No Time for Tinkering

How a “more progressive” NAFTA could break the vicious circle of global inequities in the ownership of knowledge

Ariel Katz

The postwar international trading order reflected the assumption that reducing various state-imposed restrictions on trade, and promoting free and competitive markets, would be mutually beneficial to trading nations and to the world as a whole.

As Canadian Foreign Affairs Minister Chrystia Freeland stated in a recent address to the House of Commons: “Far from seeing trade as a zero-sum game, we believe in trading relationships that benefit all parties.” But Canada’s belief in the benefits of free trade, Freeland told us, should not be confused with a belief in trickle-down economics.

Canada appreciates that continued growth, as well as the political stability it requires, depends on domestic measures that share the wealth and assure working people and the middle class that the globalized system can help them better their lives, as part of what she calls a “progressive trade” agenda.

Freeland’s position, of course, does not come out of thin air. It reflects a growing recognition that the present crisis of liberal democracy stems from its abandonment of progressive values, resulting in a global trading system that has become regressive: preoccupied with wealth creation, while being oblivious to the growing inequality that it generated.

“If we don’t act now, Canadians may lose faith in the open society, in immigration and free trade — just as many have across the Western industrialized world. This is the single biggest economic and social challenge

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2 Ibid.
we face,” Freeland said in fresh remarks3 on the eve of the renegotiation of the North American Free Trade Agreement (NAFTA).

If Freeland’s public pronouncements reflect sincere recognition that the premises and institutions of the current global economic order need some recalibration, then this should be reflected in the country’s approach to one of the most consequential trade negotiations in a quarter century.

As Canada’s chief diplomat sets out her priorities for the renegotiation of NAFTA, she must do more than appeal to the concerns of existing industries. In a knowledge economy, a progressive trade agenda must tackle the thorny question of the ownership of ideas.

The relentless extension of intellectual property (IP) rights through international trade agreements has not historically been a banner issue for advocates of a progressive trade agenda, but the data suggests it warrants attention.

The evidence from most reliable studies currently available fails to provide support to the claim that the expansion of IP has contributed to greater innovation, productivity or growth.4 Moreover, some signs indicate that the expansion of IP has already contributed to global economic stagnation, accelerated inequality and depressed wages, and that it already hampers governments’ ability to implement measures for countering those trends.

The consensus emerging from the best available scientific theory and evidence strongly suggests that our current international IP system already overshoots the mark.5 Many studies have found, over a wide array of industries and circumstances, that IP rights are not as important to ensure the production of knowledge as we often assume they are.6 Indeed, in all but a few exceptions, competition appears to be the main driver of innovation, while individuals and firms rely on mechanisms other than IP rights to obtain return on their investment in knowledge.7

IP Expansion and Economic Stagnation

After being on the rise for several decades, global business investment (not only in R&D) began dropping around 1999. It declined further during the economic crisis of 2008–2009 and has remained at historically low levels since then. This “investment slump” is predicted to persist, notwithstanding the various policies designed to stimulate the economy.8

The persistence of the investment slump has been a vexing puzzle for economists. Some economists have suggested that the global expansion of IP has been an important contributor. The reason is simple. Since knowledge is the main input for any knowledge-based production, as more knowledge gets owned, investing in activities that require the use of such knowledge becomes more costly and risky (and hence less attractive) or outright illegal. Just as over-taxation by government could reduce incentive to invest, so could over-protection of knowledge through IP.9

IP Accumulation, Increased Concentration and Forced Specialization

While numerous studies have shown that the commercial value of most patented inventions or works protected by copyright is low to zero, many firms continue to accumulate them aggressively because by strategically collecting large amounts of distinct-but-related individual patents a company may dominate an entire field.


From an international trade perspective, this trend, fuelled by the global expansion of IP rights, has allowed IP-rich countries (i.e., countries whose firms own large IP portfolios) to lock in their comparative advantage, exploit larger investment opportunities and acquire new proprietary knowledge, and limit the economic opportunities available to firms from IP-poor countries.

The consequence might be a global vicious cycle, whereby IP-rich countries become IP richer, while IP-poor countries (which include not only less developed countries, but also developed countries such as Canada) tend to stagnate in a low-investments/low-IP equilibrium.10

**IP Expansion, Labour and the Middle Class**

But perhaps the greatest obstacle to the Liberals’ progressive trade agenda on this front comes from the contribution of IP expansion to downward pressure on wages.

Knowledge possesses several unique features. First, not only does its value and utility not diminish when shared by others, they tend to increase. Second, once imparted, it can’t be untaught.

This unique feature of knowledge implies that in knowledge-based production, every worker (or partner, or subcontractor) who acquires knowledge can become a competitor, or work for one. Accordingly, where IP rights are limited and non-compete clauses are generally unenforceable, an employer wishing to retain its workers and discourage them from starting their own business or working for a competitor must treat them well and pay them handsomely.

However, ownership of knowledge allows employers to limit workers’ mobility with legal sticks instead of labour carrots. It reduces a worker’s individual bargaining power as well as her liberty.11

The global expansion of IP also reduces workers’ collective bargaining power. Where IP rights are limited, an employer would be reluctant to outsource production to low-wage subcontractors because after acquiring the knowledge, the contractor or its workers might become competitors. However, the global expansion of IP has allowed employers to reduce the risks associated with outsourcing.12

Thus, the global strengthening of IP rights has had two related effects: it has decreased wages by reducing labour mobility and workers’ bargaining power, and it has enabled employers to outsource more elements of production to low-wage countries and decrease workers’ bargaining power even further.

**How Did We Get Here?**

If the connections between stronger IP, investment in innovation and economic growth are indeed tenuous, what explains the steady expansion of IP, and why do the demands for further expansion persist? The answer doesn’t lie in the economics of innovation but the political economy of IP, domestically and globally.

Those who lobby for stronger IP rights are usually aware that displays of sheer power and self-interest may not always be politically palatable and that purporting to speak in the name of future creators and innovators would make their demands more legitimate.

But herein lies the catch. Future creators and innovators, by definition, do not yet exist, and hence cannot hire lobbyists. Accordingly, those who lobby for stronger IP laws tend to be those who have already acquired it and already accumulated sufficient economic and political power necessary for lobbying. We could pretend that today’s IP owners serve as good proxies for future creators and innovators, but they don’t. Corporate managers focus on maximizing the profit from selling their existing mousetraps. Accordingly, they will lobby for rules designed to entrench their dominance, not for laws that truly encourage their future competitors to develop better mousetraps.13

Because the negative impact of IP expansion is felt by future creators, competitors or consumers, there is an inherent challenge in organizing an effective coalition to resist this trend. This is the main reason why linking IP expansion to trade agreements has been so effective. Is it any wonder that the breadth, length, scope, geographic reach and enforcement powers of IP have been growing steadily over the past several decades?24

Over the last two decades, concentration levels in most industries have increased. Higher concentration increases the ability to collect supra-competitive rents, and it also makes it easier to organize and lobby for laws and policies that will protect this rent-collection capacity. It distorts not only market outcomes but also tends to corrupt government.

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10 Pagano & Belloc, supra note 9.


13 Baldwin & Levine, supra note 4 at 4.

University of Chicago economist Luigi Zingales described this process as the “Medici vicious circle,” in which money is used to gain political power and political power is then used to make more money, and which, in the case of medieval Italy, turned Florence from one of the most advanced and powerful cities in Europe to a marginal province of a foreign empire. Chrystia Freeland aptly described the same phenomenon in her 2012 book, Plutocrats.

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This vicious circle needs to be broken, and the ways in which the expansion of IP has contributed to it deserve greater attention.

A Moment of Opportunity

The current US demands on IP are almost identical to those of the Obama administration. This is hardly surprising, because the US global IP policy has always been dictated by the lobbyists of its IP-rich corporations. But even when the United States played a game of sheer power and self-interest, previous administrations, Republican and Democratic alike, have always been able to sugarcoat it with liberal ideology and irresistible rhetoric on shared global interests, promoting common progress and the rule of law. This is no longer the case. The Trump administration’s explicit contempt for these values, therefore, makes marshalling resistance easier.

Accordingly, Canada could and should choose a fresh path in NAFTA talks, along the same lines that Minister Freeland has already signaled she intends to pursue. She has lamented the fact that the United States “has come to question the very worth of its mantle of global leadership,” but emphasized that this “puts into sharper focus the need for the rest of us to set our own clear and sovereign course. For Canada that course must be

the renewal, indeed the strengthening, of the postwar multilateral order.”

Minister Freeland recognizes that the United States, at this time, might not always be a partner, and this requires Canada to continue working “with other like-minded people and countries who share our aims.”

To this end, instead of tinkering at the margins of US proposals, when it comes to IP, Canada should adopt a bold and principled approach based on the following three principles: a moratorium on any further expansion of IP via trade agreements; reorienting the global conversation of IP to the multilateral frameworks of the World Trade Organization and the World Intellectual Property Organization; and initiating a review of the current international IP frameworks with an eye toward scaling back some of its unnecessary and counterproductive aspects.

The benefits of such an approach are twofold: tactical and strategic. Tactically, without challenging the premise of further IP expansion, Canada will already have tied its negotiating hand. But strategically and more importantly, pursuing this approach would be the right and necessary thing to do.

The first step in breaking a vicious circle is to stop spinning. President Trump gave Canada an opportunity to make this first step. If Canada leads, it will be surprised to find that many like-minded people and countries will follow.

About the Author

Ariel Katz is an associate professor with the University of Toronto Faculty of Law, where he holds the Innovation Chair in Electronic Commerce. He received his LL.B. and LL.M. from the Hebrew University of Jerusalem and his S.J.D. from the University of Toronto. His general area of research involves economic analysis of competition law and intellectual property law, with allied interests in electronic commerce, pharmaceutical regulation, the regulation of international trade and particularly the intersection of these fields. Between 2009 and 2012, Ariel was director of the University of Toronto’s Centre for Innovation Law and Policy. Prior to joining the University of Toronto, he was a staff attorney at the Israeli Antitrust Authority.

17 Global Affairs Canada, supra note 1.
18 Ibid.
19 The highly regarded Australian Productivity Commission made similar recommendations in its recent report on IP; see Australian Government Productivity Commission, supra note 7 at 39–40.