Overview of the International Intellectual Property System

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PART ONE

GLOBALISATION OF INTELLECTUAL PROPERTY LAW
AN OVERVIEW OF IP LAW & POLICY CONCERNS

• Historical Timeline: intellectual property type laws since 15th century

• Traditional IPRs: Patent Law, Copyright Law, Trade Mark Law

• But what about the new hybrid IPRs?
  • plant varieties
  • utility models
  • designs
  • geographical indications
  • traditional knowledge and traditional cultural expression protection
AN OVERVIEW OF IP LAW & POLICY CONCERNS

• Justifying IPRs
  • Many developing countries are returning to fundamental basics as to why IPRs are granted.
  • Who are the stakeholders?
  • Creators and industries?
  • What about societal needs?
  • How does international IPRs align with other international rights?
  • Consumer rights / farmers’ rights / access to medicines and educational?
  • Rights of indigenous peoples and right of development?

• Economics and Competition:
  • What are the economic justifications and limits?
  • Interface between IP and Competition laws

• IPRs and Innovation: What is innovation? Does IPR always promote innovation? Is copying not innovative? CHINA example.
Current Concerns

- Developing countries
  - extensive patent laws, esp. for medicinal products, therapeutic products, 2nd medical use
  - tie-in clauses in transfer of technology
  - protection of agricultural products and geographical indications
  - possibilities of branding

- All legal systems
  - pricing of digital products, competition and access - eg digital music and books, internet service providers and blocking exemptions
  - crossing lines of ethics and morality - eg patenting traditional knowledge, ethical branding
The Globalisation Phenomenon & North/South Conflict

- Globalisation = processes which tend to create and consolidate a unified whole economy, that covers the whole globe, even if it does not penetrate to every part of it.

  - *Globalised localism*: when a local phenomenon is successfully globalised for example, Coca-Cola, American English, English and French copyright laws in Anglophone and Francophone ex-colonial countries

  - *Localised globalism*: when local conditions, structures and practices change in response to transnational influences for example, impact of tourism on local arts and crafts industry, interest ecological dumping, change of local laws in response ecological dumping and damage
FROM NATIONAL LAWS TO GLOBALISATION

- Consequences of international trade and global competition
- From WIPO Agreements to the WTO Agreement (TRIPS); from unilateral and bi-lateral treaties, to multi-lateral treaties
- The North/South Conflict: The above concepts of globalised localism & localised globalism reflects the two extremes of North-South relations.
- WIPO Development Agenda and concerns of developing/least-developed nation
- Current concerns:
  - interaction between IPRS and other rights
  - competition and access - eg Google books
  - crossing lines of ethics and morality - eg patenting life and branding
  - curtailment of free speech, free flow of literature, and journalism - eg Ron Hubbard’s Scientology; The Wind Done Gone and Margaret Mitchell’s estate
  - usurping user rights through contracts
  - extending existing rights / ever-greening / eroding norms in sales of goods - drugs, digital goods/exhaustion of goods/first sale doctrine
INFLUENCES OF OTHER INTERNATIONAL LAWS?

• Rio Convention on Biological Diversity 1992 - patenting and TK

• International Covenant on Economic, Social and Cultural Rights 1966 (in relation to the rights to health, education, cultural access, and rights of authors)

• Declaration on the Rights of Indigenous Peoples, 2007

• UNESCO Convention on Cultural Diversity - access to intangible cultural heritage and IPRs
PART TWO

HISTORY OF IPR POLICIES
GENESIS OF IPRS - PRE 17TH CENTURY

- Patent privileges since 13th century
- Gutenberg's printing press
- 1469 Venetian privilege to Johannes of Speyer Printing Monopoly (akin to copyright)
- 1474 Venetian Statute on Patents
- English Crown/Royal grant of letters patent
- Venetian printing privileges: patents and copyright
- Crown/Royal grant of letters patent - Right of importation of new technologies or new manners of manufacture
- European Guild Structure and Censorship
18-19th Centuries

- 1624 Statute of Monopolies / 1710 Statute of Anne / France 1791 first patent law / US 1793 first patent law
- European Civil Law Author's Rights: Revolutionary and Enlightenment
- Fluid concepts of patents, copyright, trade marks
- Prior to this: Venetian Conflict: Free trade versus rise of national patent laws
- Golden era of international treaties: Paris Convention 1883 (industrial property) and Berne Convention 1886 (artistic and literary works)
1850s-1880s: Anti-patent movement from England, Switzerland, Germany and Netherlands

Free trade, and specific patent laws in 19th century

Scientific and industrial revolutions pushing patents as a new “business model”, pushing industrial strategies - e.g. chemical dye industries in Germany / Switzerland

Rise of patent agents and pharmaceutical companies

Paris Convention on Industrial Property 1883

Query: are monopolies good for the economy?

Query: what are the justifications for property rights in inventions? Natural property? Just rewards? Incentives to innovate? Incentives to disclose invention to public?
19TH CENTURY COPYRIGHT LAW AND POLICY

What about copyright?

Colonial rule till 1948, thus UK and France laws globalised half the world

International book and music trade - extra-territoriality and bi-lateral agreements

United States - the 19th century pirate

International copyright law - “business model” consolidating international colonial interests and industries extra-territorially

Victor Hugo and rise of authors’ societies and publishers’ associations

Berne Convention on Literary and Artistic Works 1886

Query: what were the initial terms of protection of copyright works?

Query: what did copyright protect?

Query: when did the US join the Berne Convention?
20TH CENTURY LAW AND POLITICS: FROM WIPO TO WTO

- 20th century
  - decolonisation and WIPO
  - Berne Convention crisis of 1967 (Stockholm revision)
  - Universal Copyright Convention

- From WIPO to GATT to WTO - TRIPS
  - WIPO’s shortcomings
  - UN-style voting blocks; dispute mechanism

- Increase in cross-border trade
  - end in cold wars
  - increase in consumption and spending power
  - global competition: the Far East

- South Korea v. US: patent policy making

- Trade-IPRs nexus established by USTR (i.e. piracy of IP goods affects national trade balance)

- Unilateral action - “Special 301 Action” extra-territorial sanctions

- New technologies: digital copying and internet dissemination / biotechnological inventions and generic competitors

- From unilateral and bi-lateral treaties, to multilateral treaties and plurilateral treaties - ACTA and TPP
PART THREE

THE DETAILS: CONVENTIONS AND TREATIES
CONVENTIONS AND TREATIES I

- Paris Convention on Industrial Property 1883
- Berne Convention on Literary and Artistic Works 1886
- Universal Copyright Convention 1952
- Lisbon Agreement for Appellations of Origin 1958
- Rome Convention on Performers, Phonogram Producers and Broadcasters 1960
- Convention for the Protection of New Varieties of Plants (UPOV) 1961
- TRIPS Agreement 1994
- WIPO “Internet” Treaties on Copyright / Performances and Phonograms 1996
- Anti-Counterfeiting Trade Agreement (ACTA) 2011
- Beijing Treaty on Audiovisual Performances 2012
- Marrakech Treaty on Access for the Visually Impaired 2013
- Trans-Pacific Partnership Agreement (TPP) (2013)
CONVENTIONS AND TREATIES II

- General principles
  - national treatment of foreign rights holders
  - harmonised set of minimum standards
  - Most-favoured-nation clause
  - Enforcement mechanism
  - Flexibilities in implementation
General Principles - TRIPs Agreement

- Copyright:
  - computer programs protected
  - rental right
  - adopts Berne/Rome Conventions
- Patents:
  - Member states cannot exclude any field of technology from patent
  - term of protection is 20 years
  - right of importation
  - LDCs have until July 2021 to implement TRIPS
- Geographical indications, trade secrets, trade marks / unfair competition/semiconductor topography, design laws introduced / harmonised
Flexibilities in All Conventions - Examples

- Public interest grounds
- Human rights interface with IPRs
Public Interest Clauses

• Article 7, TRIPS appears to allow Member States to take into account ‘social and economic welfare’ and urges ‘a balance of rights and obligations’

• Article 8, TRIPS specifically states that members may, ‘in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.....]

• Preamble, WIPO Copyright Treaty 1996: ‘a need to maintain a balance between rights of authors and the larger public interest, particularly education, research and access to information’.
Human Rights / IPRs Interface

- Right to education - Art. 13, ICESCR
  - 1971 revisions and the Berne Appendix 1971
  - Berne Appendix 1971: international copyright law does recognise that concessions must be made towards developing countries - these concessions also appear in the TRIPS Agreement.
  - Art. 10(2), Berne Convention: “...shall be a matter for legislation in the countries of the Union... to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.”
Right to health - Art. 12, ICESCR

Pharmaceutical products can be patented

Are there limits to patenting of essential medicines?

Should patents be even allowed for pharmaceutical products/medicines/staple food or agricultural products? – note early patent laws disallowed patents for drugs and staple foods (Germany 1968, Switzerland 1977, Italy 1978, Spain 1992)

If they are are, what are the means of limiting patent protection?

Research exemptions? US Bolar exemption (allows generic companies to test drugs for limited reason)

Compulsory licensing? Under TRIPS Agreement
South Africa HIV Crisis – Why Patents and Right of Health Clashed

South Africa blindly hands out drug patents even when they’re not deserved. This makes medicines unaffordable. South Africa pays the price. Fix the Patent Laws!

www.fixthepatentlaws.org
Compulsory licensing? Under TRIPS Agreement

3 Step Test: Art. 30, TRIPS: “Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with the normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties.”

DOHA Declaration on the TRIPS Agreement and Public Health 2001: “We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. ..In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.”
PART FOUR

INTERNATIONALLY RECOGNISED IPRS
PATENTS
COPYRIGHT
TRADE MARKS
AND ....
Hybrid IPRs

G. Dutfield & U. Suthersanen, Global Intellectual Property Law, chapters 7 and 8

a. Design Rights (dessin ou modèle industriel / geschmackmuster)

- Protection of visual appearance of products, their pattern, shapes and configurations. In most systems, registration is a requirement. Design law hovers between patent and copyright regimes, with some overlap of protection. It is considered a hybrid right. Note the unregistered design right in United Kingdom, and soon to be implemented within the European Union. See Art. 25, TRIPS.

b. Passing Off

- An Anglo-Australian common law right which protects traders against confusion of marks. Sometimes referred to as the unregistered trade mark right. It requires some goodwill or reputation attached to the mark. Usually useful if the mark cannot be registered under trade mark law.
Hybrid IPRs

c. *Unfair Competition (concurrence déloyale)*

- Protection of consumers against business practices which are contrary to honest practices. Used often to aid copyright law, design law and trade mark law (slavish imitation & confusion). Originally a civil law concept infiltrating rapidly common law systems such as US in early 20th century and Australia and Israel. UK has so far resisted it as it is argued that there are other statutes which cover the same subject matter. See Art. 10bis, Paris Convention.

d. *Utility Model (certificat d'utilit, gebrauchmuster)*

- Together with design law, utility model law is elusive and indeterminate. Utility model law is also referred to as petty patents or certificates of invention. A second tier patent protection system for incremental, innovative useful inventions, which nevertheless cannot fulfil strict patent criteria. See Art. 1, Paris Convention.
Hybrid IPRs

e. Traditional or indigenous knowledge rights

- Tribal knowledge, folklore and traditional cultural expressions. Many of these "intellectual property goods" cannot be protected under traditional laws due to their failing the criteria of protection. For example, copyright law has difficulty discerning the date of creation and ownership of tribal music or art.

f. Personality rights / publicity rights

- Protection for “persona” or character or image/likeness. Usually limited to control of commercial exploitation. Question: is this a property right or a personal right (under tort law).

- One can register the personality and image rights in the British Channel Island of Guernsey (new law on 3 December 2012 - Image Rights Bailiwick of Guernsey Ordinance 2012 and allows for the registration of a personality right, together with images associated with that personality. Images = any number of personal attributes, such as likeness, mannerisms, gestures, voice, nickname etc.)
Hybrid IPRs

g. Privacy / confidential information / trade secrets

- A growing area of law which originally protected corporate interests, but extended gradually to protect private and family interests. Overlaps with patent and copyright law, and personality rights. Subset of unfair competition law in many countries under Art. 10bis, Paris Convention. Strictly speaking, not an intellectual property product: the key element here is "secrecy", as opposed to creativity or distinctive value. Once the element of secrecy is lost, the information fails to fall within intellectual property regime. However, see Art. 39, TRIPS.

Article 39, TRIPS Agreement

- 1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3. [medical dataset]
2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.
Hybrid IPRs

(h) Database Right

- A specifically EU *sui generis* right - protection of compilations for database maker, subject to showing substantial investment in making the database.

(i) Semiconductor Topography Right (or mask works in the United States)

- Protection of the topography or layout of semi-conductor chips. Introduced by United States Semiconductor Chip Act 1984, rapidly legislated for in most industrialised countries due to reciprocity clause. Section 6, TRIPS Agreement.

(j) Plant Varieties

- Sui generis protection for protection of plant varieties. See Art. 27(3)(b), TRIPS, and UPOV Convention.