

GLOBALISATION AND ITS IMPACT ON INTELLECTUAL PROPERTY RIGHTS PROTECTION

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ABSTRACT

One of the problems faced by Nigeria is related to the fact that Oil is the main source of revenue, any in fluctuations in Oil revenue will inevitably be reflected in fluctuations in Government revenue. In term of non-oil export, Nigeria exports some few insignificant manufactured goods, such as shoes, clothes, processed and semi-processed agricultural products, without taking any cognisance to the issue of intellectual property protection. This paper is therefore centred on the globalization, and its impact in the area of intellectual property, which cannot be separated from the enforcement procedures, when it concerns copy rights, patents, trade secret, industrial designs etc. And to explore the contours of the on-going process of globalization through the impact of globalization in Nigerian economy.

KEYWORDS: Property Rights, Copyright, IPR, GATT

INTRODUCTION

With globalisation came trade liberalisation enabling consumers and producers to engage more freely in mutual beneficial exchanges. Like all such exchanges, this creates a vicious circle, ensuring that entrepreneurs develop the products that people want in an ever more efficient manner. In turn this lead to economic growth which benefits all sectors of society, especially the poorest (in contrast to heavily regulated trade, which tends to benefit the wealthy and entrenched interests). Globalization, and consequential trade liberalisation ensure the movement of goods freely across the borders and this raised the issue of intellectual property protection for the goods and services as it became easier for some countries tries to import copies of intellectual property protected goods in another country, that have produced without a licence from the IP owner in countries without adequate IP protection. As a result of this copying of IP protected goods without licence, returns on investment in innovation are reduced. For example, the import of CDs manufactured without licence in countries like South- East Asia, undermine the profitability of the original producers of the music.

Similarly, imports of on -patent pharmaceuticals produced by generic manufacturers in India reduce the profitability of the pharmaceutical companies that developed the drugs. In both cases, the long term effect is to reduce the incentive to produce new items of IP, be them music or medicines. Since IP creates incentives to develop technologies and creative works, there arose areas for concomitant agreement on international protection of IP. With the coming into effect of WTO, came the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which in principle solves this problem by preventing unlicensed manufacture of patented products.

GLOBALIZATION

The term "globalization" has been given a number of meanings, it has been used as a term encompassing any form of societal change with transnational dimensions. In general, globalization is the term used to characterise the processes of growing interconnection and interdependence in today's world, generated to a large degree by growing international, economic, cultural and political co-operation and links as well as by the need to respond together to global problems which can be solved only on a planetary scale.¹ Some of the globalization's features include the rapid development and expansion of information technology, including internet links and cellular phones, the speed of communications, including cheaper and faster international transport, the intensification of international increase in financial flows with globally linked foreign exchange and capital operation 24 hours a day, the growth in the size and power of private corporations, global business competition and global consumer choice, and the sheer number of people affected by globalization. The positive aspect of globalization is increasing economic opportunities for countries to be able to find markets for which their labour forces can effectively compete and for those countries that are able to attract the investment, institutional and technological infrastructure to facilitate this; increasing consumer choice and falling prices for individual around the world. In fact, globalization facilitates exchange of information on social policies and services and thereby leads to increased market and access to goods and services. It has led to increase in international trade and liberalisation of trade among countries.

INTELLECTUAL PROPERTY AND INTELLECTUAL PROPERTY RIGHTS

Intellectual Property is information that has economic value when put into use in the market place. It is any product of human intellect that is unique and with some value in the market place.² To give a proper definition of intellectual property, it is like a parcel of real estate. AS with any piece of property it can be bought, sold and rented (i.e. licensed). However, unlike real estate, intellectual property is intangible, you cannot touch it, since it is an idea or invention. The legal mechanism of patent, copyrights, trade secrets and trademarks are used to protect such intangible property.

Intellectual Property Rights (IPRs) are the legal rights governing the use of such creations. Laws can be designed to protect the right of the person who made the invention in order to enable him reap the fruits of his labour to the exclusion of all others, exception being made only to those with his permission by way of licence. This protection is predicated on the theory that if innovators fail to recover their cost or even benefit from their innovations they will lack the incentive to develop new technologies and creative works. So property rights in the products of the intellect provide incentives to develop better products. Knowing that one's inventions can be protected. IPR acts as security for investors enabling the inventor to invest in further development, manufacture and marketing of his products.

PATENT

This is the right to exclude others from making, using or selling one's invention and includes the right to licence others to make use of or sell it.³ Patent can therefore be described as a right granted to an inventor to exercise a proprietary right over his invention to the exclusion of all others except those he permit for a limited period, usually it last for a limited

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1 Catherine, D. Workshop on the Impact of Globalization on the Enjoyment of Economic, Social and Cultural Rights to Development. Kuala Lumpur, Malaysia. Organised by Office of the High Commissioner for Human Rights. May 8-10, 2007.

² www. Legaldatabase.legal definition.com. Accessed 8th March. 2014.

³ Joseph, R. Nolan, et al, Black's Law Dictionary. 6th ed., St Paul Minnesota (West Publication. Co 1990) p 1125.

time of 20 years. Here, the inventor must provide a complete and accurate public description of the invention, and the best mode of "practicing" it. Its effect is to provide appropriate incentive for innovation and research. In Nigeria, it is governed by the Patent and Designs Act.⁴ For an invention to be patentable, it must be novel, useful, and non-obvious.

COPYRIGHT

This protects the published output of creative activities. It is the right or protection granted over literary and artistic works, such as writing, painting, photography, music and film making. As such, it protects the expression of the idea rather than the itself.⁵ Such expression must be in some retrievable form such as handwriting, set in type, recorded on magnetic tape or other storage medium. Copyrights automatically come into being when the idea is fixed in a tangible medium of expression.

TRADEMARK⁶

This protects the use of distinguishing symbol or name associated with a particular product. It is the right of a seller to use a recognized symbol or name to market a product or service in a distinctive manner and to prevent others from passing their goods or services off in the same or misleading fashion⁷. It is a distinctive mark or name used to distinguish a product, service or firm. The more a particular product is known, and associated with attributes desired by the consumer, the more valuable the trademark becomes. Without trademark protection, other companies have an incentive to free-ride on the reputation effects of distinguishing names or symbols which discourages firms from investing in reputation and hence from producing quality goods.

TRADE SECRET

This relates to that aspect that tries to protect confidential information belonging to a party. It is somehow relates to patent, but exists even where the subject matter is not patentable. Trade secrets are only protected by the law to the extent that the information remains not generally known. To ensure that it remains protected, one must extract a promise to keep the secret so, prior to disclosure.⁸

IMPACT OF GLOBALIZATION ON IPR

With the increase in international trade liberalization among countries caused by globalization, there were frequent movement of goods and services among countries. Particularly, there were increased movements of goods from the industrialized nations to the developing or importing countries. With this, came the need to regulate trade among nations.⁹ International trade in goods embodying intellectual property rights grew steadily in the 1990s in part reflecting the increasing shares of high technology goods, a number of industrial countries industries increasingly perceived the enforcement of IPRs in importing goods, and as a result reducing their competitive advantage. There was need to protect

⁴ Cap, 344 Laws of the Federation of Nigeria, 2010.

⁵ Jayashree, W., Implementing the TRIPs Agreement. Visit <http://publication.worldbank.org/catalog/content-download>. Accessed 7th June, 2010.

⁶ See Trade Marks Act, Cap 430 Laws of the Federation of Nigeria, 2010.

⁷ John, H. J., et al Legal Problems of International Economic Relations: Cases, Materials, and texts. 3rd ed, (Paul Minnesota West Publishing Co. 1995) p 849.

⁸ Eugene, T. "What is Confidentiality Agreement" Visit www.ipmail.info.edu. Accessed 4th June, 2014.

⁹ US International Trade Commission. Foreign Protection of IPRs and Effect on US Industry and Trade USITC. Pub, No, 2055 (1988) p 4.

IPRs of innovative countries and companies to avoid conflicts arising from counterfeit products. Countries were faced with the problem of applicability of such protection within and outside their territorial jurisdiction due to movement of trade across their borders.

SOLVING THE PROBLEM OF POOR ENFORCEMENT OF IP

There are several possible solutions to these problems, each with specific advantages and disadvantages. The simplest solution is to bar imports of unlicensed copies of IP protected goods, enabling owners of IP to sue firms selling illegal copies. The main advantage of this solution is that it can be implemented domestically without any action by any other country. There are many disadvantages, however, it will be realist solution only if sale of the product is readily observable, which might be the case for products sold through retail outlets in the importing country. In such cases, the IP owner cab sues the retailer, wholesaler, or importer. However, where products are sold directly to the consumer (for example via internet or mail order) from the manufacturer or retailers in the country of origin, the IP owner has nobody to sue, so merely banning imports of illegal copies will be ineffective. As the number of such sales increases, it will become increasingly difficult to enforce patents and copyrights without extra protection. The problem is likely to be particularly acute in the field of copyright protection because, as noted above, much copyright material may be distributed electronically in encrypted form across the internet at very low cost. Simply barring imports does not stop the manufacture of unlicensed copies in the countries without appropriate IP protection, thereby reducing the return on creative/inventive activity and, presumably reducing the level of such activity.¹⁰

Another alternative solution was for countries without adequate IP protection to voluntarily implement higher levels of protection. This has the merits of being lower in cost then trying to identify with imported unlicensed IP protected goods and creating better incentives locally. The drawback is that protectionist interest is likely to slow down the shift towards stronger IP protection. Local industries that currently benefit from the less protection of IP (such as Brazil's music copying industry and India's drug copying industry) are likely to oppose enhanced protection because it will reduce their profits.¹¹

However, the most favoured i believe is the elaboration of international treaties on the protection of IP. This process began in the late 19th Century, with the Paris Intellectual Property Convention of 1883, the Berne Convention of 1888, the Rome Convention of 1961, and others sought to protect one form of IPR or another to enhance free flow of international trade. More so, they were early treaties intended to rely upon the natural benefits of protecting IP for its own sake, but then there were protectionists interests lobbying against the introduction of stronger IP rights, these countries either did not sign the agreements or having signed them, did not ratify them.

The problem with the early treaties was that they were essentially unenforceable, they were little more than gentleman's agreements. In the past, international treaties were with the intention to rely upon the threat of war as an enforcement mechanism. The enforcement mechanism of the modern world is the threat of trade sanctions. And the forum for creating legally permissible trade sanctions was the General Agreement on Tariffs and Trade (GATT). This problem led to various IP based companies successfully lobbying for the inclusion of an agreement on IP protection in the Uruguay Round of the GATT, which started in Punta Del Este, in 1984. The result was the Agreement on Trade-Related Aspects of

¹⁰ Julian Morris, et al, *Ideal Matter: Globalization and the Intellectual Property Debate*. Centre for New Europe 2006. p 46.

¹¹ *Ibid*.

Intellectual Property Rights (TRIPs) which was signed by all the members of the GATT, at the conclusion of talks in 1994.¹² The TRIPs Agreement which came into effect with the establishment of the World Trade Organization (WTO) on January 1, 1995 is the most comprehensive international agreement on IP to date. This is not only because of the breadth of the subject matter covered, but also on account of its-universal applicability.

TRIPs has embraced the national treatment and most favoured nation treatment clauses as regards IP. This means that foreign IP holders have the same rights in signatory country as national IP holders, and all foreign IP holders are treated equally. TRIPs have extended the availability of patent protection to all inventions in all fields of technology. This is important for industries critically dependent on strong IP regimes. For example, before TRIPs was signed in 1994, some 25 developing nations (of the then 98 members of the GATT) excluded pharmaceutical products from patent protection. TRIPs set a uniform minimum enforcement period for patents of 20 years.¹³

Although, not all the provisions in TRIPs have been fully implemented, perhaps the most important achievements is the introduction of the WTO multilateral dispute settlement procedure. This is clearly superior to a unilateral threat mechanism such as Section 301 of the American Trade Act.¹⁴ There are at least two main benefits, which TRIPs enforcement measures provided for the effective and binding international obligations, both internally and at the border. An associated benefit of multilateralising the dispute settlement process is that it may prevent arbitrary unilateral actions, not least by the USA. Disputes arising in the TRIPs context will be resolved by WTO tribunals, whose arbitrators will be drawn from a wide pool of professionals from neutral countries. As a result, it is much less likely that a dispute under TRIPs would merely pander to the whims of local interests. In other words, the rule of law would prevail.¹⁵

TRIPs Agreement must be implemented by the current members of the WTO, and will apply to future members as its ratification is a compulsory requirement of WTO members. When fully implemented, the grant will unambiguously strengthen protection of IPRs almost worldwide, a feat not achieved by any single international treaty up to now. The TRIPs Agreement covers all major IPRs including some areas and rights not before addressed by international law or, some cases, even by national laws of many industrial countries. Its implementation will necessitate changes in the IPRs laws of all WTO members without exception. Many of TRIPs, provision were imported from the Berne Convention for the protection of Literary and Artistic Works, and many of its trademarks and patent provisions were imported from the Paris Convention for the protection of Industrial Property.

Specifically, TRIPs deals with copyrights and related rights, geographical indications, industrial designs, integrated circuit layout designs, patents, including the protection of new varieties of plants, trademarks, trade secrets and test data. TRIPs, also specifies enforcement procedures, remedies and dispute resolution procedures. The obligations under TRIPs apply equally to all member states however, developing countries are allowed period in which to implement the applicable changes to their laws.

TRIPs, itself introduced IP law into the international trading system for the first time and remains the most comprehensive international agreement on IP. As ratification of TRIPs is a compulsory requirement of WTO membership, any country seeking to obtain easy access to the numerous international market opened by the WTO must enact the very

¹² Ibid.

¹³ Julian, M. et al op cit

¹⁴ Ibid.

¹⁵ Ibid.

strict IP laws mandated by TRIPs. Furthermore, unlike other international agreement on IP, TRIPS has a powerful enforcement mechanism which is the WTO's dispute settlement mechanism, which is capable of authorising trade sanctions against non-compliant states.

CONCLUSIONS

Globalization is a good thing, increased trade, leads to increased wealth. However, without concomitant improvements in protection of IP, the incentive to provide the knowledge that underlies much of modern wealth creation will be diminished. Without concomitant agreements on international protection of IPs, trade liberalization tends to weaken IP protection by making it easier to import goods that have been produced without a licence from the IP owner in countries without adequate IP protection.

The Agreement on TRIPs in principle solves this problem, by preventing unlicensed manufacture of patented products. It is in the interest of all countries to create TRIPs compliant IP system because inventors everywhere would then have stronger incentives to develop novel products for those markets. At this point, it could be said that the stronger IP protection required by TRIPs has led to increased global trade, specifically, export from developed countries to developing countries, has attract more foreign direct investment (FDI), for host countries, has led to increased licensing of technologies, and possibly more local production through FDI in developing countries, and has led to pharmaceutical research and development.

REFERENCES

1. Catherine, D. (2007). Workshop on the impact of Globalization on the Enjoyment of Economic, Social, and Cultural Rights to Development. Kuala Lumpur, Malaysia Organised Office of the High Commissioner for Human Rights, May 8-10.
2. Eugene, T. "What is Confidentiality Agreement."
3. Jayashree, W. Implementing the TRIPs Agreement.
4. John, H. J. *et al.* (1995). *Legal Problems of International Economic Relations: Cases, Materials, and Texts*, 3rd ed. Paul Minnesota West Publishing Co, p849.
5. Morris, J. (2006). *Ideal Matter: Globalization and the Intellectual Property Debate*. Centre for New Europe, 46p.
6. Nolan, J. *et al.* (1990). *Black's Law Dictionary*, 6th ed. Minnesota: St Paul Minnesota: West Publication Co., 1125p.
7. www.legaldatabase.legaldefinition.com
8. <http://www.publication.worldbank.or/catalog/content-download>
9. www.ipmail.info.ed
10. US International Trade Commission (1998). Foreign Protection of IPRs and Effect on US Industry and Trade USITC, Pub, No 2055, 4p.