

Current Issues in International Intellectual Property Norm-Making

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1 Introduction

In attempting to situate current research on, and issues concerning, the development of international intellectual property (IP) norms, and how this might impact bilateral IP norm-making within the European Union (EU), I will consider a finite, and necessarily incomplete, list of substantive issues first and then turn to procedural ones.¹

¹ Given the short nature of this comment, I will reference in the notes articles and publications where I elaborate further on the various themes.

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2 Substantive Issues

There would be a long list of issues that matter, or should matter, to EU negotiators as they approach intellectual property negotiations. I have selected five. The most important in terms of future impacts is the promotion of domestic innovation and its role in policy-making. I will then look at geographical indications (GIs), pharmaceutical research incentives, the three-step test and the recent push to shut down Internet access for unauthorized use of copyright material online (“three strikes”).

2.1 Innovation

Is there a fundamental conflict of interest on innovation when it comes to intellectual property norm-making? Domestically, there is a perceived conflict between innovators and users of innovation, although many people are both. Internationally, the picture looks somewhat different as we consider the impact of economic theories such as comparative advantages.

When Adam Smith published *The Wealth of Nations* in 1776, international commerce consisted almost exclusively of goods of course.² The first intellectual property statutes had emerged, but relatively few goods traded internationally were protected by intellectual property rights, which were by and large territorial. The first major international intellectual property treaties recognizing the principle of national treatment/non-discrimination were adopted more than a century later, prompted by the first international exhibitions, such as the 1889 Paris World Fair (*Exposition universelle*), which gave us the Eiffel Tower.³ In fact, trade in ideational goods whose market value was due in significant part to intellectual property (factoring in the monopoly rent) was impeded by the fear that many inventors had that their “idea” would be “stolen”, which in turn prevented them from presenting their new technologies at world expos.⁴ Today, trade in intangibles (in this context,

² Smith (1961). One could perhaps point to money changers or other banking-related services as an exception to that rule.

³ The major treaties referred to here are the Berne Convention 1971 and the Paris Convention 1967. The first text of the Berne Convention was adopted in 1886 and the first text of the Paris Convention in 1883. For a brief look at the history, see May 2009. The tower was inaugurated on March 31, 1889 and the Expo opened on May 6th of that year. On the history of the Eiffel Tower, the French patent on the structure awarded to Eiffel and his partners and the importance of the tower for the 1889 and 1900 Expos, see Hervé (2002), pp. 8–11.

⁴ See Yu (2004), pp. 323, 343–348 (discussing the 1873 international exposition in Vienna and the origin of the Paris Convention). This is reflected in the text of the Paris Convention, Article 11 (1) of which provides that the “countries of the Union shall, in conformity with their domestic legislation, grant temporary protection to patentable inventions, utility models, industrial designs, and trademarks, in respect of goods exhibited at official or officially recognized international exhibitions held in the territory of any of them”.

services and goods whose value is derived from intellectual property) represents approximately 80 % of world trade, an economy whose growth and in which competitiveness is predicated on innovation. How does this translate into policy?

If one looks at the rhetoric embedded in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), one finds at least a mention of technology transfer to the developing world.⁵ The TRIPS Agreement was seen as the poster child for the so-called Development Theory, according to which developing economies should import the normative, judicial and administrative infrastructure of more industrialized nations to achieve a similar level of economic development. According to that theory, copying the infrastructure should lead to increased foreign investment, availability of capital and economic growth.⁶ One might naturally question those foundational assumptions.⁷

A somewhat more cynical view suggests that Western powers wanted to protect intellectual property in the developing world to secure new markets and revenues for ideational goods and services protected by patents, trademarks and copyright. Companies like Apple and many others⁸ saw the developing world as a potential outsourcing target to manufacture high technology products at a lower cost. Yet outsourcing is misunderstood if seen as simple cost-cutting. In reality, it is a form of knowledge transfer. It tends to evolve to progressively more complex coding and manufacturing tasks and related innovation activities, thus leading to significant innovations in the recipient (outsourced-to) country. The outsourced technology, initially involving no or low-level local innovation, progressively becomes a form of technology transfer that serves as a stepping stone to higher innovation functions and even in some cases to the emergence of the outsource as a world-class competitor.⁹

⁵ See, e.g., Article 66.2 of the TRIPS Agreement.

⁶ The intellectual backdrop for this theory is the Washington Consensus, according to which the recipe for economic development is to reduce the role of government, emphasize privatization, trade and capital market liberalization and deregulation. According to this view, governments must mostly protect property rights and avoid corruption. While acknowledging that there is no guarantee of fairness in wealth distribution that comes with this worldview, Washington Consensus advocates generally believe in trickle-down economics, *i.e.*, that all or most citizens will benefit from GDP growth. Some commentators, including Joseph Stiglitz (Nobel prize winner in economics) have questioned the evidence to support this view. Stiglitz (2001), p. 27.

⁷ See Gervais (2009b), pp. 2353–2377.

⁸ Steve Jobs, former CEO of Apple, reportedly explained to President Obama that “those jobs aren’t coming back.” See Duhigg and Bradsher (2012).

⁹ As UNCTAD’s World Investment Report 2005 notes: “In the early stages of technological activity, enterprises need not set up formal R&D departments. As they mature, however, it becomes increasingly desirable to monitor, import and implement technologies. R&D as a distinct activity may appear as early as the second level of complexity, where multifaceted technologies are involved or if local conditions demand significant adaptation. In a developing country, such R&D is feasible once the operation is fairly large scale and the necessary technical skills are available. The role of formal R&D then grows as the firm attempts significant technological improvements to introduce new products or processes”.

It is, therefore, not unrealistic to see a future where Brazilian, Chinese, Indian and other companies compete head-to-head with innovation-based Western enterprises on what has mostly been the turf of the West for the past 200 years, namely innovation itself. In certain industries, this process has begun. This innovation-displacement effect of TRIPS and TRIPS-plus agreements may be accelerated when considering that a very significant proportion of researchers in Western laboratories are nationals of developing countries (such as India).¹⁰

Perhaps the outsourcing approach and the risk of creating new competition is not as short-sighted as might appear at first glance. Through investment and acquisition, the same capital and companies, though geographically reconfigured (an issue for Western tax authorities, which may have to move massively to sales-based taxes to replace income-based revenue, but not for the companies involved), will likely remain dominant in many, perhaps most, industries.¹¹ That would explain why, both in bilateral discussions and multilaterally (to the extent that the World Trade Organization (WTO) remains a viable negotiation forum for new areas), there is such an emphasis by lobby groups representing such companies on investment liberalization in parallel to IP protection.¹²

It seems fair to ask, from a policy-making standpoint, whether the domestic interests of Western negotiators are coextensive with those of multinational corporations who dictate their objectives.¹³ The EU must decide how it wants to play this game of course. If innovation is seen merely as a layer of an inescapable globalization process, the authorities should not fight a losing battle to prevent innovation in developing countries. Nor can they be expected to naively allow Brazil, Russia, India, China, and South Africa (the BRICS countries) somehow to “take innovation over”, however. A middle way must be found, one which focuses on cooperation and value-creating interpenetration of corporations, universities and other innovation-leading institutions. In a world of highly fungible capital, that is the best and perhaps the only way forward.

An unresolved part of the global innovation equation is whether state (or “authoritarian”) capitalism is going to be able to innovate as much as traditional liberal capitalistic societies.¹⁴ The evidence suggests that state capitalism is very

¹⁰ The Financial Times reported that in order to compensate for the shortage of first-rate talent, the “clamour for brains is driving elite employers in the UK to behave like football talent scouts in India and elsewhere.” Clegg (2007).

¹¹ One author argues that, once the proper legal system and protection is in place—and especially what he refers to as the invisible infrastructure of “asset management”—the conditions required for the “Western” capitalist model to be moveable and innovation fully to emerge will be present. See de Soto (2003).

¹² UNCTAD maintains a database of bilateral investment treaties. The list is impressive, including 48 bilateral treaties involving the United States alone. http://www.unctadxi.org/templates/DocSearch___779.aspx.

¹³ Forster (2006), pp. 29–30.

¹⁴ See Gat (2007).

good at starting new businesses (less predatory than venture capital) and at incremental innovation, but that it has not been good at generating quantum innovation leaps. As a report on state-owned enterprises in *The Economist* noted:

[T]he pursuit of indigenous innovation could prove to be a distraction. Foxconn, a huge Taiwanese-registered electronics group, has an unrivalled ability to mass-produce iPads and the like [...] Huawei is a master of improving on other people's technology and bringing it to market at lightning speed. China's universities mass-produce graduates in disciplines that have been forgotten in the West, such as mining and heavy engineering. China would be better off exploiting these advantages rather than trying to build the next Silicon Valley.¹⁵

Efforts by the World Intellectual Property Organization (WIPO) to produce economic studies of intellectual property impacts will no doubt help in developing adequate policy options in this regard, as previous efforts by the World Bank and others have done in the past.¹⁶ Put differently, the variegated picture of IP as part of a broader landscape of innovation policies should help calibrate TRIPS implementations and national policies in countries that strive to join the club of innovators. It will also allow all of us better to comprehend the social costs of certain forms of IP and allow mitigation where necessary.

Let us remember that, not long ago, even while TRIPS was being negotiated in the late 1980s and early 1990s, innovation narratives were essentially absent beyond the lip-service paid to technology transfer. This is not altogether surprising: studies on the specific impacts of IP were hard to find in the industrialized world and virtually nonexistent for the developing world. Negotiators put the policy cart before the empirical horse. I realize that there may well be a point when it comes down to politics and sheer clout, but facts can and often do matter. The EU and other major players should fully support efforts to generate and analyse data on the impact of intellectual on innovation and economic development.

2.2 Geographical Indications

This is an issue where the EU has had some bilateral successes and is leading a reform of the Lisbon register.¹⁷ It is high time, however, to remove the few real obstacles to a true international protection of GIs. I am concerned about the notification system proposed in the WTO context, both because the WTO has no expertise in maintaining a register and because what has been proposed is mostly a repository of notifications and no more. A revamped Lisbon system implemented in the same way as the proposed TRIPS register is likely to offer better clarity and certainty to business.¹⁸

¹⁵ See *The Economist* (2012), pp. 21–27.

¹⁶ See Gervais (2005), pp. 505–535.

¹⁷ See “Summary by the Chair, Fourth Session Lisbon Working Group”.

¹⁸ See Gervais (2009c), pp. 87–104.

US opposition, fueled by concerns about Budweiser beer (now an EU property!) and Kraft (maker of many food products with European-sounding names but not originating from that part of the world) can be defused. This means solving a short list of known issues. There is a precedent for this in the EU-US Wine Pact, which grandfathered a number of wine appellations considered semi-generic, including Bordeaux and Chablis for example. Beyond preserving and/or phasing out certain indications, coexistence is possible, as the case of Pisco, “officially” made in both Chile and Peru, demonstrates.¹⁹ What matters, at a policy level at least, is to get the normative heft of GIs recognized even if this means accepting that a number of existing indications used in the “New World” are not compatible with current EU practice.

Establishing a renovated Lisbon system is similar in many ways to the successful expansion of the Madrid system by way of a Protocol.²⁰ It would seem fully justified for Lisbon.

The developing world could benefit from a multilateral GI protection (beyond trademark-level protection) system that creates legal certainty and is not limited to wines and spirits, as it is in TRIPS. It is compatible with certain forms of traditional knowledge and innovation (TK&I), for example, and the deep linkages to the land that often underpins the keepers of TK&I.²¹ I readily acknowledge, however, that the commercial focus of GIs will not serve all kinds of TK&I, far from it, but it is a partial solution worth exploring for products such as tea, coffee, chocolate and a number of crafts.

2.3 *Pharmaceuticals*

What exactly are the significant actual or potential markets for EU pharmaceuticals that are negatively affected by the inadequate protection of IP, whether patents or test data? Should an answer to that rather simple question inform how one makes policy choices? The issue is well known and, at the risk of oversimplification, let me summarize it as follows. When a country (typically a least-developed country)²² has no reasonable chance of being seen as a “market” for a relatively expensive pharmaceutical, no patent should be enforceable for use in that territory. Valid concerns about exports or re-exports from that territory should be addressed, however. The Doha (paragraph 6) system tried to balance precisely those two objectives.

¹⁹ See Fontaine (2011), pp. 2–3.

²⁰ See Gervais (2010), pp. 67–126.

²¹ See Gervais (2012b) in Drahos and Frankel.

²² A list of least-developed countries is maintained by the United Nations and used by the World Trade Organization to identify countries that may avail themselves of certain flexibilities, including under TRIPS. The list is available at <http://www.unohrrls.org/en/ldc/25/>.

The more complicated question arises when a country starts to go up on the per capita GDP scale. At some point in that ascension, some but not all people in that country can begin to afford—by which I mean pay a reasonable price for—pharmaceuticals, thus creating unfairness in access. Some might argue that some degree of unfairness is unavoidable. Fair enough, but is there a limit to the unfairness society will tolerate when the matter is life itself? Translated as a policy question, how much flexibility should the governments have to set that limit and implement corrective measures?

This debate has emerged in many countries, not just developing ones. In the United States the shifting stance on the importation of lower-priced pharmaceuticals from Canada is an illustration.²³ Should one allow parallel imports? Compulsory licensing? Price-setting, as many EU members do? For our purposes here, the question takes on a different hue: As a matter of EU policy, should bilateral agreements prohibit any such measure, especially in the wake of the Dutch seizure-in-transit case?²⁴

There are other, even more complex issues to tackle. As work in the World Health Organization (WHO) has tended to demonstrate, patents have generated innovation in the field of pharmaceuticals, but (a) they have also created a number of problems, and (b) there may be better ways forward to develop treatments, especially for orphan and tropical diseases. This in turn affects patent policy. For instance, should the EU be “exporting” very low patentability criteria via bilateral agreements on biotechnological inventions? Should a mere prediction of some kind of applicability be sufficient to meet the European Patent Convention (EPC) test? Patents on “new” pharmaceuticals are increasingly granted on pre-existing genes or reformulations of existing molecules. Utility/industrial applicability is an important factor, but so is novelty (when applied to preexisting biological materials) and inventive step when applied to mere isolation or reformulation of known substances. Much more work is required, rather urgently, in this area before suboptimal policies are set in bilateral or other instruments.

It is time for a full assessment of whether the tendency to patent ever closer to basic science is generating positive innovation outcomes before underlying policy assumptions are exported to other countries in bilateral and regional trade agreements in the form of IP rules. I would also suggest that we need more work on whether patents on pharmaceuticals should be combined with other forms of exclusivity or other incentives, especially when research is publicly funded. Why couldn't the WHO, for instance, generate a list of priority research areas and coordinate public research on those treatments to limit duplication of efforts? Other models have been proposed that involve less bureaucracy, including investment recovery and awards.²⁵ Evidently, global health is at stake, and we owe it to ourselves to broaden the debate beyond patents and existing research pathways.

²³ See Darrow (2011), pp. 291–297.

²⁴ See Kumar (2010), pp. 506–519.

²⁵ See eg Müller-Langer (2009).

2.4 *The Three-Step Test*

The three-step test, which was included in TRIPS and also increasingly in bilateral and regional agreements and even in EU directives, is used to limit exceptions, and the limitations need much more work. I am well aware of the work done by the Max-Planck Institute for Intellectual Property and Competition Law²⁶ and others, but we need to do more.²⁷

The existence of myriad variations of the three-step “theme” is disconcerting. In TRIPS alone, the negotiators played the three notes of the test in four different ways.²⁸ The 2013 Marrakesh Treaty mentions four (art. 11). Two WTO dispute-settlement panels have interpreted the test but also created dissonance in interpreting the steps. While I welcome the inclusion by those panels of Berne Convention history, which has yet another instantiation of the test, the normative vectors for the application of the test are still ill-defined.²⁹ As intellectual property increasingly has to face other rights in the global arena, this might prove a significant impediment. I would hope the EU will continue its leadership, as the likelihood that a case involving the test might reach the Appellate Body increases day by day.

2.5 *“Three Strikes”*

From three steps, let us move to three strikes, if I may interject copyright in this discussion. The EU has led the charge on HADOPI (*Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet*) type legislation.³⁰ It will not work, if “work” is defined for this purpose as increasing revenue streams for right holders, especially creators. Empirical data available as of this writing supports this conclusion. At the same time, I have no sympathy for professional pirates who profit through various web sites by the ease with which copyright material can be disseminated online. However, bans are simply not *the* solution.

Debates that pit the technology companies against professional right holders such as film and record companies are the exact opposite of the optimal way forward. Both “sides” need and want the same thing, namely to make available the highest quality content possible. Because right holders have by and large refused to engage with technology companies, and refused to admit that control

²⁶ See the Max Planck Institute Declaration on a balanced interpretation of the three-step test available at: <http://www.ip.mpg.de/en/pub/news/declaration-threestepstest.cfm>.

²⁷ See Senftleben (2004).

²⁸ See Articles 13, 26.2 and 30 of TRIPS for the test itself with variations. In addition, arguably at least the notion of “legitimate interests of the owner of the trademark” in Article 17 is related to the third step of the test.

²⁹ Berne Convention, Article 9(2). See also Senftleben (2004), pp. 140–151.

³⁰ See Geiger et al. (2011).

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