

IP JUSTICE POLICY PAPER
FOR THE
WIPO DEVELOPMENT AGENDA

INTERSESSIONAL INTERGOVERNMENTAL MEETINGS

20-22 JUNE 2005 -- GENEVA, SWITZERLAND

WWW.IPJJUSTICE.ORG

IP Justice is an international civil liberties organization that promotes balanced intellectual property law. The organization's focus is on international treaties, directives, and other trade agreements that address intellectual property rights or impact freedom of expression guarantees.

TABLE OF CONTENTS

I. IP JUSTICE FULLY ENDORSES THE FRIENDS OF DEVELOPMENT PROPOSAL

II. IP JUSTICE SUPPORTS THE CREATION OF WERO

III. IP Justice Supports Amending the WIPO Mandate

IV. IP Justice Supports Reform at WIPO

- a. WIPO must weigh costs and benefits of IP**
- b. A "One-size (XL) fits all" approach does not foster development in all countries**
- c. IP laws need to protect flexibilities and limitations**
- d. WIPO needs more transparency and public-interest participation which is member-driven**
- e. IP is not an end in itself and must foster the public goals of innovation, creativity, and technical development.**
- f. Freedom of expression rights need protection in a digital environment.**

I. IP JUSTICE FULLY ENDORSES THE FRIENDS OF DEVELOPMENT PROPOSAL

IP Justice fundamentally believes that a development dimension needs to be mainstreamed into all areas of WIPO's work and activities and that the remaining sessions of the IIM provide an opportunity to begin to realize this necessary change. WIPO is a United Nations Specialized Agency whose constituents are mostly from developing countries. Article 1 of WIPO's agreement with the United Nations states WIPO's objective "for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development, . . ."¹ In order to progress as a member-driven organization, WIPO needs to fully address the development concerns of its members in all aspects of its work.

IP Justice does not blindly assert that strong intellectual property protection necessarily hinders development the way that some developed countries religiously assert that strong IP protection facilitates development. We simply assert that WIPO needs an independent body to review all WIPO work and activities to make a fact-based, case-by-case determination on the developmental effects of such work.

IP Justice recognizes that many external factors, in addition to providing strong economic incentives for IP, have an impact on a country's potential and actual development. Every UN organization, including WIPO, has the responsibility to make sure that its own programs and activities conform to the UN mandate to promote economic, social and cultural development. If UN organizations could bypass their obligations under the UN mandate because their mission is to focus on another factor, all organizations could escape UN accountability for the compliance of its own programs.

¹ AGREEMENT BETWEEN THE UNITED NATIONS AND THE WORLD INTELLECTUAL PROPERTY ORGANIZATION, Art. 1, WIPO Publication No. 111 (1975) *available at* <http://www.wipo.int/treaties/en/agreement/index.html> [hereinafter UN-WIPO AGREEMENT].

II. IP JUSTICE SUPPORTS THE CREATION OF WERO

The creation of an independent research office called the WIPO Evaluation and Research Office (WERO) that would report to the General Assembly is an important component to the reform called for by the General Assembly's adoption of the Development Agenda. The creation of WERO would strengthen the oversight function of Members at WIPO, enhance the credibility of WIPO and its programs, and would comply with established international practice in other organizations such as the World Bank and the International Monetary Fund.

Since all WIPO bodies are expected to contribute to the realization of the development dimension, the Development Agenda cannot be relegated to subsidiary body of WIPO. The proposal to strengthen the Permanent Committee on Cooperation for Development Related to Intellectual Property (PCIPD) would relegate the Development Agenda to an organization that does not have direct access to the General Assembly and would limit the development dimension to technical assistance.

While some proposals to improve technical assistance could serve to complement the Friends of Development (FoD) proposal and the Development Agenda generally, a committee designed to address development concerns in the context of technical assistance is not the proper forum for all of the broad issues addressed in the Development Agenda. Focusing on improving technical assistance is a narrow "fix" that fails to address the fundamental concerns that developing countries have with WIPO.

III. IP Justice Supports Amending the WIPO Mandate

The 1974 Agreement between the United Nations and WIPO established WIPO as a specialized agency of the U.N. family with the responsibility for "promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the

developing countries in order to accelerate economic, social and cultural development, subject to the competence and responsibilities of the United Nations and its organs”²

Amending the WIPO mandate will not dilute WIPO’s role as a specialized UN agency; rather, it will inscribe the development dimension into the organization’s core, ensuring WIPO will maintain its responsibility to the UN and promote the public interest, first and foremost.

IV. IP Justice Supports Reform at WIPO

a. WIPO must weigh costs and benefits of IP

Developed and developing countries both support the proposition that WIPO needs to weigh the costs and benefits of IP, rather than just blindly promoting the benefits of IP protection. The UK proposal adopts this position, stating “WIPO should give explicit recognition to both the benefits and costs of IP protection and the corresponding need to adjust domestic regimes in developing countries to ensure that the costs do not outweigh the benefits.”³ Likewise the delegation of Singapore, speaking on behalf of the Asian Group, stated that WIPO technical assistance needs to consider the costs of IP, not just the benefits.⁴

Even within developed countries consideration is given to the costs and benefits associated with IP protection. In the many countries, the principles underpinning copyright and patent laws seek to balance the social cost of granting a monopoly with the overall societal gain. The Intellectual Property Clause of the U.S. Constitution serves to protect an artist’s incentive to create to the extent necessary to achieve the optimal advancement of progress through dissemination of works.⁵

² UN-WIPO AGREEMENT, Art. 1, *supra* note 1.

³ PROPOSAL BY THE UNITED KINGDOM, IIM/1/5 at 3, April 7, 2005, *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_5.pdf [*hereinafter* UK PROPOSAL].

⁴ *See* DRAFT REPORT, IIM/1/6 at 14 par. 40, April 25, 2005, *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_6_prov.pdf.

⁵ *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) stating:

b. A "One-size (XL) fits all" approach does not foster development in all countries

IP systems need to take into account different levels of national development to ensure that the underlying policies that IP seeks to promote are ultimately met. Both developed and developing countries support this proposition, but some developed countries try to impose a particular view of intellectual property on all, while disregarding history in which today's "rich" countries became wealthy to a certain extent by refusing to recognize intellectual property and by granting wider exceptions and limitations to copyright.

The UK delegation stated in its submission that harmonization is not necessarily the enemy of development *if it takes into account different levels of development*.⁶ The UK recognizes the need to foster sustainable development and the role IP can play, noting that IP can foster development primarily in "countries which have already developed a scientific and technological infrastructure."⁷

The delegation of Singapore, speaking on behalf of the Asian group, stated there was not a "one-size-fits-all" approach in implementing IPR commitments, believing that WIPO's work in implementing the Development Agenda should be undertaken in a balanced manner, guided by unique and peculiar circumstances in each country, and based on public policy considerations and national developmental priorities, since the national policy space of each country should be respected.⁸

"[T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. . . .

The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."

⁶ See DRAFT REPORT at 13 par. 38, *supra* note 4.

⁷ UK PROPOSAL at 2, *supra* note 3.

⁸ See DRAFT REPORT at 14 par. 40, *supra* note 4.

Throughout the development of today's developed nations, countries have offered different types of IP protection to maximize their own development. The United States has a long history of not protecting foreign authors to promote its own developmental self-interest.

In the US, Congress enacted the first copyright statute in 1790⁹ but limited copyright protection to “a citizen or citizens of these United States or resident therein.”¹⁰ The Act explicitly allowed pirating of foreign published works, stating:

[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book, or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.¹¹

A lack of copyright protection to foreign authors was not unique to the US in the late eighteenth and early nineteenth centuries.¹² The piracy of foreign works was commonplace in Europe when some countries “openly countenanced piracy as contributing to their educational and social needs as reducing the prices of books for their citizens.”¹³

While the Berne Convention for the Protection of Literary and Artistic Works took force in 1887 between twelve countries and largely eliminated unauthorized copying of foreign works in Europe, the United States was one of the last countries refusing to join and did not join the Berne Convention until 1988. The United States' own path to development illustrates that different levels of IP protection that respect a country's own developmental needs are acceptable and optimal in allowing others to develop.

⁹ Act of May 31, 1790, ch 15, 1 Stat. 124.

¹⁰ *Id.* § 1.

¹¹ *Id.* § 5.

¹² See Peter Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 339 (2003).

¹³ EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 231 (2000).

c. IP laws need to protect flexibilities and limitations

More developed countries' own IP laws and international instruments illustrate the need for flexibilities and limitations that ensure optimal social values are achieved by an IP system.

Countries need to have policy space to meet national developmental priorities in the interest of respecting every nation's national sovereignty. Competition policy in developed countries is proof that monopoly rights can be curtailed when sufficient public policy considerations are present.

US copyright law includes a number of key exceptions and limitations that have helped the US to become prosperous and innovative. Exceptions and limitations to US copyright law that permit reverse engineering or time-shifting or space-shifting of information have created entirely new revenue streams for creators and new uses for consumers.

Perhaps the best examples of exceptions that allow certain uses of protected works consistent with a country's policy choices are the US fair use exceptions. Unlike many foreign counterparts, in the US Copyright Act, fair use is not clearly defined.¹⁴ Instead, four factors are listed¹⁵ and applied in a balancing test, on a case-by-case basis.¹⁶ In the US, fair use is designed to provide an "equitable rule of reason [that] permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed

¹⁴ Many countries define fair use through a laundry list of specific acts which qualify as fair use. This creates a bright line rule, eliminating the need for a case by case analysis.

¹⁵ 17 U.S.C. § 107 provides :

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes

(2) the nature of the copyrighted work

(3) the amount and substantiality of the portion used in relation to the copyrighted work as whole

(4) the effect of the used upon the potential market for or value of the copyrighted work

¹⁶ "Section 107 requires a case-by-case determination whether a particular use is fair." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

to foster.”¹⁷

The US courts have used fair use to allow otherwise infringing activity in the interest of promoting copyright’s overall policy goals. The courts have allowed reverse engineering¹⁸ to promote technological development and market competition, and they have allowed other personal uses that facilitate access to information and promote innovation generally.¹⁹

US copyright law provides several other key exceptions to a right-holder’s exclusive rights. For example, the First Sale Doctrine limits a publisher’s exclusive right of distribution and allows individuals to sell or give away their own copies of books and CDs.²⁰ 17 U.S.C. § 108 (a)-(e) provide exceptions for libraries to copy and distribute copyrighted works without the authors permission.

International instruments further support exceptions and limitations. Article 1 of TRIPS gives members the freedom to “determine the appropriate method of implementing the provisions of [the] agreement within their own legal system and practices.”²¹ Article 8 of TRIPS states “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”²² The UK proposal asserted that

¹⁷ *Id.* at 550 n3.

¹⁸ *Sega Enterprises v. Accolade*, 977 F.2d 1510, 1518 (9th Cir 1993). “Where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law.”

¹⁹ In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), the court articulated an exception for unauthorized copying of television programs when the copy was used for time shifting purposes.

²⁰ 17 U.S.C. § 109(a) allows a lawful owner of copy to sell or otherwise dispose of copy without permission of the copyright holder; dispose of includes lending or renting.

²¹ Agreement on Trade-related Aspects of Intellectual Property Rights, art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 1197 (1994), available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS Agreement].

²² *Id.* at art. 8.

IP regimes should be tailored to take into account individual country's circumstances within the framework of international agreements such as TRIPS.²³

Even developed countries advocating for “harmonization” recognize the importance of flexibilities within the IP system. The delegation from the US at IIM/1 stated they would “welcome a factual dialogue on this important question” (referring to learning “what lack of flexibilities exist in WIPO treaties, or how they limit policy choices or hinder development”).²⁴ The UK report also recognizes that harmonization is unlikely to bring any direct benefit to least developed countries and that it may be appropriate to explicitly provide in any harmonization proposal an extended transition period *or even a clear opt out*.²⁵

d. WIPO needs more transparency and public-interest participation which is member-driven

Most countries support more transparency at WIPO and welcome public-interest civil society participation in the discussions. The US delegation welcomes full transparency of WIPO proceedings and supports NGO's participation.²⁶ Likewise, the delegation from the UK stated that “technical cooperation must be transparent, planned and also demand-led.”²⁷

Even with broad support for transparency generally, the degree of support varies and ultimately turns on how member-driven WIPO truly is. The FoD proposal initiates an important dialogue on making fundamental changes to ensure that WIPO is truly member driven. The proposal is an excellent starting point for talks on this important issue and should not be

²³ UK PROPOSAL at 3, *supra* note 3.

²⁴ See Opening Statement by Paul Salmon, Head of the U.S. Delegation at IIM, *available at* <http://www.ipjustice.org/WIPO/200504US.shtml>.

²⁵ See UK PROPOSAL at 6, *supra* note 3.

²⁶ See DRAFT REPORT at 11 par. 35, *supra* note 4; In the US statement at IIM, *supra* note 23, the delegation agreed with the FoD proposal in that “we should strengthen WIPO governance through greater transparency and internal controls such as code of conduct.”

²⁷ See DRAFT REPORT at 13 par. 38, *supra* note 4.

relegated to even a strengthened PCIPD because the issue's scope clearly exceeds the technical assistance purview of the PCIPD.

e. IP is not an end in itself and must foster the public goals of innovation, creativity, and technical development.

The Indian delegation at these meetings has stated that “the primary rationale for IP protection is . . . to promote societal development by encouraging technological innovation.”²⁸

International instruments should reflect the public goals of IP protection and the will of the people. The WIPO Copyright Treaty recognizes that copyright law serves “to maintain a balance between the interests of authors and the larger public interest, particularly education, research, and access to information.”²⁹ TRIPS art. 7 explicitly stipulates a balanced and harmonious outlook of IP.³⁰

The US Constitution also recognizes the public goals of IP. The Copyright Clause of the U.S. Constitution grants Congress the power “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³¹ The placement of the clause within the enumerated powers of Congress suggests that an Author does not possess inherent control of his work once published, but is granted such a right by Congress who ensures the right is for the promotion of “Progress.”

²⁸ See Statement of the Delegation of India at IIM, *available at* <http://lists.essential.org/pipermail/ip-health/2005-April/007753.html>.

²⁹ See WIPO Copyright Treaty, *adopted* Dec. 20, 1996, WIPO Doc. CRDNR/DC/94 (Dec. 23, 1996) pmbl, *available at* <http://www.wipo.int/clea/docs/en/wo/wo033en.htm>.

³⁰ TRIPS art. 7, *supra* note 20, states:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

³¹ U.S. CONST., art. I, § 8, cl 8.

Since the limited monopoly granted to IP right-holders is an exception to the belief that competitive markets are the best guarantee to maximize the benefits to society, the rationale for the monopoly needs to be evaluated in every market. It is essential that IP protection serves to foster innovation, creativity and technical development, and it is imperative that WIPO adopts a framework which can ensure that IP protection advances public goals in developing countries.

f. Freedom of expression rights need protection in a digital environment.

The tension between intellectual property and freedom of expression rights reaches new heights in a digital environment, where technological restrictions are placed on information to control its use (and anti-circumvention laws are enacted that prohibit bypassing these controls or providing others with information on how to bypass them). Virtually any use of information or entertainment in a digital environment invokes IP rules. Greater exploration of the impact of intellectual property rights on traditional freedom of expression rights is necessary to maintain a balance between a free exchange of information and incentivising creativity.

Article 19 of the Universal Declaration of Human Rights guarantees all people, “the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas *through any media and regardless of frontiers*.”³² While some IP rights holders claim that consumers should have fewer rights in a digital environment because of the risk of infringement, the UN Declaration from half a century ago has already spoken that the public’s right to freedom of expression carries into a digital environment.

³² Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, available at: <http://www.un.org/rights/50/decla.htm>

In the course of setting a Development Agenda, WIPO should pay particular attention to the dangers that over-broad intellectual property rights and technical restrictions create for freedom of expression guarantees and other civil liberties (such as privacy).

CONCLUSION

WIPO needs to consider the costs of IP systems to developing countries, recognize that countries at different stages of development have different needs, protect flexibilities within the IP system to allow countries to promote their own developmental needs, and generally work to become more transparent and member-driven with ongoing inclusion of NGO's. IP Justice endorses the FoD proposal and fully supports the creation of WERO and amending the WIPO mandate as crucial first step towards necessary reform.