HARMONIZATION OF IP LAWS

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ABSTRACT

Now that the industrialised world operates as a set of knowledge-based societies, the intellectual property rights have become foreground features of their economies. Knowledge is rendered fluid through its transference from material objects to other media; workplaces and markets are replaced by remote visualisation; data can be stored in convenient magnetic and electronic packages. Participating in this new world order is a challenge for both individuals and nations, for it requires high intellectuality and advanced technological infrastructure. The shift from physical to virtual is a challenge for both international and personal relations and it will certainly provoke dramatic changes in law. The Knowledge-Society core source of wealth is the recognition of intellectual property. Information, ideas and innovation are basic war weapons today's economy. With the ready availability and increased sophistication of copying devices such tools would be valueless without the protection of intellectual property laws.

However, in today's world only protection is not sufficient, mere drafting of laws is also not sufficient. What the world needs now is a common platform for the laws of all countries. We need to blend the laws of both civil law countries and common law countries into a unified coded law. This is imperative if we wish to achieve the truest form of globalization. The various conventions like Paris Convention (1883) and Berne Conventions (1886) to the WIPO (World Intellectual Property Organization) and the TRIPS Agreement of the WTO, all have only aided towards this goal.

However, the destination is yet to be achieved and the major questions that need to be addressed are how to unify the laws in a manner that are beneficial to all- specially the developing countries and whether achieving harmonization of IP laws is a far-fetched dream?

INTRODUCTION

Intellectual Property Right is an ever- growing aspect especially with the advancement of technology. IPR affects trade and laws all over the world. It is an international concept that needs to be harmonized.

Harmonization is the process by which the domestic laws of various sovereigns inter-connect and amalgamate into one. All sovereign entities agree to follow the same legal principles and unify their laws. Entities bound their laws by eliminating major differences and uniting on a common platform. This leads to a unified and common laws which in turn helps in easing the scope of trade and commerce for all.

In this 21st Century, when the entire world is becoming a globalized village, harmonization of laws is the next rationale step only then can we achieve the goal of globalization in its truest form.

WHAT IS THE REASON FOR HARMONIZATION OF IP?

The major reason for harmonization of laws is to achieve the utmost ease in trade and commerce. Harmonization lowers the transaction costs with easy to access of IP protection all over the world. It helps in promoting economic welfare, protection of the incentives the promote the creation of IP and advantages in international trade. It helps in the dissemination of knowledge, sharing of latest know- how, promotion of creativity and merger of cultural values. It also promotes patience towards other cultures.

Any inventor or creator has the option of protecting his work in any foreign country where he wishes to seek protection for his work. However, it is an expensive and nearly impossible for the creator or inventor to keep a track of the infringement in the international arena. Also, by the time the creator or artist finds out, he may already incur substantial economic losses and loss of reputation. It is due to these reasons that many experts have suggested creating a universal database for international Trademarks and Patents.

Even though this seems like a tempting point, the biggest drawback is that it will increase the cost of registration of IP.

Two conflicting principles, territoriality and first-sale doctrine are the driving force behind the harmonization of 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.

HISTORY OF HARMONIZATION

The Paris Convention of 1883 and the Berne Convention of 1886 mark the beginning of the movement for harmonization of intellectual property rights,[1] in both their substantive and their procedural aspects. With respect to patent and trademark rights, most of the world's countries are signatory to Paris Convention. 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 upon payment of adequate fees. There are special agreements relating to trademarks in addition to the Paris Convention which set out procedural rules in order to obtain protection.[2]

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 regional basis in some places. For example, the European Patent Office will examine patents that have force and effect throughout the European union.

These Conventions would thereafter be revised, and others concluded, to widen the scope of intellectual property rights subject to harmonization efforts. Further, the World Intellectual Property Organization (WIPO), which serves as the central core of harmonization activity in this field, is the successor organization to the International Bureaus set up by the Paris and Berne Conventions. Intellectual property rights harmonization activity has also been strongly influenced by the TRIPS Agreement adopted during the Uruguay Round of GATT.

[1] The World International Property Organization defines intellectual property as 'creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.' (See WIPO, 'What is intellectual property?' 〈http://www.wipo.int/about-ip/en/〉.) Intellectual property can be broadly divided into industrial property (including patents, trademarks, industrial designs, and geographic indications) and copyright (which covers literary works, musical works, films, such artistic works as paintings and sculptures, architectural designs, and so forth). So-called 'neighbouring rights,' rights connected to copyright, also exist, such as rights to performances, recordings, and broadcasts.

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

A. THE PARIS CONVENTION

Harmonization of industrial property rights first became an issue with the World's Fair-type international exhibitions of the latter half of the nineteenth century. In 1851, the first World's Fair was held in London with twenty-five countries participating. In the run-up to the sixth World's Fair, held in Vienna in 1873, the need to ensure international legal protection for inventions was made apparent by the refusal of many participating countries to run the risk of having their ideas stolen by exhibiting their products.

Furthermore, the Congress of Vienna for Patent Reform, convened the same year, 'elaborated a number of principles on which an effective and useful patent system should be based, and urged governments "to bring about an international understanding on patent protection as soon as possible." '[3]In 1878, an International Congress on Industrial Property was convened in Paris.

In 1878, an International Congress on Industrial Property was convened in Paris. It was decided at this Paris Congress to convene an international conference 'with the task of determining the basis of uniform legislation' in the field of industrial property. Following up on this decision, France proposed establishment of an international union for the protection of industrial property. A diplomatic conference convened in Paris in 1880 approved a draft treaty the substantive provisions of which provided the main features of the Paris Convention for the Protection of Industrial Property of 1883.[4] Under the Convention, member countries constitute a Union for the Protection of Industrial Property.

The Paris Convention has been amended seven times.[5]By this means, harmonization of both substantive and procedural provisions in the various fields of industrial property has been deepened and made more detailed. The Convention as amended is legally binding on contracting parties, who are obligated to revise their domestic laws when necessary to bring them into line with the Convention's provisions.[6] However, contracting parties are allowed

[3] WIPO (2004: 241).
[4] Paris Convention for the Protection of Industrial Property, signed on 20 March 1883, entered into force on 7 July 1884. The Convention was initially signed by eleven countries: Belgium, Brazil, El Salvador, France, Guatemala, Italy, the Netherlands, Portugal, Serbia, Spain, and Switzerland. Prior to its coming into force it was also signed by the United Kingdom, Tunisia, and Ecuador. It thus came into force among fourteen signatory countries. For the text of the Convention (in French), see *La Propriété Industrielle*, 1er Volume, 1885, pp 2–5.
[5] In 1900, 1911, 1925, 1934, 1958, 1967, and 1979
[6] Article 25(1) requires '[a] country party…to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention,' while Paragraph 2 of the same article requires that a country

significant leeway to maintain distinctive domestic laws pertaining to industrial property. Article 20(1)(b) allows a country, in acceding to or ratifying the Convention in its most recent amended version, to 'declare…that its ratification or accession shall not apply' to the substantive provisions contained in Articles 1 through 12.[7]

B. BERNE CONVENTION

The first effort to conclude a multilateral treaty protecting copyright was the Congress on Literary and Artistic Property, held in Brussels in 1858 and attended by scholars and publishers from around Europe and the Americas. a Conference was convened in Berne in September 1883 of representatives from interested bodies (including writers, artists, publishers, and scholars) and a draft treaty for protection of copyright to artistic products composed. International diplomatic conferences of government representatives at which drafts of such a treaty were discussed were then held in 1884, 1885, and 1886. On 9 September 1886, a Convention[8] was at last signed in Berne.[9]

The content of the Berne Convention can be divided into three categories: (1) basic principles of substantive and procedural law pertaining to copyright protection; (2) substantive legal rules concerning content, scope, and term of copyright; and (3) provisions concerning the organization and functions of the 'Union for the protection of the rights of authors in their literary and artistic works established pursuant to the Convention.

The signatories of Berne 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 which has helped in the ease of registration and harmonization of the laws with respect to copyright.

ratifying or acceding to the Convention 'be in a position under its domestic law to give effect to [its] provisions.'

[7] Yoshifuji (1994: 638–9)

[8] Berne Convention for the Protection of Literary and Artistic Works, signed 9 September 1886, entered into force 5 December 1887. Of the ten original signatory countries—Germany, Belgium, Spain, France, the United Kingdom, Haiti, Italy, Liberia, Switzerland, and Tunisia—all but Liberia ratified the treaty. The text of the treaty (in French) is found at *Actes de la 3me Conférence internationale pour la protection des oeuvres littéraires et artistiques, réunis à Berne du 6 au 9 septembre 1886*, Berne: Impr K-J Wyss, 1886, pp 30–4.

[9] ibid, pp 25–50Ricketson and Ginsberg (2006)

OBSTACLES

Global harmonization faces many obstacles, starting from the very basic concept of language. By language, scholars wish to include concepts, legal culture, judiciary, concept of jurisdiction. Such diversity amongst counties leaves a wide scope for interpretation which in turn will cause greater confusion.

The major challenge is converging the civil law countries and common law countries as the laws of one are unacceptable to another.

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. And substituting one legal system for another does not guarantee success.

The major obstacle is defining a copyrighted work or a trademarked work.

Additionally, there are challenges with respect to 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. [10]

Every nation has laws that are framed according to its society and hence merging them into one is a complicated process.

IMPLEMENTATION

WIPO was created "to encourage creative activity, to promote the protection of intellectual property throughout the world".[11] 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 countries in coming up with a

[10] Doris Estelle Long, Traditional Knowledge and the Fight for the Public Domain, 5 J.Marshall Law Rev. Intell. Porop. L. 317 (2006)

[11] Convention Establishing the World Intellectual Property Organization, http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html) signed at Stockholm on July 14, 1967, Preamble, Second Paragraph.

resolution, which is often criticized because such role is rather vague and imbalanced without a real enforcement process.

There has also been a proposition for harmonization in a manner that preserves one's culture and society while a uniform system of IP laws. They vary from a legal transplant to diversification.

A 'legal transplant' is the 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.

'Diversification' which signifies not only disagreement, but also agreement that countries sometimes agree to disagree.[12]

CONCLUSION

With the amalgamation of foreign economies, the interest in harmonization of IP will also increase to make transactions and access, more efficient. However, many nations do not wish to let go of their individual sovereign status.

Thus, harmonization of intellectual property is a tedious process of careful negotiations and separation of issues of trademark, copyright and patent laws.

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