACTIVISM* 59-76 (2005).

30. See, e.g., Benford & Snow, *supra* note 13, at 613.

31. Marc W. Steinberg, *Toward a More Dialogic Analysis of Social Movement Culture*, in *SOCIAL MOVEMENTS: IDENTITY, CULTURE, AND THE STATE* 208, 210 (David S. Meyer, Nancy

groups “create oppositional discourses by borrowing from the discourses of those they oppose,” engaging in a “tug of meanings in ongoing dialogue [that] can have unanticipated, and sometimes contradictory, consequences for movement development.”³² Frames also have a “discursive” quality, “limit[ing] what can be discussed or heard in a political context,” and as such should be understood not only to enable but also to delimit action.³³ It is this dialogical and discursive concept of framing that this Article invokes.

Only recently have sociologists begun to address the specific role that law plays in framing processes.³⁴ Scholars in the law and society tradition have addressed questions of how courts affect and are affected by social change, and of the impact of cause lawyering on social movements.³⁵ But they have not generally engaged the theory of frame mobilization, with the result that “law has not . . . been systematically incorporated—as a fundamental concept and theoretical mechanism—into social movement theory generally, and into the cultural framing perspective specifically.”³⁶

Whittier & Belinda Robnett eds., 2002). Snow and Benford embrace this dialogic understanding, emphasizing that the essence of framing processes “resides ‘not within us, but between us.’” Snow & Benford, *supra* note 19, at 207 (citation omitted).

32. Steinberg, *supra* note 31, at 208.
33. Nancy A. Naples, *The “New Consensus” on the Gendered “Social Contract”: The 1987-1988 U.S. Congressional Hearings on Welfare Reform*, 22 SIGNS 907, 908 n.3 (1997). Conceived of in this way, framing theory shares more with Gramscian theories of ideology, but in my view retains important differences in emphasis. Even more dialogic forms of framing theory are centered on the agency that individuals exercise in the exercise of speech and thought. Because of this, and because framing theorists view the world as made up of innumerable overlapping frames more than a few more totalizing ideologies, they are better situated to describe what Touraine calls the “complex of social relations and movement, cultural products and political struggles” that characterize the contemporary world. ALAIN TOURAINE, *THE VOICE AND THE EYE: AN ANALYSIS OF SOCIAL MOVEMENTS* 5 (1981); see also *supra* text accompanying notes 19-20.
34. Pedriana, *supra* note 12, at 1721-22 (“[L]aw and legal institutions have not been central components of social movement theory generally, nor of cultural framing scholarship specifically.”). This is likely in part because at least some early theorists understood social movements as entities that do not engage with law. See *supra* note 2.
35. Pedriana, *supra* note 12, at 1722 n.4; see also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); MICHAEL W. MCCANN, *RIGHTS AT WORK* (1994); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974); Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOC. 1201 (1991).
36. Pedriana, *supra* note 12, at 1723; see also Michael W. McCann, *How Does Law Matter for Social Movements?*, in *HOW DOES LAW MATTER?* 76, 78 (Bryant G. Garth & Austin Sarat eds., 1998) (“Just how law matters rarely is addressed in any sustained, theoretically rigorous way by

Recent work has sought to remedy this and to theorize the special role of law in frame mobilization.³⁷ Nicholas Pedriana, for example, makes the case that law and legal symbols serve as “master frames” for social movements,³⁸ which is to say, as powerful and broad “master algorithm[s]”³⁹ that “resonate deeply across social movements and protest cycles,”⁴⁰ and that have “potentially dominant” effects.⁴¹ The explanation for this, Pedriana argues, lies partially in the modern “legalization of society” (a phenomenon that, as de Tocqueville noted, has been particularly profound in the United States).⁴² But it lies also in the inherent qualities of law as a “dual resource” for movement actors, one that encompasses both “instrumental incentives and penalties, on the one hand, and socially constructed legitimating scripts and schemas, on the other.”⁴³ On this account, law is attractive to movements because it is both a “means by which a movement can . . . garner legitimacy and support for the movement” and “the ends of that process.”⁴⁴

Political scientist Michael McCann has also recently sought to elaborate and categorize the various ways that law influences the frames and processes of

[social movement] literature.”). Keck and Sikkink’s foundational account of transnational issue networks also does not address the role of law in the mobilization of such networks. This is striking, because there is a notable correspondence between international law and the two issues that they define as “most characteristic of [transnational advocacy] networks,” those of “bodily harm” (for example, torture) and “legal equality of opportunity.” KECK & SIKKINK, *supra* note 2, at 204.

37. Pedriana, *supra* note 12, at 1720. Other recent articles that theorize the role of law in frame mobilization include Ferree, *supra* note 20; Valerie Jenness, *Managing Differences and Making Legislation: Social Movements and the Racialization, Sexualization, and Gendering of Federal Hate Crime Law in the U.S., 1985-1998*, 46 SOC. PROBS. 548 (1999); and Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659 (2003).
38. Pedriana, *supra* note 12, at 1725.
39. Benford & Snow, *supra* note 13, at 618.
40. Pedriana, *supra* note 12, at 1725.
41. *Id.* at 1751. As Snow and Benford define them, “Master frames are generic; specific collective action frames are derivative. So conceived, master frames can be construed as functioning in a manner analogous to linguistic codes in that they provide a grammar that punctuates and syntactically connects patterns or happenings in the world.” Snow & Benford, *supra* note 23, at 138. Two examples of “master frames” that Snow and Benford offer are the “psychos salvational frame” (used, for example, by spiritual movements of self-realization) and the “civil rights frame” (which, as they invoke it, attributes blame for unjust circumstances to “encrusted, discriminatory structural arrangements rather than to the victim’s imperfections”). *Id.* at 139.
42. Pedriana, *supra* note 12, at 1726.
43. *Id.* at 1727.
44. *Id.* at 1729.

social movements. McCann emphasizes the fact that “law provides both normative principles and strategic resources for the conduct of social struggle,”⁴⁵ and seeks to build a dynamic model that identifies particular moments of legal influence on movements. Law can, in his view, be a resource for groups seeking to “name and to challenge existing social wrongs or injustices,”⁴⁶ provide practical “leverage” and “symbolic normative power,”⁴⁷ and influence a movement’s “overall ‘opportunity structure.’”⁴⁸ By the same token, “law can constrain opportunities when legal norms are biased against certain types of claims.”⁴⁹ Law thus “can at once both empower and disempower variously situated social groups.”⁵⁰

Legal scholars interested in questions of social change until recently paid little attention to the relationship between law and the frames used by social movements.⁵¹ There are some notable exceptions, who do not explicitly invoke the literature on framing, but who seek to illuminate the complex relationship between law’s meanings and social-movement mobilization. William Forbath’s work on the evolution of the American labor movement is one such example. He recounts the history of the interaction between the U.S. labor movement and courts, making the case that resistance and hostility from judges led the labor movement to realign its goals away from a radical republicanism and toward a more modest attempt to secure workers’ basic freedom to organize.⁵²

45. McCann, *supra* note 2, at 22.

46. McCann, *supra* note 36, at 83.

47. *Id.* at 90, 91.

48. *Id.* at 84.

49. *Id.* at 88.

50. *Id.* at 82. For a more comprehensive elaboration of some of these themes, see generally MCCANN, *supra* note 35. Both Pedriana and McCann invoke a capacious definition of “law,” understanding it not just as a set of institutions and rules, but also as a set of concepts and symbolic effects that are immanent to such institutions and rules, such as the “conceptual prisms of property, contract, rights, obligations, [and] due process.” Pedriana, *supra* note 12, at 1723; see also McCann, *supra* note 36, at 81. Lawyers and legal scholars might rightly note that there is no one legal “prism” of property or contract or rights. But the existence of multiple and competing legal narratives about, for example, the nature of property does not contradict the argument that legal discourses about property influence social conceptions of property. It simply suggests that these influences are multiple and may, at times, compete with one another.

51. McCann, *supra* note 36, at 77.

52. William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1132-79 (1989).

Over time, he seeks to show, organizers came to inhabit a language that they had adopted strategically.⁵³

Scholars such as Reva Siegel, William Eskridge, and Jack Balkin have begun to develop a broader theory of social-movement engagement with law that resonates with contemporary developments in social-movement theory.⁵⁴ Eskridge focuses on the civil rights, women's rights, and gay rights movements, arguing that "constitutional doctrine not only channel[ed] the energies of these social movements and countermovements, but also channel[ed] their rhetoric and perhaps even their ideologies into the furrows plowed by judges and law professors."⁵⁵ In time, the movements returned the favor.⁵⁶ Siegel has similarly argued that the U.S. Constitution "elicits and channels dispute."⁵⁷ Movements are drawn to and influenced by constitutional law because they understand it to be "semantically permeable," made of open-textured principles and authored by "the People."⁵⁸ But "constitutional argument can transform . . . conflicts" because those drawn to it end up framing conflicts "in light of constitutional values and the narratives understood to vindicate those values."⁵⁹

Siegel's more recent work argues that the Constitution and U.S. constitutional culture encourage groups vying for control over law to modulate their arguments to appeal to a broad constituency and to respond to the counterarguments offered by their opponents.⁶⁰ Movements therefore mute as well as provoke social conflict and "create[] areas of apparent or actual convergence in which the [Supreme] Court [can] decide cases."⁶¹ The result is

53. *Id.* at 1202-03.

54. See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

55. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 480 (2001).

56. *Id.* at 423 ("The channeling effect is not one-way. Just as constitutional law has influenced the rhetoric, strategies, and norms of social movements, so the movements have affected the rhetoric, strategies, and norms of American public law.").

57. Siegel, *supra* note 54, at 321.

58. *Id.* at 322.

59. *Id.* at 326.

60. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CAL. L. REV. 1323, 1352-56 (2006).

61. *Id.* at 1331.

that “[b]itter constitutional dispute can be hermeneutically constructive, and has little noticed socially integrative effects.”⁶²

Thus, a small contingent of legal scholars has recently begun to theorize the relationship between law and what are, in effect, the framing processes of social movements. Recent turns in social-movement theory and law-and-social-movements scholarship have thus created fertile new ground for dialogue. It is this terrain that we must mine if we are to understand the processes that have led to the emergence of the A2K coalition and, less intuitively, to the emergence of the coalition of intellectual property industries before it.

II. FROM INTELLECTUAL PROPERTY TO ACCESS TO KNOWLEDGE

Intellectual property law has been the location of tremendous conflict and flux in recent years. As the pages that follow describe, IP rights have become significantly stronger over the past thirty years, in both the domestic and international realms. The most widely accepted explanation for this trend is derived from public choice theory. IP rights, the argument goes, create opportunities for potentially lucrative rents. Businesses that could benefit from such rents recognize this fact and will generally be willing to spend up to the amount of their potential rents in order to secure these rights. Those most hurt by stronger IP are industries based upon copying, which do not enjoy monopoly rents, and average consumers, each of whom may be hurt in small ways and/or far in the future. In the “market” for law, then, IP industries purportedly enjoy a significant advantage.

How, then, are we to understand the recent countermovement that has emerged, and the recent shift in the political valence of IP law? This Part describes the recent strengthening of IP law and the emerging countermobilization and explains why public choice theories do not, in fact, fully and satisfactorily explain either event. Acts of framing have been central to both contexts and have permitted those involved to interpret their interests, forge common cause with others, and justify the legal action they have sought in terms that can persuade others. The frames adopted in the process of this mobilization and countermobilization matter because frames are not merely resources that can be wielded to serve their makers. They also generate opportunities for a group’s opponents and make possible unpredictable chains of argument and counterargument.

62. *Id.*

A. *The Historical Evolution of Enclosure and A2K*

As many scholars have noted, “By virtually any measure, intellectual property rights have expanded dramatically in the last three decades.”⁶³ Yochai Benkler and James Boyle have analogized the shift to a new “enclosure movement.”⁶⁴ Whatever it is called, the nature of the trend is clear: over the past thirty years, exclusive rights over information have grown broader (to cover more kinds of information), deeper (giving IP owners more robust rights of exclusion), and more severe (imposing greater penalties on infringers).

This worldwide phenomenon has been driven significantly by developments in the United States,⁶⁵ so we can begin our discussion here. In recent years, the scope of patentability expanded significantly,⁶⁶ standards for nonobviousness diminished,⁶⁷ the experimental-use exemption was weakened,⁶⁸ and patents became significantly more likely to be upheld in the

63. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1042 (2005); see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* 1-4 (2004); William W. Fisher III, *The Growth of Intellectual Property: A History of Ownership of Ideas in the United States* 22 (n.d.) (unpublished manuscript), available at <http://cyber.law.harvard.edu/people/tfisher/iphistory.pdf>, translated in *Geistiges Eigentum - ein ausufernder Rechtsbereich: Die Geschichte des Ideenschutzes in den Vereinigten Staaten*, in EIGENTUM IM INTERNATIONALEN VERGLEICH [INTERNATIONAL PERSPECTIVES ON PROPERTY] (Hannes Siegrist & David Sugarman eds., 1999).
64. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 33.
65. See, e.g., GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY RIGHTS AND THE LIFE SCIENCE INDUSTRIES* 8 (2003).
66. See, e.g., Fisher, *supra* note 63, at 4-5.
67. See Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 CAL. L. REV. 803, 823-27 (1988) (contending that the Federal Circuit transformed the secondary effects test of “commercial success” in ways that made it easier for inventions to be judged nonobvious); Arti K. Rai, *Intellectual Property Rights in Biotechnology: Addressing New Technology*, 34 WAKE FOREST L. REV. 827, 833 (1999) (“In considering DNA-based inventions, the [Federal Circuit] has employed nonobviousness in a manner that dramatically lowers the bar for patentability . . .”). But see Lee Petherbridge & R. Polk Wagner, *The Federal Circuit and Patentability: An Empirical Assessment of the Law of Obviousness*, 85 TEX. L. REV. 2051, 2055 (2007) (arguing that “much of the current commentary may overstate the concerns with the Federal Circuit’s approach to obviousness”). The Supreme Court recently raised the obviousness standard, although exactly how much is unclear. See *KSR Int’l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727 (2007).
68. See *Madey v. Duke Univ.*, 307 F.3d 1351 (Fed. Cir. 2002). A reasonably robust de facto research exemption seems to exist currently in academia, as researchers frequently ignore patents and are only rarely sued for infringement. See Rebecca S. Eisenberg, *Patents and*

face of challenges in the courts.⁶⁹ The protectable subject matter of copyright law likewise expanded, most prominently to include software.⁷⁰ The term of copyright protection was extended repeatedly,⁷¹ and enforcement actions against private, noncommercial copiers became more common.⁷² Penalties for violating copyright became harsher, and the rights accorded to owners, for example to prevent derivative uses, became more robust.⁷³ Finally, entirely new forms of protection emerged, such as a *sui generis* system to protect plant varieties and exclusive rights in data used to register pharmaceutical products.⁷⁴ Interesting questions can be raised about whether all of these changes in law should be categorized together and about the appropriate baseline against which to measure the “strengthening” of IP law.⁷⁵ There is

Data-Sharing in Public Science, 15 INDUS. & CORP. CHANGE 1013, 1018-19 (2006); John P. Walsh, Charlene Cho & Wesley M. Cohen, *View from the Bench: Patents and Material Transfers*, 309 SCI. 2002 (2005). Such scientists arguably are in a precarious position, however, and certainly in a worse position after *Madey* than they were before.

69. See ADAM B. JAFFE & JOSH LERNER, *INNOVATION AND ITS DISCONTENTS* 104-07 (2004); Merges, *supra* note 67, at 822.
70. See 17 U.S.C. §§ 101, 117 (2000); see also *id.* § 102(a)(4) (choreographic works); *id.* § 102(a)(8) (architectural works).
71. See, e.g., Sonny Bono Copyright Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.); An Act for the General Revision of the Copyright Law, Pub. L. No. 94-553, §§ 303-304, 90 Stat. 2541, 2573-76 (1976) (codified as amended in scattered sections of 17 U.S.C.); see also Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended in scattered sections of 19 U.S.C.) (restoration of foreign copyrights); Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (codified as amended in scattered sections of 17 U.S.C.) (automatic renewal).
72. See Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 335-36 (2003).
73. See Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 337-38 (1989); see also 17 U.S.C. §§ 505-506 (2000).
74. See Plant Variety Protection Act, Pub. L. No. 91-577, 84 Stat. 1542 (1970) (codified as amended at 7 U.S.C. §§ 2321-2582 (2000)); see also Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296 (codified as amended at 21 U.S.C. §§ 301, 394 (2000)); Drug Price Competition and Patent Term Restoration (Hatch-Waxman) Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified in scattered sections of 15, 21, & 35 U.S.C.); Orphan Drug Act, Pub. L. No. 97-414, 96 Stat. 2049 (1983) (codified as amended at 21 U.S.C. §§ 355, 360aa-360ee; 26 U.S.C. § 45C; 42 U.S.C. § 236 (2000)).
75. IP scholars discussing the expansion of IP law typically invoke a formal definition of law, or “law on the books.” This has the virtue of being both readily understood and conventional. (We generally speak of criminal law becoming stronger, for example, when the penalties associated with a crime are increased, rather than when the rate of a particular crime goes down.) One might reasonably object that the creation of IP rights in subject matter that previously did not exist (such as software) cannot be an “expansion” of IP unless one

clearly room for further specification of the claim, but on balance, it is fair to say, as many scholars have, that IP law has become stronger, both at a formal level and practically in many respects.

New technologies also make it possible for rights holders to exert more control over information at the code level. “Digital rights management” (DRM) tools or “technical protection measures” have become an important part of the contemporary appropriation strategies of the information industries.⁷⁶ Adobe uses DRM, for example, to prevent readers of its eBooks from copying text or using read-aloud programs.⁷⁷ Sony has developed “sterile” CDs, which permit users to make only one copy, which in turn cannot be copied.⁷⁸ Agriculture has seen the development of its own analogue to DRM technologies, so-called terminator genes and other genetic use restriction technologies designed to enhance the excludability of proprietary plant varieties.⁷⁹ Like DRM, these technologies frequently prevent uses that are

presumes a baseline of free information rather than property. Boyle himself notes this, suggesting that what he calls the “commons” of the mind might sometimes be more akin to frontier land or even drained swampland. See Boyle, *supra* note 64, at 41 n.34. But there are of course many indicators of the expansion of IP law that do not relate to newly existing subject matter (for example, lengthening copyright terms, the greater likelihood of success in patent infringement suits, and the introduction of robust exclusive rights in territories that previously lacked them). One might also ask whether the *practical* strength of IP law is greater today than it was thirty years ago, here invoking “law in action” rather than “law on the books.” The digital era, of course, brings new and formidable enforcement challenges for rights holders in the area of copyright. It is not clear, however, that the same is true in patent. Even in copyright, the issue is not easily parsed; while the digital era clearly undermines some enforcement efforts, it also increases the ability of IP owners to extract revenue, price discriminate, employ technical protection measures, and detect illegal uses. See, e.g., Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1 (2006). Moreover, the digital age creates new strategies for appropriation even as it undermines old strategies, see YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 29-90 (2006), suggesting that IP law could be stronger when measured against how much exclusivity is needed to generate the same amount of innovation. Yet another baseline we might use is the frequency with which individuals encounter IP law in their everyday activities. On that measure, copyright law has become significantly stronger since the advent of the digital age. See JESSICA LITMAN, *DIGITAL COPYRIGHT* 27-28 (2001).

76. See, e.g., Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 AM. J. COMP. L. 323 (2004).
77. Alan Story, Study on Intellectual Property Rights, the Internet, and Copyright 39 n.24 (n.d.) (unpublished manuscript), available at http://www.iprcommission.org/papers/pdfs/study_papers/sp5_story_study.pdf.
78. See *BMG Cracks Piracy Whip*, WIRED, May 31, 2005, <http://www.wired.com/entertainment/music/news/2005/05/67696>.
79. See *Terminator Technology—Five Years Later*, COMMUNIQUÉ (ETC Group, Ottawa, Can.), May/June 2003, at 2, available at http://www.etcgroup.org/upload/publication/pdf_file/167.

permitted in patent law.⁸⁰ In a sense, information industries are using technical protection measures to alter the genetic nature of information, manufacturing scarcity where before there was reproducibility. Although these changes are technical in nature, they have been accompanied by a supportive legal regime. Terminator technologies could obviously be the subject of government regulation, and digital encryption schemes and copy protection measures rely upon laws such as the Digital Millennium Copyright Act (DMCA), which make it illegal in most circumstances to attempt to circumvent DRM technologies.⁸¹

The trend of expansion in the international realm is even more striking. The TRIPS Agreement requires all members of the WTO to implement high levels of substantive IP protection. It requires, for example, patents in all fields of technology and of no less than twenty years in duration, some form of plant-variety protection, adherence to most of the Berne Convention on Copyright, and copyright protection for software object and source code.⁸² Moreover, TRIPS is just a floor. The WIPO Copyright Treaty (WCT),⁸³ which came into force in 2002, is an “optional” WIPO agreement that the United States is pressing a growing number of countries to join through bilateral trade agreements.⁸⁴ It adds to the substantive protections in the Berne Convention, for example by requiring signatories to create criminal as well as civil sanctions for the “remov[al] or alter[ation of] any electronic rights management information without authority.”⁸⁵

80. *Id.* at 3 (“Unlike patents and plant breeders’ rights, Terminator seeds are not time-limited, there is no user exemption for farmers, researchers or breeders, and no threat of compulsory licensing.”). In the copyright area, there is a growing literature proposing legal solutions to the problem of overbroad technical protection measures that restrict fair uses. *See, e.g.*, Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41 (2001); Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA’s Anti-Device Provisions*, 19 HARV. J.L. & TECH. 111 (2005); Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime To Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981 (2008).

81. 17 U.S.C. §§ 1201-1205 (2000); *see also* Cohen, *supra* note 75.

82. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 9, 10, 27, 33, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS].

83. WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65.

84. COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 106-07 (2002), *available at* http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf [hereinafter CIPR Report].

85. *See* WIPO Copyright Treaty art. 12(1)(i), *supra* note 83, S. TREATY DOC. NO. 105-17, at 11, 36 I.L.M. at 71.

The United States and European Union have also used bilateral and regional trade agreements to add to the substantive protections required by TRIPS. Since 2000, the United States has completed free trade agreements with more than a dozen countries, and it is pursuing agreements with many more.⁸⁶ Such agreements typically require signatories to increase IP protection in a host of areas, for example, by providing sui generis protection for pharmaceutical registration data, limiting the grounds on which compulsory licenses can be granted, providing for the extension of patent terms to compensate for delays arising from regulatory approval processes, providing for patents on life forms, adhering to the International Union for the Protection of New Varieties of Plants (UPOV) and the WIPO Copyright Treaty, enacting local versions of the DMCA, and extending copyright terms.⁸⁷

Over the last ten to fifteen years, however, numerous groups have emerged to contest the recent expansion of intellectual property. They have recently begun to forge alliances with one another and, jointly and severally, have had a substantial effect on both the substance and political valence of IP law.⁸⁸ Some of the earliest moments in this recent mobilization came on the heels of the negotiations over the TRIPS Agreement. In 1993, for example, more than five hundred thousand farmers demonstrated in Bangalore, India, demanding that their government reject the TRIPS Agreement and exclusive rights in seed

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86. See Office of the U.S. Trade Representative (USTR), *Bilateral Trade Agreements*, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Nov. 25, 2007).
87. See, e.g., Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125 (2004); Carsten Fink & Patrick Reichenmiller, *Tightening TRIPS: The Intellectual Property Provisions of Recent US Free Trade Agreements*, TRADE NOTE (World Bank Group, Washington, D.C.), Feb. 7, 2005, at 1-2. A new bipartisan agreement on trade policy has, however, recently moderated the USTR's mandate in the IP area. See *infra* note 158.
88. Several scholars have also noted these trends. See, e.g., Balkin & Siegel, *supra* note 54, at 948-49; James Boyle, *Cultural Environmentalism and Beyond*, LAW & CONTEMP. PROBS., Spring 2007, at 5, 15-17; Rosemary J. Coombe, *Commodity Culture, Private Censorship, Branded Environments, and Global Trade Politics: Intellectual Property as a Topic of Law and Society Research*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 369, 387 (Austin Sarat ed., 2004); Susan K. Sell, *Post-TRIPS Developments: The Tension Between Commercial and Social Agendas in the Context of Intellectual Property*, 14 FLA. J. INT'L L. 193, 216 (2002); Susan K. Sell, *Books, Drugs, and Seeds 14-15* (Mar. 20, 2006) (unpublished manuscript), available at http://www.tacd.org/events/intellectual-property/s_sell.doc; cf. Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 331-32 (2006) (considering the diverse set of groups and claims emerging to contest IP law, arguing that these claims should be understood through rubrics of identity politics and culture, and positing that they suggest "a broader normative purpose for intellectual property").

stocks for multinational firms.⁸⁹ It was only one in a series of similar actions around India in the surrounding months.⁹⁰ The Indian protests were the most visible manifestation of a network of farmers in developing countries and NGOs organizing around the subject, united with “striking uniformity” by their sense that “the international IPR regime is heavily weighted against farmers.”⁹¹

Campaigns such as these rapidly built cross-border networks in order to contest newly internationalizing IP law. In 1993, for example, farmers’ rights advocates built an international campaign against one company’s efforts to obtain U.S. and E.U. patents related to extractions of an insecticidal compound from the Indian neem tree.⁹² The fact that the tree could be used to produce a pesticide had been known for many years in India.⁹³ Activists filed a patent reexamination request in the United States accompanied by signatures “of more than 100,000 Indians, as well as by more than 225 agricultural, scientific, and trade groups in 45 countries.”⁹⁴ Explaining the action, a leader of the group said: “The real battle is whether the genetic resources of the planet will be maintained as a shared commons or whether this common inheritance will be commercially enclosed and become the intellectual property of a few big

89. See Martin Khor, *Indian Farmers Fight Seed Patents*, GREEN LEFT WKLY., Nov. 10, 1993, <http://www.greenleft.org.au/1993/122/5060>.

90. See *id.*; see also John-Thor Dahlburg, *Trade Pact Foes, Cops Clash in India*, CHI. SUN-TIMES, Apr. 6, 1994, at 30S.

91. Craig Borowiak, *Farmers’ Rights: Intellectual Property Regimes and the Struggle over Seeds*, 32 POL. & SOC’Y 511, 512 (2004); see also SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW 140-46 (2003) (describing the emergence of the farmers’ rights movement and advocacy around plant variety protection). Farmers’ rights protests continue to this day, and not only in India. See, e.g., Denise Caruso, *Someone (Other Than You) May Own Your Genes*, N.Y. TIMES, Jan. 28, 2007, at 3 (discussing recent protests in Peru).

92. The company, W.R. Grace & Co., secured such patents in the United States. See U.S. Patent No. 5,124,349 (filed Oct. 31, 1990); U.S. Patent No. 4,946,681 (filed June 26, 1989); see also Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73, 106 (2003). The company also applied for such a European patent. See Eur. Patent No. EP0436257B1 (filed Dec. 20, 1990); Chris Hamilton, *Biodiversity, Biopiracy and Benefits: What Allegations of Biopiracy Tell Us About Intellectual Property*, 6 DEVELOPING WORLD BIOETHICS 158, 165 (2006). On the emergence of the campaign in India, see Linda Bullard, *Freeing the Free Tree: A Briefing Paper on the First Legal Defeat of a Biopiracy Patent* 6 (Mar. 2005) (unpublished manuscript), available at http://www.ifoam.org/press/press/pdfs/Briefing_Neem.pdf. See also David Dickson & K.S. Jayaraman, *Aid Groups Back Challenge to Neem Patents*, 377 NATURE 95 (1995) (discussing demonstrations led by the Karnataka state farmers’ association). On its internationalization, see Ghosh, *supra* at 106-07; and Bullard, *supra* at 3.

93. Hamilton, *supra* note 92, at 165.

94. John F. Burns, *Tradition in India vs. a Patent in the U.S.*, N.Y. TIMES, Sept. 15, 1995, at D4.

corporations.”⁹⁵ The U.S. reexamination appeal failed, but the opposition to the European patent succeeded, providing what campaigners pronounced the “First Legal Defeat of a Biopiracy Patent.”⁹⁶

In 1995, the Clinton Administration launched an initiative to strengthen copyright law and to introduce sui generis protections for databases both in the United States and (with the help of the European Union) at the international level through WIPO.⁹⁷ Almost immediately, the initiatives met strong opposition from scientific, academic, and consumer rights circles.⁹⁸ The opposition quickly internationalized, as domestic opponents to the Clinton Administration’s plan went to WIPO to press their case.⁹⁹ The amount and intensity of attention to copyright and database protection issues among academic and public interest groups was unprecedented, as was the international public interest coalition that emerged at WIPO. Their efforts met with significant success: “In the end, none of the original U.S.-sponsored digital agenda proposals emerged unscathed from the negotiation process, and at least one – the proposed database treaty – did not emerge at all.”¹⁰⁰

95. *Id.*

96. Bullard, *supra* note 92, at 1.

97. See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369, 372-73, 418-19 (1997).

98. See *id.* at 429, 432-34; see also *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Comm. on the Judiciary*, 104th Cong. 72-78 (1995) (statement of Peter A. Jaszi); Colin Macilwain, *US Science Lobby Intensifies Attack on Database Pact . . .*, 384 NATURE 299 (1996); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997); *Administration’s Copyright Proposal Draws Equal, Opposite Reactions*, INFO. L. ALERT, Dec. 1, 1995, at 6 (excerpting a letter to Congress by the Digital Future Coalition, representing librarians, computer firms, and public interest groups); James Boyle, Op-Ed., *Sold Out*, N.Y. TIMES, Mar. 31, 1996, at E15; Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134; Robert M. White, *Taking on the Database Challenge – and Winning*, TECH. REV., May/June 1997, at 65; Digital Future Coalition, *A Description of the Digital Future Coalition*, http://www.dfc.org/dfc1/Learning_Center/about.html (last visited Nov. 2, 2007) (describing the creation of a coalition of “non-profit educational, scholarly, library, and consumer groups, together with major commercial trade associations representing leaders in the consumer electronics, telecommunications, computer, and network access industries” that emerged in response to the Clinton Administration’s digital agenda (emphasis omitted)).

99. Samuelson, *supra* note 97, at 374 (citations omitted); see also Digital Future Coalition, *supra* note 98.

100. Samuelson, *supra* note 97, at 374-75; see also Fisher, *supra* note 63, at 25 (describing the defeat of some of the Clinton Administration’s white paper proposals as the result of “a publicity and lobbying campaign waged by a miscellaneous group of scholars, educators, and public-interest activists”).

A few years later, the access-to-medicines campaign was born, when AIDS activists and humanitarian organizations joined forces to demand antiretroviral medicines for the millions of people in developing countries dying of HIV/AIDS. Patented AIDS medicines were extremely expensive, and campaigners focused their attention on the refusal of patent-holding companies to offer significant discounts or permit the use of generic alternatives and on the limits that the TRIPS Agreement and the trade policies of countries such as the United States put on countries' abilities to override patents.¹⁰¹

Activists adopted confrontational tactics and achieved rapid results.¹⁰² In April 2000, they forced thirty-nine multinational drug companies to abandon a high-profile lawsuit challenging a South African law designed to reduce the price of medicines there.¹⁰³ Another important victory came in 2001 at a WTO ministerial meeting in Qatar. As the *Wall Street Journal* reported, "unlike in 1993, when intellectual-property protections were first negotiated as part of the initial WTO pact, this time the [drug company] lobbyists were matched by AIDS activists who proved to be a well-coordinated group of opponents."¹⁰⁴ The result was the "Doha Declaration on the TRIPS Agreement and Public Health," which states that the TRIPS Agreement "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."¹⁰⁵ The Doha Declaration also set in motion a process that resulted in the first ever amendment to TRIPS (or indeed, to any core WTO agreement), which gives developing countries marginally more flexibility to use generic medicines.¹⁰⁶ But perhaps the most significant measure of the success of the campaign has been the drastic fall in the price of antiretroviral medicines. In a few years, the world-best price of first-line triple-combination HIV/AIDS

101. See, e.g., Barton Gellman, *A Conflict of Health and Profit: Gore at Center of Trade Policy Reversal on AIDS Drugs to S. Africa*, WASH. POST, May 21, 2000, at A1. For a description of the movement written by a key participant, see Ellen 't Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT'L L. 27 (2002).

102. See, e.g., Gellman, *supra* note 101.

103. See Rachel L. Swarns, *Drug Makers Drop South Africa Suit over AIDS Medicines*, N.Y. TIMES, Apr. 20, 2001, at A1.

104. Geoff Winestock & Helene Cooper, *Activists Outmaneuver Drug Makers at WTO*, WALL ST. J., Nov. 14, 2001, at A2.

105. World Trade Organization, Ministerial Declaration of 14 November 2001 on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

106. Press Release, World Trade Org., Members OK Amendment To Make Health Flexibility Permanent (Dec. 6, 2005), http://www.wto.org/English/news_e/preso5_e/pr426_e.htm.

therapy purchased from originator companies dropped by ninety-five percent, and generics became available in many developing countries at a discount of ninety-nine percent.¹⁰⁷

In 2003, two Swarthmore students, Nelson Pavlovsky and Luke Smith, founded the “Swarthmore Coalition for the Digital Commons.”¹⁰⁸ The group met regularly to discuss what they called issues of the “intellectual commons,” including “drug patents, music downloading, and Monsanto’s crop patents.”¹⁰⁹ It was just a discussion group, until Pavlovsky and Smith decided to post internal memos from a company called Diebold on the Internet. The memos described systemic flaws in Diebold’s voting machines, and Diebold was keen to keep them out of the public eye. The company sent the students (and many others like them) cease-and-desist letters asserting that the posting was an act of copyright infringement. The students found some powerful allies, Diebold retreated, and Smith and Pavlovsky ultimately won a copyright abuse suit against the company.¹¹⁰ They then set their sights on a new challenge: creating a “Free Culture” movement on college campuses around the world, in order to “reverse the recent radical expansion of intellectual property” and “build a technological and cultural movement to defend the digital commons.”¹¹¹ Despite its recent beginnings, it now has more than thirty chapters in the United States and some germinating in other countries too.¹¹² As a profile in the *New York Times* recently remarked, members of the Free Culture movement “talk about the group’s goals with something like the reverence that earlier generations displayed in talking about social or racial equality.”¹¹³

107. MÉDECINS SANS FRONTIÈRES [DOCTORS WITHOUT BORDERS], UNTANGLING THE WEB OF PRICE REDUCTIONS 5 (9th ed. 2006), available at <http://www.doctorswithoutborders.org/news/hiv-aids/untangled.pdf>. These price reductions do not mean, of course, that the problem of access to HIV/AIDS treatment has been solved, or that price is no longer an issue. See UNAIDS & WORLD HEALTH ORG., AIDS EPIDEMIC UPDATE 5, 7-8 (2007); Robert Steinbrook, *Closing the Affordability Gap for Drugs in Low-Income Countries*, 357 NEW ENG. J. MED. 1996 (2007).

108. See FreeCulture.org, About, <http://freeculture.org/about> (last visited Nov. 2, 2007); see also John Schwartz, *File Sharing Pits Copyright Against Free Speech*, N.Y. TIMES, Nov. 3, 2003, at C1; Emily Hawkins, *Swarthmore Free Culture: Two Teenage Digital Davids Down Diebold*, CAMPUS PROGRESS, <http://www.campusprogress.org/tools/169/digital-davids-down-diebold> (last visited Nov. 2, 2007).

109. Hawkins, *supra* note 108.

110. *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

111. FreeCulture.org, Manifesto, <http://freeculture.org/manifesto> (last visited Nov. 2, 2007).

112. See FreeCulture.org, *supra* note 108.

113. Rachel Aviv, *File-Sharing Students Fight Copyright Constraints*, N.Y. TIMES, Oct. 10, 2007, at B7.

The Free Culture movement is in many ways the child of the Creative Commons movement, which was begun in 2001 by law professor Lawrence Lessig, with the support of colleagues such as James Boyle and Eric Eldred.¹¹⁴ The Creative Commons project seeks to “build a layer of *reasonable* copyright on top of the extremes that now reign.”¹¹⁵ It does this by offering creators a series of copyright licenses that give users more rights than they would have under the default rules of copyright law, for example the right to make derivative works or to reproduce covered material for noncommercial purposes.¹¹⁶ Use of the licenses has grown exponentially in the last few years, and today they govern an estimated sixty million copyrighted works around the world.¹¹⁷

Recent years have also seen the emergence and extraordinary success of free and open-source software paradigms. Such software is created by volunteers, and sustained by an open-licensing scheme that guarantees users’ rights to share and modify the software source code.¹¹⁸ Free and open-source software programs such as Linux have become major components in the worldwide software market, and have been adopted by leading corporations such as IBM, HP, and Dell.¹¹⁹ Successful new enterprises have also emerged to sell services and support to users of free software, demonstrating that new business models can be built around informational products that are not governed by rules of exclusivity.¹²⁰ Because free and open-source software has been both wildly successful and contradicts “our longstanding perceptions of how people behave

114. See Christopher M. Kelty, *Punk to Culture*, 77 ANTHROPOLOGICAL Q. 547, 549 (2004); see also Creative Commons, History (July 13, 2007), <http://creativecommons.org/about/history>.

115. LAWRENCE LESSIG, *FREE CULTURE* 282 (2004).

116. See Creative Commons, Choosing a License: Creative Commons Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited Nov. 2, 2007).

117. See Giorgos Cheliotis et al., Taking Stock of the Creative Commons Experiment: Monitoring the Use of Creative Commons Licenses and Evaluating Its Implications for the Future of Creative Commons and for Copyright Law 6 (Aug. 15, 2007) (unpublished manuscript), available at <http://web.si.umich.edu/tprc/papers/2007/805/CreateCommExp.pdf>.

118. For histories and analyses of the free and open-source software movements, see GLYN MOODY, *REBEL CODE* (2001); STEVEN WEBER, *THE SUCCESS OF OPEN SOURCE* (2004); and Eric von Hippel & Georg von Krogh, *Open Source Software and the “Private-Collective” Innovation Model: Issues for Organization Science*, 14 ORG. SCI. 209 (2003). For details on the licensing scheme that underpins free software, see *infra* text accompanying note 284.

119. See Kenneth J. Rodriguez, *Closing the Door on Open Source: Can the General Public License Save Linux and Other Open Source Software?*, 5 J. HIGH TECH. L. 403, 404 (2005); *March of the Penguin: Linux Wins Battles, but Windows Owns the War*, GLOBE & MAIL (Toronto), May 17, 2007, at B11.

120. See, e.g., RedHat Home Page, <http://www.redhat.com/> (last visited Nov. 2, 2007).

and how economic growth occurs,”¹²¹ it has also been central to the theorization of a new mode of production that is characteristic of the digital networked age: the “commons-based peer production model,” which “relies on decentralized information gathering and exchange.”¹²²

Increasingly, programmers have moved beyond bottom-up private-ordering strategies to advocate top-down legal change. They have focused particularly on software patents, which many believe present a significant threat to the collaborative processes that produce free and open-source software.¹²³ Thus, programmers—supported by corporations that have put open-source software at the center of their business models—recently launched a vocal campaign against an E.U. patent directive that would have ensured the availability of software patents throughout Europe.¹²⁴ By mobilizing hundreds of demonstrators and lobbyists, these programmers helped persuade the European Parliament to abandon that directive.¹²⁵ A German parliamentarian

121. Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 446 (2002).

122. *Id.* at 375.

123. See, e.g., Jean Paul Smets & Hartmut Pilch, *Software Patentability with Compensatory Regulation: A Cost Evaluation*, UPGRADE, Dec. 2001, at 23, available at <http://www.upgrade-cepis.org/issues/2001/6/up2-6Smets.pdf>.

124. See NoSoftwarePatents.com, About the Campaign, <http://www.nosoftwarepatents.com/en/m/about/index.html> (last visited Nov. 2, 2007).

125. See Marc Jacoby, *How Hartmut Pilch, Avid Computer Geek, Bested Microsoft*, WALL ST. J., Sept. 12, 2006, at A1 (describing the protests and lobbying at the European Parliament, and quoting one Member of Parliament stating that it was “the sheer volume and number of people” that caused Parliament to vote against the software directive); see also Mark F. Schultz & David B. Walker, *How Intellectual Property Became Controversial: NGOs and the New International IP Agenda*, ENGAGE, Oct. 2005, at 82, 92, available at http://www.fed-soc.org/doclib/20070321_Octo5.pdf (crediting the movement with “blocking software patents in the EU”). The defeat should be kept in perspective: the European Patent Office (EPO) has effectively granted many software patents already, permitting them if they are directed at a “technical process” rather than the software itself. See EUROPEAN PATENT OFFICE, GUIDELINES FOR EXAMINATION pt. C, ch. IV-4 (2005); Michael Guntersdorfer, *Software Patent Law: United States and Europe Compared*, 2003 DUKE L. & TECH. REV. 0006, <http://www.law.duke.edu/journals/dltr/articles/PDF/2003DLTR0006.pdf>. But the European Patent Convention explicitly forbids patents on software as such. European Patent Convention § 52(2)(c), 13 I.L.M. 268, 285 (1974), available at http://www.european-patent-office.org/legal/epc/pdf/epc_2006_v5_bm_en.pdf. EPO member countries (who are not identical with E.U. countries) are also free to take a different view when it comes to enforcing a patent issued by the EPC. This led to the argument for the European Union directive, which would have ostensibly “codified” the EPO standard and ensured that E.U. members uniformly enforced software patents. See Andreas Grosche, *Software Patents—Boon or Bane for Europe?*, 14 INT’L J.L. & INFO. TECH. 257 (2006); Jack George Abid, Note, *Software Patents on Both Sides of the Atlantic*, 23 J. MARSHALL J. COMPUTER & INFO. L. 815, 832 (2005);

who led the attempt to pass the law gave the following pithy account of its demise: “They produced a whole movement. . . . Industry was sleeping.”¹²⁶ More and more programmers seem to be warming to the activist role. In France, computer enthusiasts recently staged street demonstrations and demanded to be arrested for violating digital rights management systems that, for example, prevent an individual from playing iTunes music files on a portable player other than an iPod.¹²⁷

In the past several years, there have also been attempts by key architects of this new politics to build something more sustained and interconnected. As the previous pages demonstrate, the recent surge of advocacy around intellectual property issues has always oscillated between local and global, often within very short timeframes and in the same campaign. But attempts to conjoin all of these groups under the rubric of the “access to knowledge movement” and to try to create a common framework through which to articulate their concerns came only very recently.

Perhaps the most significant flashpoint was in 2004, when Brazil and Argentina, seeking to capitalize on the growing discontent among public interest groups and developing-country governments regarding international IP law, proposed that WIPO revisit its mandate and adopt what they called a “development agenda.” The aim was to secure a new commitment within WIPO to the concerns and needs of developing countries and a willingness to explore the potential of non-IP based models of innovation, such as open-source software and open genomics.¹²⁸ In conjunction with this proposal, advocates organized a meeting in Geneva that brought policymakers and business representatives together with participants in the access-to-medicines, free-software, Creative Commons, open-science, and open-publishing

see also Robert Bray, *The European Union “Software Patents” Directive: What Is It? Why Is It? Where Are We Now?*, 2005 DUKE L. & TECH. REV. 0011, <http://www.law.duke.edu/journals/dltr/articles/PDF/2005DLTR0011.pdf>.

126. See Jacoby, *supra* note 125.

127. Thomas Crampton, *Their Crime: Playing iTunes on Devices Not Named iPod*, N.Y. TIMES, Oct. 9, 2006, at C4. Apple has since begun to sell some DRM-free tracks, initially making them more expensive but recently reducing their price to the standard \$0.99. Joshua Chaffin, *Apple Slashes Price of DRM-Free Songs Online*, FIN. TIMES (London), Oct. 17, 2007, at 20.

128. WIPO, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, 31st (15th Extraordinary) Sess., WO/GA/31/11 (Aug. 27, 2004), available at http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf [hereinafter Development Agenda Proposal].

campaigns.¹²⁹ The meeting endorsed the proposal for a development agenda, and produced a three-page document entitled the “Geneva Declaration on the Future of the World Intellectual Property Organization.”¹³⁰ Signed by more than five hundred individuals, this declaration reads like nothing so much as a manifesto for a new movement.

“Humanity faces a global crisis in the governance of knowledge, technology, and culture,” the Geneva Declaration proclaims, and cites as evidence widespread lack of access to medicines, global inequalities in access to education and technology, growing obstacles to follow-on innovation, misappropriation of the public domain, and increasing concentration and anticompetitive practices in the knowledge industries.¹³¹ It goes on to emphasize the success of new modes of knowledge production such as open-source software and Wikipedia, and insists that “[h]umanity stands at a crossroads—a fork in our moral code and a test of our ability to adapt and grow.”¹³² It poses the choice as one between existing policies, which it calls “intellectually weak, ideologically rigid, and sometimes brutally unfair and inefficient,” and new models to produce and govern informational goods.¹³³ It calls for a “moratorium on new treaties and harmonization of standards that expand and strengthen monopolies and further restrict access to knowledge,” urges the negotiation of a “Treaty on Access to Knowledge and Technology,” and demands fundamental procedural reforms in WIPO to render it more responsive to the needs of developing countries and more open to participation from public interest groups.¹³⁴

The WIPO membership voted to create a committee to consider the adoption of a development agenda,¹³⁵ and NGOs and activists took advantage of the opening by convening further international meetings to define that agenda. One result was a document that might be thought of as a preliminary campaign platform for this new mobilization: a draft Access to Knowledge Treaty. Two themes unite many of the proposals in the text: the idea that

129. See Trans Atlantic Consumer Dialogue, *The Future of WIPO* (Sept. 13, 2004), <http://www.tacd.org/events/wipo/index.htm>.

130. See Geneva Declaration on the Future of the World Intellectual Property Organization, <http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf> (last visited Nov. 2, 2007) [hereinafter *Geneva Declaration*].

131. *Id.* at 1.

132. *Id.*

133. *Id.*

134. *Id.* at 2.

135. World Intellectual Property Organization, *WIPO General Assembly Report* ¶ 146, WO/GA/32/13 (Oct. 5, 2005).

“restrictions on access ought to be the exception, not the other way around,” and that “both subject matter exclusions from, and exceptions and limitations to, intellectual property protection standards are mandatory rather than permissive.”¹³⁶ Notably, the treaty addresses not only users’ rights, but also rights and structures intended to benefit open-source models of innovation.¹³⁷

The Access to Knowledge Treaty is a prototype more than a completed proposal, but intra-issue collaborations have since spread to other fora. In 2005, leading figures in the free software movement, the farmers’ rights movement, the open genomics movement, the Creative Commons, librarian organizations, and the access-to-medicines movement, along with the Minister of Culture of Brazil, drafted the “Adelphi Charter,” a set of principles that they contend governments and international agencies should respect when modifying IP laws.¹³⁸ Low-level conferences to generate dialogue between groups such as software programmers and farmers’ rights advocates are also being organized.¹³⁹ Knowledge-rights activists are also increasingly issuing calls for greater cooperation and sharing between them. An editorial recently published by the farmers’ rights organization GRAIN, for example, urged that if those “working on free software, no-patents-on-life, access to generic drugs, traditional medicine, digital rights, peer-to-peer networking and ‘fair use’ came together and formulated one common platform to rein in the IPR system, the effect could be explosive.”¹⁴⁰ New umbrella organizations such as “IP-Watch”

136. Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 1013 (2007).

137. See A2K Treaty, *supra* note 1; *id.* art. 3.1 (creating exceptions and limitations to copyright law); *id.* art. 5.1 (creating a “knowledge commons committee . . . to promote cooperation and investment in databases, open access journals and other open knowledge projects that expand the knowledge commons”). I should note that I participated in the meeting and discussions that produced the draft treaty.

138. Adelphi Charter on Creativity, Innovation, and Intellectual Property (Oct. 13, 2005), http://www.sitoc.biz/adelphicharter/pdfs/adelphi_charter2.pdf [hereinafter Adelphi Charter].

139. See, e.g., FTA Watch et al., *Fighting FTAs: An International Strategy Workshop*, Bangkok, Thailand (July 27, 2006), available at <http://www.bilaterals.org/IMG/pdf/Fighting-FTAs-summary-report.pdf>; Frederick Noronha, *India at the Forefront of Knowledge Commons Debate*, INTELL. PROP. WATCH, Sept. 3, 2006, http://www.ip-watch.org/weblog/index.php?p=389&res=1280_ff.

140. Editorial, *Freedom From IPR: Towards a Convergence of Movements*, SEEDLING, Oct. 2004, at 3, available at <http://www.grain.org/seedling/?id=301>; see also David M. Berry & Giles Moss, *The Politics of the Libre Commons*, FIRST MONDAY, Sept. 2006, http://www.firstmonday.org/issues/issue11_9/berry/index.html (arguing that the open-source and free commons struggles could come together to form a radical democratic project).

and “IP Justice” have recently been created to contribute to and to report on the activities of these groups.¹⁴¹

These overt attempts to build interissue platforms are also mirrored by a wave of everyday cross-references and collaborations. For example, when asked why the Brazilian government was migrating its computers to open-source software, Brazil’s top technology official, Sérgio Amadeu, explained that the shift would reduce licensing fees, support a national effort to increase computer access, and promote the development of local technological industries.¹⁴² Then he added a fourth reason: “Free software is like generic drugs.”¹⁴³ Creative Commons explains that it drew inspiration for its licenses from those that govern free software.¹⁴⁴ Richard Stallman, one of the founders of the free-software movement, recently published a letter in an open content journal declaring that free software and open publishing are “based on the same fundamental principle: knowledge contributes to society when it can be shared and developed by communities.”¹⁴⁵ A prominent farmer’s rights organization encourages visitors to its Web site to learn about “Software Freedom Day.”¹⁴⁶ Scientist Richard Jefferson, who recently invented an important new genomics tool that is governed by an open-source license (also modeled on open-source software licenses), states that “[e]verything that open source has been fighting in software is exactly where we find ourselves now with biotechnology.”¹⁴⁷

NGOs and activist coalitions that emerged independently of one another to contest the contours of IP rights in seeds, medicines, software, genetic material, and cultural goods are thus beginning to build links to one another. The structure of this emerging mobilization is more akin to a network than a pyramid.¹⁴⁸ Like many networks, this one is characterized not only by

141. See Intellectual Property Watch, Mission, http://ip-watch.org/mission.php?res=1024_ff (last visited Nov. 2, 2007); IP Justice, Our Mission, <http://ipjustice.org/wp/about/mission/> (last visited Nov. 2, 2007).

142. Jonathan Karp, *A Brazilian Challenge for Microsoft: The Government’s Preference for Open-Source Software May Tilt the Playing Field*, WALL ST. J., Sept. 9, 2003, at A14.

143. *Id.* (internal quotation marks omitted).

144. See Creative Commons, *supra* note 114.

145. Richard Stallman, *Free Community Science and the Free Development of Science*, 2 PLOS MED. 0169, 0170 (2005).

146. GRAIN, Freedom from IPR, <http://www.grain.org/i/?m> (last visited Nov. 2, 2007).

147. Thomas Goetz, *Open Source Everywhere*, WIRED, Nov. 2003, at 158, 211, <http://www.wired.com/wired/archive/11.11/opensource.html>.

148. By this I mean to suggest that the mobilization is arranged through horizontal and overlapping webs of association rather than through a centralized and vertical structure of

horizontal connections between actors engaged in advocacy around IP, but also by “hubs,” or groups and individuals who are prominent within the network for the density and intensity of their connections.¹⁴⁹ These key participants are seeking to create a set of shared principles, arguments, and identities between groups that are otherwise divided by their substantive or regional focus.

These groups have also begun to have, jointly and severally, a significant impact on IP law. Some such effects have been noted above: the successes of the access-to-medicines campaign in obtaining an amendment to TRIPS and bringing down the prices of HIV/AIDS medicines; the success of free-software programmers in preventing the codification of software patents in Europe; and the expansive growth of the private ordering schemes introduced by proponents of free software and the Creative Commons.

Some of the most significant changes that these groups have inaugurated are those underway at WIPO. The political dynamic triggered by the development-agenda process has created a significant challenge to the agency’s mandate. Negotiations over new treaties creating broadcasting rights and further harmonizing substantive patent law very recently fell apart, with developed countries disagreeing with one another, developing countries objecting, and A2K groups in active opposition.¹⁵⁰ A2K advocates, in concert with supportive developing country governments, successfully pressed WIPO to create a new standing committee to discuss the impact of IP on

hierarchy. See MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 501-02 (2d ed. 2000) (describing a network as “a set of interconnected nodes,” that is “highly dynamic,” “open,” and “susceptible to innovating without threatening its balance”). Like Keck and Sikkink, I use the term to emphasize the “fluid and open relations among committed and knowledgeable actors working in specialized issue areas,” KECK & SIKKINK, *supra* note 2, at 8, the “voluntary, reciprocal, and horizontal patterns of . . . exchange” between participants, *id.*, and the “dense exchanges of information and services” within the network, *id.* at 2.

149. We might begin identifying the hubs in this new network by examining the participants in prominent A2K initiatives, such as the Adelphi Charter, see Adelphi Charter on Creativity, Innovation and Intellectual Property, Who Are We?, <http://www.sitoc.biz/adelphicharter/group.asp.htm> (last visited Nov. 2, 2007); the Geneva Declaration, see Signing the Geneva Declaration on the Future of WIPO (Oct. 7, 2004), <http://www.cptech.org/ip/wipo/signatures.html>; and the Access to Knowledge Treaty, see Access to Knowledge (A2K), <http://www.cptech.org/a2k/a2k-debate.html> (last visited Nov. 2, 2007). A list of hubs of the A2K network would include scholars, activists, NGOs, and even some representatives from government and business. Most are based in northern countries, but there is significant and influential participation from grassroots activists and actors based in developing countries.
150. See Schultz & Walker, *supra* note 125, at 82; Frances Williams, *Piracy Collapses Broadcasting Treaty*, FIN. TIMES (London), June 24, 2007, <http://www.ft.com/cms/s/0/71ed85da-225e-11dc-ac53-000b5df10621.html>; *WIPO Broadcast Treaty Talks Collapse*, BRIDGES (Int’l Centre for Trade & Sustainable Dev., Geneva, Switz.), June 27, 2007, at 4.

development,¹⁵¹ to make the agency's technical assistance programs better serve the interests of developing countries, and to "promote norm-setting activities related to IP that support a robust public domain in WIPO's Member States."¹⁵² Developing countries have also urged WIPO to take up proposals to articulate minimum exceptions and limitations in areas such as copyright, pointing to the possibility that WIPO could be used to create ceilings, and not just floors, for IP rights.¹⁵³

In the United States, significant changes in patent law are also underway. Major reports from both the Federal Trade Commission and the National Academy of Sciences have expressed concern that patent law has become overgrown and have recommended major reform.¹⁵⁴ After many years of implicitly ceding the realm to the Federal Circuit, the Supreme Court has stepped decisively back into the arena. The past few years have seen "the highest level of patent activity at the Court in forty years."¹⁵⁵ The result has been a series of decisions that have diminished the power of patents.¹⁵⁶ Precisely how much awaits determination in the lower courts, but these cases have sent a clear signal of concern that the U.S. patent system has become too strong and may be stifling rather than promoting innovation.¹⁵⁷ A new bipartisan agreement on trade policy that was recently negotiated in Congress

151. WIPO, Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) (June 11, 2007), http://www.wipo.int/ip-development/en/agenda/pcdao7_session4.html.

152. *Id.*

153. WIPO, *Proposal by Chile on the Analysis of Exceptions and Limitations*, WO/SCCR/13/5 (Nov. 22, 2005), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_13/sccr_13_5.pdf.

154. FED. TRADE COMM'N, *TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY* (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>; NAT'L ACAD. OF SCIS., *A PATENT SYSTEM FOR THE 21ST CENTURY* (Stephen A. Merrill et al. eds., 2004).

155. Harold C. Wegner, *Wegner's Top Ten Supreme Court Patent Cases*, IP FRONTLINE, Nov. 28, 2005, at 1, 2, available at <http://www.ipfrontline.com/downloads/SupremeCourtNov28.pdf>.

156. See, e.g., *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727 (2007); *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764 (2007); *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006).

157. See, e.g., *KSR Int'l Co.*, 127 S. Ct. at 1741 (noting that "[g]ranting patent protection to advances that would occur in the ordinary course without real innovation retards progress"); *eBay Inc.*, 126 S. Ct. at 1842 (Kennedy, J., concurring) (noting that "in many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases" and making reference to the emergence of patent holders who do not work patents but exist only to seek licensing fees, as well as the "suspect validity" of some business method patents).

has ratcheted back the U.S. Trade Representative's (USTR's) mandate to increase IP protection through free trade agreements, particularly with developing country trading partners.¹⁵⁸

As of this writing, a bipartisan patent reform bill is also pending that would make meaningful changes in the patent system in order to address perceived problems with patent quality and the expense of patent litigation.¹⁵⁹ The process that has led to this reform effort has also turned up significant rifts in the coalition of IP industries. As one newspaper editorial page characterized it, patent reform negotiations have

brought on a fight between two usually like-minded allies, biotech and computer technology. Other groups—financial services, universities, research firms, and small inventors—are taking sides too. . . . In broad terms, large tech firms want patents harder to get, easier to challenge and worth less when infringement occurs. Big players, such as Cisco or Intel, claim “patent trolls” target their products with longshot claims over a small part in a router or computer chip. . . . Biotech has a different gripe. A pill built around a lab-created molecule or protein fold may need only a few patents. Biotech firms spend millions of dollars to develop silver-bullet drugs that need years of sales to pay back the investment. These firms want the nuclear option that tough patent defenses bring: Infringe on our product, and we'll destroy you in court.¹⁶⁰

All of these signals point to a significant shift in the political valence of the field of IP in a few short years. A once strong industry coalition is beginning to fray. Courts, legislators, and international agencies are increasingly receptive to arguments that IP rights have become too restrictive. Calls for a reorientation

158. The new agreement provides, *inter alia*, that the USTR will not seek many of the TRIPS-plus provisions that it has sought in the past, and that all FTAs will expressly recognize the freedom of developing countries to use TRIPS flexibilities to protect the health of their populations. U.S. Trade Representative, *Bipartisan Agreement on Trade Policy: Intellectual Property Provisions* (May 2007), *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file312_11283.pdf.

159. *See* Patent Reform Act of 2007, S. 1145, 110th Cong. (2007); Patent Reform Act of 2007, H.R. 1908, 110th Cong. (2007). The bill would, *inter alia*, create postgrant oppositions with limited estoppel effect and limit the damages awarded after infringement to the value of the patented segment over the prior art, not the value of the product as a whole.

160. Editorial, *The Laptop vs. the Pill Bottle*, S.F. CHRON., Aug. 5, 2007, at E4; *see also* Stephen Heuser, *High Tech, Biotech Clashing on Patent Bill*, BOSTON GLOBE, July 19, 2007, at A1 (describing the conflicts further); Lisa Lerer, *Finance Industry Leads on Patent Reform*, POLITICO, July 31, 2007, <http://www.politico.com/news/stories/0707/5187.html> (same).

in the field are increasingly audible, and public interest groups and developing countries are enjoying increasing success in asserting their agenda at local and international levels. Groups that have emerged to contest IP norms in different subject areas are now forming alliances across their differences. How should we understand these events?

B. IP and A2K as Mobilizing Frames

The predominant account in IP scholarship of the recent expansion in IP law draws on public choice theory.¹⁶¹ William Landes and Richard Posner, for example, point to the “inherent asymmetry between the value that creators of intellectual property place on having property rights and the value that would-be copiers place on the freedom to copy without having to obtain a license” that results from the fact that exclusive rights “can shower economic rents on the holder of that right, but copiers can hope to obtain only a competitive return.”¹⁶² These pressures, they suggest, account for some portion of the recent and rapid growth in copyright law.

Over the years, many scholars have called attention to the same issue, often drawing upon Jessica Litman’s important early work demonstrating that the drafting of U.S. copyright law had been effectively delegated to competing interest groups.¹⁶³ Today, a wide range of IP scholars have come to agree that rights holders have had a theoretically and practically disproportionate influence on IP lawmaking, and to use public choice theories to explain this fact.¹⁶⁴ The boldest articulations of the argument suggest that public choice

161. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007).

162. LANDES & POSNER, *supra* note 63, at 14.

163. See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987); Litman, *supra* note 73.

164. See, e.g., Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 532-34 (2000); Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2235-36 (2000); Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, U. OTTAWA L. & TECH. J. 1, 9-10 (2004); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law?*, 94 MICH. L. REV. 1197, 1244-46 (1996). Tim Wu argues that there are “two schools” describing the twentieth century evolution of copyright law: a Demsetzian one that sees the expansion as an efficient response to the rising value of information and the decreasing costs of copying, and a public choice school that “sees copyright owners as a discrete and highly organized group whose lobbying acumen has led to a century of advantageous legislation.” Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 291-92 (2004); see also *id.* at 292 (noting that “[m]ost scholars—even those associated with one or another school—will admit that copyright’s evolution reflects elements of both approaches”).

pressures will exist wherever there are exclusive rights in information. Yochai Benkler, for example, writes:

Our legislative process demonstrates a systematic imbalance in favor of the expansion and deepening of exclusive rights to information at the expense of the public domain. The imbalance exists because the benefits of such rights are clearly seen by, and expressed by, well-defined interest holders that exist at the time the legislation is passed. In contrast, most of the social costs—which are economic, social, political, and moral—are diffuse and likely to be experienced in the future by parties not yet aware of the fact that they will be affected by the extension of rights.¹⁶⁵

He further contends that “it is never the case that the diffuse and future users [of information] will band together to expand fair use. Even if they were to band together, it is impossible that copyright owners would remain unaware of the initiative and fail to offer substantial opposition in the legislative process.”¹⁶⁶ Those who have sought to provide remedies have invoked a familiar public choice solution to the problem: courts.¹⁶⁷ Benkler has argued, for example, that “it is the role of courts to prevent the systematic and excessive expansion of exclusive rights by serving as a backstop” against the powerful lobbying advantages that exclusive-rights-based industries enjoy.¹⁶⁸ He proposes that courts apply intermediate scrutiny to all copyright legislation.¹⁶⁹ Neil Netanel has contended similarly that “rigorous, albeit ‘intermediate,’ scrutiny is warranted in [copyright] cases in part because speech entitlement allocations give rise to a suspicion of successful rent seeking by the highly organized interests to whom the entitlements are granted.”¹⁷⁰ Such arguments were in fact explicitly (and unsuccessfully) presented to the Supreme Court as

165. Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 173, 196.

166. *Id.*

167. See, e.g., FARBER & FRICKEY, *supra* note 8, at 145-53 (arguing that public choice theory “provide[s] a basis for a more intelligent judicial response” for courts deciding constitutional privacy cases because it reveals the political obstacles to organizing around privacy issues).

168. Benkler, *supra* note 165, at 197.

169. *Id.* at 200.

170. Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 6 (2001).

grounds for striking down a retroactive extension of the copyright term in *Eldred v. Ashcroft*.¹⁷¹

These arguments, in their strongest form, suggest that public mobilization against increasingly strong IP law is improbable or even impossible.¹⁷² And yet, as the previous Section shows, such a mobilization appears to be emerging and changing the political valence of IP law. Paradoxically, the *Eldred* case may have played a role in this, by providing a locus for mobilization of groups outside the court.¹⁷³ At the same time, an industry coalition that once appeared invincible now shows signs of division.

Existing public choice accounts in the field did not predict this.¹⁷⁴ Public

171. 537 U.S. 186, 218-21 (2003).

172. Not all those who have made use of the public choice account, of course, have taken such a categorical position. See, e.g., Lemley, *supra* note 164, at 532.

173. Cf. Balkin & Siegel, *supra* note 54, at 948-49 (noting that *Eldred* “will hardly be the last word” on the issues at stake in the case, because it marks the beginnings of a new social movement, and social movements “have the power to change the meaning of law”); Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 937 (2004) (arguing that “[i]n recent years, the *Eldred* litigation and the public domain, free software, and open source movements have created a tremendous momentum toward a major change in copyright policy”).

174. They might, of course, be retrofitted to better explain these events. Such an account might begin by noting that some members of the “public” have acute and short-term interests in opposing strong IP laws (such as poor people living with HIV/AIDS, or students or artists who are sued for copyright infringement). It might also point out that the digital networked environment and factors such as cheaper air travel have dramatically lowered barriers to organizing, especially across borders. See KECK & SIKKINK, *supra* note 2, at 14; Lesley J. Wood & Kelly Moore, *Target Practice: Community Activism in a Global Era*, in FROM ACT UP TO THE WTO 21, 25-27 (Benjamin Shepard & Ronald Hayduk eds., 2002). Even with these modifications, however, dilemmas remain. As the frame-analytic perspective and the pages that follow suggest, even interests that appear to be acute and material require interpretation. And those members of the public who have come to understand themselves as having acute interests in weaker IP law typically have very limited material resources, particularly when compared with their industry counterparts. Foundations can compensate for this to some small degree and have provided crucial funding for some A2K groups. But the resources they devote to these issues pale in comparison to the amount that industry lobby groups can spend. Moreover, philanthropic foundations themselves do not fit well into public choice rubrics. See *supra* note 6. Some businesses that stand to gain from the A2K agenda have also participated in A2K meetings, but to my knowledge have not provided substantial funding for A2K initiatives. Moreover, many who participate in the A2K mobilization are engaged in efforts to advance the interests of others. And the coalition’s success in fact appears to be predicated on changing many individuals’ conceptions of their interests, using the environmental movement as a model. See Boyle, *supra* note 64, at 52; see also Boyle, *supra* note 88, at 6-7.

One might also imagine public choice accounts of the conflict developing between IP industries: some industries and companies thought they would be able to take advantage of

choice theory presumes that social actors have fixed interests, and that they do not need to make complex judgments to determine how their interests can be advanced. It also does not explain how nonmaterial motivations and resources affect collective action. The frame-analytic perspective can help us understand the socially mediated process through which preferences and collective-action strategies are developed. It can therefore offer us richer accounts of both the A2K mobilization and the mobilization of IP industries.

1. *Frame Mobilization in IP Industries*

Can the recent increase in IP protection both locally and globally really be explained as the direct product of the rents associated with exclusive rights regimes, as the broadest public choice accounts suggest? A closer examination indicates not. In their account of the recent strengthening of copyright law, William Landes and Richard Posner point to a gap in the logic of public choice theories: if IP laws invariably create rent-seeking pressures, the public choice problems associated with IP law are timeless. Why, then, have they suddenly come to have such a significant effect? Economic models suggest that information has become more valuable, but this has been a much more gradual process than the recent shifts in the law.¹⁷⁵ To explain the inflection point that seems to have occurred about thirty years ago, Landes and Posner turn to influences such as political context and “ideological currents.”¹⁷⁶ They cite, for example, the “[f]ree-market ideology” that came to prominence in the late 1970s and argue that “[g]iven the historically and functionally close relation between markets and property rights, it was natural for free-market ideologists to favor an expansion of intellectual property rights.”¹⁷⁷ They refer to such forces as the decline of U.S. competitiveness internationally and the decreased hostility of new Supreme Court nominees and executive agencies to strong IP rights.¹⁷⁸ Their conclusion: “political forces and ideological currents . . . abetted by interest-group pressures that favor originators of intellectual property over copiers, may explain the increases” in copyright protection that we have

stronger IP laws but have ended up with the short end of the stick and changed course. But to say this is to recognize that industry actors themselves engage in acts of interpretation, in order to develop theories about business models and legal environments that will advantage them, and to legitimate and motivate collective action.

175. See LANDES & POSNER, *supra* note 63, at 25.

176. *Id.*

177. *Id.* at 22-23.

178. *Id.* at 24-25.

seen.¹⁷⁹ One of the most recent and sophisticated public choice accounts in the field thus ultimately treats ideology and context, and not material interests, as the fulcrum of change.

Other scholars have also pointed to the influence of the conceptual realm when they seek to understand the timing and velocity of recent changes in IP law. Mark Lemley and William Fisher, for example, argue that the term “intellectual property” did not come into widespread use in the United States until the 1960s.¹⁸⁰ What we today call IP was once more commonly called “industrial property” or “monopoly,” and many scholars contend that this shift in terminology itself has helped to legitimate and effectuate the recent expansion of IP law.¹⁸¹ Most such arguments focus on the purported impact of the word property, or the “propertization” of intellectual property.¹⁸² They point out that it is not obvious that patents, copyright, and trademarks should be thought of as a species of property. They might instead be treated as a branch of tort law (for example, through rubrics of unfair competition or misappropriation), or as a kind of government regulation or subsidy.¹⁸³ And of course patent, copyright, and trademark law are quite unlike property law in many ways.¹⁸⁴ Others contend that what has changed is less the use of the

179. *Id.* at 25 (emphasis added).

180. See Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895 (1997) (book review); Fisher, *supra* note 63, at 22.

181. See CHRISTOPHER MAY & SUSAN K. SELL, *INTELLECTUAL PROPERTY RIGHTS: A CRITICAL HISTORY* 18 (2006); Julie E. Cohen, *Overcoming Property: Does Copyright Trump Privacy?*, 2002 U. ILL. J.L. TECH. & POL’Y 375, 379; Fisher, *supra* note 63, at 20-23; Lemley, *supra* note 63, at 1037; Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 398 (1989); Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL’Y 35, 51-52 (1998).

182. Fisher, *supra* note 63, at 22 (“[T]he use of the term ‘property’ to describe copyrights, patents, trademarks, etc. conveys the impression that they are fundamentally ‘like’ interests in land or tangible personal property—and should be protected with the same generous panoply of remedies.”); see also Rochelle Dreyfuss, *Protecting the Public Domain of Science: Has the Time for an Experimental Use Defense Arrived?*, 46 ARIZ. L. REV. 457, 465 (2004) (calling the trend “Locke Jaw”); Lemley, *supra* note 63, at 1033 (arguing that property rhetoric has led courts to “jump from the idea that intellectual property is property to the idea that the IP owner is entitled to capture the full social value of her right,” although this makes little economic sense where the good in question is informational).

183. See Lemley, *supra* note 63, at 1069-75; Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417 (2005).

184. Patents and copyrights are limited to a fixed number of years, and all three forms of IP law have numerous exceptions that have no analogues in property law. See Sterk, *supra* note 183. The fact that information is nonrivalrous and an input as well as an output of its own production process also leads to fundamentally different economic dilemmas than those that

word “property” in relation to immaterial goods, but the “use of the combination of the words ‘intellectual’ and ‘property’ as a catch-all phrase to denote a large variety of disparate rights – in other words, the ‘intellectualizing’ of property.”¹⁸⁵ Scholars have thus pointed to several areas in which ideas and acts of interpretation may affect the structure of IP law, but there has been as yet no systematic attempt to link these insights together and incorporate them into our accounts of the political economy of the field. To develop such an account, we must return to the framing theories described in Part I.

The insights of framing theory are rarely applied to corporate actors, perhaps because they are usually excluded by definition from the social movements that framing theorists usually study.¹⁸⁶ I apply the paradigm here not to suggest that the IP industries constitute a social movement, but to call attention to the processes of interpretation that industry actors must engage in before they act, and particularly before they act collectively. Even corporate interests are not invariably fixed and given. As importantly, corporate actors’ theories about how such interests can be advanced (diagnoses and prognoses, in frame-analytic terms) are subject to the usual set of interpretive difficulties that framing theorists describe.¹⁸⁷ That does not mean that the assumptions of public choice theory – that actors have fixed interests and are able to ascertain with a high degree of certainty how to advance them – are not useful in some settings and at some times. In fact, these assumptions frequently may be adequate for describing institutionalized actors in settled times; framing

obtain in the real property context. See Lemley, *supra* note 63, at 1037 (describing, for example, the misfit of the concept of the “tragedy of the commons” in the informational domain). Many of the suppositions that govern the economics of property in land, and that are often used to justify the contours of real property law, might therefore not apply when the good in question is informational. For more on this argument, see *id.* See also LANDES & POSNER, *supra* note 63, at 23.

185. Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 4.

186. See *supra* note 2. Some social movement theorists also suggest that framing processes are less important in institutionalized settings. MCADAM, *supra* note 2, at xxi (arguing that the “continuous processes of sense-making and collective attribution are arguably more important in movements insofar as the latter require participants to reject institutionalized routines and taken for granted assumptions about the world and to fashion new world views and lines of interaction”). In my view, elite contention and struggle by and between dominant groups, not only popular contention, see *supra* note 2, can involve such acts of radical reinterpretation. Arguably, the TRIPS agreement is itself an example of the rejection of “institutionalized routines and taken for granted assumptions,” in favor of the then-radical claim that intellectual property is trade related.

187. See, e.g., Snow et al., *Micromobilization*, *supra* note 10, at 466 n.7 (noting that “interpretation is a problematic enterprise that can be encumbered by intentional deception, incomplete information, stereotypic beliefs, disputes between allegedly ‘authoritative’ interpreters, and so on”).

processes may be in turn more salient and important at times of ideational and environmental uncertainty.¹⁸⁸ The digital networked economy has evolved at breakneck pace, and IP law alongside it. This may be a good example of the kind of unsettled context in which interests and interpretations are unpredictable, even in the most institutionalized and materially oriented sectors. Material interests and aims are not just properties of social actors; rather, they arise out of social processes mediated by collective understandings.

Consider an example. Businesses have available to them many different theories of how they might profit from the production of information. IP rights are one such system; publicly financed prizes and grants are another.¹⁸⁹ An IP strategy requires significant up-front investments and unpredictability at the back end and raises the price of informational inputs as well as outputs.¹⁹⁰ IP rights can also be very expensive to enforce; the government “trough” might in some circumstances be viewed as a more secure source of funds than the market, and of course is also a possible target of rent seeking.¹⁹¹ One classic criticism of provisioning programs derives precisely from the possibility of rent-seeking and capture that they generate.¹⁹² The point is not that IP is not the best way for a particular industry to obtain the greatest rents, but that whether this is so may at times be difficult to tell objectively, and contingent on contextual factors. It will depend not only on complex judgments about economics, but also on the likelihood that one frame or another will resonate with allies and bystanders.

The broadest public choice claim, that IP rents themselves will invariably lead to strong demands for more IP, is perhaps best understood as a powerful descriptive account of a particular historical moment, one that has been

188. MCADAM, *supra* note 2, at xxiv, xxvi.

189. Paul A. David, *Intellectual Property Institutions and the Panda's Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 19, 29 (Mitchel B. Wallerstein, Mary Ellen Mogee & Roberta A. Schoen eds., 1993).

190. See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 614-15 (Nat'l Bureau of Econ. Research ed., 1962).

191. See, e.g., GORDON TULLOCK, PUBLIC GOODS, REDISTRIBUTION AND RENT SEEKING (2005); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 4-5 (1971); see also JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 283-95 (1962) (discussing the relationship between special interest groups and governmental economic activity).

192. Michael Kremer, *Patent Buyouts: A Mechanism for Encouraging Innovation*, 113 Q.J. ECON. 1137, 1139 (1998); Fred Smith, *Governmental Research Funding and Economic Distortion*, KNOWLEDGE, TECH. & POL'Y, Fall 1998, at 27, 28.

conditioned by many more influences than opportunities for rents. As Landes and Posner point out, IP—unlike strategies of patronage or prize funds—was a good fit with the “ideological currents” of the 1980s.¹⁹³ A self-interested business in the 1980s might well have made assumptions about the state, markets, and property rights—operating with the “free market” frame, for example—in ways that affected not only what it could achieve through the political process, but also what it could understand as its own interests. In other words, the imperative of interpretation affects the corporate sector too, and corporate collective action is thus necessarily shaped by interpretive choices that are influenced by preexisting discursive opportunities and structures.

Such everyday interpretative frames become collective-action frames in the sociological sense when they are used to foster, sustain, or legitimate collective action.¹⁹⁴ As described above, the term “intellectual property” has been very much “in vogue” in recent years.¹⁹⁵ One reason may be that the term provides a collective-action frame for industry groups, one that unifies a disparate set of industries and at the same time capitalizes on the positive associations that come with the concept of “property.” The popularity of the term “intellectual property,” that is, may not simply affect policymakers and judges, or be “evidence” that such decision makers are treating IP more like property.¹⁹⁶ It may also be evidence of a process of dialogic framing.¹⁹⁷

The term “intellectual property” appears to do several different kinds of framing work. As scholars such as Lemley and Fisher have emphasized, the term conceptually links regimes like copyright and patent law with the strong rights of exclusion and cultural legitimacy associated with real property law. Justin Hughes has recently demonstrated, however, that regular references to copyright as “property” or “literary property,” and to patents as “industrial property,” reach back to the nineteenth century, and that the word “property”

193. See LANDES & POSNER, *supra* note 63, at 24–25.

194. See SNOW, *Discursive Fields*, *supra* note 10, at 385.

195. See LEMLEY, *supra* note 63, at 1033.

196. See JUSTIN HUGHES, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1003 (2006) (arguing that these are the two primary arguments that scholars have emphasized to date).

197. Cf. NEIL WEINSTOCK NETANEL, *Impose a Noncommercial Use Levy To Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 22 (2003) (noting that “[t]he copyright industries regularly employ the rhetoric of private property to support their lobbying efforts and litigation” and citing examples); STERK, *supra* note 183, at 420 (“One might surmise then, that introduction of the property label into copyright and patent was not accidental.”).

figured in the original title and text of the Statute of Anne.¹⁹⁸ “Even if ‘intellectual property’ was a recent concept,” he contends, “no one has provided a serious explanation of how ‘intellectual property’ leads to the proprietization of copyright in a way that ‘property’ and ‘literary property’ did not in the eighteenth, nineteenth, and twentieth centuries.”¹⁹⁹

Framing theory may provide us with such an explanation. For one, concepts of property have of course themselves changed over time, providing different resonance today than in earlier years.²⁰⁰ A second explanation turns precisely on the “intellectualization” of property, a trend that Hughes does not dispute. The term “intellectual property,” that is, constructs a diverse group of industries as having common interests. Framing theory also suggests that the term facilitates alliances between these groups, and helps them appeal to a broader cohort of contiguous groups and bystanders. The frame builds a bridge between patent and copyright, perhaps permitting copyright industries to draft off of the arguments that the pharmaceutical industry makes about the importance of exclusive rights to innovation. Similarly, it may permit patent-based industries to benefit from arguments about piracy and the breakdown of law that copyright owners make. (Of course, each member of this newly framed group is also rendered vulnerable to the attacks made on their new allies.)

The importance of collective-action frames for industry actors is particularly apparent in the international realm. The TRIPS agreement is widely attributed to the efforts of a very small number of industry leaders in the United States who came together to articulate a common interest and persuade the legislative and executive branches that IP protection was crucial to the balance of trade in the United States.²⁰¹ But as analysts of the process have shown, the alliance itself was not a foregone conclusion; industry groups had to create a new trade committee in order to create a common agenda that would unite Hollywood producers, publishing interests, the software sector,

198. See Hughes, *supra* note 196, at 1008, 1012-13.

199. *Id.* at 997.

200. Lemley argues that the term “intellectual property” draws on one particular recent theory of property that has emerged from law and economics scholarship, which “emphasizes the importance of private ownership as the solution to the economic problem known as the ‘tragedy of the commons,’” and urges that private property is essential for efficient allocation of resources because it aligns “private and social costs and benefits.” Lemley, *supra* note 63, at 1037, 1039-40.

201. See PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY (2002); SELL, *supra* note 91, at 98-99.

industrial manufacturers, and the chemical and pharmaceutical industries.²⁰² Participants initially understood themselves as “strange bedfellows” and had significant disagreements about strategy.²⁰³ Part of how they united and gained the support of policymakers was by forging a common identity as intellectual property industries, and by framing the use of their products without permission as “theft.”²⁰⁴

The industry lobby was “particularly effective in translating their private interests into a matter of public interest,” for example by “packag[ing] its demands as a solution to America’s trade woes” and “appeal[ing] to America’s long-standing free trade ethos.”²⁰⁵ It made the case that TRIPS was not only good for American business, but also good for global innovation, and for developing countries specifically.²⁰⁶ Although there were undoubtedly many factors that worked to produce the acquiescence of developing countries,²⁰⁷ those who have studied it have concluded that the success of TRIPS required not just pressure and transfer payments, but also interventions in the realm of ideas.²⁰⁸

202. See SELL, *supra* note 91, at 103.

203. See *id.*

204. DRAHOS & BRAITHWAITE, *supra* note 201, at 61, 118-19, 122-23, 132; SELL, *supra* note 91, at 12-13; Peter Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, 13 PROMETHEUS 1, 12-13 (1995).

205. SELL, *supra* note 91, at 99, 100.

206. See, e.g., J. Hearing of the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary and the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 103d Cong. 297-98 (1994) (statement of Gerald J. Mossinghoff, President, Pharmaceutical Research and Manufacturers of America); see also SELL, *supra* note 91, at 55 (“The private sector’s normative power was consolidated and institutionalized in so far as it ‘elevated its own self-interest to the status of a substantive norm’ and established ‘understandings about what is proper, natural and legitimate’ that reflected ‘the interests of the big corporate players.’” (citation omitted)); Drahos, *supra* note 204, at 15 (“[A]s novices, [some developing countries] were subject to the disciplining effect of expert knowledge. Negotiators from the developed world were almost always in a position to be able to ‘pull rank’ in terms of technical expertise.”).

207. See SELL, *supra* note 91, at 110.

208. DUTFIELD, *supra* note 65, at 201; SELL, *supra* note 91, at 100. Coercion alone would, for example, have undermined the desire of northern countries to create a stable multilateral trading system. Drahos, *supra* note 204, at 12. Drahos also suggests that the ideas and expertise mobilized around TRIPS had their desired effect. He found in his interviews, for example, that

senior policy makers from many countries expressed support for the globalization of intellectual property, even though their own country was a net intellectual property importer and could, in all probability, never hope to be a net exporter. When confronted by their status as net importers, they could offer no real

Some might contend that frames are merely epiphenomenal expressions of material conditions. But as the preceding examples indicate, framing processes can themselves affect material circumstances and outcomes. As Landes and Posner show, framing processes may sometimes define “tipping points” and thus affect outcomes in a political contest. Frames can thus themselves be thought of as contextual resources. But they are also resources that are not fully in the control of those who seek to use them. Rather, they set up chains of argument and counterargument that are difficult to predict a priori.

For example, when a coalition of industry groups promoted TRIPS as an agreement that would promote development, they may have paved the way for the agreement’s adoption, but they also paved the way for a critique of that argument (and thus of TRIPS) by developing countries and A2K advocates. Similarly, the industry attack on “pirates” who steal intellectual property has been inverted into an attack on industry “biopirates” who “steal” traditional knowledge and genetic resources.²⁰⁹ Arguments about the importance of copyright to innovation have been contested by showing that an extension to an already long copyright term adds only a miniscule amount to the incentive effect of the original term.²¹⁰ The argument that exclusive rights are essential to sustaining innovation in software has been undermined by scholars who chronicle the success of free and open-source software.²¹¹

The frames that are chosen to advance a particular political claim can thus be challenged in ways that can help turn back the gains of a group. Frames can also shape the framer’s response to a counterattack. Consider the coevolution of TRIPS and the access-to-medicines campaign. When seeking to legitimate TRIPS, representatives of the pharmaceutical industry argued that the agreement, and strong patent rights, were good for developing countries.²¹² When the access-to-medicines campaign drew attention to the price implications of patents in developing countries and the extremity of the AIDS crisis, the industry responded in several ways, all of which continued to operate within the initial frame that insisted on the importance of medicines to

justification for their belief, except to suggest that, perhaps one day, they would be exporters.

Peter Drahos, *Thinking Strategically About Intellectual Property Rights*, 21 TELECOMM. POL’Y 201, 206-07 (1997) (footnote omitted).

209. VANDANA SHIVA, PROTECT OR PLUNDER? UNDERSTANDING INTELLECTUAL PROPERTY RIGHTS 49 (2001).

210. Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

211. See, e.g., Benkler, *supra* note 121.

212. See *supra* note 206 and accompanying text.

developing countries. They first offered limited drug donation programs and argued that lack of medical infrastructure was a much more important barrier to access than patents.²¹³ This strategy largely failed.²¹⁴ Companies then lowered prices more significantly, to what they said were “no profit” prices in some countries.²¹⁵ These offers were also criticized, with advocates claiming that the reductions were not steep enough and the programs were too bureaucratic and limited.²¹⁶ Eventually, companies began issuing limited licenses to generic suppliers²¹⁷—the very same move that a few years earlier they had adamantly resisted.

Around the same time, the access-to-medicines campaign took an interesting turn, one perhaps influenced, and at least facilitated, by the frames set forth by their opponents. In order to counter companies’ arguments that strong patents are necessary for R&D in poor countries, medicines campaigners collected evidence that roughly ninety percent of the world’s R&D funds went to diseases that cause only ten percent of the world’s disease burden, and that this state of affairs was a predictable result of the small market share that the world’s poor represent.²¹⁸ They also created new organizations specifically to stimulate R&D for neglected diseases.²¹⁹ Encountering and seeking to discredit the companies’ “innovation frame” thus seems to have helped direct the access-to-medicines campaign toward new initiatives and advocacy around R&D. In response, drug companies that had

213. See Helene Cooper, Rachel Zimmerman & Lauren McGinley, *Patents Pending: AIDS Epidemic Traps Drug Firms in a Vise*, WALL ST. J., Mar. 2, 2001, at A1; Michael Waldholz, *Bristol-Myers Heeds Calls To Bolster War Against HIV in Africa*, WALL ST. J., May 6, 1999, at A1.

214. See Cooper et al., *supra* note 213.

215. Mark Schoofs & Michael Waldholz, *AIDS-Drug Price War Breaks Out in Africa, Goaded by Generics*, WALL ST. J., Mar. 7, 2001, at A1; Rachel Zimmerman & Michael Waldholz, *Abbott To Cut African AIDS-Drug Prices*, WALL ST. J., Mar. 27, 2001, at A3.

216. Schoofs & Waldholz, *supra* note 215; Zimmerman & Waldholz, *supra* note 215.

217. *Bristol-Myers Squibb Seeks To Expand Access to HIV/AIDS Medicine*, PHARMA BUS. WK., Mar. 20, 2006, at 89.

218. See GLOBAL FORUM FOR HEALTH RESEARCH, *THE 10/90 REPORT ON HEALTH RESEARCH 2003-2004* (2004); Patrice Trouiller et al., *Drug Development for Neglected Diseases: A Deficient Market and a Public-Health Policy Failure*, 359 LANCET 2188, 2189-90 (2002). Several of the authors of this oft-cited *Lancet* paper worked for Médecins Sans Frontières [Doctors Without Borders] and have been involved in the access-to-medicines campaign. See *id.* at 2188.

219. See Drugs for Neglected Diseases Initiative, Home Page, <http://www.dndi.org/> (last visited Nov. 2, 2007).

historically spent very little on neglected diseases began to invest much more in charitable attempts to develop medicines for neglected diseases.²²⁰

Paradoxically, pharmaceutical companies may have set the stage for a new moment of global consciousness about the medical needs of developing nations when they framed their arguments for strong global patent rights in terms that trumpeted the importance of access to medicines for all people. As the access-to-medicines campaign unfurled, the process of argument and counterargument followed a path enabled (though not determined) by the arguments made by companies. The claims of activists forced companies to reduce prices, grant licenses, and allocate resources to R&D to bolster their claim that strong patent rights were not inconsistent with access to medicines and R&D for the poor. Had the conditions of the political culture of the time permitted companies to defend TRIPS with regard to a different claim—say, as an agreement that concentrated R&D resources in the wealthiest countries and that extracted maximum resources from developing countries—then different responses would have been possible and different material outcomes would have resulted.

2. *Frame Mobilization in A2K*

The existence and success of the A2K mobilization likewise requires us to understand not just material interests, but how people collectively construct their sense of interests and opportunities, and how acts of framing can help groups to build support, recruit allies, and exert political leverage.

Many of those involved in the A2K mobilization have acute material stakes in calling for changes in IP laws. Arcane aspects of patent law can be understood to affect the lives of people with AIDS in South Africa in a

220. Mary Moran, *A Breakthrough in R&D for Neglected Diseases: New Ways To Get the Drugs We Need*, 2 PLOS MED. 0828, 0829 (2005) (noting that as of 2005, companies were providing half of all new neglected disease research and doing so on a “non-commercial basis”). As Moran notes, the landscape for development of drugs for neglected diseases “changed dramatically” from 2000 to 2005. *Id.* at 0828. This “activity—at a level unheard of in the past two decades—commenced largely in the *absence* of significant new government incentives and generally without public intervention” and was funded significantly by philanthropic groups, and to a smaller extent by industry actors. *Id.* at 0829. Moran concludes that companies’ new interest in neglected diseases is “not motivated by commercial returns in the neglected-disease market, but rather by . . . the risk to [the companies’] reputation stemming from growing public pressure on companies over their failure to address developing country needs [and] corporate social responsibility and ethical concerns,” as well as instrumental desires such as the wish to build “access to low-cost, high-skilled developing country researchers.” *Id.*

profoundly immediate way, for example. But even this fact, the frame-analytic perspective tells us, requires an act of interpretation before it can be the basis of political mobilization. In South Africa, for example, high government officials responded to the AIDS crisis and the high price of patented medicines not in an anti-IP frame, but in an “AIDS denialist” frame.²²¹ Other interpretations are possible, including the one offered by drug companies: that AIDS drugs are sophisticated and that their high cost represents their “true” price, when the massive expenditures and risk required for their development are considered.

Why then did so many AIDS patients and access-to-medicines campaigners focus on IP as a problem and on international trade rules and companies as the proper register in which to respond? Posing this question helps to elucidate a broader point: the recent politicization of IP was not inevitable, even for those most directly and materially affected by strong IP laws. Rather, it is the result of movement-building dynamics that have their roots in intersections between expanding IP law and emergent frameworks of antiglobalization, human rights, environmentalism, and cyberutopianism.

The access-to-medicines campaign, for example, both understood and built claims against strong patent laws through frameworks of international human rights discourse and corporate malfeasance.²²² Farmers’ rights advocates tapped into environmental frameworks and the antiglobalization movement.²²³ The

221. They argued, that is, that HIV does not cause AIDS, that HIV/AIDS drugs are toxic, and that such drugs are in fact a possible cause of AIDS itself. This denialist frame, as it has emerged in South Africa, includes diagnostic and prognostic elements: it posits a racist conspiracy promoted in part by multinational drug companies, argues that AIDS is in fact caused by factors such as poverty, and urges that antipoverty campaigns are the best medicine for AIDS. See generally Mandisa Mbali, *AIDS Discourses and the South African State: Government Denialism and Post-Apartheid AIDS Policy-Making*, 54 *TRANSFORMATION* 104 (2004); Adam Sitze, *Denialism*, 103 *S. ATLANTIC Q.* 769 (2004). The discourse of AIDS denialism emerged initially in the United States, but as Mandisa Mbali has shown, “unlike AIDS dissidence internationally, the South African version of denialism espoused by Mbeki and other high profile government officials has been obsessed with colonial and late apartheid discourses of race, sexuality and disease in Africa.” Mbali, *supra*, at 104. It is in relation to these latter frames, and not an anti-IP frame, that these officials interpreted the AIDS crisis and responded to (by rejecting) calls for access to medicines.

222. For example, the declaration accompanying what was perhaps the first global demonstration for access to HIV/AIDS treatment begins: “We are united with a single purpose, to ensure that everyone with HIV and AIDS has access to fundamental rights of healthcare and access to life-sustaining medicines.” XIII International AIDS Conference, *Global Manifesto* (July 9, 2000), <http://www.actupny.org/reports/durban-access.html>. The movement also draws upon themes of corporate greed. See *id.*; see also Eric Sawyer, *An ACT UP Founder “Acts Up” for Africa’s Access to AIDS*, in *FROM ACT UP TO THE WTO*, *supra* note 174, at 88, 98–101.

223. See, e.g., SHIVA, *supra* note 209, at 6 (arguing that “[p]atents for living organisms impoverish human society ethically, ecologically and economically,” and bring “commercial

open-source and Creative Commons movements have drawn upon conceptions of the freedom of cyberspace and the abundance of the digital age.²²⁴ All of these frameworks both helped orient these groups toward an understanding of IP as a problem and build bridges to others who might support their cause.

Access-to-medicines campaigners could use the human rights frame to create connections with human rights organizations and institutions in Geneva and New York.²²⁵ Farmers' rights campaigners' arguments about sustainable development linked them to environmental groups.²²⁶ Claims for protection of traditional knowledge were framed in a way that drew connections to indigenous rights claims. Thus, each of these groups mobilized frames that made certain alliances and political arguments possible.

But these acts of framing also made other alliances more difficult—including some of the alliances that are beginning to emerge under the rubric of A2K. AIDS activists, for example, have drawn on humanitarian and human rights frames to argue that medicines are “essential” and categorically more important than cultural goods like “Barbie dolls or CDs.”²²⁷ Farmers' rights groups often take strong stances against genetically modified organisms, in conflict with those who argue for open-source biotechnology on the grounds that it will allow scientists to engineer new products for poor farmers.²²⁸ To the extent that groups concerned with farmers' rights and traditional knowledge draw upon antitechnological discourses, this creates obvious possibilities for

gains to a handful for corporations”). For a description of the actors and themes that constitute the antiglobalization movement, see PAUL KINGSNORTH, *ONE NO, MANY YESSES* (2003). As Kingsnorth notes, Shiva is perceived as a significant force in that movement. *Id.* at 227.

224. See, e.g., John Perry Barlow, A Declaration of the Independence of Cyberspace (Feb. 8, 1996), <http://homes.eff.org/~barlow/Declaration-Final.html>; Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, FIRST MONDAY, Aug. 1999, http://www.firstmonday.org/issues/issue4_8/moglen/index.html.

225. See Access to Medication in the Context of Pandemics Such as HIV/AIDS, Tuberculosis and Malaria, U.N. Comm'n on Human Rights Res. 2003/29, U.N. DOC. E/CN.4/RES/2003/29 (Apr. 22, 2003); Human Rights Watch, *The FTAA, Access to HIV/AIDS Treatment, and Human Rights*, A Human Rights Watch Briefing Paper (Oct. 29, 2002), <http://www.hrw.org/press/2002/10/ftaa1029-bck.htm>.

226. See, e.g., Press Release, Greenpeace, CBD Must Maintain Moratorium on Terminator Technologies (Mar. 22, 2006), <http://mailman.greenpeace.org/pipermail/press-releases/2006-March/000209.html> (arguing that “terminator technologies” “threaten[] biodiversity, farmers' rights and the environment”).

227. See MÉDECINS SANS FRONTIÈRES [DOCTORS WITHOUT BORDERS], *A MATTER OF LIFE AND DEATH: THE ROLE OF PATENTS IN ACCESS TO ESSENTIAL MEDICINES 1* (2001), available at <http://www.msf.org/source/pdf/2001/dohacol.pdf>.

228. See, e.g., Carina Dennis, *Biologists Launch “Open-Source Movement,”* 431 NATURE 494 (2004).

conflict with those advocates of free and open-source software who see in new digital technologies a revolution in the making.²²⁹

How and why, then, did groups working with such different frames build bridges to one another? As the next Part argues, these groups are being brought together through an encounter with IP law itself, operating here both as a form of constraint and as a field of meaning. Law has provided these groups with a frame—that of “intellectual property”—that encourages them to understand themselves as having similar problems and interests, and that facilitates joint countermobilization against the “IP industries.” This is, of course, somewhat ironic, given the purported power of the concept of IP to promote the agenda of rights holders. The paradoxical implication here is that the consolidation of the concept of intellectual property also created a scaffold for the creation of a broad countermovement. This comports with one of the central insights of dialogic framing theory, that groups borrow discourses from their opponents. It also suggests that successful acts of framing can help to consolidate ground for opposition as well as advance the framer’s cause.

IP is the broad frame that is bringing these groups together. But these groups are also making use of narrower frames to create common arguments criticizing the existing IP system and to create a sense of themselves as related. At a recent conference, for example, a key actor in the A2K mobilization, James Love (of the NGO Knowledge Ecology International), offered the following list of terms that align the groups in question and that distinguish them from the IP industries²³⁰:

229. See, e.g., Eben Moglen, *The dotCommunist Manifesto* (Jan. 2003), <http://moglen.law.columbia.edu/publications/dcm.pdf>.

230. James Love, Presentation at the Politics and Ideology of Intellectual Property Conference: Rhetoric and Ideology—IP and the Knowledge Commons (Mar. 20, 2006) (on file with author).

Table 1.
RHETORIC OF THE IP INDUSTRIES

NEGATIVE	POSITIVE
PIRACY	INNOVATION
THEFT	WEALTH CREATION
PROPERTY	INCENTIVE
STEALING	CREATIVE
COUNTERFEIT	INVESTMENT
ORGANIZED CRIME	RESPECT IP
KNOCK-OFF	ECONOMIC GROWTH

Table 2.
RHETORIC OF THE RESISTANCE

PEJORATIVE TERMS	POSITIVE TERMS
MONOPOLY	FREEDOM
PRIVILEGE	SHARING
ANTICOMPETITIVE	ACCESS
RESTRICTIVE	INNOVATION
PIRACY OF THE COMMONS	NEW BUSINESS MODELS

As these tables suggest, A2K groups are actively and self-consciously creating new concepts in order to construct their interests as related. Frames of the “information commons” and the “public domain,” for example, are at the heart of the A2K mobilization. The most common definition of the public domain is the realm of “IP-free resources,” unprotected either because they were ineligible for protection in the first place or because they have been “freed” by invalidation or expiry of the relevant IP right.²³¹ The first scholarly call to recognize something called the public domain came in 1981, but the term

231. See Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 789-91 (2006).

did not come into broader academic usage until much more recently.²³² It has since become a central frame for the A2K mobilization (although not always uncontroversially).²³³ James Boyle explained why: “We need a change in the way that these [IP] issues are understood, a change that transforms even our perceptions of self-interest, making possible coalitions where none existed before.”²³⁴ This could be done, he suggested, through the development of “affirmative arguments for the public domain” and the “use of the language of the commons to defend the possibility of distributed methods of non-proprietary production.”²³⁵ “Like the environment,” Boyle contended, “the public domain must be ‘invented’ before it is saved.”²³⁶

The concept of the “commons” had to be invented in much the same way, drawing on the notion of the commons as a historical concept in real property

232. See *id.* at 786 (describing the “pioneer[ing]” work of David Lange, *Recognizing the Public Domain*, LAW & CONTEMP. PROBS., Autumn 1981, at 147). For important early work on the public domain, see Lange, *supra*; and Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990). See also L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* (1991); Samuelson, *supra* note 181; Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992). For more recent work, see generally DAVID BOLLIER, *WHY THE PUBLIC DOMAIN MATTERS: THE ENDANGERED WELLSPRING OF CREATIVITY, COMMERCE AND DEMOCRACY* (2002); David Lange, *Reimagining the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 463; Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 147; and Pamela Samuelson, *Preserving the Positive Functions of the Public Domain in Science*, 2 DATA SCI. J. 192 (2003). As Samuelson notes,

The sparseness of legal commentary on the public domain until very recently is somewhat surprising given that many judicial opinions had discussed the public domain as the status of informational works following expiration or invalidation of intellectual property rights (IPRs) or as the consequence of a claimant’s failure to satisfy substantive or procedural requirements for intellectual property protection.

Samuelson, *supra* note 231, at 786. The copyright statute referred to the public domain as far back as 1909. See Copyright Act of 1909, ch. 320, § 7, 35 Stat. 1075, 1077, *superseded by* Act of July 30, 1947, ch. 391, 61 Stat. 652 (codified as amended at 17 U.S.C. (2000)). I thank Pam Samuelson for this point.

233. See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1335 (2004) (criticizing the concept of the public domain as hostile to the claims to property that indigenous groups may deserve).

234. Boyle, *supra* note 64, at 52.

235. *Id.*

236. *Id.*

law, and adapting it to the nonrival domain of information in order to combat the frame of the “tragedy of the commons.”²³⁷ As Boyle describes it:

Increasingly, intellectual property scholars and information economists have turned to the theorists of the commons in trying to understand innovation. . . . In the debates over intellectual property policy, we have been familiar with a conceptual scheme that portrays “intellectual property” as a monopoly, and “the public domain,” as its conceptual opposite—a realm of vaguely defined “freedom.” In contrast, the commons literature gives us a conceptual scheme in which property, seen as a regime of individual, legal, market-based control is juxtaposed to its conceptual opposite—the well-run commons, a realm of collective, and sometimes informal, controls that avoids the tragedy of the commons without a need for single party ownership. The former juxtaposes monopolies against freedom, the latter juxtaposes individual formal controls against collective, and often informal, ones. Both give us a realm of property and a realm in which its opposite, or alternative, are offered.²³⁸

Boyle thus illustrates the power of collective-action frames to combat, and possibly overcome, what might at first appear to be insurmountable public choice problems. Acts of framing can create a sense of commonality between people who previously understood themselves as unrelated. They can also render interests that are diffuse suddenly salient, particularly once we incorporate nonmaterial interests into our theories of action.

Savvy acts of framing can also help groups recruit support for their cause. Love’s Tables illustrate the framing struggle between IP and A2K activists, with IP proponents mobilizing terms such as “piracy” and “theft,” and the A2K

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237. For important early work elaborating the concept of the information commons, see Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 298-319 (1998); Benkler, *supra* note 64; and Yochai Benkler, Property, Commons, and the First Amendment: Towards a Core Common Infrastructure (Mar. 2001) (white paper for the First Amendment Program, Brennan Center for Justice at NYU Law School), available at <http://www.benkler.org/WhitePaper.pdf>; LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001). See also Lawrence Lessig, *Keynote Address: Commons and Code*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 405 (1999). See generally Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993); Peter A. Jaszi, *Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT’L L. 595 (1996).
238. James Boyle, *Foreword: The Opposite of Property?*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 1, 8 (footnote omitted).

mobilization countering with arguments about “sharing,” “freedom,” and “access.” Thus, we can also see how A2K activists are seeking to build *collective* frames that resonate across their different issue areas and that supplement their issue-specific frames of, for example, environmentalism and peer-to-peer production. In other words, the most pessimistic public choice accounts of the tectonics of this area of law do not reckon with the mediating power of frames. As framing theorists point out, the “passage from condition to [political] action is a contingent and open process mediated by a number of conjectural and structural factors.”²³⁹ The A2K and IP mobilizations are both illustrations of this fact. (This is not to say that the A2K movement will necessarily continue to enjoy success, or even that it will continue to mobilize through the same rubric and frames. Nor is it to suggest that industry groups’ significant material advantages will not give them disproportionate influence in the political arena. Rather, it is to draw attention to the mediating role of framing processes and to the contingent acts of meaning making that have facilitated the emergence of both mobilizations.)

We can also find in the A2K mobilization many illustrations of the fact that frames are not simply epiphenomenal. Concepts of framing, for example, help explain the rapid proliferation of open-licensing schemes across the A2K mobilization. As critics point out, there may be vast differences in the material realms in which these licenses are being employed, and it is not obvious that they will work in the realm of copyright or biotechnology as they do in the realm of software.²⁴⁰ But as groups have been drawn together through their encounter with law into an “A2K” frame, they are trying these strategies, perhaps as a form of solidarity or because they believe that their problems are related.

Frames also matter because they can help determine who occupies and is linked to a particular mobilization. The A2K mobilization, as noted above, has seized on concepts of the “public domain” and the “commons” as themes that unify groups working in different areas of IP and as anchors for arguments about the damage that strong IP does to public welfare. But this creates tension

239. Canel, *supra* note 2, at 190.

240. See, e.g., David W. Opperbeck, *The Penguin’s Genome, or Coase and Open Source Biotechnology*, 18 HARV. J.L. & TECH. 167, 181-200 (2004) (contending that the open-source paradigm does not translate well into the biotechnology domain). The GPL, of course, has been used as a model for a myriad of other private ordering schemes, such as Creative Commons licenses, open genomics licenses, and licenses to promote access to public sector research. See Amy Kapczynski et al., *Addressing Global Health Inequities: An Open Licensing Approach for University Innovations*, 20 BERKELEY TECH. L.J. 1031, 1069-72 (2005); see also *supra* text accompanying notes 144, 147.

with some groups that have contributed to the growing critique of IP—most evidently, those that argue for protection of traditional knowledge.²⁴¹ There are, of course, many different ways of conceptualizing the claim for protection of traditional knowledge, some more and some less in tension with a call for open access and the protection of a public domain.²⁴² But as participants in the effort to build an A2K movement have pointed out, tensions between advocates of openness and advocates for protection of traditional knowledge may create a cleavage in what is currently a fragile coalition.²⁴³ This fissure would, in a very material sense, be attributable to framing choices made by movement actors.

III. THE GRAVITATIONAL PULL OF LAW ON FRAMING PROCESSES

The previous Part shows that A2K groups have relied on acts of framing to create connections to one another, to develop a theory of their shared interests and claims, and to create resonance with bystander publics. It also demonstrates that the A2K mobilization has succeeded in influencing IP law in significant ways. Less obvious, however, is how we should understand law to be influencing this mobilization.²⁴⁴ The pages that follow describe the central

241. For a recent articulation of this conflict, see Chander & Sunder, *supra* note 233.

242. Shubha Ghosh has offered a helpful classification of the three main positions that have emerged from those debates: the “public domain position,” which insists that traditional knowledge or genetic resources be “shared by all constituencies in a global commons”; the “moral rights position,” which seeks for holders of traditional knowledge “either a complete ownership interest that would block any claims by actual appropriators and exploiters of the knowledge or a stake in any commercial exploitation made by multinationals”; and the “appropriation position,” which reflects the U.S. and European IP systems and “supports exclusive ownership of traditional knowledge with rights vested in that entity that makes commercial or other practical use of the knowledge.” Ghosh, *supra* note 92, at 79. Advocates have proposed a wide variety of legal mechanisms to protect traditional knowledge, some of which would yield strong rights to exclude, and others of which would establish only “defensive” protection (for example, by codifying traditional knowledge in a public database to defeat patent claims, or voiding patents that entailed an appropriation of traditional knowledge without adequate informed consent). See, e.g., CARLOS M. CORREA, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY 9-19 (2001); GRAHAM DUTFIELD, PROTECTING TRADITIONAL KNOWLEDGE: PATHWAYS TO THE FUTURE 22-32 (2006), available at <http://www.iprsonline.org/unctadictsd/docs/graham%20final.pdf>.

243. Editorial, *supra* note 140, at 3 (noting that not all may agree on the merits of concepts such as the “public domain,” particularly “if putting seeds in the public domain means that Monsanto can inject them with Terminator genes to destroy peasant agriculture,” and if groups have different ideas about the ultimate acceptability of property in informational goods).

244. I focus on this rather than the role of law in shaping the frames used by the pro-IP mobilization because the A2K mobilization is much less well described and ostensibly more

role that law has played in the acts of framing that are helping to constitute the A2K mobilization.

The influence of law on the framing processes of A2K activists illustrates what I call the “gravitational” force that law can exert on framing processes. Law is, of course, only one among many resources for framing.²⁴⁵ Nonetheless, there is good reason to believe that law has a particularly powerful influence on the meaning-making efforts of movement actors. This follows directly from law’s status as a dual resource (to use Pedriana’s term) and from the fact that “[l]egal practices carry with them their own inherent constraints on what is accepted as legally sensible or compelling.”²⁴⁶ The term “gravitational” is thus intended to designate something more than the role of law as a “master frame.”²⁴⁷ It points also to the special form of constraint that legal frames exert upon those who use them.

From the discursive perspective, of course, all frames are freighted with preexisting meanings and affordances, and cannot be wielded simply to suit the aims of an actor. But legal frames are more constrained—more weighty, if you like—than many because they are imbued with doctrine and history, and tethered to institutions that are authorized to define and implement the law. If law attracts movement actors because it is “semantically permeable,” in Siegel’s words,²⁴⁸ it also directs their arguments because it is semantically constrained. The term “gravitational” marks this directionality. It is not, however, intended to figure law as the center of the social universe. Everything with mass exerts a gravitational pull; the more massive an object, the greater the force.

A crucial caveat is in order. To say that law exerts a gravitational pull on the framing processes of groups is not the same thing as saying that engagement with law tends to coopt or deradicalize groups.²⁴⁹ An exploration of that

surprising than its counterpart. With sufficient time and space, however, it would be possible to develop an analogous account of the substantive role that law has played in the framing processes of those who argue for stronger IP rights. Such an analysis might begin by examining the role that the legal concept of property has played in the pro-IP mobilization. See *supra* text accompanying notes 196-200.

245. See Marshall, *supra* note 37, at 662; McCann, *supra* note 2, at 23; Pedriana, *supra* note 12, at 1750.

246. McCann, *supra* note 2, at 22; cf. Jack M. Balkin, “*Wrong the Day It Was Decided*”: Lochner and Constitutional Historicism, 85 B.U. L. REV. 677, 711 (2005) (noting that “constitutional common sense . . . allows well-socialized lawyers to recognize what is a better and worse argument, what is a plausible interpretation of the Constitution and what is ‘off-the-wall’”).

247. Pedriana, *supra* note 12.

248. Siegel, *supra* note 54, at 322.

249. There is, of course, a long-running debate in the law and society literature about whether movements fall under the sway of legal ideology, or whether they use law when the benefits

question is beyond the scope of this Article. Importantly, though, the gravitational and integrative effects that are here discussed are meaningful even if they do not lead to cooptation in the classic sense because they influence the path that a movement/countermovement conflict takes. The gravitational pull that law has exerted on the framing processes of the A2K mobilization has, as I describe below, affected the group's architecture, discourse, and strategies. It has also brought it into alignment with its opponents, creating zones of agreement between A2K groups and their opponents, but also zones of common disagreement.

This Part concludes by theorizing three possible implications of law's gravitational pull. If law integrates groups with their opponents, movement/countermovement conflict can strengthen law even as it unsettles it, as Siegel has noted. To the extent that movement actors become aware of these effects, they may be better able to predict and control them, with strategies also drawn from the frame-analytic perspective. Perhaps most intriguing, however, are the implications of law's integrative effect in the international domain. If publics and polities are defined as communities of disagreement, then the case study offered here suggests that law may have a significant role to play in creating such communities beyond the nation-state. Analyzing the A2K mobilization, that is, may help us not only understand the new politics of IP, but also may help us theorize how new forms of international and transnational law may facilitate the emergence of global polities and publics.

A. Illustrating the Gravitational Power of Law

The A2K mobilization suggests at least three kinds of effects that law can have on framing processes, which can be loosely, but usefully, distinguished from one another. These types and examples are not intended to be exhaustive, but rather to help begin to specify the different capacities in which law can act on framing processes. The first effect is architectural; it designates how law can influence a group's understanding of who its allies and opponents are. The second and third effects can be called discursive and strategic. As A2K groups have engaged with law, they have at times modulated their arguments. We can think of strategic effects as the "thin" version of this, as actors make narrow interpretive choices in order to capture law's instrumental benefits. Discursive effects, in contrast, involve more elaborated arguments that groups come more deeply to inhabit and rework. It may be difficult to draw a sharp delineation between strategic and discursive effects, but as ideal types they can nonetheless

outweigh the costs and without being overborne by its authority. Compare SCHEINGOLD, *supra* note 35, with MCCANN, *supra* note 35.

be helpful because they designate different levels and types of engagement that groups may have with substantive legal arguments.

1. *Architectural Effects*

As some linked to the A2K mobilization themselves have argued, the concept of “intellectual property” is a “seductive mirage,” that generalizes across domains and laws that work very differently.²⁵⁰ Free-software guru Richard Stallman’s well-known plea to abandon the term IP notes, for example, that

[o]ne issue relating to copyright law is whether music sharing should be allowed. Patent law has nothing to do with this. Patent law raises issues such as whether poor countries should be allowed to produce life-saving drugs and sell them cheaply to save lives. Copyright law has nothing to do with such matters.²⁵¹

When asked more recently for his view on the potential of a broad coalition of groups organizing against exclusive rights in information, Stallman made a similar point: “The various movements are dealing with issues that have little in common.”²⁵² The issue with medicines “is simply one of price,” he suggested, while the issue of seeds is one of “freedom to save and exchange [farmer’s] seeds and breed their crops,” and the issue for programmers is “freedom to do what’s necessary in order to develop software.”²⁵³

Stallman makes this point in order to denaturalize and discredit the idea of the “IP industries.” It is thus notable that the very same concept provides the skeleton for the A2K mobilization. As is evident from the issues that they work on, and the statements of these groups themselves, A2K actors are drawn together by the recent expansion of IP law and the institutionalization of the new international IP regime.²⁵⁴ Despite his skepticism about the wisdom of

250. See Richard M. Stallman, GNU Project, Did You Say “Intellectual Property”? It’s a Seductive Mirage (Oct. 19, 2007), <http://www.gnu.org/philosophy/not-ipr.xhtml>.

251. *Id.*

252. Convergence Panel, *Convergence Zone?*, SEEDLING, Oct. 2005, at 3, 10, available at http://www.grain.org/seedling_files/seed-05-10.pdf.

253. *Id.*

254. *Id.* at 6 (reporting Beatriz Busaniche’s statement that “[o]ur common points are the spaces where we struggle on all the fronts, such as WIPO, the WTO, agreements like TRIPs, free-trade agreements, etc.”); Editorial, *supra* note 140, at 2 (“In the past few years, the potential synergy in the battle against patents on seeds and drugs has grown clear, particularly around the [TRIPs] Agreement . . .”).

convergence, for example, Stallman argues that “[a]t a broader, more general level, all these movements . . . oppose laws being made to give business more power.”²⁵⁵ When asked what links she saw between the various nodes of the movement, a long-time leader of the access-to-medicines campaign, Ellen ’t Hoen, said, “It is obvious that there is a global backlash against monopoly rights that have gone too far.”²⁵⁶ An editorial that calls for the mobilization of this new movement gives this account:

[T]hey are killing innovation, freedom and access to essential things like culture, health and education—*our* innovations, *our* freedom, *our* education. Farmers can’t save seeds. Sick people can’t afford drugs. Computer programmers can’t modify software. Librarians won’t let you photocopy a magazine article. Students can’t afford textbooks. Why? Because of myriad IPR laws being strengthened every day to stop you from doing things with someone else’s “creative work.”²⁵⁷

In other words, the intersection between these groups, and their efforts to emerge and work collectively, is located in an identification that is provided first and foremost by intellectual property law.²⁵⁸ More specifically, these groups are aligning themselves as skeptics of the recent consolidation and expansion of IP law in both the domestic and international contexts.

The power of law to act as an architectural force appears formidable from this perspective, given the divergence between the issue areas and initial frameworks around which different A2K groups are organized. But we can understand this process of consolidation through the theories described in Part I. As social-movement scholars have recently begun to emphasize, groups look to law as they seek to understand, and also to change, their circumstances.²⁵⁹ This process in turn shapes groups’ sense of their own identities and interests. The groups that are building connections to one another under the A2K rubric did not start out thinking of themselves as related. But as they evolved and began making attempts to change law, they adopted new accounts of themselves. They began to talk about themselves as users of information and as afflicted by a similar set of problems that could be expressed not only in terms

255. Convergence Panel, *supra* note 252, at 10.

256. *Id.* at 5.

257. Editorial, *supra* note 140, at 1.

258. This is evident to others who consider the movement. See, e.g., Schultz & Walker, *supra* note 125, at 82 (noting that the “New International IP Agenda” is “unified by a common thread of IP skepticism and a network of [NGOs] and activists”).

259. Pedriana, *supra* note 12, at 1724, 1729.

of globalization or human rights or freedom, but also in terms of intellectual property and information economics and structures of innovation. To say that IP law is the key to the emergence of this new mobilization, therefore, is not simply to identify the influence of law as a set of restrictions upon freedom. It is also to identify the power of law to provide groups with frameworks to understand a particular field of regulation, and how they and others relate to it.

We can call this the “architectural” effect of law on framing processes, designating the power of legal categories to provide social actors with circuits through which to connect to other social groups. This corresponds to law’s power to link the fates of different groups through acts of institutional and logical categorization. When law establishes institutions and substantive rules of law that apply across groups, it also invites groups affected by these institutions (for example, WIPO) and rules (for example, “IP law”) to think of themselves as related and perhaps to make common cause. That is because such groups are mutually affected by the operation of these institutions and rules (for example, procedural changes at WIPO or substantive changes in the obviousness standard in patent law).

Of course, this process is dialogic and not fixed or determined in top-down fashion. Legal architectures do not simply shape social actors, but are also shaped by them. The existence of agreements like TRIPS and umbrella institutions such as WIPO, for example, can be explained in part as the product of coalitions built between industry groups. To offer an example from a different context, today, the analogy between race and sex is firmly entrenched in U.S. antidiscrimination law. Decisions about evidentiary standards under Title VII or the institutional workings of the Equal Employment Opportunity Commission affect a wide variety of overlapping social groups. The analogies that account for this, however, did not come ready-made in law. The Fourteenth Amendment and arguments about the nature of invidious discrimination provided a circuit (or language) through which these connections could be built, but feminist and antiracist advocates also consciously constructed analogies between race and sex.²⁶⁰

Architectural decisions have potentially deep implications for advocates. Just as the analogy between race and sex highlights certain issues and arguments and downplays others,²⁶¹ groups in the A2K mobilization implicitly reject alternative alliances and frameworks when they suture themselves to one

260. See Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004); Serena Mayeri, Note, “A Common Fate of Discrimination”: *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045 (2001) [hereinafter Mayeri, *Common Fate*].

261. Mayeri, *Common Fate*, *supra* note 260, at 1086-87.

another through the rubric of IP. The A2K coalition does not, for example, thematize access to education generally. When it talks about the subject, it is to stress the importance of educational exceptions in copyright law.²⁶² Similarly, the mobilization has not focused substantial attention on the need for universal access to the Internet, but tends instead to raise questions about barriers that intellectual property may present to the vitality of the Internet as an open communication medium.²⁶³ This did not have to be the case. At times, groups within the A2K mobilization have sought to generalize along different axes, for example that of free communication, and different trajectories in the future are of course possible.²⁶⁴ But today, the rubric of IP is the one that most powerfully organizes the mobilization.

2. Discursive Effects

As they engage with law, groups seek to understand and retool the narratives and arguments that justify and give meaning to law's commands. In the process, they encounter the arguments of their opponents and often end up speaking in these same terms. Such effects correspond to law's persuasive and legitimating force. We can make sense of them if we understand legal narratives as at the same time constrained and open: groups seeking to comprehend, challenge, and remake law encounter a field of meaning that influences them. But groups are drawn into these languages in part because legal discourses can also be remade and the legitimating effects of legal

262. See Andrew Rens, Achal Prabhala & Dick Kawooya, *Intellectual Property, Education and Access to Knowledge in Southern Africa* 6 tbl.3, 10-11 (ICTSD, UNCTAD & TRALAC, Working Paper No. 13, 2006), available at http://www.tralac.org/pdf/20061002_Rens_IntellectualProperty.pdf; see also WILLIAM W. FISHER & WILLIAM MCGEVERAN, *THE DIGITAL LEARNING CHALLENGE: OBSTACLES TO EDUCATIONAL USES OF COPYRIGHTED MATERIAL IN THE DIGITAL AGE: A FOUNDATIONAL WHITE PAPER* (2006), available at <http://cyber.law.harvard.edu/home/2006-09>; A2K Treaty art. 3-1(a)(iii)-(iv), *supra* note 1.

263. See, e.g., A2K Treaty art. 3-5, *supra* note 1 (incorporating provisions requiring open standards); see also William New, "Dynamic Coalitions," *The New Sword in Internet Governance Debates*, INTELL. PROP. WATCH, Nov. 5, 2006, http://www.ip-watch.org/weblog/index.php?p=444&res=&res=1280_ff&print=0. The first academic conference organized around the A2K rubric, organized by the Information Society Project at Yale Law School, is also a good reference point for tracing the contours of the mobilization. Notably, the agenda included discussions on peer production in education and network neutrality, but not on access to education or the Internet more generally. See *Access to Knowledge Conference Agenda* (Apr. 21, 2006), available at <http://research.yale.edu/isp/eventsa2k.html>.

264. See Aviv, *supra* note 113 (reporting that at the Free Culture movement's first national conference, speakers presented on topics including "enhancing Internet access in impoverished countries").

discourse thus altered or called into question. The following pages offer an example of how the language of the A2K mobilization has been affected by the substantive terms in which IP laws are debated and justified. They draw predominantly on two declarations that members of the A2K mobilization have collectively produced, the Geneva Declaration on the Future of WIPO and the Adelphi Charter.²⁶⁵ They show that while the A2K mobilization sometimes makes claims in the idiom of culture, equality, or human rights, many—and perhaps most—of its claims are made within the framework of information economics and the incentive effects of IP systems. A2K advocates have become deeply enmeshed in arguments about innovation, contesting the dominant justification for IP law not by rejecting the importance of innovation, but by offering critiques of the model of innovation that IP law invokes and proposing projects designed to sustain new and more collaborative forms of innovation. That is a symptom, I contend, of the A2K mobilization's deep engagement with IP law and, more specifically, the incentive theory of IP.

When participants in the A2K mobilization seek to frame arguments and mobilize support, they sometimes make claims that sound in discourses of fundamental rights and values. The Geneva Declaration, for example, asserts that the current IP system is causing harm to “development, diversity, and democratic institutions,”²⁶⁶ and urges WIPO to make efforts to protect “consumer rights and human rights.”²⁶⁷ The Adelphi Charter declares that “[h]uman rights call on us to ensure that everyone can create, access, use and share information and knowledge, enabling individuals, communities and societies to achieve their full potential” and urges that IP laws “must serve, and never overturn, the basic human rights to health, education, employment and cultural life.”²⁶⁸ Many more examples can be found across the spectrum of A2K groups and campaigns.²⁶⁹ As one supporter of the A2K mobilization notes,

265. This is a common method of frame analysis, i.e., using “movement documents, especially those offered by key movement organizations as position statements.” See Hank Johnston, *Comparative Frame Analysis*, in *FRAMES OF PROTEST: SOCIAL MOVEMENTS AND THE FRAMING PERSPECTIVE*, *supra* note 19, at 240. As Johnston notes, “[t]he description of these frames is useful insofar as we accept the presumption that their content is widely shared by movement participants.” *Id.* The A2K mobilization is so recent that it is difficult to define its contours precisely. Any selection of key texts is thus contestable, but I contend that the two used here would be accepted as representative by the majority of those who identify with the A2K mobilization.

266. Geneva Declaration, *supra* note 130, at 1.

267. *Id.* at 2.

268. Adelphi Charter, *supra* note 138.

269. For example, a proposal put forth by the central coalition supporting the development agenda at WIPO declares that “under no circumstances can human rights—which are

these conceptual moves are designed to shift the debate into more favorable conceptual terrain and to “reframe intellectual property as a public health care issue or a freedom of speech issue, rather than allowing it to be presented as an indispensable tool of modern economic management.”²⁷⁰

References to values of equality and distributive justice are also made within the A2K mobilization. The Geneva Declaration, for example, argues that the existing system fosters “morally repugnant inequality of access to education, knowledge and technology [that] undermines development and social cohesion”²⁷¹ and is sometimes “brutally unfair.”²⁷² Again, such claims are also made by individual A2K groups and campaigns. Advocates for farmers’ rights invoke terms such as “bioserfdom.”²⁷³ Free-software advocates state that “[w]hat we are fighting . . . is a growing monopolisation over knowledge by major corporations These companies can deny others access to knowledge and the benefits of science.”²⁷⁴ Others object to the substantial wealth transfers from developing to developed countries that are expected to accompany the implementation of TRIPS.²⁷⁵

Yet many A2K claims—particularly in those documents that represent the most concerted attempt of these groups to make claims together—sound in languages not of fundamental human rights or distributive justice, but of information economics, innovation systems, and the need for well-functioning markets. These latter terms, of course, are those most commonly used to justify

inalienable and universal—be subordinated to intellectual property protection.” See WIPO, *Proposal To Establish a Development Agenda for WIPO*, ¶ 51, WO/IIM/1/4 (Apr. 6, 2005), available at <http://www.wsis-pct.org/WIPO/devel-agenda-6apro5.html> (reprinting a proposal by a coalition called the Group of Friends of Development). The copyleft movement in the United States frequently makes reference to a conflict between copyright and free speech values, and it has pursued litigation attempting to invalidate expansions of copyright law by invoking free speech values. See *Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003); *Golan v. Gonzales*, 501 F.3d 1179, 1182 (10th Cir. 2007); *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007); see also LESSIG, *supra* note 115, at 228; Benkler, *supra* note 64, at 389–90. The access-to-medicines movement often insists that the right to health must come before patent rights, asserting, for example, that “[i]ntellectual property is not an inalienable private right, like life or dignity or adequate health.” Mark Heywood, *Drug Access, Patents and Global Health: ‘Chaffed and Waxed Sufficient,’* 23 *THIRD WORLD Q.* 217, 228 (2002).

270. Drahos, *supra* note 208, at 207.

271. Geneva Declaration, *supra* note 130, at 1.

272. *Id.*

273. *New Enclosures: Alternative Mechanisms To Enhance Corporate Monopoly and BioSerfdom in the 21st Century*, COMMUNIQUE (ETC Group, Winnipeg, Can.), Nov./Dec. 2001, at 2.

274. Convergence Panel, *supra* note 252, at 6.

275. See, e.g., DRAHOS & BRAITHWAITE, *supra* note 201, at 11.

intellectual property rights today, both in the United States and around the world.²⁷⁶ Both the Geneva Declaration and the Adelphi Charter take pains to indicate that they are not opposed to intellectual property per se and instead frame their request as one for balance and increased competition. In so doing, these documents draw on economic arguments about the dangers of IP that is too strong or too far upstream in the innovation chain.²⁷⁷ The Geneva Declaration urges WIPO to acknowledge “the importance of striking a balance between the public domain and competition on the one hand, and the realm of property rights on the other,” and to “formally embrace the notions of balance, appropriateness and the stimulation of both competitive and collaborative models of creative activity.”²⁷⁸ The Adelphi Charter insists that “[t]he public interest requires a balance between the public domain and private rights” and “between the free competition that is essential for economic vitality and the monopoly rights granted by intellectual property laws.”²⁷⁹ In other words, rather than rejecting IP outright or rejecting the economic framing of the field,

276. This justification contends that exclusive rights are required to induce the production of information because information is (at least in ideal form) nonrival and nonexcludable. See ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 12-18 (2d ed. 2000). There are other philosophical justifications offered for IP, such as the Lockean account that treats IP as a reward for labor, see *id.* at 2-5, and “personality” theory, which suggests that IP helps realize individual personhood or will, see G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 41-45 (T.M. Knox trans., 1967) (1821); Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982). But perhaps because these latter theories are today somewhat less influential in political and legal terms, see William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 173 (Stephen Munzer ed., 2001), it is rare to find a direct challenge to or reworking of these claims in the texts of the A2K mobilization. The one notable exception comes from the traditional knowledge domain, which, as I suggested earlier, sits in an uneasy relationship to the A2K mobilization as a whole.

277. Economists and legal scholars have long posited that exclusive rights in basic knowledge inputs—facts, words, ideas, scientific principles, literary tropes, data, and so forth—have the potential to create dynamic inefficiencies. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 93, 306 (2003); see also Richard R. Nelson, *The Simple Economics of Basic Scientific Research*, 67 *J. POL. ECON.* 297, 302-04 (1959) (describing why firms often cannot capture the full value produced by basic R&D). Scholars have also recently argued that broad and increasingly upstream patents may create thickets or anticommons effects that could impede innovation. See, e.g., Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *SCI.* 698 (1998). For diverging views regarding whether research in the United States has been affected by inability to quickly negotiate access to IP, compare Walsh et al., *supra* note 68, with STEPHEN HANSEN ET AL., *THE EFFECTS OF PATENTING IN THE AAAS SCIENTIFIC COMMUNITY* 21 (2005).

278. Geneva Declaration, *supra* note 130, at 1-2.

279. Adelphi Charter, *supra* note 138.

A2K groups have become quite deeply engaged with arguments about competition and monopoly and have actively embraced arguments about the importance of a “balance” between public and private rights.

Just how deeply these groups have come to engage these arguments becomes clear when one considers the kinds of policy proposals that A2K groups suggest. The Adelphi Charter and Geneva Declaration insist that “[c]reativity and investment should be recognised and rewarded”²⁸⁰ and that “creative individuals and communities” must be supported.²⁸¹ They also propose a series of alternatives to IP that could meet these aims. The Geneva Declaration, for example, points to new “collaborative efforts to create public goods, including the Internet, the World Wide Web, Wikipedia, the Creative Commons, GNU Linux and other free and open software projects,” and a “renewed interest in compensatory liability rules, innovation prizes, or competitive intermediators, as models for economic incentives for science and technology that can facilitate sequential follow-on innovation and avoid monopolist abuses.”²⁸²

Actors involved in the A2K mobilization are thus both embracing the language of innovation and creativity, rather than, for example, rejecting innovation in favor of access to informational resources, and engaging substantively in questions about how information is best produced and how innovation systems can be optimized to maximize social welfare. A2K actors are seeking to refashion arguments about the economics of innovation from within in at least two ways: by challenging the presumption embedded in IP law that information is generally or most efficiently created by individuals who are seeking to make a profit, and by arguing that the poor cannot adequately manifest their demand in markets, so that a privatized innovation system will not maximize true public welfare.

These arguments are foreshadowed in the declarations discussed above, but a proper elaboration requires us to delve somewhat more substantively into the arguments of participants in the A2K network. The production process of free and open-source software is central to the imaginary of the A2K mobilization because it offers a model of collaborative, distributed innovation that does not

280. *Id.* at 1.

281. Geneva Declaration, *supra* note 130, at 1. As the Web site that hosts the model Access to Knowledge Treaty puts it, “While the [Access to Knowledge] movement is concerned about fairness and access to knowledge, it also is supportive of creative and inventive communities. To reconcile these interests, we promote new paradigms for the creation and management of knowledge resources.” See CPTech, Access to Knowledge, Overview, <http://www.cptech.org/azk/> (last visited Nov. 2, 2007).

282. Geneva Declaration, *supra* note 130, at 1.

rely on the incentivizing effect of IP rights. Free software is created by volunteers, and its collaborative model of production is sustained by the General Public License (GPL) that governs it.²⁸³ The GPL gives users the right to copy and modify the associated source code and requires that users apply the same rights to any derivative works produced from the licensed software.²⁸⁴ Everyone who makes use of such software must therefore contribute any improvements back into the common pool, and no one who makes incremental improvements on the software can seek compensation for his or her labor through strategies of exclusion. If the account embedded in IP law were correct, such software should not exist.²⁸⁵

The fact that it does exist leads participants in the A2K mobilization to postulate that the traditional model of IP misses something fundamental about the necessary conditions of creativity, particularly in the digital age. The argument has been developed most centrally by Yochai Benkler. He contends that the networked digital environment facilitates new forms of commons-based peer production because it aggregates individuals at a scale that helps overcome motivational and organizational challenges.²⁸⁶ Perhaps the most forceful articulation of this view is Eben Moglen's "Metaphorical Corollary to Faraday's Law": "Wrap the Internet around every brain on the planet and spin the planet. Software flows in the wires. It's an emergent property of human minds to create."²⁸⁷

The arguments of farmers' rights advocates are strikingly similar. For millennia, these advocates contend, farmers have refined and protected plant varieties by sharing knowledge about them and by sharing seeds and cuttings from local variations ("landraces").²⁸⁸ Each landrace may be a slightly different species, and while landraces may produce lower yields on average than

283. See GNU Project, GNU General Public License (June 29, 2007), www.gnu.org/copyleft/gpl.html.

284. See Josh Lerner & Jean Tirole, *The Scope of Open Source Licensing* (Nat'l Bureau of Econ. Research, Working Paper No. 9363, 2002), available at <http://www.nber.org/papers/w9363>.

285. See, e.g., Boyle, *supra* note 64, at 45.

286. Benkler, *supra* note 121; see also BENKLER, *supra* note 75; Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004); see also Boyle, *supra* note 64, at 44-46; Eric Raymond, *The Cathedral and the Bazaar*, FIRST MONDAY, Mar. 2, 1998, http://www.firstmonday.org/issues/issue3_3/raymond/.

287. See Moglen, *supra* note 224, pt. III.

288. In developing countries, at least eighty percent of seed is obtained outside of the commercial system. See Carlos M. Correa, *Options for the Implementation of Farmers' Rights at the National Level* 14 (Istituto Agronomico per l'Oltremare [Overseas Agronomic Institute], Working Paper No. 8, 2000).

commercial monocultures, they are also more diverse and thus protect better against catastrophic crop failure to which standardized monocrops may be vulnerable.²⁸⁹ Local varieties may also be better adapted to local circumstances than the monocultures sold by seed companies and will be the inputs for bioprospecting in the short and long term.²⁹⁰ The agricultural stock that we have today thus depends upon the historical efforts of farmers to cultivate and preserve landraces. But plant breeders' rights and patents on genetically modified plant materials cannot compensate for this past labor. The subject matter of landraces is too minimally defined and variable, and landraces typically evolve naturally over time, which can make it impossible to separate out the contributions of different farmers.²⁹¹ There is no clear titleholder for germplasm produced in this way, and no formula for the optimal duration and territorial validity of rights derived from the collective work of farmers.²⁹²

Farmers' rights proponents and advocates of free software thus describe systems of "innovation" that are inherently collective and that create informational goods of significant value, but that cannot be protected by, and indeed are harmed by, regimes of exclusive rights in information. Software patents, many programmers contend, are incompatible with an open-source model of software development.²⁹³ And exclusive rights in germplasm, especially when combined with seed laws that require certification and restrict sharing practices, threaten to "undermine the free sharing of knowledge and resources among local communities and the world community [and may prove] incompatible with the collective nature of innovation at the community level."²⁹⁴ These arguments resonate with those made by advocates of Wikipedia, open-source genomics, and even open-source drug development.²⁹⁵

289. Borowiak, *supra* note 91, at 524.

290. Correa, *supra* note 288, at 11.

291. *Id.* at 3, 20.

292. *Id.* at 29-30.

293. See, e.g., RICHARD STALLMAN, *The Danger of Software Patents*, in FREE SOFTWARE, FREE SOCIETY 95 (Joshua Gay ed., 2002).

294. Correa, *supra* note 288, at 21. On seed laws, see, for example, Neils Louwaars, *Biases and Bottlenecks: Time To Reform the South's Inherited Seed Laws?*, SEEDLING, July 2005, at 4, available at http://www.grain.org/seedling_files/seed-05-07-2.pdf.

295. See, e.g., Yochai Benkler, *Commons-Based Strategies and the Problems of Patents*, 305 SCI. 1110 (2004) (discussing the application of peer-production models to science); Goetz, *supra* note 147, at 208, 210-11 (discussing open-source genomics); Stephen M. Maurer, Arti Rai & Andrej Sali, *Finding Cures for Tropical Diseases: Is Open Source an Answer?*, 1 PLOS MED. 183 (2004) (discussing open-source biomedical research).

Taken together, these arguments are being used by A2K advocates to sketch out a claim that creative potential inheres as much in the undivided group as in the individual genius and can perhaps best be said to reside in the network that connects people. Even the access-to-medicines campaign—which, recall, Stallman characterized as being “just about price”—has a form of this claim. As access-to-medicines advocates frequently note, it was Indian firms that first incorporated all of the necessary anti-HIV drugs into one pill, thereby making it easier for patients to adhere to treatment and prevent viral resistance.²⁹⁶

If the traditional IP paradigm idealizes a moment of creative departure from what came before, the A2K mobilization idealizes the ground from which creators depart and the rights that would-be-creators have to stand upon it. The implication, ultimately, is that existing IP law is not welfare maximizing because it fails to reward a great deal of innovation and because it puts collaborative and “open-source” innovators at a comparative disadvantage.

A second form of internal critique that A2K participants are developing argues that the incentives produced by exclusive rights in innovation do not, in fact, correspond to social welfare, for example because most of the world’s people are too poor to adequately manifest their demand in the global market. This critique can be seen in the argument about the “R&D gap” articulated by access-to-medicines campaigners. Advocates argue that this gap exists because “drug companies in developed and developing nations simply cannot recoup the cost of R&D for products to treat diseases that abound in developing countries.”²⁹⁷ Unsurprisingly, the global pharmaceutical market is highly concentrated in wealthy countries. Low- and middle-income countries together provide only about five to seven percent of the revenues of the U.S.-based pharmaceutical industry, and of course, potential revenues are a significant factor in firms’ decisions to invest.²⁹⁸ As a recent blue ribbon commission of academics, economists, and policymakers concluded, the ability of IP to incentivize biomedical R&D in developing countries “may be limited or non-existent” because “the market demand . . . is small and uncertain.”²⁹⁹ Patents

296. In the United States and Europe, every effective drug combination involves patents from more than one company, and the first combination pill to enter that market did so only in July 2006. Andrew Pollack, *F.D.A. Backs AIDS Pill To Be Taken Once a Day*, N.Y. TIMES, July 13, 2006, at C3.

297. ’t Hoen, *supra* note 101, at 28–29.

298. I have made this point in more detail with colleagues in a recent article. See Kapczynski et al., *supra* note 240, at 1051–52.

299. Tomris Türmen & Charles Clift, *Public Health, Innovation and Intellectual Property Rights: Unfinished Business*, 84 BULL. WORLD HEALTH ORG. 338, 338 (2006) (describing the conclusions of the CIPR report, *supra* note 84).

and private markets in innovation generally drive innovation toward areas of highest potential profit. Because wealth is highly unequally distributed around the world, advocates contend, a patent-based medical R&D system will systematically fail to produce products in proportion to medical need. It will instead drive innovation toward areas of greatest return to firms, and thus will maximize private value rather than social value.

The same point is made by A2K advocates in relation to the public domain.³⁰⁰ They contend that markets fail to register properly not only demand that is not made manifest with dollars, but also value that cannot be privately appropriated. This, then, represents another way that A2K advocates are seeking to refashion the arguments about innovation systems that legitimize the global IP system: they contend that exclusive rights regimes will not maximize social welfare because they prioritize private over social value.

A2K advocates are also proposing strategies to sustain the kind of innovation that they value, outside or alongside the IP system. For example, many A2K groups have developed and promoted private ordering strategies designed to change individuals' practices in relation to IP rather than the law of IP itself.³⁰¹ Free software, of course, is just such an effort. It is a private ordering system designed to foster innovation within traditional IP regimes by creating mechanisms and norms to facilitate collaboration and sharing among private individuals. The GPL, of course, has been used as a model for a myriad of other private ordering schemes, such as Creative Commons licenses, open genomics licenses, and licenses to promote access to public sector research.³⁰²

The access-to-medicines campaign has evolved into a critique of the global pharmaceutical R&D system and a set of proposed solutions that involve not just the right to override patents, but also new systems to incentivize innovation that will better serve the world's poor. A2K groups, for example, recently proposed a new framework convention for medical R&D, which would require equitable global investment in medical R&D and at the same time address some of the criticisms that the movement has developed about patent-based medical R&D.³⁰³ All of these are symptoms of the discursive effect that engagement with law has had upon A2K actors.

300. See, e.g., RUFUS POLLOCK, *THE VALUE OF THE PUBLIC DOMAIN* 3-4 (2006).

301. Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 376 (2005).

302. See Kapczynski et al., *supra* note 240, at 1069-72; *supra* text accompanying notes 144-147.

303. See *Medical Research and Development Treaty (MRDT)* arts. 4, 7 (Feb. 7, 2005) (draft), <http://www.cptech.org/workingdrafts/rndtreaty4.pdf>; see also Nicoletta Dentico & Nathan Ford, *The Courage To Change the Rules: A Proposal for an Essential Health R&D Treaty*, 2 *PLOS MED.* 0096 (2005).

3. *Strategic Effects*

We can also see in the A2K mobilization evidence of a third kind of effect that law has on framing processes. This “strategic” effect leads groups to modulate their claims in narrow fashion in order to gain control over the instrumental power of law. The difference between strategic and discursive effects, as I intend the terms, turns on the depth of engagement with the argument in question, not on the degree to which the argument is internalized by movement participants.

Two examples will illustrate. Copyright law generally permits limited copying under the defense of “fair use” or “fair dealing.” The defense can accommodate a range of different kinds of copying, from rote reproduction for educational use to “transformative” uses such as works of parody. Some influential members of the copyleft community make the case that everyday, rote copying is just as important to creativity as is transformative copying.³⁰⁴ The value of plain copying is particularly high for those who have no other means to access a particular work—as is undoubtedly the case for many purchasers of unauthorized copies in developing countries. And yet, when copyleftists seek to mobilize sentiment against the encroachments of copyright and argue for broader fair use provisions, they almost uniformly call upon the figure of the parodist or transformative creator, rather than the teacher who creates a coursepack for her students.³⁰⁵ Why? One possibility is the strategic effect that legal discourse has on acts of framing. Transformative uses may appear more legitimate than other forms of copying, particularly in countries, such as the United States, that have strong free speech traditions. They may also be easier to defend as a legal matter.³⁰⁶ Both dynamics would be produced by a strategic calculation, and yet could have significant long-term effects. As

304. See Lawrence Liang & Achal Prabhala, *Reconsidering the Pirate Nation*, INFOCHANGE, Nov. 2006, http://www.infochangeindia.org/IPR_article14.jsp. For an extended argument about the importance of rote copying to free speech, see Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 546 (2004).

305. Lawrence Lessig, for example, sometimes treats transformative copying as presumptively fair, and nontransformative copying as presumptively unfair. See, e.g., LESSIG, *supra* note 115, at 85–94. Boyle and Benkler both cite the *Wind Done Gone* facts (wherein the estate of Margaret Mitchell sought to enjoin the publication of a retelling of *Gone with the Wind* written from the perspective of a slave) as the paradigmatic violation of fair use rights. See Benkler, *supra* note 165, at 173; Boyle, *supra* note 64, at 56; see also *Suntrust Bank v. Houghton Mifflin Co. (Wind Done Gone)*, 268 F.3d 1257 (11th Cir. 2001).

306. Rebecca Tushnet argues, for example, that fair use law in the United States has become “realigned around transformative use,” Tushnet, *supra* note 304, at 555, which would make such arguments more likely to succeed in court.

Rebecca Tushnet notes, when advocates cite transformative uses and parodies as the paradigmatic examples of fair use, they implicitly downgrade the status of pure copying under fair use doctrine.³⁰⁷ They may therefore unwittingly be contributing to the drift of fair use law toward transformative copying and away from the kind of rote copying that some copyleftists argue is more important.

A second example can be drawn from recent advocacy around the Indian Patent Act.³⁰⁸ In order to comply with TRIPS, India had to introduce product patents on medicines in early 2005.³⁰⁹ It previously had no such patents and had become the world's largest producer of generic medicines by volume.³¹⁰ Concerned about the impact of this new patent law on patients around the world, access-to-medicines groups lobbied the government heavily. They did not urge the government to flout TRIPS, but instead insisted that it make use of TRIPS flexibilities, for example, by adopting a very narrow definition of patentable subject material.³¹¹

The government adopted such a standard,³¹² and today these same activists are engaged in pregrant patent oppositions, rather than opposition to patents in India. This is so even though all of them would likely prefer that India were entirely free of product patents on medicines. Despite their clearly stated view that “[t]he implementation of the TRIPS agreement will have a negative effect on the developing world’s capacity to manufacture affordable generic drugs, and will lead to an increase in drug prices,”³¹³ none of the groups central to the

307. *Id.* at 558.

308. See The Patents (Amendment) Act, 2005, No. 15, Acts of Parliament, 2005.

309. With the 1970 Patent Act, the Indian government did away with patents on medicines in an effort to become self-sufficient in the pharmaceutical sector and provide Indian consumers with increased access to affordable medicines. See Shubham Chaudhuri, Pinelopi K. Goldberg & Panle Jia, *Estimating the Effects of Global Patent Protection in Pharmaceuticals: A Case Study of Quinolones in India* 6-7 (BREAD, Working Paper No. 125, 2006), available at <http://www.cid.harvard.edu/bread/papers/working/125.pdf>; see also Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT’L L. 317, 320 (2005).

310. See Chaudhuri et al., *supra* note 309, at 3.

311. See, e.g., MÉDECINS SANS FRONTIÈRES [DOCTORS WITHOUT BORDERS], WILL THE LIFELINE OF AFFORDABLE MEDICINES FOR POOR COUNTRIES BE CUT? CONSEQUENCES OF MEDICINES PATENTING IN INDIA 4-6 (2005), available at <http://www.msf.fr/documents/base/2005-02-01-msf.pdf>.

312. See, e.g., The Patents (Amendment) Act, 2005, § 3(d) (precluding patents on new uses of known substances and limiting patents on new forms of known substances).

313. MÉDECINS SANS FRONTIÈRES [DOCTORS WITHOUT BORDERS], EMERGENCY PRESCRIPTIONS: STRATEGIES FOR INCREASING ACCESS TO MEDICINES FOR INFECTIOUS DISEASES (2000).

medicines campaign have publicly campaigned against TRIPS as such. They argue instead that countries should not go beyond what TRIPS requires and should make maximal use of TRIPS exceptions—even as they express doubt that these exceptions are in fact workable for poor countries.³¹⁴ My own experience in this campaign verifies this disconnect: although many of the key advocates in the field seem to believe that IP does not belong in the trade regime, they are paradoxically far less likely to make this claim than are mainstream economists and academics unconnected with the movement.³¹⁵

B. The Implications of Law's Gravitational Pull

The preceding pages describe several types of effects that law may have on framing processes. It is of course difficult to know how deeply engagement with law will affect the A2K mobilization, in part because there is as yet no single place to go to ascertain the self-conception and strategies of this new set of political actors. But that is also part of the point. Movements that organize around and through law do not preexist that law—instead, they are constituted through it. And the process of engaging with law no doubt generates feedback effects that alter the internal dynamics of these movements. As groups begin to succeed in changing law, for example, these successes may promote some strands of the movement over others. To the extent that less disruptive reform efforts are likely to have more success, they may begin to take center stage in the movement. This is yet another way to understand law as a constitutive force in the dynamics of political mobilization.

Organizing around law has helped not only to galvanize the A2K mobilization, but also to shape its language and self-construction. This is evident in the architecture of the mobilization, in the investment of A2K actors in arguments and strategies that operate internal to the logic of the law and legal discourse of IP, and in the tendency of movement actors strategically to modulate their claims by, for example, embracing TRIPS flexibilities rather than opposing TRIPS. These are effects of what I call the gravitational pull that law exerts on framing processes. What are the implications of these effects?

One implication, as Reva Siegel points out, is that movement/countermovement struggle can “strengthen law precisely as it

314. See MÉDECINS SANS FRONTIÈRES [DOCTORS WITHOUT BORDERS], NEITHER EXPEDITIOUS, NOR A SOLUTION: THE WTO AUGUST 30TH DECISION IS UNWORKABLE (2006).

315. See, e.g., Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126, 127 (2002).

unsettles it.”³¹⁶ Siegel’s point is that because (or where) law is open to contestation, groups seeking to capture its instrumental and legitimizing power may be drawn to legal institutions and discourse, and thus drawn to speak in the same language as their opponents and at the same time to make claims upon – and implicitly defer to – existing legal institutions.

This can strengthen law in two ways. First, it can create zones of overlapping consensus in which judges can decide cases and law can be seen as legitimate despite sharp contestation. Siegel offers an example of this dynamic drawn from the history of the Equal Rights Amendment: in their struggle for control over constitutional discourse, proponents of the ERA publicly disavowed expansive applications of the amendment that they privately favored, and leading opponents of the ERA argued that a constitutional amendment was unnecessary because the Fourteenth Amendment already protected women’s equality.³¹⁷ Second, movement/countermovement conflict can strengthen law by producing identification with legal terms. The latter may occur, for example, when groups embrace a constitutional principle and seek to redeem it before a court. But it may also happen when groups seek to use nonconstitutional legal tools as well. For example, Creative Commons has been criticized as implicitly promoting the conceptual framework of copyright law because “the only practice [it] persistently promotes is letting individuals govern their works.”³¹⁸ The GPL, of course, also necessarily relies on copyright law for its effects, and it is now frequently pointed out that in this sense, its licensing scheme depends upon copyright law.³¹⁹

The A2K mobilization offers another, perhaps more paradoxical, mechanism by which movement/countermovement mobilizations may strengthen law even as they unsettle it. When A2K advocates draw attention to the restrictive nature of IP law to recruit support for their cause, they may radicalize their intended audience. But they may at the same time introduce IP concepts to potential constituents who would otherwise be unaware of them. Many academic scientists in the United States today, for example, operate with studied disregard for the patent status of the research tools that they use.³²⁰

316. Siegel, *supra* note 60, at 1419.

317. *Id.* at 1381-1414.

318. See Elkin-Koren, *supra* note 301, at 400-01.

319. See, e.g., Boyle, *supra* note 88, at 10. This fact not only has potential effects on framing; it also creates legal quandaries. See Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, LAW & CONTEMP. PROBS., Spring 2007, at 23.

320. See, e.g., John P. Walsh, Ashish Arora & Wesley M. Cohen, *Effect of Research Tools Patents and Licensing on Biomedical Innovation*, in PATENTS IN THE KNOWLEDGE-BASED ECONOMY 285, 327 (Wesley M. Cohen & Stephen A. Merrill eds., 2003); Walsh et al., *supra* note 68, at 2002.

One such scientist recently told a researcher that such patents were “not a problem. I know this is a murky legal issue, and you should talk to patent lawyers, but in everyday practice, it is not murky. There is a concept of ‘academic use’ . . . I don’t know if it is solidly defensible in the law, but it is the practice.”³²¹

Paradoxically, it may be advocates of a broader research exemption who draw attention to this conduct and introduce to the academic research community a sense that they are behaving illegally, particularly because such scientists are rarely sued.³²² Similarly, many netizens may learn first from copleftists that their everyday activities (select-all, copy, paste) may violate copyright law. The tutelary effect of the legalism of the A2K mobilization may be particularly important if, as some scholars have suggested, IP law frequently conflicts with everyday practices and behaviors.³²³ But this dynamic may also be one that operates more broadly. Those who seek popularly to contest law must first explain it to their constituents. They may even be led to aggrandize the effects of the law that they seek to change, once again with potentially paradoxical implications from the perspective of these same advocates.

The account of law’s gravitational effects offered here thus suggests that groups that engage in attempts to change law may be drawn into legal discourses, and into more agreement with their opponents than they might wish. I do not presume here that movement actors should resist the gravitational pull of law or that the benefits are invariably outweighed by the costs. The conceptual paradigm that underpins framing theory does suggest, though, that discourses carry with them particular affordances and constraints. It also indicates that groups can and do manipulate these effects to some degree. But law is a particularly weighty source of frames, and if groups find themselves wanting to resist its pull, framing theory suggests several strategies that might help.

A2K groups, for example, might consciously cultivate alternative collective-action frames. The mobilization might, for example, theorize its connections as based not on IP law but on other axes that might unite its members, such as a “neo-Jeffersonian” ideology that privileges smallholders and distributed

321. Walsh et al., *supra* note 320, at 327.

322. *See id.*; *see also supra* note 68.

323. *See, e.g.,* Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTEL. PROP. L. 39 (2004); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1345-46 (1989).

networks over large businesses and hierarchical modalities of production.³²⁴ If A2K actors attend to the pull that law exerts on their discourse and strategies and the path-dependent chains of argument that their interpretive choices establish, they can seek to act against them. They might respond to the example of parody and fair use offered above, for example, by making rote copying more central to their fair use claims. Similarly, information economics is of course not the only frame in which to contest IP law, and A2K actors might actively cultivate alternative languages for making their claims.³²⁵ Discourses that might be mined for such purposes can be readily found in the writings of the movement and its academic proponents.³²⁶ Of course, to adopt different discourses and strategies in this way might mean relinquishing some of the short-term and instrumental value of engagement with legal discourse. But to the extent that groups are aware of framing processes, they are likely to be better situated to make such judgments.

Given space constraints, in the remaining pages I will focus on a third implication, one that the A2K mobilization is particularly suited to help us think about. As Siegel points out, if law and legal discourse are sufficiently open to competing groups, and if control over legal language is sufficiently appealing in instrumental or normative terms, groups may well find themselves speaking in the same terms, as they each struggle to embed their claims in law and counter one another's claims. This may mean, as Siegel's example of the ERA demonstrates, that groups come to outwardly voice agreement upon certain things, such as the fact that the Fourteenth Amendment applies to women as a protected class.

But law can also create a different kind of integration—an integration of disagreement. Disagreement here means something specific:

324. See Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium,"* 89 MINN. L. REV. 1318, 1319, 1325-35 (2005).

325. See Drahos, *supra* note 204, at 15.

326. See, e.g., 3D, POLICY BRIEF ON INTELLECTUAL PROPERTY, DEVELOPMENT AND HUMAN RIGHTS: HOW HUMAN RIGHTS CAN SUPPORT PROPOSALS FOR A WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) DEVELOPMENT AGENDA (2006), http://www.3dthree.org/pdf_3D/3DPolBrief-WIPO-eng.pdf (human rights); Frederick M. Abbott, *TRIPS and Human Rights: Preliminary Reflections*, in INTERNATIONAL TRADE AND HUMAN RIGHTS 145 (Frederick M. Abbott, Christine Breining-Kaufmann & Thomas Cottier eds., 2006) (same); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1877-79 (1991) ("dialogism"); see also LESSIG, *supra* note 115 (free speech); Benkler, *supra* note 165 (same); Rosemary J. Coombe & Andrew Herman, *Rhetorical Virtues: Property, Speech, and the Commons on the World-Wide Web*, 77 ANTHROPOLOGICAL Q. 559, 566 (2004) (cultural autonomy); William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217-18 (1998) ("semiotic democracy").

[A] determined kind of speech situation: one in which one of the interlocutors at once understands and does not understand what the other is saying. Disagreement is not the conflict between one who says white and another who says black. It is the conflict between one who says white and another who also says white but does not understand the same thing by it³²⁷

True disagreement (as opposed, say, to misunderstanding) thus occurs where “[t]he interlocutors both understand and do not understand the same thing by the same words.”³²⁸ Integration thus does not necessarily imply agreement; it also implies communities of disagreement. Such communities are what some philosophers would argue constitute the public and political spheres. Hannah Arendt, for example, argues that the “public” is a place that is “common to all of us,” where we can see and be seen by others.³²⁹ The common world of the public is thus “not guaranteed primarily by the ‘common nature’ of all men who constitute it, but rather by the fact that, differences of position and the resulting variety of perspectives notwithstanding, everybody is always concerned with the same object.”³³⁰ The *polis*, in turn, is a space where things are “decided through words and persuasion and not through force and violence,” and where there can be no “uncontested rule.”³³¹

One critical question in contemporary debates about globalization regards the degree to which coalitions, political identifications, and publics can be built across national boundaries and among geographically dispersed communities.³³² Although there is robust scholarly debate over the degree to which globalization is undermining the traditional authority of the sovereign state, there is broad agreement that the boundaries of the nation-state have become more porous and our world increasingly networked.³³³ This then poses

327. RANCIÈRE, *supra* note 4, at x.

328. *Id.* at xi.

329. HANNAH ARENDT, *THE HUMAN CONDITION* 50-52 (2d ed. 1958).

330. *Id.* at 57-58.

331. *Id.* at 26, 28.

332. See KECK & SIKKINK, *supra* note 2, at 33 (“We lack convincing studies of the sustained and specific processes through which individuals and organizations create (or resist the creation of) something resembling global civil society.”).

333. See, e.g., CASTELLS, *supra* note 148, at 135-47; ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 63-65 (1990); JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER* 106-07 (Ciaran Cronin & Pablo De Greiff eds., Ciaran Cronin trans., 1998). As Jürgen Habermas characterizes the dilemma that ensues, processes of globalization

a “troubling question of whether democratic opinion- and will-formation could ever achieve a binding force that extends beyond the level of the nation-state.”³³⁴ Where, to adopt Arendt’s terms, might we find the “common objects” of dispute and the language in which to disagree beyond the borders of the nation state? Increasingly, the answer may be in forms of international and transnational law.

We thus arrive at possibly the most intriguing implication of the gravitational pull that law can exert on framing processes. A2K groups and their opponents are, as indicated above, struggling for control over common terms, such as those related to innovation, the importance of medicines in poor countries, and the implications of the digital age for processes of creative production. The emergence of this new global political discourse of IP should be of particular interest, because scholars of transnational mobilization suggest that it is unlikely for mobilization to occur around issues as arcane and technical as IP law.³³⁵ One implication of the story of the A2K mobilization, then, is that international law and international legal institutions, even those associated with prototypically “private” law, may have a key role to play in building global publics. Law may help to create publics or polities by creating places where people may come to build coalitions, develop areas of consensus, and forge areas of common disagreement. If this is so, then decisions about the shape of law and legal institutions can very likely help or hinder the creation of such publics.

Again, a caveat: to say that law may be central to the creation of publics and polities is not to suggest that law provides an even playing field, or that the publics and polities it helps to create are not affected by forms of historical

give rise to two opposed tendencies. On the one hand they promote the expansion of actors’ consciousness, on the other the differentiation, extension, and interconnection of systems, networks (such as markets), or organizations. Whereas the growth of systems and networks multiplies possible contacts and exchanges of information, it does not lead per se to the expansion of an intersubjectively shared world and to the discursive interweaving of conceptions of relevance, themes, and contributions from which political public spheres arise. . . . For the present it remains unclear whether an expanding public consciousness, though centered in the lifeworld, nevertheless has the ability to span systematically differentiated contexts

HABERMAS, *supra*, at 120–21.

334. HABERMAS, *supra* note 333, at 127.

335. Keck and Sikkink suggest that because “[n]etworks are difficult to organize transnationally,” they “have emerged around a particular set of issues with high value content and transcultural resonance.” KECK & SIKKINK, *supra* note 2, at 200. “Intellectual property” would not seem to have met either criterion prior to the A2K mobilization.

privilege and disadvantage. The concept of the public sphere sometimes carries such implications, but it need not.³³⁶ Other questions also remain about the exact nature of the commonalities and disagreements that can be built across borders through engagement with international law and legal institutions. Under what conditions might such communities emerge? Can they be of sufficient durability and depth to demand and enforce accountability at the supranational level? Under what conditions might conflict over legal orders at the international level engender strong and normatively engaged publics, and under what conditions fragmented and volatile publics?

To these questions we must add the more general question of when, whether, and how much law will matter to the framing processes of particular groups. One factor might be the degree to which groups understand themselves to be authorized to make claims upon, or offer reinterpretations of, a particular law or form of law.³³⁷ Another might be the purchase that a particular law has in a given circumstance or legal system. The gravitational pull of different forms of law, that is, might also respond to the relative force of that law within a particular legal order or problem. Audience is also likely to matter a great deal; law may hold tremendous authority in some circles and be viewed as irrelevant or suspect in others. A fourth factor might be the degree to which the terms of a particular law are “elaborated” or “restricted.”³³⁸ Restricted terms, as they are defined in linguistics and framing theory, are highly particularized, predictable, and rigidly organized; they “provide a constricted range of definitions, thus allowing for little interpretive discretion.”³³⁹ They may thus be less attractive for groups seeking to mobilize than elaborated terms, which are more flexible and universalistic and “allow for

336. See generally Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in *THE PHANTOM PUBLIC SPHERE* 1 (Bruce Robbins ed., 1993); Bruce Robbins, *Introduction: The Public as Phantom*, in *THE PHANTOM PUBLIC SPHERE*, *supra*, at vii-viii.

337. Siegel suggests that U.S. constitutional law has a special attraction for those engaged in social movements in the United States today because “mobilized groups of citizens understand themselves as authorized to speak to matters involving ‘what is officially the law/legal system’ where the Constitution is concerned, in a way that they do not feel authorized to speak about questions of tort or property law.” Siegel, *supra* note 54, at 322. But as Siegel implies, the degree to which individuals feel authorized to speak to the meaning of a law is likely to vary with context. And even today, while constitutional law may imply a special relationship of authorship by “We the People,” all forms of law in the United States, even tort and property law, are commonly understood to derive from the authority of the people, and all laws are officially open to revision by these same people.

338. Snow & Benford, *supra* note 23, at 139-40.

339. *Id.* at 140.

extensive ideational amplification and extension.”³⁴⁰ This notion fits with the suggestions of some law-and-social-movement scholars that constitutional discourse and rights discourse are particularly attractive to movements because they operate through the application of open textured principles.³⁴¹

Studying the A2K mobilization and the industry mobilization that preceded it using a dialogic frame-analytic perspective thus permits us not only to develop appropriately complex accounts of the new politics of IP, but also to begin to theorize the relationship between law and framing processes, and between law and the emergence of publics and politics beyond the nation-state.

CONCLUSION

In the last several decades, intellectual property law has become significantly stronger, both in the United States and around the world. Recently, a powerful backlash has emerged and begun to gather loosely under the rubric of “access to knowledge.” The dominant explanation for the expansion of IP law cannot, by itself, account for the emergence and initial successes of the countermovement—or indeed, the mobilization of the IP industries that preceded it. This Article argues that frame-analytic accounts developed in the field of sociology can provide a fuller and less deterministic account of the new politics of IP, by elucidating the way that socially mediated acts of interpretation have influenced collective action in both the IP industries and the A2K mobilization.

Using framing theory, we can see how the recent expansion of IP law responded not just to material interests, but also to acts of framing that allowed IP advocates to interpret their interests, build alliances, and persuade others to support their cause. The A2K mobilization was made possible by similar acts of framing, which have permitted those involved—who come from diverse contexts and who initially organized around divergent frameworks—to build

340. *Id.*

341. See, e.g., Balkin & Siegel, *supra* note 54, at 928 (“[W]hen advocates apply constitutional principles in new ways, they can create conflicts between longstanding principles and longstanding practices so that one customary understanding calls into question the other.”); William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1805 (1994) (book review) (“People mobilize around rights, not human capital policy. Every previous generation of reformers addressed its task in the language of citizenship and rights, as well as of budgets and policies. We have learned to be leery of high-sounding rights talk; we have not learned to do without it.”); Siegel, *supra* note 60, at 1323 (referring to the “open-textured language of the Constitution’s rights guarantees”).

new concepts joining them together, concepts such as the “public domain,” the “commons,” the importance of “sharing,” and the value of “access to knowledge.” The acts of framing that have characterized this mobilization—many of which were directly facilitated or influenced by law—have allowed A2K groups to understand their interests as related, forge coalitions, and recruit support in areas where popular political categories and claims previously did not exist. The frame-analytic perspective thus helps us to develop a rich account of the new politics of IP and of the way that the A2K mobilization and IP industries have coevolved in the shadow of law.

What, ultimately, can we learn from the A2K mobilization, and from the social-movement methodology that this Article adopts? First, the field of IP is influenced—perhaps especially today—not only by changes in economics and technology, but also by social actors and the arguments that these actors use to build alliances and persuade others. A frame-mobilization perspective allows us to see how groups use frames to interpret their interests, to recruit allies, and to convince others of the justness of their cause—and thus how an IP industry coalition that once looked all-powerful is fraying, and why a countermovement that once seemed impossible now appears to be emerging.

Other scholars have recognized the importance of ideas to the field of IP, and I have relied on their work here. My contribution is not to introduce this notion, but to situate it within a theory of the role of interpretation in collective action. Framing theory permits us to systematize and extend the insight that ideas matter to IP law, and to relate this to existing public choice accounts of the politics of IP. Systematically incorporating the role of interpretation into accounts of political economy should make us significantly less confident of our ability to predict political outcomes using fixed assumptions about interests and how a group’s interests can best be advanced. This may be particularly true in times of environmental uncertainty and ideational flux.

By drawing on the synergistic developments in framing theory and law-and-social-movements theory, both of which have recently begun to address the role of law in framing processes, we can also understand key aspects of the evolution of the A2K mobilization. Studying that mobilization allows us to develop further theories of how and why law affects framing processes. As A2K activists have come up against legal constraints and looked to law to understand and change their circumstances, they have been offered new understandings of their interests and claims. As A2K groups seek to coalesce through an architectural framework provided by law and to embed their own interests in that law, they are developing a range of proposals to reform IP law and arguments that operate within the discourse that governs contemporary discussions about IP. That is, organizing around law has helped not only to galvanize this movement, but also to shape its language and self-construction.

A2K groups are, for example, developing critiques internal to the economic logic most commonly used to justify IP law, challenging the notion that information is most efficiently produced by individuals seeking to make a profit, and arguing that privatized innovation systems prioritize private over social welfare.

These effects demonstrate what I call the gravitational pull of law. This term encompasses both law's power as a "master frame" and the fact that legal discourses are constitutively constrained. This force not only can affect a group's architecture, discourse, and strategies; it can also lead groups into zones of agreement, and of common disagreement, with their opponents.

The final aim of this Article has been to begin to explore several implications of law's gravitational pull on framing processes. First, law's integrative effect may be of interest to those who design legal systems because it suggests that law can be strengthened, and not only unsettled, by mobilizations and countermobilizations. Second, it may be of interest to those engaged in social mobilization, because understanding these effects may be important to determining how to engage and possibly exert more control over them. Third, and perhaps most intriguingly, it may be of interest to those concerned with whether and how we can build publics and polities that reach beyond the borders of the nation-state. International and transnational law can, that is, offer competing groups a common language in which to speak, and a common table around which to gather. Law may therefore form a medium through which international publics and polities may emerge. Analyzing the A2K mobilization thus not only tells us something about the new politics of IP; it can also help us begin to theorize the relationship between law and the creation of global publics and polities.

If we take seriously the role of interpretation in collective action, we discover that law can have important effects on the framing processes of social actors. These insights open up fertile new ground for scholarship, particularly in the domain of international and transnational law. But they are also important to our ability to describe and understand the new politics of IP, which is emerging around us as we speak.