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Teaching Intellectual Property in Developing And Transitional Countries In the Wake of TRIPS

I. Introduction

On 48 trips over the past ten years, I have had the opportunity to give 102 talks:

a.) to developing and transitional country audiences, such as government officials, personnel of IP offices, IP practitioners, industry managers, judges, academicians, students, etc.

b.) on topics, such as, the nature and importance of IPRs, the role of IPRs in economic development, IP licensing and technology transfer, teaching IP law, etc.

c.) in 30 countries from Argentina, Ecuador and Panama to Madagascar, Mongolia and Indonesia, and

d.) under the auspices of WIPO, UNTNC, USIS, USAID, local and regional associations, etc. or on my own initiative, as well as to developing and transitional country audiences, who attended IP programs at WIPO in Geneva, the USPTO in Washington, Franklin Pierce Law Center in Concord, New Hampshire, etc.

II. Challenges in Developing and Transitional Countries

Attending and participating in such programs and being able to "spread the gospel" of IPRs in the face of considerable skepticism, were very interesting and gratifying but also challenging experiences. Excerpts from just two trip reports about visits to:

a.) Guatemala and Costa Rica in 1995 and

b.) Islamabad, Lahore and Karachi in Pakistan in 1997

will illustrate this perfectly.

The key points which I tried to convey in lectures and discussions on missions to these countries and which were culled from my special list of "Credos — Insights — Truisms about Intellectual Property Rights" (see Attachment) were the following:

- The defense of intellectual property rights today is the new frontier as were the human rights yesterday.
- An effective intellectual property system is indispensable to technological and cultural development which in turn is indispensable to economic growth and social welfare.
- There is solid correlation between the quantity of investments a country can attract from abroad and domestically and the quality of its intellectual property systems.
- An intellectual property system should be part of a country's infrastructure from the outset rather than something thought about after reaching a fairly advanced state of development.
- An intellectual property system does benefit nationals, not just foreign corporations; after all, there is genius and creativity everywhere but they need nurture.
- Of the several incentives provided by the intellectual property system, namely, to invent or create, to disclose, and to invest, the incentive to invest is the most important.
- "Everything under the sun made by man is patentable", according to the U.S. Supreme Court; hence, there should be no exclusions of subject matter from patentability.
- Subject matter that is viewed as too important to be protected, like pharmaceuticals and products of biotechnology, is on the contrary, too important not to be protected.
- A patent and other intellectual property are property and are not and cannot be monopolies, primarily for the reason that a monopoly is something in the public domain that the government takes away from the public; an invention, on the contrary, is something novel that was not in the public domain but will later enter the public domain and be freely available.
- Technology transfer, licensing and investments are ever so much easier to carry out and accomplish via patents and other intellectual property rights as vehicles or bases.

In concluding my talks, I proposed and advocated implementation of a six-phase, overlapping course of action to improve their IP systems, as follows:

- modernization and strengthening of national IP legislation,
- installation of an effective IP administration,
- adherence to all relevant and important international IP treaties,
- instillation of appreciation in all sectors of the importance of IP in economic and cultural development,

- improvement of judicial mechanisms for the enforcement and defense of IPR's, and
- establishment of regional, centralized IP systems and offices.

I was pleased that some of my more telling points resonated with the audience and other speakers. For example, there were expressions of understanding and endorsement of my infrastructure and property-nature arguments, my point about inventive genius existing everywhere, the quality of an IP regime and the quantity of investment being correlated, etc.

On the other hand, however, skeptical comments and testy questions abounded, e.g.:

- copying and imitation are basic human traits and nothing can be done about it (strong Robin Hood syndrome);
- the U.S. left the Japanese along when they copied U.S. products, but turns on us;
- with the free flow of goods there should be free flow of information and technology as a matter of human rights;
- the degree of respect for IPRs should depend on the degree of economic development;
- a patent system that is rooted in America should not have to be adopted in other countries;
- a country should be free to participate or opt out;
- millions don't have access to medicines and enforcement of IPRs would make it worse;
- developing countries need assistance and forbearance, especially those that were exploited by colonial masters;
- Western IP policies are unfriendly and barren of compassion;
- the U.S. should use more the carrot than the stick;
- IPRs should be shared, even if, or especially if, they are property.

It was not always easy to respond to such comments and questions, coming out of the blue. Particularly tricky was this question: If a patent is a contract between an inventor and his government and grants protection in exchange for disclosure, why should a foreign country also grant protection later when there is no quid pro quo? (Answers: 1) benefits are world-wide, 2) reciprocal national treatment.)

Based on my conversations and observations in these and other developing countries, I believe the biggest challenges and problems have to do with the fact that

there is, as a general rule, not only appalling ignorance but also glaring misconceptions about IPRs and their role in technological development and economic growth; their IP offices are understaffed, underfinanced and hence inadequate and there is no culture for intellectual property, little teaching of the subject in universities and no enforcement which leads to rampant piracy.

Illicit copying and lack of enforcement have the following unfortunate consequences:

- Foreign owners of IPRs stay out of the country — won't build plants, ship in and license local distributors.
- Home-grown taxpaying channels of distribution are not developed. Tax base doesn't grow and taxes are not paid where piracy is rampant.
- Markets are flooded with inferior illegitimate products and technology is not incorporated in the country's technology base and infrastructure. There is no technical support.
- Development of a country's industries is impeded. Local inventors and authors can't make a living from their work. Local IP is less likely to be created and suffers.
- Countries are in non-compliance with requirements of international laws and face trade sanctions.
- The basic shared moral proposition that it is not proper to take someone's work and effort without payment, is violated. (*See* Jonathan Zavin et al., "The Value of Intellectual Property Rights Enforcement in Developing Countries", *Economic Perspectives*, June 1997.)

Modern and strong IP systems should be of interest for all nations, including the smallest and also the least developed. For this reason, such systems are being adopted around the globe. Many developing and transitional countries established or strengthened their intellectual property systems before the GATT-TRIPS era and without being swayed by pressures from the outside, because they had come to realize that IP systems would serve their own self-interests.

For example, a high official of the Indonesian Government made the following statements in a seminar, which I attended in Jakarta a few years ago when I served as a consultant for the Patent , Trademark and Copyright Office, to assist them in implementing their first patent system:

> "The need to expand our knowledge and to improve our technological development and dominance require a greater availability of technological information through growth

and development of the patent system. Only through the expansion of knowledge, and the increase in technological dominance, will we be able to carry out efficiently the process of technology transfer as well as solve related problems.

Especially today one cannot ignore the role that intellectual property plays in international markets, which is becoming increasingly more important.

The future economic development of the country will focus more and more on the industrial sector directed to exports, which obviously will need access to international markets. This access will only be achieved if we participate in mutual agreements in the sector of intellectual property, through the operation of sufficient, efficient and reciprocal legal protection.

.....

The current situation, where intellectual property has greater value and more importance provides a very different stage from that of the fifties, sixties or even the seventies."

In my opinion, these affirmations — and similar ones which I heard on subsequent trips to Korea and Malaysia — are very positive, modern, and at the same time surprising, since until 1991 there was no patent system in Indonesia. Furthermore, these statements have much relevance in other developing countries because there is considerable parallelism among many of them and Indonesia.

The realization has also set in developing countries that the negative consequences of inadequate IP protection are affecting economic development. During a visit at Shalimar Recording Company, Islamabad, on my mission to Pakistan, Mr. Khalid Hassan, its CEO, lamented the fact that pirates were driving recording and publishing companies out of business, his company being down to 11 from 400 employees and another company already having folded completely. Lawsuits are very slow, there are no injunctions, and damage awards and penalties are rather nominal, so it is hard to stop piracy. But from others I learned that the climate is improving with more effective IP laws being enacted, more raids taking place, and greater IP consciousness in the government and other circles being noticed.

III. IP Teaching and Training in Developing and Transitional Countries

The above-mentioned developments and trends are encouraging and the TRIPS-imposed minimum standards for stronger and more effective IP systems in WTO countries cannot help but accelerate these favorable trends. But passing laws is not enough — far from it, although I heard one official in Costa Rica assert: "We passed a law, doesn't that take care of it?" Enforcement is of course indispensable. A law that is not enforced is worse than no law. In this connection I have heard Americans complain: "What good is a law, if it's not enforced!" True, but passage of a law is a requisite first step. Without a law there is nothing to enforce. Thus as stated above in my six-point action program, instillation and appreciation in all sectors of the importance of IPRs in economic and cultural development, is an essential concomitant step for the effective defense of IPRs.

Strategies that have been or could be successful in promoting respect for IP and should be intensified, are in the first place, local educational campaigns and programs, as sponsored by WIPO, USIA, USAID and other international and national organizations. More importantly, however, students and teachers and officials and practitioners in developing and transitional countries should be encouraged and supported to go abroad for IP education and training and enroll in academic IP programs being offered in increasing numbers in law schools and universities in developed countries. One such program is e.g. the internationally-acclaimed one-year MIP (Master of IP), half-year DIP (Diploma in IP) or IP Summer Session of Franklin Pierce Law Center, Concord, New Hampshire. This kind of intensive academic training credentials graduates, enhances employment prospects and "teaches teachers" and is well-suited to foster IP awareness in developing countries. When these students return to their home countries, they have a heightened awareness of how much IP protection promotes invention, innovation and technological and economic progress. Unfortunately, several admitted foreign applicants are being denied visas to study at FPLC every year.

IV. The Future of TRIPS for Developing and Transitional Countries

An overwhelming amount of literature has been generated in recent years by academics and commentators, interpreting TRIPS and assessing its economic and social implications, in general, and for the developing countries, in particular. Comments range from very positive to quite negative.

On the plus side, according to Bob Sherwood TRIPS is a "blueprint for effective defense of intellectual property rights" (37 *IDEA* 491, 537 (1997)) and according to former Commissioner of Patents and Trademarks, Gerald Mossinghoff, TRIPS "clearly

set the stage for the next steps in effective multinational patent protection." (38 *IDEA* 529, 539 (1998)) In fact, he predicts that with the "landmark" TRIPS Agreement in place, we will have a World Patent System "sooner rather than later." (*Id.* at 561)

> But tensions which have to do with a perceived disconnect between GATT/WTO (trade law) and TRIPS (IPRs) in terms of obligations, vocabulary, etc. are seen by some. "Success will depend on how well the GATT/WTO system addresses the differences between the intellectual property and trade matters." (Rochelle Cooper Dreyfuss and Andreas Lowenfeld, "Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together" (37 *VA J. Int'l L* 275 (1997))

J.H. Reichman's assessment in his article "Enforcing the Enforcement Procedures of the TRIPS Agreement" (37 *VA J Int'l L* 335, 339 (1997)), is also interesting:

> "Taken together, the enforcement and dispute-settlement provisions of the TRIPS Agreement put teeth into the pre-existing intellectual property conventions, which relegated the issue of effective implementation of agreed minimum standards to a purely theoretical possibility of litigation before the International Court of Justice. In the long term, one may well hope that these provisions will further the goal of adapting the international intellectual property system to the challenges of an integrated world market."

Significant assessments and proposals were advanced by Robert Sherwood in a report commissioned by WIPO in 1995 regarding macro-economic benefits and costs to developing countries in implementing the TRIPS Agreement (37 *IDEA* 491 (1997)).

According to Sherwood "(d)eveloping countries can expect benefits of many kinds as they fully implement the TRIPS Agreement" (*Id.* at 491). He discusses in great detail the factors that contribute to macro-economic cost/benefit analysis of the implications of TRIPS for developing countries in terms of innovation, price levels, technology acquisitions, human skills, private investment in research, science in agriculture, industrial base, private risk capital and university technology and then concludes:

> "On balance, it appears that the impact of the TRIPS Agreement on most developing countries is likely to be slightly negative in the short run (one to two years) and increasingly favorable as local firms and individuals begin

> to realize the potential benefits for their activities. Public education will play a role in the speed with which the benefits are realized."

And for some in-between commentary: Jayashree Watal in his article "The TRIPS Agreement and Developing Countries — Strong, Weak or Balanced Protection?" (*J of World Int. Prop.* 281, 282 (1998)) has this to say: The views of some legal experts "...range from interpreting TRIPS as an agreement which ushers in an era of strong intellectual property protection in developing countries to a treaty so full of loopholes as to provide a number of escape hatches to developing countries."

Nonetheless, he concludes that:

> "As more work is done on the economic implications of TRIPS for developing countries, it may become clear that is is unambiguously in the interests of such countries to interpret TRIPS at the highest levels of protection of IPRs in order to achieve higher levels of domestic innovation, and attract foreign investment or the latest technologies." (*Id.* at 307)

Incidentally, Watal takes issue with the characterization of TRIPS as setting merely minimum standards by asserting that:

> "...for developing countries it represents a major change from not only the pre-existing international law on the subject but also from their pre-existing national laws. In this sense, TRIPS represents very high, if not the maximum, standards for intellectual property protection for these countries." (*Id.* at 282)

While most of the commentaries are optimistic and positive, a few negative and pessimistic voices have also been heard. For example, according to Marci Hamilton TRIPS is "imperialistic, outdated and over-protective", as it "attempts to remake international copyright law in the image of Western copyright law." (29 *Vanderbilt J Transnatl L* 613-614 (1996)) Also noteworthy in this connection is the "Rapid Patent" proposal, recently floated within AIPPI circles in the belief that developing countries can't possibly live up to TRIPS standards. Under this proposal patent applications would be filed, published and kept pending for 20 years when they go abandoned, unless patentability examinations had been requested by someone during pendency. (The ultimate deferred examination system.)

V. Conclusion

In the context of a discussion of the future of TRIPS and IP teaching and training in the wake of TRIPS, WIPO's Francis Gurry offered his prognosis in *Managing Intellectual Property* (June 2000, p.14), which are a fitting conclusion to be quoted here:

> "At some stage, we may have a TRIPs 2 treaty. But it could be two years or 20 years. TRIPs is not cast in stone, but when will it be necessary? At the moment, there is no great pressure. The most important development over the past 10 years has been the widespread recognition that in an economy where intellectual capital is a source of wealth generation, intellectual property controls. Before the Uruguay round, negotiators didn't know what IP was, but there is now an increasing recognition of its importance. Translating it into a business and governmental strategy is a different question. But we are now every close to a widespread understanding.
>
> The advantage of this is that people appreciate the importance of IP and what is happening and it is easier to get action at the appropriate level. But the disadvantage is that there is no longer a private club where we can talk about IP; we have to deal with a whole new range of people. This means we have to become more effective communicators, and explain what IP is and why it is needed, in order to answer the critics."

This is a ringing call for intensified efforts for IP teaching and training, especially in developing and transitional countries to enhance appreciation and awareness of the importance of robust IP systems for technological development and economic growth.

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KFJ/Ruh/12.15.00

ATTACHMENT

CREDOS • INSIGHTS • TRUISMS

on

Intellectual Property Rights and Technology Transfer

- The defense of intellectual property rights today is the new frontier as were the human rights yesterday.
- An effective IP system is indispensable to technological development which leads to economic growth and social welfare.
- An IP system should be part of a country's infrastructure from the outset rather than something that one thinks about after reaching a fairly advanced stage of development (Robert Sherwood).
- There are no viable alternatives to the present patent system which is the only system "that is compatible with the system of market economy" (Professor Carlos Fernandez-Novoa).
- There is solid correlation between the quantity of investments that can be attracted and the quality of the patent system (Professor Mansfield).
- Of the four incentives provided by a patent system, namely, to invent, to disclose, to "invent around" and to invest, the incentive to invest is the most important.
- An IP system does benefit nationals, not just foreign corporation; after all there is genius and creativity everywhere but they need nurture.
- A patent and other IP are property and are not and cannot be monopolies (a patent does not take from the public and give to the individual; on the contrary, it takes from the individual and gives to the public).
- "Everything under the sun made by man is patentable" (U.S. Supreme Court in the Chakrabarty decision); hence, there should virtually be no exclusions of subject matter from patentability.
- Subject matter that is viewed as too important to be protected (e.g. pharmaceuticals) is, on the contrary, "too important not to be protected" (Professor Thomas Field).
- Some countries have gold, some have oil — and some have technology and those that have gold and oil do not consider them part of the "common heritage of mankind" and accordingly give them away for free (Naboth Mvere, former Controller of IP, Zimbabwe).
- The duration of a patent should be no shorter than 20 years from filing and preferably 25 years or more or provide for patent term restoration to compensate for regulatory and other delays.
- Lead times for commercializing inventions have become longer in all areas and not just the pharmaceutical area and hence conventional periods of three or four years till lapsing or compulsory licensing and short patent terms are badly out of step with present realities.
- Patents and trade secrets are not mutually exclusive but complementary; they "dovetail" (U.S. Supreme Court in the Bonito Boats decision); thus, the question is not whether to patent or to padlock but rather what to patent and what to keep a trade secret and whether it is best to patent and to padlock, i.e. expoit the overlap.
- "Trade secret law and patent law have coexisted in this country for over one hundred years..... the extension of trade secret protection (even) to clearly patentable inventions does not conflict with the patent policy of disclosure." (U.S. Supreme Court in the Kewanee Oil decision).
- Multiple forms of protection can and should be utilized and integrated by exploiting the overlap between the various IP categories, especially in modern fields of technology; this provides fall-back positions, achieves synergistic effects and thus optimizes exclusivity (Professor Jay Dratler).
- Technology transfers, licensing and investments are ever so much easier to carry out and accomplish via patents and other IPRs as vehicles or bases.
- Importation of technology leads not only to export of products but also to export of adapted, improved technology (reverse technology transfer).
- The days when technology transferors took advantage of transferees (in developing countries) are gone, the realization having taken hold that the only viable license is one that results from a win/win approach and passes the fairness test.

KFJ/Ruh/10.5.00