General intellectual property

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International intellectual property jurisprudence after TRIPs

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A. International law and intellectual property rights

As in many other fields of intellectual property law, Professor Cornish was a pioneer in the way in which his commentaries and treatises on British intellectual property law were the first to locate that law in its European jurisprudential context. As the counterpart Herchel Smith Professor at the University of London, this contribution attempts to broaden that perspective to take account of the international law impact following the promulgation of the TRIPs Agreement.

Intellectual property rights exist primarily by virtue of national laws. So-called global intellectual property rights are a bundle of nationally enforceable rights. However, it is true to say that in most countries, those national rights exist not only as a consequence of domestic legislation or jurisprudence, but also because of international, multilateral, bilateral and regional obligations. In a number of regional associations, such as the European Union, there is the possibility of regional legislation either with direct national effect, or which prescribes national intellectual property norms. International intellectual property laws play an important role in harmonizing national substantive and procedural rules. This is particularly the case with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which prescribes domestically enforceable norms for the protection of intellectual property rights as a condition of membership of the WTO.

Thus, international law plays an important constitutional role both in providing procedures and modalities for negotiating the norms and standards of domestically enforceable intellectual property rights and in the harmonization of national and regional intellectual property norms.

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The adoption of common intellectual property standards is facilitated when countries can be assured that the same regulatory standards will prevail in competitor states.

1. *The legal sources of international intellectual property law*

The legal sources of international law which are applicable to the international intellectual property regime, as well as all other fields of international law, are conveniently set out in Article 38 of the Statute of the International Court of Justice. This Article provides that the Court, in resolving the disputes which are referred to it, shall apply:

1. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
2. international custom, as evidence of a general practice accepted as law;
3. the general principles of law recognized by civilized nations;
4. subject to the provisions of Article 59 [which, *inter alia*, allows the court to call witnesses and experts] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This Article, which became part of the Statute of the Permanent Court of International Justice of the League of Nations, was incorporated into the 1945 Statute of the International Court of Justice. It lists the principal contemporary sources of international law, although without indicating a formal hierarchy of sources. International intellectual property law is largely derived from treaty law; however, with the increasingly central significance of dispute settlement, general principles of law are becoming more important. Assertions of the primacy of human rights principles above intellectual property law are compelling a re-examination of the traditional international sources of intellectual property law.

(a) Treaty law

The international intellectual property regime is grounded upon the Paris Convention for the Protection of Industrial Property 1883, and the Berne Convention for the Protection of Literary and Artistic Works 1886. The gradual development of the international intellectual property regime commenced through the promulgation of special treaties under these two treaties. Two important departures from this process were the formulation of the Universal Copyright Convention in parallel

with the Berne Convention and the recent promulgation of the WTO TRIPs Agreement.

The rules of international law governing the interpretation and application of treaties are set out in the 1969 Vienna Convention on the Law of Treaties. Most countries have subscribed to this treaty. The USA is a notable exception, although it has indicated that it accepts the terms of the Convention as reflecting customary international law applying to treaties.

It has not yet been authoritatively established that the treaties establishing regional organizations are governed by the Vienna Convention, but as a matter of practice, this is likely to be the case.[1]

(b) Customary international law

Unlike other areas of law, intellectual property law has been obliged by technological change to develop fairly rapidly. Consequently, the gradual evolution of international intellectual property law through the application of customary principles is not likely in this area. However, even legislative change is too slow to keep up with technological developments and thus private standard-setting is becoming increasingly important. This is particularly the case with the impact of the Internet upon intellectual property law, where the regulation of domain name registrations occurs on a self-regulatory basis.

Customary international law principles have been cited in discussions about voting procedures within the Paris Union. Until 1980, votes for amendments to the Paris Convention had to be unanimous, but a proposed amendment during the first session of the Diplomatic Conference to Revise the Paris Convention for the Protection of Industrial Property, which was held in Geneva in March of that year, provided for the adoption of amendments by votes of a two thirds majority. The USA representative stated that it was 'our view that the rule of unanimity for the adoption of a final text, which was a traditional practice for revision of the Paris Convention that ripened into a principle of customary international law, can itself be changed only by unanimous agreement'.[2] As this argument failed to convince the delegates at the 1980 meeting and the following year at the Nairobi Diplomatic Conference for the Adoption of a Treaty

[1] See J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 Yale L.J. 2403.

[2] See M. Kirk, 'Summary Minutes of the Meetings for Diplomatic Conference for the Adoption of a Treaty on the Protection of the Olympic Symbol' in WIPO, *Records of the Nairobi Diplomatic Conference for the Adoption of a Treaty on the Protection of the Olympic Symbol* (1984), 70.

on the Protection of the Olympic Symbol, the existence of a customary international law principle on this subject is called into question.

A question which has not yet been explored is the extent to which principles of customary law applicable to the protection of real property and tangible chattels apply also to intangible property. Also to be explored is the application of the customary international law principles such as *pacta sunt servanda*[3] and the legal equality of states.

(c) Judicial precedent

Judicial precedent has not proved to be an important source of international intellectual property law. There have been no intellectual property cases brought before the International Court of Justice or its predecessor, the Permanent Court of International Justice. This situation has begun to change with the adjudication of breaches of the TRIPs Agreement by the Dispute Settlement Body of the WTO, based upon recommendations by a panel or the Appellate Body. Although the reasoning of the panels and the Appellate Body are not binding, future panels and the Appellate Body are obliged to consider their reasoning. It has been suggested that the rule of law in the international economic system would be promoted if national and regional courts adjudicating matters falling within the purview of WTO Agreements gave effect to decisions of the panels and Appellate Body.[4]

National and regional courts are the principal sources of judicial authority in the intellectual property field. Although not primary sources of international law under Article 38 of the Statute of the International Court of Justice, they are important in constituting the body of general principles of international law.

(d) Legal writings

Article 38 of the Statute of the International Court of Justice refers also to the writings of highly qualified jurists as a secondary source of international law. The common law courts have tended to refer more readily to scholarly works than have the civil law courts. In the rapidly developing field of international intellectual property law, the writings of jurists can play an important role in promoting consistency and coherence.

[3] The rule that international agreements shall be performed in good faith.

[4] T. Cottier, 'Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union' (1998) 35 Common Market Law Rev. 325.

(e) General principles of law

Aside from treaty law, general principles of law are the most important source of international intellectual property law. A number of important general principles of judicial procedure have already been incorporated into the enforcement provisions of the TRIPs Agreement, such as the requirement in Article 41.2 that 'procedures concerning the enforcement of intellectual property rights shall be fair and equitable' and that they 'shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays'. Similarly the requirement in Article 41.3 that decisions be 'on the merits of a case shall preferably be in writing and reasoned' and that they 'shall be made available at least to the parties to the proceeding without undue delay' are procedural principles which have arguably become generally accepted. Due process is enshrined in the TRIPs Agreement in the requirement in Article 41.3 that 'decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard'.

Article 42 of the TRIPs Agreement requires that procedures are fair and equitable in that defendants are entitled to 'written notice which is timely and contains sufficient detail, including the basis of the claims'. The Article's requirement that parties 'shall be duly entitled to substantiate their claim and to present all relevant evidence' has probably also become a general principle of law, as has the requirement that procedures not impose 'overly burdensome requirements concerning mandatory personal appearances'.

Substantively, general principles of good faith and equity are probably part of the corpus of substantive international intellectual property law. The doctrine of proportionality, in the sense that laws ought not impose obligations in excess of those that are reasonably necessary to deal with the circumstances which give rise to them is a general legal principle, which has influenced the European Court of Justice.

2. International organizations

The administration of aspects of the international intellectual property regime is undertaken by a number of international and intergovernmental organizations which are also established by treaty. The principal general intellectual property organizations at the international or inter-governmental level are the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO).

Specific aspects of international intellectual property law fall within the mandates of a number of international organizations: copyright and folklore: United Nations Educational Scientific and Cultural Organization (UNESCO); plant variety rights: Union for the Protection of Plant Varieties (UPOV); access to genetic resources: Food and Agricultural Organization (FAO), Conference of Parties of the Convention on Biological Diversity (CBD), United Nations Environment Programme (UNEP); medical technologies: World Health Organization (WHO); neighbouring rights: International Telecommunications Union (ITU); technology transfer: United Nations Industrial Development Organization (UNIDO); technology transfer and the impact of intellectual property rights in developing countries: United Nations Conference on Trade and Development (UNCTAD).

A number of regional organizations have also established intellectual property norms and structures. These include the Andean Pact, European Union (European Patent Organization (EPO) and the Office for Harmonization in the Internal Market (OHIM)), North American Free Trade Association (NAFTA), MERCOSUR and the Association of South East Asian Nations (ASEAN). Additionally, specific intellectual property institutions have been established with regional functions. These include the African Regional Patent Organization (ARIPO) and the Eurasian Patent Office. In each case these organizations were established by treaties which govern their powers and functions.

As each of these organizations were established by treaties, the scope and effect of their operations will also be dictated by the principles of treaty interpretation. In the case of the European Union, the oldest of these regional arrangements, the constitutive treaties play an important constitutional role in which general principles of public international law are replaced by constitutional principles.[5]

The perceived transcendental impact of the global intellectual property regime upon all aspects of human enterprise has caused questions to be raised about the human rights implications of intellectual property. In its Report, *Human Rights and Human Development*, the United Nations Development Programme (UNDP) suggested that aspects of the TRIPs Agreement might be inconsistent with the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights.[6]

[5] See Weiler, n. 1 supra.
[6] UNDP, *Human Rights and Human Development* (2000), 83–88.

On 17 August 2000 the UN Sub-Commission for the Protection and Promotion of Human Rights, noting that –

> '. . . actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to, inter alia, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food of plant variety rights and the patenting of genetically modified organisms, "bio-piracy" and the reduction of communities' (especially indigenous communities') control over their own genetic and natural resources and cultural values, and restrictions on access to patented pharmaceuticals and the implications for the enjoyment of the right to health,'

adopted a resolution calling into question the impact of the TRIPS Agreement on the human rights of peoples and communities, including farmers and indigenous peoples worldwide. The resolution noted 'the apparent conflicts' between the intellectual property rights embodied in the TRIPS Agreement and international human rights law, particularly that 'the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination' (Article 2). The resolution reminded 'all Governments of the primacy of human rights obligations over economic policies and agreements' (Article 3).

On the other hand, the guarantee in Article 27(2) of the Universal Declaration of Human Rights that 'Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' suggests that the protection of intellectual property might itself be a human right. This is emphasized in the similarly worded Article 15.1.c of the International Convention on Economic, Social and Cultural Rights.

The apparently conflicting intellectual property implications of these human rights conventions can be reconciled by contrasting the role of human rights as a foundational justification for intellectual property protection and the impact of human rights norms in shaping existing intellectual property rights. The UN Sub-Commission's concern was addressed primarily to the possible adverse impact of intellectual property rights upon access to medicines. In this latter context the signatories of the November 2001 Doha Declaration on Public Health have indicated that

patent rights in relation to anti-HIV AIDS drugs, should yield to the untrammelled availability of those products.

The former context is illustrated by the demands of indigenous groups that intellectual property protection be erected around the traditional knowledge of those groups.[7]

3. *Interpretation of international agreements*

The main principles of treaty interpretation in international law are set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31(1) provides that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objectives and purpose'. The 'context' for the purposes of the interpretation of a treaty, is defined in Article 31(2) in addition to the text, including its preamble and annexes, to comprise:

> '(a) any agreement relating to the treaty which was made between all parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.'

Also to be taken into account, according to Article 31(3), together with the context,

> '(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.'

Article 31(4) permits the parties to a treaty to give a special meaning to a term.

According to Article 32, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm a meaning resulting

[7] See UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Draft UN Declaration on the Rights of Indigenous Peoples' (1995) 34 International Legal Materials 541.

from an application of Article 31 or to determine a meaning when the interpretation according to the Article leaves the meaning ambiguous or obscure or which leads to a result which is manifestly absurd or unreasonable.

These principles of treaty interpretation in an intellectual property context have been addressed in a number of the Panel and Appellate Body decisions concerned with disputes which have arisen under the TRIPs Agreement.

(a) US–India patent protection for pharmaceuticals (1996)

This dispute concerned a complaint by the USA that India had failed to establish a mailbox mechanism for the receipt of patent applications, as required by Article 70.8 of the TRIPs Agreement and that it had failed to grant exclusive marketing rights, as required by Article 70.9. The mailbox mechanism was envisaged for developing countries during the transitional period, prior to the substantive patent obligations of the TRIPs Agreement coming into effect in those countries. In setting out the standards applicable to the interpretation of the TRIPs Agreement, the Panel sought to apply the customary rules of interpretation of public international law as set out in the Vienna Convention.[8] The Panel ruled that the good faith interpretation of the TRIPS Agreement required 'the protection of legitimate expectations derived from the protection of intellectual property rights'.[9] Also the Panel noted that as the TRIPs Agreement was one of the Multilateral Trade Agreements negotiated under the framework of the GATT 1947, it was obliged to apply GATT jurisprudence, which also recognized the principle of legitimate expectations.

Sub-paragraph (a) of Article 70.8 of the TRIPs Agreement required that where a WTO Member did not make patent protection for pharmaceutical and agricultural chemical products available at the date of entry into force of the WTO Agreement, it had to provide a means by which applications for patents of such inventions could be filed. In interpreting this sub-paragraph, the Panel stated that 'like other provisions of the covered agreements, [it] must be interpreted in the light of (i) the ordinary meaning of its terms; (ii) the context; and (iii) its object and purpose, following the rules set out in Article 31(1) of the Vienna Convention'.[10]

The Panel found that the ordinary meaning of Article 70.8(a) envisaged the establishment of a mechanism to permit the filing of relevant patent

[8] WTO, Report of the Panel, WT/DS50/R, 5 September 1997, para. 7.18.
[9] *Ibid.* [10] *Ibid.*, para. 7.24.