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Introduction

Kamil Idris*

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Introduction

Kamil Idris

Abstract

Intellectual property law is one of the fastest growing fields of law worldwide. This unprecedented, rapid evolution and the accompanying massive upsurge in the use of the intellectual property system had four main triggers— the advent of the Internet (to many, the heart of the digital revolution); unprecedented advances in science and technology; the emergence of intangible assets, such as knowledge, information and innovation, as the main drivers of economic development; and the growing interdependence of nations resulting from the internationalization of commerce. Of these, the digital revolution alone has had a profound effect on all aspects of the creation, protection, and use of intellectual property. Trillions of dollars are forecast to change hands in electronic commerce transactions, most of which have an intellectual property component, spotlighting the key contribution of intellectual property law in securing the commercial viability of innumerable industries, employing millions of people and generating revenues essential to the economic well-being of Nations. The increasing prominence of intellectual property considerations in this, and many other areas, has given additional weight to the recognition by economists that the way in which a Nation uses intellectual property to capture the value of the creativity and innovation of its people and convert it into concrete economic assets, is part of the answer to the riddle of why some countries prosper while others do not. In a world marked by huge material disparities, intellectual property is a means by which individuals, companies of all sizes, universities and other research institutions, and economies at the local, national, and regional levels can empower themselves to compete more effectively in the international marketplace. Wielded in the correct way, intellectual property can be used as an effective power tool to help build sustainable economic growth. These factors have not only propelled intellectual property to the forefront of policy-making circles generally, but they have forced the intellectual property law community to re-think established paradigms. The debate and discussion that flow from publications such as the *Fordham International Law Journal* and its series of issues-related books are the seedbed for new ideas and approaches that are indispensable in ensuring that the intellectual property system continues to grow and adapt in a way that fosters the creativity and innovation that is the springboard of economic growth and social well-being, while serving the public good within a rapidly changing technological environment.

INTRODUCTION

*Kamil Idris**

Intellectual property law is one of the fastest growing fields of law worldwide. This unprecedented, rapid evolution and the accompanying massive upsurge in the use of the intellectual property system had four main triggers — the advent of the Internet (to many, the heart of the digital revolution); unprecedented advances in science and technology; the emergence of intangible assets, such as knowledge, information and innovation, as the main drivers of economic development; and the growing interdependence of Nations resulting from the internationalization of commerce. Of these, the digital revolution alone has had a profound effect on all aspects of the creation, protection, and use of intellectual property. Trillions of dollars are forecast to change hands in electronic commerce transactions,¹ most of which have an intellectual property component, spotlighting the key contribution of intellectual property law in securing the commercial viability of innumerable industries, employing millions of people and generating revenues essential to the economic well-being of Nations.

The increasing prominence of intellectual property considerations in this, and many other areas, has given additional weight to the recognition by economists that the way in which a Nation uses intellectual property to capture the value of the creativity and innovation of its people and convert it into concrete

* Kamil Idris is the Director General of the World Intellectual Property Organization (“WIPO”), an international, governmental body dedicated to helping to ensure the promotion and protection of intellectual property rights worldwide. Prior to joining WIPO, Mr. Idris was a member of the Sudanese Foreign Service, where he held the rank of Ambassador. While at the Permanent Mission of Sudan to the United Nations Office at Geneva, he was spokesman and coordinator of the Group of Developing Countries. Mr. Idris holds a PhD in international law from the Graduate Institute of International Studies of the University of Geneva, Switzerland, and degrees in law, political science, and international affairs from the universities in Egypt, Sudan, and the United States of America. He was a professor of law with extensive experience lecturing on international intellectual property issues. Mr. Idris was a member of the United Nations International Law Commission (“ILC”) from 1992 to 1996 and 2000 to 2001.

1. See WIPO, *From Physical Product to On-Line Delivery: Electronic Delivery of Publications, Music, Films and Software*, available at <http://ecommerce.wipo.int/meetings/1999/papers/koskinen.html>. See also WIPO, *Definitions and Descriptions of Electronic Commerce, Annex 1*, available at <http://ecommerce.wipo.int/primer/annex1.html>.

economic assets, is part of the answer to the riddle of why some countries prosper while others do not. In a world marked by huge material disparities, intellectual property is a means by which individuals, companies of all sizes, universities and other research institutions, and economies at the local, national, and regional levels can empower themselves to compete more effectively in the international marketplace. Wielded in the correct way, intellectual property can be used as an effective power tool to help build sustainable economic growth.

These factors have not only propelled intellectual property to the forefront of policy-making circles generally; they have forced the intellectual property law community to re-think established paradigms. The debate and discussion that flow from publications such as the *Fordham International Law Journal* and its series of issues-related books are the seedbed for new ideas and approaches that are indispensable in ensuring that the intellectual property system continues to grow and adapt in a way that fosters the creativity and innovation that is the springboard of economic growth and social well-being, while serving the public good within a rapidly changing technological environment.

With this changing profile of intellectual property, what was once considered to be a purely legal and technical area, has today become a focal point of national policy agendas. Civil society groups are taking a growing interest in the field, which increasingly has implications for health, food security, and access to technology and information. Competing interests and different interpretations of what constitutes the “public interest” have fuelled and widened the debate on intellectual property issues. The appearance of this publication is also, therefore, both, a reflection of the deepening interest in intellectual property, and testimony to its growing importance on the international stage. In the Articles and Essay that follow, leading scholars and practitioners provide their analyses and interpretations of a broad range of pertinent and complex issues that underline the relevance of intellectual property for all countries of the world. The scope of the featured pieces provides fertile ground for in-depth discussion and debate, that will promote greater understanding of the issues and help sustain the flow of ideas on many intricate, cross-cutting intellectual property questions. Such publications are vital to efforts to renew, improve, and promote better under-

standing and use of the intellectual property system in all parts of the world.

Such an understanding linked to the full participation of all sectors of society is key to our success in developing an intellectual property system that continues to serve the public good within a dynamic operating environment. To be truly effective, such an intellectual property system must be supported by a sound policy-making structure, that includes a robust and supple intellectual property infrastructure and appropriate fiscal strategies to attract foreign investment, as well as an operating environment where intellectual property laws are respected and enforced and where an informed understanding of the benefits of the intellectual property system exists at all levels of society.

The opportunities and challenges presented by this endeavor are many and varied. The World Intellectual Property Organization (“WIPO” or “The Organization”)² contributes to meeting them by providing a forum for its 179 Member States to discuss these issues and to develop appropriate solutions. The Organization’s aim is to develop a flexible and responsive international intellectual property system that is more user-friendly and accessible, and that provides an appropriate balance between the rights of inventors and creators and the general public of all countries.³

1. LEVERAGING THE BENEFITS OF THE INTELLECTUAL PROPERTY SYSTEM

Part of the changing profile of intellectual property is the fact that intellectual assets are gaining ground as a measure of corporate viability and future performance. Although often referred to as “hidden value” — in that they rarely show up on company balance sheets — it is now increasingly evident that patents; copyright and related rights; trademarks; industrial designs; geographical indications; and trade secrets are significant contributors to enterprise value. Intellectual property is becoming

2. WIPO is one of the sixteen specialized agencies of the United Nations (“U.N.”) and its activities include progressive development of international law, assistance to developing countries, and services to the private sector, which facilitate the international filing of patents and the international filing and registration of trademarks and industrial designs.

3. See WIPO, *Vision and Strategic Direction of WIPO*, available at <http://www.wipo.int/about-wipo/en/>.

one of the most valuable elements in commercial transactions, be it in the form of licensing agreements; manufacturing, purchase or distribution agreements; or mergers and acquisitions. Such transactions often involve technology transfer or transfer of know-how in the form of training, which are increasingly important facets of these agreements. Such ways of leveraging intellectual property are increasingly disproving the notion that intellectual property rights are merely some sort of monopoly, exercised by blocking competitors. In practice, intellectual property is as often used to license products and technologies to be exploited by others. These licenses provide royalty revenues for the owners of the intellectual property, and income, products, and technologies for licensees who, otherwise, might not have had access to them. In such transactions, the creative cycle often continues, as licensees may also develop their own intellectual property by creating improvements or generating derivative works which can, in turn, be cross-licensed or licensed to others. The interface of invention with business transactions has resulted in intellectual property becoming a major element in corporate strategic business management, with intellectual property asset portfolios being used as a negotiating tool in discussions such as those leading to joint venture and cooperative R&D agreements, and mergers and acquisitions.⁴

As can be imagined, intellectual property, in all its forms, is now gaining ground as an essential component of economic strategy for all countries, regardless of their level of economic development. Indeed, there is growing evidence that many developing countries are adroitly wielding the intellectual property system to stimulate and strengthen economic development. This requires a set of proactive policies, including encouraging foreign direct investment and technology transfer through the fostering of a favorable national intellectual property environment and stimulating R&D in universities and research centers, which is another effective way of jump-starting domestic knowledge development and providing the "fuel" to keep the national innovation cycle running. In summary, handled properly, intellectual property is a powerful driver of national innovation,

4. See WIPO, *Workshop on Innovation Support Services and Their Management*, June 12 to 22, 2001, available at <http://www.wipo.org>.

R&D, product creation, and business transactions that have beneficial macro and micro economic effects.

II. AWARENESS BUILDING FOR PROMOTION AND PROTECTION

Although intellectual property is a term increasingly in use today, to many people outside the specialized intellectual property-related communities, it remains a somewhat obscure legal concept. One of WIPO's priorities is to "demystify" intellectual property — to create a broader understanding, and appreciation, of the positive contribution it can make to society.⁵ A notable step in this direction was made when WIPO Member States, spearheaded by a group of developing countries, decided to designate April 26 as World Intellectual Property Day — to be celebrated each year with special events to showcase intellectual property and promote a better understanding of its role in fostering economic development and social and cultural well-being.⁶ Working towards achieving a well-founded understanding throughout society of what intellectual property is; why it is important; and how the intellectual property system works; is of pivotal importance in building an intellectual property culture that champions respect for intellectual property rights and allows countries to mine the value in such rights for the benefit of their peoples.

The respect such an intellectual property culture generates is vital to help promote and protect intellectual property rights. The reasons such rights are violated are many and varied, ranging from perceived necessity, lack of awareness, greed, and ruthless criminal intent all the way to innocent mistake. The scale of abuse varies considerably, from illegal copying of protected works at home for personal use, to large-scale commercial criminal enterprises, which produce hundreds of thousands of illegal copies.⁷

When such illegal products take market share (or even kill a

5. See *Vision and Strategic Direction of WIPO*, *supra* n.3.

6. See WIPO, *World Intellectual Property Day is April 26*, available at http://www.wipo.org/news/en/worldip/world_ip.htm.

7. See INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2001 SPECIAL 301 REPORT: QATAR; Robert Holleyman, *The Impact of Intellectual Property: Jurisdiction, Enforcement and Dispute Resolution*, WIPO, Dec. 14, 1999, available at <http://ecommerce.wipo.int/meetings/1999/papers/holleyman.html>.

potential market), and when recouping an investment is prevented by such illegal activity, enforcement mechanisms are called into play to protect the interests, not only of the holders of the rights involved, but also of the public. Intergovernmental and non-governmental organizations and industry bodies whose mandates involve dealing with some aspect of counterfeiting and piracy and its effects, have estimated that the market in illegal products is between five percent and seven percent of total world trade. Discussion of this pivotal issue, as in many of the pieces in this volume, is an invaluable contribution not only in promoting greater understanding of the consequences of piracy and counterfeit activities — a stagnant and receding economy; a reduction in creativity and inventiveness; and a business climate bereft of foreign direct investment, consistency or reliability — but also as an important reference source for those involved in developing effective enforcement strategies in all parts of the world.

III. *EXPLORING THE BOUNDARIES AND SECURING THE HINTERLAND*

In ensuring a healthy and well-balanced development of the intellectual property system, we are pioneers, setting a course towards prosperity and security for current and future generations. Only with determination and a sense of unity and common purpose can we address the challenges currently facing us. The borderless nature of cyberspace, for example, is pushing countries to tackle issues of applicable law in cross-border intellectual property transactions, ownership of multi-media works, interoperability of digital rights management systems and technological protection measures. Legal professionals, such as the distinguished authors of the pieces contained in this publication, are having to dig deep into their own inventiveness to tackle these issues in a manner that does not stifle the cycle of creativity, but that protects the public interest and promotes the rights of intellectual property asset holders.

In a rapidly evolving technological landscape, there is a clear need to respond quickly to challenges that arise. The Member States of WIPO have started to employ various mechanisms to respond to such situations. These include a “soft law” approach, which uses recommendations to help structure the in-

tellectual property environment and harmonize certain industrial property principles and rules, as a complement to the rather more time-consuming treaty-based approach. This has been welcomed by concerned stakeholders, as it responds to the practical imperative for accelerated development and implementation of certain international harmonized common principles and rules in intellectual property law.

Alternate dispute resolution is another field that has acquired prominence, as parties to disputes seek cheaper and faster methods of resolving differences. WIPO was the principle architect of the Uniform Dispute Resolution Policy (“UDRP”), which governs the settlement of disputes relating to abusive registration of trademarks as top-level generic domain names.⁸ The Organization has also been working with many of the operators of the country code top-level domains (“ccTLDs”) to develop domain name dispute resolution mechanisms for their domains.⁹

There are a raft of other exciting areas related to the evolving intellectual property landscape. Policy-makers, for example, are looking at the relevance of tradition-based innovation and creation, which has been largely overlooked by the intellectual property community until recently. It is being increasingly recognized that the economic value of traditional knowledge assets could be further enhanced by the use of intellectual property. Holders of traditional knowledge are starting to explore how best this might be done.¹⁰

An excellent illustration of the imperatives to be addressed in developing an intellectual property system sufficiently flexible to respond to the varying demands of present day circumstances are the two main challenges currently facing the international patent system. The first lies at the operational level, in the light of the dramatic increase in patent applications, and the second lies at the policy level, amidst concerns about the social and eco-

8. See Internet Corporation for Assigned Names and Numbers (“ICANN”), *Uniform Domain-Name Dispute-Resolution Policy*, available at <http://www.icann.org/udrp/udrp.htm>.

9. See WIPO, WIPO Conference on Intellectual Property Questions Relating to the ccTLDs, Feb. 20, 2001, available at <http://ecommerce.wipo.int/meetings/2001/cclds/>.

10. See WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore: Traditional Knowledge*, available at <http://www.wipo.org/globalissues/tk/>.

conomic impact of intellectual property and the perceived effects of the system.

At the operational level, the sheer number of patent applications to be processed is straining the resources of many patent offices that are struggling to meet the expectations of both users and the community generally, in the efficient delivery of their services. This is exacerbated by the steadily increasing range of technological subject matter, which increases the complexity and scope both of the prior art to be searched and of the expertise that examiners need to possess in order to assess patentability.

At the policy level, in spite of unprecedented use of the patent system and the availability of an exponentially expanding volume of information about new technologies — information that would otherwise be undisclosed — and also access to increasingly affordable information technologies for global delivery of this information, concerns have been voiced about the social and economic impact of the patent system and its perceived negative effects.

The fact that the patent system uses private rights as a means of serving public goals leads to a perception that any enhancement of the patent system prioritizes private rights over public welfare. Yet, there is an evident public interest in processing patent applications more efficiently and effectively. A clear distinction must be made between processing and defining patent rights, on the one hand, and regulating the way in which patent rights are exercised and the technologies involved are used (having regard to other public policy mechanisms), on the other. Losing sight of this key distinction can lead to paradoxical proposals, such as that the most important and valuable technological advances should be singled out for denial of patent rights, rather than a consideration of how valid patent rights, once granted, could be managed as part of a nation's stock of intangible assets and exploited for the ultimate benefit of the public.

Recognizing these imperatives and the importance of addressing them in an inclusive manner, such that the concerns of all countries are taken into consideration, WIPO launched its Patent Agenda in 2001,¹¹ to spearhead discussions on the long-

11. See WIPO, *WIPO Patent Agenda*, available at <http://patentagenda.wipo.int/>. See

term development of the international system and on more immediate measures to alleviate the workload crisis. The ultimate aim of the WIPO Patent Agenda is to enhance the Organization's efforts to develop an international patent system that is more user-friendly and accessible and that provides an appropriate balance between the rights of inventors and the general public, while at the same time taking into account the implications for developing countries. We must not lose sight of the fact that the patent system has been developed as a public policy tool that uses the creation and exercise of private rights as a means of promoting the public good.

The ideas, analyses, and viewpoints expressed in journals such as the *Fordham International Law Journal* and its related publications, are an essential element in preparing and planning the journey towards achieving our common goal — ensuring the establishment of intellectual property systems that serve the public good and act as an incentive for innovation and invention. I look forward to studying the rich pool of ideas contained in the Articles and Essay that follow and extend my warm congratulations to the editorial board at Fordham for the timely publication of this issue, which covers many important areas of current interest.