Harmonization of Intellectual Property

Introduction

During this class, we have discussed many aspects of international IP laws and the final topic naturally leads us to the notion that there is a growing need for harmonization of IP laws among many countries. It is apparent that IP plays a critical role in fostering dynamic and growing economic progress and the welfare of the world's citizens because IP is a key to successful innovation.

Harmonization is a process by which the varying laws of different sovereign entities are bound in order to reflect a common set of legal principles they agreed to follow. Even though the word harmonization is often used so it appears synonymous with unification, it has a much broader connotation, because it seeks to coordinate various legal systems by eliminating major differences and creating minimum requirements; unlike unification, which leads to a uniform set of agreed rules or substitution of two or more legal systems with one single system.

Reasons for Harmonization of IP

Primary goals for harmonization are lower transaction costs with easier access to IP protection throughout the world, promotion of economic welfare, advantages in international trade, and protection of the incentives that promote the creation of IP, such as dissemination of ideas, sharing knowledge, and supporting creativity. Since it is expensive and sometimes impossible to keep track of one's IP on the international arena and often when an infringement is discovered, it has already caused substantial damage either to the reputation or financial well-being of the original right-owner. Therefore, many have suggested creating a universal database or system for international Trademarks and Patents. However, the debate is not over yet, whether

it is beneficial to require all types of IP entered into one international database in order to maintain an easier recording system, since such a step would substantially increase the cost of obtaining the IP protection for new businesses,

Two conflicting principles, territoriality and the first-sale doctrine, are the driving force behind the efforts to harmonize IP laws in Europe. According to the principle of territoriality, the IP protection is given to national jurisdictions, which means a patent owner would only achieve international protection through a bundle of individual national patents limited to the states that have granted them.

The principle of first-sale doctrine means that when the first sale has occurred, the goods can be resold freely without the owner's permission. A crucial question is in which state the sale occurred and the owner's rights were exhausted. The analysis further follows the territoriality principle, i.e. the first sale of goods protected as IP can exhaust the IP right only in that territory but not elsewhere. Thus the right's owner can enjoin the importation of previously sold goods into other countries where the IP right has not been exhausted.

In addition to the territoriality and first-sale principles that interfere with free trade, there are several other factors. The disparities in national laws between neighboring countries impose substantial burden on production and distribution of goods and services.

Many developed countries highly rely on the notion that stronger IP protection will benefit developing countries; but this has not been properly established by any economic theory and requires more empirical proof. It is also questionable that universality would maximize global welfare. Many argue that the current copyright laws in America protect large corporations and copyright industries at the expense of the general public. The Western approach tends to

allow disproportionate leverage and the possibility of dictatorship over less developed nations by countries with greater economic power and military capabilities. Thus, harmonization is the process that allows integration of different values and neutral negotiations leading to more-or-less balanced results which suit the interests of all members.

History and Development of Harmonization

The first international effort to standardize and simplify the protection of IP rights in the Member States was done in 1883 with the passage of the Paris Convention. Since then, the Paris Convention has been modified numerous times. With respect to patent and trademark rights, most of the world's significant industrialized countries are signatories to the Paris Convention for the Protection of Industrial Property. The Paris Convention essentially allows a person who has filed a patent or trademark application in one member country to file a corresponding application in another member country and establish an effective filing date for the corresponding application equivalent to the date of the original application. There are special agreements relating to trademarks in addition to the Paris Convention which set out procedural rules in order to obtain protection. [1]

Thus, while the Paris Convention facilitates the filing of patents and trademarks in multiple countries, it is largely a procedural tool because it does not address each member country's substantive laws relating to patents and trademarks. Hence, IP owners must comply with the various formal and substantive legal requirements in each of the countries in which they seek IP protection. The discrepancy between the substantive laws of different countries has led to creation of treaties that would harmonize those laws. Such harmonization has occurred on a

[1] Trade Mark as a Model of Unitary Transnational Trademark Protection, 149 U. Pa. L. Rev. 309 (2000)

regional basis in some places. For example, the European Patent Office will examine patents that have force and effect throughout the European Union. Similarly, the Patent Cooperation Treaty allows for the examination of patent applications before those applications are examined by the national patent offices, however, it does not replace existing national patent offices.

Copyright law is covered by the Berne Convention. Signatories have agreed that the basic substantive copyright laws set forth in the Berne Convention will be the law in those countries. Accordingly, a person who has obtained a copyright in one Berne Convention country possesses automatic copyright protection in all Berne Convention countries. The Berne Convention eliminates many of the various formal requirements with which IP owners were required to comply in the past. With adoption of these requirements, United States eliminated a cumbersome process of copyright registration. These formal requirements included the mandatory display of copyright notices and the need to file a copyright application before enforceable rights attached to the copyrighted work. Some countries, including the United States, still require IP owners to comply with some of these requirements in order to enjoy additional protections that are above and beyond the Berne Convention's basic remedies.

In the 1980s, there was a new development towards international harmonization with creation of the WTO and TRIPS Agreement. TRIPS was created because many countries acknowledged the value of IP protection and the fact that developing countries would be more attractive to investment if there is a system to protect new technology without the fear that it might be illegally copied. An additional benefit of IP rights in a developing nation is that it would encourage generating more innovations of their own. The Agreement sets out minimum standards for IP protection for developed countries immediately and allows a certain time frame for developing countries to comply with the standards. The Agreement provides specific

enforcement procedures, sets procedural requirement governing administrative acquisition and maintenance of IP, and provides a dispute resolution mechanism through WTO. TRIPS objective, as outline in Article 7, is very generic in the sense that it provides "protection and enforcement of IP rights, [which] should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users…", which leaves room for broad definitions of what would constitute "promotion of technological innovation."

Obstacles

Global harmonization faces many obstacles, starting from the very basic concept of a language. A well-known IP scholar, Marshall Leaffer, said that sometimes there are too many irreconcilable differences in language and concepts, legal culture, and judicial systems among nations for there to be unification of trademark law in the strict sense. Such differences leave room for interpretation, which is not acceptable in civil law countries. Unlike common law countries, civil countries are accustomed to follow the rule of law, which is codified, without establishing a history of precedent of interpreting the terms.

It is hard to predict what the effect would be if one global IP system substitutes all other prior agreements that govern Copyright (Berne Convention), Patents (Paris Convention), Trademarks (Paris Convention, Madrid Agreement and Protocol). Even though these agreements might not be perfect in providing a working system for all countries, some countries already rely on them and have already adopted parts of the requirements into their national laws.

To demonstrate that even in a small setting, during our class discussions, students with different cultural backgrounds have different values. There was an evident separation of views

on Moral Rights. Some students strongly believed that no such right is needed after an author assigned his interest, while others viewed moral rights as an extension of the artist's expression which is inseparable. Berne Convention takes a minimalistic view on it and dictates that an author must have moral rights during his life. However, TRIPS, a western-driven document; and compromises Berne's requirement for adopting moral rights. As of today the U.S. provides very little protection of moral rights under Lanham Act, but if it were not for European viewpoint, there likely would have been no protection at all. Thus it is important to preserve values other cultures bring to the table.

Substituting one legal system for another does not guarantee success. China, as an example, assumed obligations to follow international standards when it entered into the agreement with the U.S. and accessed with WPO. However, it was soon apparent that poor enforcement of IP laws and regulations created a widespread system of counterfeiting and piracy. China still remains one of the largest distributors of pirated digital media, software, books, technology, clothing, etc. United States sought to resolve specific concerns about China's IP law enforcement because of the immediate economical danger it imposes on the U. S. based business both in China and in the U. S. when such products reach the market. [2] The negotiations and the work to improve the IPR enforcement continue not only in China but in many other less developed countries.

Since countries often cannot agree even on the definition of a copyrighted work or a Trademark registration process, it is hard to come up with one set of rules that would govern all IP laws in different countries because it would cause many ambiguities and unpredictable

[2] Foreign Trade Barriers – China, 2009
http://www.ustr.gov/sites/default/files/uploads/reports/2009/NTE/asset_upload_file868_15464.pdf

outcomes. It is also important to note that international IP has become "sectorized" meaning that certain industries lobby for their own paternalistic laws. [3] For example, the food industry lobbies for geographical indications, and the entertainment industry seeks more copyright protection to protect the interests of large corporations, not an individual creator. As seen with examples of geographical indicators, countries pursue their own internal interests in establishing such rights. Since the late 1990s, nations were given a deadline to complete negotiations to come up with a workable solution for products beyond "wine and spirits" for geographic indications. Such deadline has been extended several times with no agreement in sight.

Additionally, there are challenges with respect to the protection of traditional knowledge in the international arena. There is a debate that traditional knowledge falls outside the scope of any form of legal protection, because it enhances information and culture as a human right. These believers suggest that if any legal right exists, the holders should give up such rights for the benefit of society at large. This view contradicts another theory that generational or traditional knowledge, particularly where such knowledge represents the culture and traditions of an indigenous group, is entitled to protection. The debate between these two conflicting theories should be resolved by negotiations in order to end up with a system that is fair and workable, rather than imposing one standard on a culture that might adopt one view over another. [4] By eliminating individual values and concerns, a global standard could cause hostility. Plowing one's heritage and culture has never proven to be a successful resolution.

[3] Currents and Crosscurrents in the International Intellectual Property Regime, 38 Loy. L. A. L. rev. 323(2004)
[4] Doris Estelle Long, Traditional Knowledge and the Fight for the Public Domain, 5 J. Marshall Law Rev. Intell. Prop. L. 317 (2006)

Implementation and Enforcement Procedures

WIPO was created “to encourage creative activity, to promote the protection of intellectual property throughout the world." Its primary objectives are to harmonize national property legislation and procedures, provide services, exchange IP information, provide legal and technical assistance to developing countries, and facilitate the resolution of private IP dispute. Its role is not to enforce any particular laws, but to facilitate the countries in coming up with a resolution, which is often criticized because such role is rather vague and imbalanced without a real enforcement process.

Patent

The European Court of Justice took significant steps in creation of a uniform European patent law through international agreements. This was an attempt to simplify the patent application procedures in Europe instead of filing an application in every country where protection was sought. This prompted many countries to adapt their patent laws to conform with the European Patent Convention and eliminate disparities between their national standard and the new EPC requirement.

Trademark

The European Trademark Office handles the enforcement and registration of Community Trademarks. The members could obtain Community trademarks proving uniform protection throughout the territory of the Community. Its primary objectives are outlined in Articles 2 and 3: establishment of a Common Market, development of economic activities, abolition of obstacles for goods and services, and institution of a system ensuring that competition is not

distorted. Even though the trademark regulations do not require a comprehensive and complete harmonization at this time because the procedural matters have not been harmonized but left to the legislation of Member States, this Community Trademark Regulation provides an approximation that is limited to those national provisions.

Copyright

Several directives were issued on the legal protection of computer programs, on rental and lending rights, on satellite broadcasting and cable transmission, and on *droit de suite* (the right to follow). There is a trend to require the Community to take into account cultural factors which is aimed not only at creating a barrier-free trade environment but also at providing higher levels of cultural protection and instituting equal conditions in substantive law. [5]

Thus, harmonization does not mean that all rules in all their details have to be identical; instead, it leaves room for national deviations.

Different Approaches to Harmonization

Several scholarly approaches have been proposed for the process of harmonization in order to preserve one's culture and society while having a uniform system of IP laws. They vary from a legal transplant to diversification. A legal transplant is "a process by which any legal notion or rule which, after being developed in a 'source' body of law, is introduced into another, 'host' body of law." On the other end is diversification, which signifies not only disagreement, but also agreement that countries sometimes agree to disagree.[6] The theory of unification is, in my

[5] Harmonization and Intellectual Property in Europe, 2 CLMJEURL 481 (1996)

[6] Currents and Crosscurrents in the International Intellectual Property Regime, 38 Loy. L. A. L. rev. 323(2004)

opinion, not possible because it erroneously assumes that law is a simple single concept, instead it is a living entity which is meant to meet the needs of a particular society. There is also a question of what should be considered a driving force for harmonization, whether one already established standard should be adopted or should it be determined by the market demands. [7]

Moreover, it has become apparent that since so much effort has been put into crafting a system which takes into account the sovereignty of many countries and differences not only in their languages but cultures, it would be counterproductive to erase this valuable block to create a completely new system of international IP laws. There were some strong proponents in our class and they also exist in academia, but as history shows, such radical change would lead to inevitable discrimination of less powerful countries and it would create an additional burden of developing precedents. The idea of starting with a clean slate is impractical at best. Many countries would not see the incentive to abandon their legal system of IP laws and adopt a brand new one. From these reasons why it is a difficult path to harmonization, we can also see that the definitions and values of protection vary from country to country, from one region of the world to another.

This is not the goal of harmonization, but rather a goal of unification, which is not applicable to all aspects of international IP laws. Harmonization itself is the best alternative to unification because it acknowledges the values each country tries to protect, the process that is already adopted, and the difficulties that interfere with effective international trade, in order to facilitate the countries' achievement of a workable solution. One vivid example is the elimination of notarized signature requirement for trademark applications, because in different

[7] Harmonization of International Copyright Protection in the Internet Age, 19 PMGBLJ 435 (2007)

countries a notary is a different person. In Mexico it is a licensed attorney, in Japan it is a retired judge, while in the US it could be an average civilian who completed a very simple procedure and paid a fee of approximately $100.

Moreover, the process of harmonization requires a different approach to copyright protection, to trademark application and registration, and to patent related laws. “Like rules in a basketball game, IP laws differ across the world due to the diverging levels of wealth, economic structures, technological capabilities, political systems, and cultural traditions.” [8] Thus, there is no one easy solution to impose a new system for all aspects. Some countries may form regional treaties and agreements as it has already been done in Europe and Asia, since it is a difficult task to encompass all countries at once. Such effort may not even be necessary for a particular entity which seeks to have its rights protected only in the primary market, for example in Asian countries. The cost of registering and tracking its Trademark in all countries might be more than the benefit such an entity would gain, especially if it is a small or newly developed start-up.

The issues related to the internet, which erased international borders, are unique and challenging in nature. The internet allows users to access digital information located around the world and creates ample opportunities for infringement. Due to the lack of a uniform law principle governing the internet, different nations apply their own standards and achieve different outcomes because their standards vary from nation to nation. International organizations, such as WIPO, have attempted to harmonize copyright law among member states, but issues related to jurisdiction, choice of law, and enforcement remain unclear. Several solutions are proposed to resolve the internet IP protection problem - creating one uniform International Copyright Protection Agreement, International Copyright Code, or developing a new set of regulations that

[8] The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade, 26 Fordham Int’l L.J. 218 (2003)

applies solely to the internet and distinguishes "digital world" from the "real world." [9] Since the internet is a relatively new entity and many nations do not have an established precedent for issues arising from online infringement in their own legal systems, they would likely be interested in adopting a uniform code.

Conclusion

I believe that with increasing interest in foreign economies, the interest in harmonization of IP will also increase to make transactions and access more efficient. However, since many nations try to preserve their sovereign status, they have different national interests and different laws. Thus, harmonization of intellectual property is a tedious process of careful negotiations and separation of issues of trademark, copyright, and patent laws.

Harmonization is a process without a defined start and finish point. We could say it is accomplished when developing and already established countries have a working system, accessible to all interested parties, with a neutral and unbiased organization to resolve disputes. Since countries vary in their scientific and technological advances as well as in their socio-economic structures, an optimal IP system needs to be flexible and transparent as well.

[9] Harmonization of International Copyright Protection in the Internet Age, 19 Pac. McGeorge Global Bus. & Dev. L.J. 435 (2007)