DIFFICULTIES IN INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS

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ABSTRACT
The paper discusses the difficulty of defining and using intellectual property in the international arena. I discuss issues that provide complications in the area, including governing laws that may not be observed between countries, cultural differences that provide varying working definitions of intellectual property.

KEYWORDS: *intellectual property, difficulties*

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1. INTRODUCTION

The issue of intellectual property (IP) continues to present difficulty in the international arena. Governing laws of one country may not be observed in another; cultural differences may dictate totally different working definitions of what constitutes intellectual property. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international legal agreement between all the member nations of the World Trade Organization (WTO). TRIPS sets the standards for intellectual property protection in the world today, which are binding on all members of WTO. An important characteristic of contemporary world politics is that IP rights are increasingly a ground for global cooperation and conflict. Lately international IP law has been transformed by a variety of new institutions and agreements. They transformed the process of international IP lawmaking.

2. DISCUSSIONS

This article discusses important differences between the international property laws in different countries, accounting for cultural differences.
One approach to resolving these differences is to attempt to place monetary value on intellectual property. This notion can provide conflicts but it can help to establish that intellectual property is indeed a real and tangible asset (Meredith, 2003). The international arena still is a long way from agreeing on one set of international laws (Andersen, 2002).
The form of human capital as intellectual possession should be valued as an asset, along with structural capital, intellectual assets and intellectual property (Intellectual Property Valuation, 2000). Intellectual property generally takes one of five forms: patents, copyrights, trademarks, trade secrets and know-how (Intellectual Property Valuation, 2000). Within these five forms are many

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types of intellectual property, including items such as "brand names, literary works, technical documentation and use rights" (Intellectual Property Valuation, 2000).

One of these examples is the decision at Ford Motor Company to increase the assembly line worker's daily pay by 625 percent in an effort to gain control over high turnover rates in the days of Henry Ford. There is expense involved in replacing employees, but turnover among those doing manual labor is less problematic for the organization than knowledge workers. This is because the manual worker does not own the means of production. They "have a lot of valuable experience, but that experience is valuable only at the place where they work. It is not portable" (Drucker, 1999).

In contrast, knowledge workers do indeed own the means of production that they need to execute their jobs. "That knowledge between their ears is a totally portable and enormous capital asset. Because knowledge workers own their means of production, they are mobile" (Drucker, 1999).

The knowledge worker is the worker of the future, "Intellectual capital is the value generator of the future" (Intellectual Property Valuation, 2000). Identification of all of the organization's intellectual property is only the first step. Valuation is an end goal useful in several respects. Not only does it enter into negotiations in merger situations, it now also needs to be accounted for financially within the context of those mergers (Schweihs, 2002). Even when merger is not an immediate concern, the organization needs to have a firm idea of the value of the intellectual property it possesses.

Intellectual property "is a subset of intangible assets" (Intellectual Property Valuation, 2000), assets that lack physical properties on the order of items such as production machinery, office equipment, contracts or other tangible items of business. The Nike logo, Target's bullseye, and Coca-Cola's distinctive red and white logo are examples of intangible assets that also qualify as intellectual property.

What is the value of Nike's logo? McNamara (2002) reports that "Although the value of intellectual property as a business asset is now almost universally recognized, identifying and assessing the value of intellectual assets in a business transaction remains a confusing and difficult task". Hoffman and Smith agree, but offer several approaches. These authors maintain that one of three general approaches or combination of the three to valuation can be applied to nearly any type of intellectual property. The three methods include the income approach, market approach and cost approach. One of the three approaches should be acceptable nearly anywhere in the world.

The income approach "estimates the value of IP based on the cash-generating ability of the asset" (Hoffman and Smith, 2002). It is based on capital budgeting methods quantifying the present value of the future economic benefits that would accrue to the owners of the IP. These benefits, or future cash flows, are discounted to the present at a rate of return commensurate with the asset's inherent risk and expected growth (Hoffman and Smith, 2002).

In mergers, the Financial Accounting Standards Board (FASB) now requires acquiring organizations to account for the IP of acquired businesses "using the purchase method; the pooling-of-interests' method may no longer be used. This means that all business combinations must be accounted for based on the values of the intangible assets exchanged" (Schweihs, 2002). This approach is straightforward for patented pharmaceuticals or a copyrighted literary work, but it is less clear when what needs to be valued is a trademark or specific expertise.

The market approach relies less on revenues expected from a specific piece of IP, but rather is "based on what other purchasers and sellers in the market have paid for similar IP. This approach is based on the principle of substitution" (Hoffman and Smith, 2002), which states that "the limit of prices, rents, and rates tends to be set by prevailing prices, rents, and rates for equally desirable assets" (Hoffman and Smith, 2002). It is based on a "Guideline IP" resulting from the price paid for

an IP similar to the one being valued. This is an intuitive approach, one commonly used when buying a physical asset such as a house (Hoffman and Smith, 2002).

The cost approach is another that potential tangible property buyers use as well. It is "based on the theory that a prudent investor would pay no more than the cost of constructing a similar asset, of like utility, at prices applicable at the time of the appraisal" (Hoffman and Smith, 2002). Quaker paid $1.7 billion for Snapple in 1995; it sold it to Triarc in 1997 for $300 million (Prince, 1997). The $1.3 billion Quaker lost in the process represents the price differential it was willing to pay for Snapple rather than spend promoting a similar product to the point of equaling the market share that Snapple enjoyed before being acquired by Quaker. After three years with Quaker, that intangible advantage no longer existed.

One example of cultural differences in intellectual property is the IP of agricultural resources- like crop seeds in Costa Rica versus crop seeds in USA. Costa Rica has very strong environmental laws allowing only pure, not genetically modified growing crop seeds, versus USA where genetically modified crop seeds are allowed though obeying to a strict IP laws. The difference is not only in the IP laws, but understanding the cultural differences between the 2 countries. The 1993 United Nations Convention on Biodiversity gave property rights over the biological and genetic resources to the nation-states (Merson, 2000). Though the search for new resources is a priority for the industries, the laws are not always up to the challenging progress of the evolving of genetically modified agriculture.

This is an example of how TRIPS seeks to arbitrate the different national policies toward innovation and creativity. International IP laws should consider cultural differences that affect important characteristics such as biodiversity. They should mediate the competition among international institutions for policy dominance in this consideration. One of the most controversial pieces of international law in recent years, the Trans-Pacific Partnership Agreement (TTP) is President Barack Obama's signature Asia-Pacific economic project aimed at protecting American interests in the region. The current negotiations include twelve countries: the U.S., Japan, Australia, Peru, Malaysia, Vietnam, New Zealand, Chile, Singapore, Canada, Mexico, and Brunei. Over time, the U.S. hopes to expand TPP's reach to incorporate all members of the Asia-Pacific Economic Cooperation forum, comprising roughly 40 percent of the world's population, 55 percent of global GDP, and some of the world's fastest growing economies.

Another example of cultural differences occurs in geographic indications protected by TRIPS due to their great economic and political importance in Europe. TRIPS standard for geographic indications for products like wine and spirits does not allow the misleading uses of geographic place-names. TRIPS does not allow for the deception of consumers about the source of the product, an important aspect that also addresses cultural differences.

3. CONCLUSIONS

There are different approaches to gain a more complete view of the value of IP. None of the three primary methods of IP valuation described above is quite complete on its own (Intellectual Property Valuation, 2000). The increasing intersection of IP and cultural differences appears inevitable, and it will undoubtedly continue to alter the shape and the trajectory of legal rules. To understand the future of IP while taking into account cultural differences in laws, we must think methodically about how the rising density of the international system affects the processes of rulemaking. However, we must be attentive about the ways these areas interact and overlap, as both are increasingly central to world politics. Given the potential harmful effects of overly robust IP protection on many individuals and societies around the world, IP laws that account cultural

differences may produce many beneficial effects, even if it is unlikely to be an entirely complimentary union.

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