International Intellectual Property's Institutional Problem

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It is difficult to find an article on any topic in the field of intellectual property (IP) that does not call for reform. Many legislative efforts are afoot in the EU to "update" IP norms, including a proposed Directive on copyright in the Digital Single Market. The same is happening elsewhere but most of those reforms are at the national or regional level. Is international reform possible?

One argument to explain why it is not possible is that international law typically follows national law so that incorporating new norms in an international instrument such as a new treaty presupposes that countries already agree. The treaty here is seen as de jure recognition of de facto state practice. Historically this has certainly been true on a number of occasions but in IP empirically it is not verified. New international IP instruments can do more than reflect an existing consensus; they can create new ones.

The 1961 Rome Convention, which protected rights of performers, record companies and broadcasters, created a new legal regime which very few countries had put in place at the time. The Convention pulled the neighbouring (related)

rights regime up rather than confirming its existence in other words. There were arguments at the time that some musical performances should be copyright works. Still today the United States considers sound recordings as works (and tried but failed to make that an international rule during the TRIPS negotiations), leaving open vexing questions about originality.

Speaking of the TRIPS Agreement—adopted as part of the World Trade Organization (WTO) package in April 1994—, it also pulled IP protection norms upwards in several jurisdictions. Reviled in the years following its application in developing countries (for most of them, 1 January 2000), TRIPS is now often used as a defense against demands for higher norms in regional trade and other agreements. With a better understanding of the flexibilities it contains, TRIPS is viewed by many commentators and policy makers worldwide as an acceptable standard.

Since TRIPS, the IP spotlight moved (back) to the World Intellectual Property Organization (WIPO). Many new instruments were adopted there, including the 1994 Trademark Law Treaty (TLT) and its cousin the 2006 Singapore Treaty on the Law of Trademarks, which are best seen as administrative instruments not fundamentally changing substantive trademark law. In the same category (mostly administrative with some substantive impacts), I would put the 2015 negotiation of a new Act of the Lisbon Agreement on the protection of geographical indications. That Act, for reasons I've explained elsewhere, is not likely to succeed in expanding GI protection, especially in common law jurisdictions.[1]

Since then, a number of substantive instruments have been successfully negotiated, all in the field of copyright and related rights. The 1996 WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty (WPPT), the 2012 Beijing Treaty on Audiovisual Performances, and the 2013 Marrakesh Treaty for visually impaired persons. Whether this is a good way to reform international copyright law I will discuss in a separate blogpost later.

Can reform actually happen internationally? Lobbies are powerful, but they are not an insurmountable obstacle. A comprehensive reform package could appeal, in the way that a good compromise can. There is an institutional problem as well, however.

IP policy requires both normative trade-offs and appropriate doctrinal

implementation of policy choices.

Of the intergovernmental organizations (IGOs) active in IP, the WTO has the broadest portfolio. It can, and has, offered trade-offs between patents and textiles; sound recordings and bananas; or cotton and pharmaceuticals. It has made one change to TRIPS since 1994, namely the addition of the system allowing compulsory licensing of pharmaceuticals (art. 31*bis*). That said, the WTO's "round" approach to reforms (where all sectors are on the table) make it an unlikely forum for major progress in the foreseeable future.

The World Health Organization (WHO) has health as its prime objective and many of its recent efforts in IP have focused on access issues and skewed research investment. It cannot easily offer comprehensive reforms in a way that patent and data protection right holders would find attractive.

Let us not forget UNESCO, which has copyright in its brief as administrator of the now obsolete Universal Copyright Convention and has risen to prominence again in the area of intangible knowledge protection, where its mandate intersects with IP (copyright and TK). UNESCO membership seems unlikely to expand UNESCO's IP reform anytime soon.

WIPO remains of course front and center. It can cooperate with other IGOs, as it has on health.[2] WIPO can push, as it now does, for small-scale reforms. WIPO has stayed away from more comprehensive normative reforms. Yet it has the resources and expertise to identify, analyze and parse normative issues and to make policy proposals, which could be of a more comprehensive nature. Barring a more ambitious approach, it may be that the feeling of perpetual dissatisfaction, best seen as a sign of suboptimal international IP norms, will continue.

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[1] See Gervais, D. and Slider M., 'The Geneva Act of the Lisbon Agreement: Controversial Negotiation; Controversial Result', in van Caenegem, W., Cleary, J. (eds*), The Importance of Place: Geographical Indications as a Tool for Local and Regional Development* (Springer, 2017) and Gervais, D., 'Irreconcilable

Differences? The Geneva Act of the Lisbon Agreement and the Common Law', (2015) 53:2 *Houston L. Rev*. 339-371.

[2] See Trilateral cooperation on intellectual property and public health, https://www.wto.org/english/tratop_e/trips_e/who_wipo_wto_e.htm