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978-1-107-01314-8 - Test Tubes for Global Intellectual Property Issues: Small Market Economies

Susy Frankel

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Test Tubes for Global Intellectual Property Issues

Small market economies provide a valuable insight into how a country might balance competing interests in global intellectual property. As developed countries that are also net importers of intellectual property, small market economies have similar concerns to some developing countries. This duality of developed and developing country interests has resulted in some innovative ways of calibrating laws so that they both support national economic and social needs and honour international commitments. In this book, Susy Frankel uses examples from the small market economies of Singapore, New Zealand and Israel to address global intellectual property issues. Those issues include approaching treaty interpretation to assist in implementation of obligations, utilisation of flexibilities and effective dispute resolution, the links between trade and innovation, when and how patent and copyright law can be flexible, the importance of trade marks to small businesses, parallel importing and the protection of traditional knowledge.

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Foreword

Rochelle Cooper Dreyfuss

From both a theoretical and a practical perspective, this book is an important resource. Ever since the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) set out the minimum standards of intellectual property protection for members of the World Trade Organization (WTO), considerable attention has focused on the wisdom of moving towards a system that is more deeply harmonised and that mandates the recognition of even stronger rights.

For the most part, the debate centres on questions of technological development. To many, countries that are behind the technology curve gain little from strong protection, even when it is offset by market access for their own products. The products developing countries sell (raw commodities, manufactures) are priced competitively and therefore earn rather scant returns, while the ‘knowledge products’ developing countries must buy (pharmaceuticals, manufacturing equipment, educational materials) are patented, copyrighted and trade marked – and priced well above marginal cost. International obligations to impose high standards of intellectual property protection can therefore cause considerable injustice, for these rights siphon funds from poor countries to rich ones. At the same time, proponents of raising worldwide standards point to the post-TRIPS success of the BRICs (Brazil, Russia, India and China) and suggest that strong protection will benefit other developing countries as well. Intellectual property laws can create powerful inducements to domestic innovators. Furthermore, they promote technology transfer, help establish local creative industries and motivate governments to prioritise activities that move their countries to the intellectual frontier.

While this conversation is interesting and important, lost in it is another dimension of the harmonisation issue: market size. Based on the debate set out above, one might think that the interests of all advanced economies would be in alignment, for any country that innovates at world-class levels can reap supra-competitive returns from the global market. This book dispels that notion. Its careful analysis of patent, copyright, trade

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mark and related law in three economies – New Zealand, Singapore and Israel – demonstrates why small market economies do (or should) develop their own approach to the design of intellectual property laws and institutions.

For theoreticians of international intellectual property law, these insights are provocative. Ultimately, the book suggests that true harmonisation is an unreasonable goal and that achieving distributive justice is not merely a transitional problem, solved as soon as all WTO countries catch up. Under this view, the BRICs' success in benefiting from TRIPS derives not only from their greater responsiveness to intellectual property incentives (as proponents of strong protection suggest) or from the fact that they were on the cusp of becoming robustly innovative at the time TRIPS came into force (as the other side claims), but, at least in part, because their markets are potentially as large as those of the United States, the European Union and Japan. As a result, there is enough local demand to spur creative production across a wide spectrum of endeavours. Moreover, there is sufficient domestic capacity to satisfy the bulk of the population's creative needs.

In contrast, advanced small market economies may, because they are relatively affluent, demand a range of sophisticated, high-quality products – blockbuster films, advanced therapeutics, fashionable attire – that local industry will never be in a position to fully supply. Because these nations are reliant on foreign sources, their interests in the conditions under which intellectual products can be *imported* will often reflect the interests of developing countries. But because local demand is often insufficient to support the creative production of which these countries are capable, they are heavily dependent on making sales abroad. Thus, their *export* interests will largely parallel those of the developed world. Finally, because these countries are already advanced, their interests are unlikely to change significantly over time. The flexibilities in TRIPS are, in short, not a temporary phenomenon that can be phased out in successive negotiations as all markets mature. Rather, they are necessary to do justice to the needs of the varied economies engaged in international trade in creative products.

But this presents a puzzle: if intellectual property rules are harmonised, creators – irrespective of their location – should be acting in response to global, not local, demand. And users – no matter where they live – should be drawing on worldwide supply. Why, then, should the size of national markets matter at all? A partial answer is that full harmonisation has yet to occur. But again, the book suggests that the problem may not be temporary. Local culture and policies determine how potential innovators are educated, the sorts of activities investors will support and the creative

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opportunities that are most evident to intellectual property-intensive industries. Local taste determines the feedback innovators most immediately receive. Furthermore, industries benefit from clustering and small markets can maintain fewer clusters. The sectors that do develop become salient in the economy, but other countries will not always share a strong interest in devising intellectual property rules that promote or support them. The example provided is the traditional knowledge of the Māori, for which New Zealand has developed its own *sui generis* domestic legislation. While New Zealand has also taken a leading role in promoting international protection, its achievements fall far short of the success large economies have enjoyed in seeing rights recognised in their special knowledge products (the inclusion of geographical indications in TRIPS, which benefits mainly the European Union, is an illustration).

From a practical point of view, the book is even more important. As it notes, small market economies can suffer from inadequate case law and too few specialist adjudicators. But the experiences of New Zealand, Singapore and Israel that are collected here can inform other small market economies of ways to deal both domestically and internationally with the issues arising uniquely within these nations. Thus, the book emphasises the importance of research: of deep knowledge of the country's industrial base, including what endeavours attract foreign investment, which local industries are primed to flourish, where importation is likely the only long-term solution, how national industries fit into emerging global value chains and which intellectual property rights are crucial to local producers. These factors affect such issues as which subject matter to protect and through which intellectual property right to protect it, the appropriate height of the inventive step, the right term of protection, what should count as infringement, the proper rules on parallel importation (international exhaustion) and the benefits of subsidisation. The book describes laws that demonstrate how to handle the disjuncture these countries experience between import and export interests. It also provides a valuable discussion on the compatibility of the suggested approaches with international law.

Negotiators should also pay heed to the lessons of this book. Increasingly, international intellectual property law making is becoming regional and plurilateral, with several small market economies included. (New Zealand and Singapore, for example, participate in the Anti-Counterfeiting Trade Agreement and the Trans-Pacific Partnership Agreement, both of which are intended to raise the level of intellectual property protection.) In these venues, the representatives of small market economies can suffer from the 'elephant bumping' illusion: at a bargaining table with elephants, they assume that they too are elephants, and that

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their countries will benefit from the rules proposed by the representatives of much larger economies. The book demonstrates why small market negotiators must be careful. And also why their participation is of global importance: not only do small market economies share interests with developing countries, but, to some extent, they also act as stand-ins for interests (such as user interests) that are overshadowed in the political economies of nations with larger markets.

Now that Susy Frankel has demonstrated that there is a limit to harmonisation, it behoves the international intellectual property community to find an approach to the global economy that is capable of greater nuance. Possibilities include tiers of protection, menus of choices and flexibilities, user rights, supplementing the floors of protection in minimum standard regimes with ceilings. Procedural reforms – international agreements on conflicts of law, jurisdiction, case consolidation and recognition of judgments – should also be on the table, for they would make the worldwide distribution of intellectual products and the global enforcement of intellectual property rights more efficient, while leaving ample space for cultural diversity and market differentials.

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Preface

Since I began teaching and researching international intellectual property law, I have observed that frequently large players in the global debate about the scope and details of international intellectual property show little concern for promoting the interests of others around the globe. At the same time, they seek to extract maximum intellectual property related gains from those others. Perhaps this is simply a luxury resulting from being a powerful nation or a part of a relatively significant economic zone. Much intellectual property is created and innovated in the large countries of the developed world and for that we have to thank the creators and innovators of Europe and North America. The large countries of the developing world are, however, now significant players in intellectual property and have in many ways posed serious challenges to the developed world's approach to intellectual property. Developed and developing countries are of course many and varied. Small market economies are different again. They are dependent on global connectedness and they seek to trade with all. They are conscious of international differences and strive to retain their unique culture and identity. Such countries do not have the power to bring about global change or the luxury to 'go it alone'. From an intellectual property perspective, they are often like test tubes, that is, places for experimentation and legal innovation in how to reconcile the competing interests of globalisation and national autonomy inwith their law making. The experiments in these test tubes may sometimes be designed legal innovations and at other times less well planned. This book presents some experiences from these test-tube experiences.

There have been several stages in this project and there are many people to thank. I am extremely thankful to the New Zealand Law Foundation for funding much of the research. Research assistance has spanned several years and included students, past and present, of Victoria University of Wellington, Jessica Lai, Anne O'Driscoll, Danielle Thorne, Thomas McKenzie, Sereana Perry, and especially Rachel Collins. Thanks to Jessica Lai for more recent proofing assistance and comments.

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Abbreviations

ABS	access and benefit sharing
CBD	Convention on Biological Diversity of 1992
EPA	Economic Partnership Agreement
EWCA	Court of Appeal of England & Wales
EU	European Union
FDI	foreign direct investment
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GI	geographical indication
IP	intellectual property
IPONZ	Intellectual Property Office of New Zealand
NZ	New Zealand
SCM	Agreement on Subsidies and Countervailing Measures
TCE	traditional cultural expression
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Office
WIPO-IGC	WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization