

Know IP – The Stockholm Network’s Monthly IPR Journal Volume 3: Issue 7. October 2007

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Commentary- Is TRIPS Dead? Long Live IGWG? - Meir Pugatch and Helen Disney¹

The short answers to these two questions are "probably yes" and "probably no". Of course the reality is more complex so we might as well give these questions some more serious thought and analysis.

Is TRIPS dead?

Are intellectual property rights trade-related? That was the essence of the discussion and debate that took place before, during and after the Uruguay Round (1994-2005).

This discussion was settled (at least politically) with the inclusion of the Agreement on Trade Related Aspects of Intellectual Property Rights – TRIPS – under the auspices of the WTO.

As far as IPRs were concerned, the TRIPS Agreement drastically altered perceptions. Talks about the international regulation of IPRs focused on the pre and post TRIPS era. Some have described this agreement as "a revolution in international intellectual property law".²

The decade of TRIPS can roughly be divided into three periods. The first period – 1995 to early 1999 – may be described as the period of 'determination'. Developed countries were positively convinced about TRIPS' ability to provide a long-term platform for the protection and enforcement of their IP rights world-wide. One need only look at the different WTO disputes between the US and the EU on one side and India and Pakistan on the other, over the so-called patent 'mail-box' provisions in order to understand why such optimism was in place.³ It

¹ Dr. Meir Perez Pugatch, Haifa University, is Director of Research of the Stockholm Network; Helen Disney is CEO of the Stockholm Network.

² Reichman, H. J.; "Securing Compliance with the TRIPS Agreement after US v India"; *Journal of International Economic Law*, vol.1:4; 1998; pp. 581-601

³ WTO - Dispute Settlement Body. *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products: Complaint By the European Communities and Their Member States* (Geneva: 24 August 1998), document number: WT/DS79/R

was also a period in which developed countries underestimated the growing opposition to TRIPS by developing countries, and particularly the least developed countries.

The second period – November 1999 to November 2001 - may be described as the period of 'resentment'. Developing countries, backed by a new wave of anti-IP sentiment within the NGO community, expressed a growing sense of antagonism about their obligation to implement TRIPS as of 2000. Briefly put, some developing countries felt that the TRIPS agreement was too one-sided, with limited prospects for the interests of their own nationals. This resentment was fuelled, in part, by two separate events – the colossal failure of the Seattle Ministerial Conference in late 1999, and the case of patented AIDS medicines in South Africa.

The third period – November 2001 to date - may be described as the period of 'flexibility', though not necessarily in a positive sense for all parties concerned. This period brought two major changes. First, the subject matter of the discussion on TRIPS has narrowed to an almost exclusive focus on pharmaceutical IPRs. Second, discussions no longer focused on the implementation of TRIPS, but rather on the 'flexible' interpretation of TRIPS, in other words on the manner in which developing and least developed countries could avoid or circumvent the Agreement. The ultimate outcomes of this era are the 2001 Declaration on the TRIPS Agreement and Public Health, and the 2003 and 2005 Agreements on the implementation of Paragraph 6 of the declaration (focusing on the manner in which least developed countries with no manufacturing capacities can import generic substitutes to existing patented pharmaceutical drugs).⁴

But the era of TRIPS flexibilities, while celebrated in the media and by some NGOs, has proven to be the most dangerous period in the existence of the Agreement and may jeopardise to its survival prospects. To a large extent, TRIPS flexibilities

⁴ WTO Ministerial Declaration on the TRIPS Agreement and Public Health- Adopted on 14 November 2001; Council for TRIPS, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (30 August 2003).

have proven to be excessive, leading to two different yet interconnected outcomes.

The first outcome is the surge of regional and bilateral agreements that establish IP commitments at a 'TRIPS+' level, which means that the parties, including developing countries, are required to implement stronger and more detailed IP provisions than those stated by TRIPS.¹

The second outcome is the (almost) complete stagnation in the negotiating agenda of TRIPS, in pharmaceuticals as well as in other fields of technology. Indeed, in the decade that has passed, we have experienced vast and rapid technological developments, such as in the World Wide Web, mobile and digital mediums. These fields encompass highly complex and important IP issues, most of which are not covered in TRIPS. Therefore one may argue, with a certain degree of certainty, that the TRIPS agreement has been forsaken.

Long Live the IGWG?

Simply put, the mandate of the WHO Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG in short) was "to prepare a global strategy and plan of action on essential health research to address conditions affecting developing countries disproportionately".²

Established only recently (2006) the IGWG is a sort of 'spin-off' to an earlier work performed by another WHO taskforce – the Commission on Intellectual Property Rights, Innovation and Public Health (CIPRH) – whose mandate was to analyse IPRs, innovation and public health, including the question of appropriate funding and incentive mechanisms for the creation of new medicines specifically relevant to developing countries".³

¹ Pugatch M.P.; 'The International Regulation of IPRs in a TRIPS and TRIPS plus World', *Journal of World Investment and Trade*, volume 6 number 3; 2005; pp. 231-265

² . Commission on Intellectual Property Rights, Innovation and Public Health (2006); www.who.int/intellectualproperty/en/

³ WHO-IGWG. *Draft global strategy and plan of action on public health, innovation and intellectual property* (31 July 2007), A/PHI/IGWG/2

The first draft of the IGWG strategy was published on 31 July 2007 and is now considered to be the blueprint for the new pharmaceutical IPRs negotiation agenda. The draft focuses on the context, the aim, and on the various elements that the global strategy aims to promote.

If one needs to judge a process on the basis of its 'vibe' and 'hype', then the IGWG is certainly the right place to look. Anybody who is somebody in the health policy community is certainly paying attention to what the IGWG is doing and to what it has to say.

Indeed, the IGWG process has led to a flood of hearings, workshops, events, reports, and research. It breathes new life into the entire discussion on IP-Health related issues that have run their course under the TRIPS framework. So, to that end, long live the IGWG.

But a closer look at the IGWG process and a review of its strategy raises some serious concerns about the expected length of reign of the new king of the multilateral court.

First, observing from the point of view of those involved in the process of IP policy making, it is difficult to see how the recommendations of IGWG can be implemented at the national level. With no disrespect to the role of the WHO, there is a big difference between adopting a global working plan at the multilateral level (via the WHO Assembly) and the willingness or ability of different countries, developed and developing alike, to pursue this strategy at the local level.

Secondly, de facto the IGWG process is now taking precedence over the other formal international platforms under which the international negotiation of IPRs (including pharmaceuticals) are supposed to take place, such as under TRIPS and the World Intellectual Property Organization (WIPO). The question, therefore, is what will happen to these tracks. Will the IGWG process be synchronised with these institutions or will it clash with them? We believe that the latter option is the more realistic one.

Finally, and perhaps most importantly, a closer look at the proposed strategy of the IGWG raises some serious concerns about the efficacy and applicability of this strategy. One cannot avoid the feeling that these recommendations may, after a long process of political negotiations, look nice on paper but have little impact in practice.

After all, how can we expect that an international body will be able to secure the implementation of recommendations, such as "promote the active participation of developing countries in innovation", "provide support for national health research programmes in developing countries through political action and long-term funding", "promote transfer of technology and the production of health products in developing countries" and "monitor the impact of intellectual property rights and other factors on innovation and access to health-care products"?¹

The truth of the matter is that the promotion of innovation and the creation of new medicines for the sake of developing countries cannot be based on a top-down process. Rather they should be based on bottom-up solutions by the actual players involved in this process - companies, research institutions, and the regulatory and IP authorities.

When help is needed on specific issues such as, for example, helping a developing country to strengthen its capacity to carry our clinical trials (say via Good Clinical Practices - GCP), the WHO can certainly be of a great assistance. It can coordinate missions, provide information and organise training sessions, all of which will undoubtedly be of great value.

But, what the IGWG is now doing is essentially providing a sort of a "visionary blueprint" of what all actors involved in the healthcare innovation game ought to be doing. This seems to be quite presumptuous, even for the WHO.

We therefore predict that the IGWG process will fail. Undoubtedly, the recommendations will be discussed, debated and explained. Perhaps

¹ WHO-IGWG. *Draft global strategy and plan of action on public health, innovation and intellectual property* (31 July 2007)

other committees will be established. But this, unfortunately, will have little effect and impact on the state of innovation and the supply of new medicines in developing countries. We submit that at the end of the day these medicines will be most likely to stem from pharmaceutical companies, as has been the case for the last century.

But for now, we have a new act in Geneva, so we can at least enjoy the show.

Topic of the Month

Microsoft Judgement Confirms New World Order in Competition Policy – Simon Moore ²

It's all over. The result is in. The Jarndycian legal war between Microsoft and the European Commission has come to a conclusion, one that will bring delight to Brussels and displeasure to Redmond in equal measure.

The Court of First Instance (CFI) upheld the 2004 verdict of the European Commission that Microsoft's conduct, both in bundling its Windows Media Player with copies of its Windows operating systems, and in not disclosing technical data about interoperability with its server products, constituted abuses of its dominant market position. The CFI judgement dismissed Microsoft's protestations about the original ruling, describing the testimony of Microsoft's general counsel as "scarcely credible", finding firmly in favour of the original Commission decision across the board. The sole proviso was a modest criticism of the powers given by the Commission to the independent trustee appointed to monitor Microsoft's implementation of the original decision.

The punishment laid out for Microsoft is not insubstantial. Beyond the cost of the fines (now up to €777 million), and several years' worth of lawyers' fees on both sides that Microsoft must bear, it also faces the outlawing of a large part of its business strategy. Beyond complying with the existing ruling, Microsoft will also be wary of

² Simon Moore is an adjunct researcher with the Stockholm Network.

attacks on its other more successful products, including the new Windows Vista, and its Office suite of applications.

Other firms may also be looking over their shoulders. Cases are already pending against Qualcomm, a US mobile phone component manufacturer, over alleged excessive licensing terms, and against Intel, for allegedly using abusive tactics to keep its customers from switching to products made by its rival AMD. Each of these cases is, however, different in kind from the Microsoft case, and the precedents set are unlikely to be transferable. Where the case may apply, however, is in the cases of Apple and of Google. Apple is already under pressure from several national governments, including France, to open up its iTunes store to rival players. If a case is brought at the European level, Apple could find itself in a similar position to its long-time rival. Google also, simply by way of its market share in online search, advertising, and other smaller sectors such as mapping, may be in danger of drawing the Commission's attention.

The case underscores the difference in values between US and European regulators, which could become more troublesome as the disjoin becomes more embedded. The European regulatory approach is much more pessimistic about corporate behaviour in general. Rather than adopting the 'innocent until proven guilty' approach, they tend to start from the precautionary principle, that once something is identified as a potential harm, all care must be taken to demonstrate that it is not, before it be allowed to proceed. As a consequence, the European standards tend to be much more demanding of companies than the more laissez-faire approach in Washington. Or to look at it another way, the US pursues antitrust cases when consumer benefit is being clearly harmed, whereas Europe views competition as a good in and of itself, protecting competitor firms even if the impact on consumer welfare is negligible or unproven.

This attitude, being the more restrictive of the two, has the potential to spread more widely around the world. Countries such as China are leaning toward the European model when creating their own regulatory structures. It

matters little, though, whether other countries follow Europe's lead or not. Companies operating in a global market are already likely to alter their production to suit the most stringent of the various regulatory frameworks in which they hope to sell. In this regard, Europe gets to decide for the world what makes it to the marketplace.

This is no small power: regulation often works to the advantage of incumbent market powers by creating an extra cost or barrier to entry. European firms, more used to dealing with the European regulatory method, gain a distinct competitive advantage by the extension of European regulations, both within the EU, and now also further afield. This market distortion is unhealthy for competition, making regulatory compliance, not quality of product, a more critical factor in corporate success. Even in antitrust regulation, where one imagines being bigger is disadvantageous in drawing the wrath of regulators, European dominant companies (scarce as they are) are far more adept at avoiding prosecution thanks to their familiarity with local legal customs and involvement in the drafting of regulation.

Beyond the advantage to European business, does the EU have anything else to gain from the export of its regulatory method? Trade commissioner Peter Mandelson seems to think so. "Export[ing] our rules and standards around the world [is] an increasingly important part of my job as trade commissioner", he claimed in a speech to the Chamber of Commerce and Industry in Paris.¹

This approach could be very damaging to innovation. Creating a desirable product is disincentivised when its success mandates the loss of protection of the intellectual property that sustains it. Meanwhile, without the coercive interventions of the European Union, Microsoft's dominance is being challenged. Linux, while unlikely to take over the operating system market completely any time soon, has moved towards being a credible rival in a substantial niche of the market. Google's rise has shown that the IT sector embraces new high-quality products rapidly, without mourning for whomever is

¹ http://ec.europa.eu/commission_barroso/mandelson/speeches_articles/sppm159_en.htm

displaced by them (remember when Netscape and Altavista dominated the search engine market? It seems like a lifetime ago but these companies declined from domination to irrelevance in the space of only a couple of years). A system which penalises success to the extent of the European model demotivates the up-and-coming firms designing the next 'killer-app' as much as it does the existing industry behemoths. After all, the reason most of these firms exist is to try to become the next Google or Microsoft, to make the product everybody wants to buy.

Of course Microsoft may yet decide to appeal again, putting all these questions on hold for who knows how many years longer. In which case, we'll see you at the European Court of Justice sometime soon.

Views

Fighting the Fakes: Why Harry Potter's Magic doesn't work– Sukanya Natarajan¹

The significance of intellectual property is growing with great rapidity, not only in the developed world but also in the developing world. To promote the cause of IP in different countries and also at a global level, education is required and must be advocated. Fighting the fakes will result in an increased number of new works coming onto the market.

Do not be surprised if you find a counterfeited version of JK Rowling's latest bestseller *Harry Potter and the Deathly Hallows* (released on July 21 2007) in pirate bookshops (especially sidewalk vendors) in China and India or on the internet. In 2000, a raid by the Chinese authorities discovered fake Harry Potter books being produced by a publisher in the south western city of Chengdu.² The extent of the copyright

¹ Sukanya Natarajan is a research officer at the Stockholm Network

² The infringing publisher in Chengdu, Bashu Publishing House, was a legitimate enterprise. Once the pirated books were discovered, the publisher quickly settled the dispute, agreeing to pay a \$2,500 fine within six

violation has become much more complicated than it was when JK Rowling started writing Harry Potter 17 years ago. The unauthorised versions not only affected Rowling and her publisher, but also hurt Renmin Wenxue publishing company, the local state-owned publishing house that holds the rights to publish the Chinese translation of the Harry Potter books.³

More than 2 million copies of *Harry Potter and the Deathly Hallows* were pre-ordered worldwide, including 240,000 from India. India's booksellers did not rejoice about the anticipated Potter bonanza. They worried that their profits will be drained away by pirated copies. According to China Daily, the leading Chinese foreign book trader imported 50,000 Harry Potter books (this figure is half of their total imported books).⁴ Bloomsbury and Penguin India commissioned a team of legal experts and vigilance officials and teamed up with local police units to ensure that the latest Potter did not see the light of day before the 6:30am (IST) official release moment on Saturday, July 21.⁵ "We estimate 50% of sales lost due to piracy," says Himali Sodhi, head of marketing for Penguin India.⁶

Rowling and Warner Bros filed a lawsuit in India in 2004 against several eBay sellers and eBay itself over unauthorised copies of e-books that appeared on Baazee.com/eBay India.⁷ The Delhi

months and to publish an apology in China's *Legal Times*

Pomfret, John, 'Chinese Pirates Rob 'Harry' of Magic, and Fees'; *Washington Post*; 1 November 2002.

Jacobson, Aileen; 'Harry Potter and the Wizards of Ersatz'; *Newsday*; 14 November 2002

³ Peter K. Yu, 'From Pirates To Partners (Episode II): Protecting Intellectual Property In Post-WTO China', *American University Law Review*, Vol. 55, 2006

⁴ "Chinese bookworms going potty over Potter"; *China Daily*; 23 July 2007; www.chinadaily.com.cn/ezine/2007-07/23/content_5441349_2.htm

⁵ Pirated versions of the 6th J K Rowling book, *Harry Potter and the Half-Blood Prince*, were available in sidewalk stalls across India on the day of its release in 2005. About 2,500 pirated versions were captured in Mumbai's Haji Ali, India's epicentre for fake goods, in the first week after the official launch. On Day 2 after the hysteria-wrapped release of *Deathly Hallows*, no pirated version was reported there as yet.

⁶ www.atimes.com/atimes/South_Asia/IG24Df01.html

⁷ www.publishersweekly.com/article/CA6422603.html

High Court has not commented on the 31 May 2007 ruling, and the case will come up for hearing again later this year.¹

The availability of the pirated versions of the Harry Potter book series and the movie send the signal that intellectual property rights in general (and copyrights in particular) are very weak in these countries. Moreover there has not been any major anti-piracy campaign in India and China to try to make the buyer feel criminally guilty about buying a pirated copy and made to realise that he or she is actually stealing legitimate dues from the author and official publisher. Though the authorities in both countries have attempted to help the publishers in India and China, this has brought the issue of the already existing counterfeited goods in the market into the limelight.

While the Harry Potter series has exhibited the extent of violation of copyright policy (not restricted to India and China) it also provides an insight into the serious problem of counterfeiting in the developing world. This extends to other counterfeited products such aircraft parts, motor goods, luxury goods and more importantly medicines which pose a risk to public safety. In countries such as India and China, fake products have a parallel market and strict measures are not used to eliminate the counterfeit goods. Though laws are present to address this problem, their implementation and enforcement are the bottlenecks.

Piracy and counterfeited goods have an underground market which has to be tackled by their respective governments. The solution to this problem lies not only in altering the legal chambers of developing countries such as India and China but also in advancing the cause of protecting and promoting intellectual property rights. When it comes to educating developing countries regarding intellectual property, progress is slow. Moreover, in China and India, the authorities spend their resources on preventing the exploitation of goods in specific high-profile cases such as Harry Potter books rather than on educating and spreading awareness of intellectual property more widely.

¹ www.contentsutra.com/entry/419-ebay-india-takes-on-jk-rowling-in-delhi-high-court

As these countries have just become ostensibly TRIPS compliant, the big question facing these two economies is how to solve the problem of counterfeiting. With a population of 1 billion each, it is time that India and China realise the harm that is inflicted on future economic prospects by failing to protect, promote, and enforce intellectual property. In this particular instance it may be copyrights that require protection, but spreading awareness, strengthening laws and providing IP education will have a beneficial effect on other aspects of IP such as patent protection and trademarks, for decades to come.

Forthcoming Event

Negotiating Pharmaceutical IPRs – International Governance In Need of Coordination?

Date: Wednesday, 21 November 2007

Time: 9:00 -13:00

Venue: UNCTAD, Palais des Nations, Geneva

Speakers: Kiyoshi Adachi and Christoph Spennemann, UNCTAD; Dr Xuan Li, South Centre; Helen Disney and Dr Meir Perez Pugatch, Stockholm Network.

The United Nations Conference on Trade and Development's Policy Implementation Section, the Stockholm Network Intellectual Property & Competition Programme, and the South Centre are delighted to invite you to a forum and debate on "Negotiating Pharmaceutical IPRs – International Governance in Need of Coordination?".

The negotiations on pharmaceutical IPRs are today in a state of a flux. The issues at stake are complex and fundamental and are likely to have a significant impact on the future and architecture of the system as a whole, both internationally and domestically. Multilateral discussions (and to some extent negotiations) over the future of pharmaceutical IPRs are taking place in various organizations, such as the WTO, the WHO, WIPO, OECD, UNCTAD, etc. Consequently, the

following questions emerge: How can increased coordination of multilateral discussions lead to improvements in the system for pharmaceutical innovation, to address developed and developing country diseases and public health needs? Are there any ways in which coordination between the various bodies can be enhanced? What should be the role of external players in this process? Will these negotiations lead to a better pharmaceutical IP system or will they damage it? These questions will be discussed in a joint workshop by UNCTAD, the Stockholm Network and the South Centre.

RSVP to Helen Davison, helend@stockholm-network.org

News Flashes

Top Stories in the World of IP and Competition

1) Clearly, the big IP news story since the last *Know IP* was the European Court of First Instance ruling on the Microsoft case discussed in the opening Commentary.

http://www.news.com/Microsoft-ruling-EU-court-statement/2100-1014_3-6208343.html?tag=ne.fd.mnbc

2) YouTube's owner Google has agreed a UK licensing contract with music rights managers MCPS-PRS. While not resolving the issue of uploading copyrighted material, the deal enables artists to receive royalties when their music is used as backing to clips loaded onto the site.

www.guardian.co.uk/technology/2007/aug/30/youtube.netmusic

3) Further developments in the long-running chipset licensing battle between Nokia and Qualcomm have occurred this month. In the wake of various legal verdicts going in its favour, Nokia has opted to push Qualcomm further into a corner, by asking the US International Trade Commission (ITC) to ban mobile phone handsets containing certain Qualcomm chips from entering the US.

www.ft.com/cms/s/0/11dcccfd4-4ced-11dc-a51d-0000779fd2ac.html

4) Sony has admitted defeat and is withdrawing its proprietary format ATRAC from the crowded personal music player market. In an apparent concession to the might of Apple and its iTunes player/.aac file combination, and the popularity of MP3, Sony's new range of portable players will support a variety of standards, but not the ATRAC format it developed. Sony also announced the closure of its online music store Connect.

www.ft.com/cms/s/0/c746ba8e-574b-11dc-9a3a-0000779fd2ac.html

5) Meanwhile, Apple has pulled shows from US network NBC after a pricing dispute in which rsApple accused the produced of popular programmes "Heroes" and "The Office" of "a dramatic price increase" amounting to almost doubling the price of its material. NBC refuted the accusations, instead blaming Apple for failing to consider the interests of content producers. Analysts were quick to point to the move as evidence of growing tension in Hollywood about Apple's expanding power in the entertainment industry.

www.marketwatch.com/news/story/apple-pull-nbc-shows-itunes/story.aspx?guid=%7B319BB7B3-734C-41D2-BC03-F1B465968708%7D&dist=MostTopHome

6) Microsoft suffered another setback when the data format supporting its Office software suite was turned down in its bid to become an accredited international standard. The 104 members of the International Standards Organization (ISO) failed to reach the two thirds majority required to approve a product. The impact of the decision could be substantial, as it is likely to hinder the take-up of Microsoft software and data formats by government bodies around the world. The ISO will meet again in February, when Microsoft will hope to see the decision change.

ap.google.com/article/ALeqM5jb3PZbolPuFF1DdKGzjYgWpVBqyg