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Emerging Regulatory Issues intellectual property and global value chains

Intellectual property includes several areas of regulation which govern access to and uses of knowledge, information and technology. In addition to having many cultural and social benefits, knowledge, information and technology are key building blocks of an innovative economy. The central and perpetual challenge of intellectual property law and policy is to ensure that there are both adequate incentives for innovators and creators to generate these building blocks, and that those incentives do not overreach so as, in fact, to inhibit innovation. This description, however, no longer tells the whole intellectual property story. This article discusses the emergence through trade and investment agreements

of a changed approach to the objectives of intellectual property protection, and the challenges that approach presents for knowledge-based and innovation development of New Zealand interests.

Intellectual property after the TRIPS Agreement

After the giant leap forward that was the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement (World Trade Organization, 1994) there has been a relentless tide of demands for ever-increasing levels of intellectual property protection. The rhetoric that such increases are to support innovation is still maintained by some, but the United States has openly stated that it seeks increased intellectual property protection to further its export interests. In light of this, consider the following:

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“The [Productivity] Commission considers that Australia should not generally seek to include IP [intellectual property] provisions in further BRTAs [bilateral and regional trade agreements], and that any IP provisions that are proposed for a particular agreement should only be included after an economic assessment of the impacts, including on consumers, in Australia and partner countries. To safeguard against the prospect that acceptance of ‘negative sum game’ proposals [sic], the assessment would need to find that implementing the provisions would likely generate overall net benefits for members of the agreement. (Australian Productivity Commission, 2010, p.264)”

The requirement that there should be an overall benefit for there to be a case for increases in intellectual property protection applies to New Zealand, although such a firm statement as the above has not been publicly made here. The caution that the Australian Productivity Commission expressed arises because increased intellectual property protection is not necessarily desirable as it may be neither innovation- nor trade-enhancing. Intellectual property protection has moved from being primarily about incentives to innovate to becoming a tool that frequently over-protects. This move to over-protection (which is frequently boosted with the rhetoric of property) has been able to gain ground in part because it has been possible to increase protection within intellectual property’s existing framework. Demonstrating overall benefit through evidence before creating more intellectual property obligations should require differentiation between claims to support innovation. So, for example, if we accept the need for patents in order to encourage some types of innovation, then any increases in patent protection should be based on specific evidence of innovation-related problems, not the same bald claim that the increases are simply needed for innovation in a general sense. Identifying the ill-effects of over-protection, which is

in essence protectionist-style intellectual property, should not be mistaken for saying that intellectual property protection is not important. On the contrary, the importance of incentive-based intellectual property law is more crucial than ever.

“To restore a place for balance, international lawmakers and adjudicators must focus on the nature and purpose of that which is being protected. IP lawmakers need to be cognizant of other regimes and public-regarding concerns. In their analysis of issues and interpretation of agreements, decision makers should ensure they remain alert to IP

It might be said that just as the nature of trade negotiations has evolved, the same is true of intellectual property. As Peter Mumford notes, ‘behind the border’ regulation as part of trade discussions is not new to those working in diverse areas, including intellectual property (Mumford, 2014). What is new, however, is the way in which trade agreements are increasingly defining the details of intellectual property laws (which are and always have been behind the border), when these details were previously a matter largely of national discretion, provided certain internationally-agreed minimum standards were met. The framework of the main pre-TRIPS Agreement conventions (Berne and Paris) and the

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values and refrain from contributing to the reconceptualization of the IP regime in ways that lead to longer-term isolation of public regarding interests. As states consider their position in international negotiations, they too must recalibrate. Positions in the technology hierarchy change over time and every state must recognize that the flexibilities that it now wishes to limit may become indispensable to its society’s future well being. Even those in the strong position now may not have considered where this reconceptualization puts them in the future when they are not necessarily at the front of innovation or because they are not in control of the IP intensive part of an innovation-related value chain. In either situation those pushing assetization now may wish for more flexibility in the future. (Dreyfuss and Frankel, 2014, p.46)”

TRIPS Agreement is one of minimum standards of protection. These minimum standards often have flexibility because of undefined terms which national legislatures and courts shape, and there are broad permissions (rather than exact detail) for exceptions.¹ The freedom to provide more extensive protection than the minimum standards require has not just resulted in increased protection, but has also resulted in increased detail about how to implement that protection, and agreements to eliminate existing flexibilities and exceptions.

At the forefront of the US trade-negotiating objectives are increasing protection and enforcement of intellectual property rights. That increases in intellectual property protection are sought is not new, but the intensity of the demands and their impacts on areas of policy outside of intellectual property’s core functions, such as health policy, has become striking.

Existing free trade agreements (FTAs), such as the US–Korea FTA (KORUS), indicate the likely direction of

current negotiations in the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). There are numerous examples of ways in which intellectual property protection has increased. A small sample of examples includes: for copyright, increasing the term and reducing its flexibilities; for patents, allowing for term extension, requiring protection of incremental developments which might not otherwise be patentable (because they fail standards of novelty or inventive step), and increased data protection of information (such as clinical trial information) provided to regulatory agencies; and for trade marks, requiring

of 'rights.' The shift from TRIPS to FTAs and BITs was equally drastic: it converted IP into an investment asset subject to claims of direct and indirect expropriation, thereby emphasizing the rhetoric of 'property'. (Dreyfuss and Frankel, 2014, p.3)

As we note, the effect of these changes cannot be underestimated. Intellectual property law based on incentive rationales also has scope for exceptions to meet competing concerns in areas such as education and health. But some trade and investment rationales are comparatively impervious to flexibility and balancing.

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protection of well-known marks even in instances where there is no consumer deception involved. As Rochelle Dreyfuss and I have noted, each change may look relatively small and be explainable (some perhaps more than others). Collectively, however, they are reconceptualising intellectual property protection away from a balanced regime designed to create and enhance innovation incentives to a mechanism which treats intellectual property both as a commodity in need of extensive protection and as an asset requiring investment protection.

The development has entrenched a new qualitative vision of IP, one that drives a fundamental reconceptualization. Thus, a comparison of the WTO's TRIPS Agreement with the original General Agreement on Tariffs and Trade (GATT) moved from framing IP as a barrier to trade into conceptualizing it as a tradable commodity in the name of facilitating trade. It put enforcement on the international agenda and emphasized the rhetoric

The shifting nature of intellectual property law and policy

If one looks at the role of intellectual property law from a domestic perspective, then the rationales are neither surprising nor indeed new. Using trade marks as an example, they are identifiers of goods and services in trade. They serve to distinguish one trader's goods from those of another trader and the legal protection of registered trade marks is based on this distinguishing, or badge of origin, function. Economists provide nuance to this badge of origin role and suggest that trade marks also lower consumer search costs and foster quality (Landes and Posner, 2003). Perhaps the greatest challenge to this traditional trade mark role has been online. Courts first stretched the law of passing off and registered trade mark law to prevent 'cybersquatters' on domain names (Frankel, 2011, pp.825-42). The next online challenge is whether Google advertising words can amount to trade mark infringement.² As isolated legal developments these look like natural progressions, but the expanding protection of trade marks is packaged into trade agreements. Through this

mechanism, trade mark law is likely to expand to require protection of foreign marks that are well known, even when use of those well-known marks does not cause consumer confusion.³ What is well known in New Zealand does not necessarily result in correlative protection overseas. It is harder to be well known internationally when originating from New Zealand when well-known is defined on an international scale.

This expansion matters because it moves trade mark law away from a badge of origin function, which has incentive values, to a property function which cannot easily be affected by other regimes. The central issue in an intellectual property-related investment dispute is not whether the incentive function of intellectual property is adversely affected, but whether the value of the intellectual property right has been impaired in some way. Of course, the exact details of each claim will vary depending on the investment agreement at issue and the subject matter involved. To be clear, investment agreements may have value; however, intellectual property as an investment is not a straightforward matter, as current disputes over trade marks (plain packaging)⁴ and patents (revocation of patents that have no utility)⁵ show.

The expanding nature of patent-related protection is no longer confined to patent law itself; regulatory measures, which have as their primary goal the health and safety of medicines, are fast becoming vehicles to extend patent life. Trade agreements include requirements to extend data protection of clinical trial information that has been provided for the medicines approval system, and especially where there is or has been a patent involved.

Intellectual property's progressive reconceptualisation is resulting in conflict with areas of policy that it should support. Intellectual property protection should not be the enemy of innovation and creativity, or indeed health and environmental policy (to name a couple of overlapping areas). For New Zealand this means that, more than ever, we cannot act as if increases in intellectual property protection will not matter. Precisely the

opposite is true. The goods and services of the 21st century frequently depend on intellectual property (they may themselves even be intellectual property which is tradable in its own right). We need to ensure that there is adequate flexibility within the system to incentivise local innovation and to create business opportunities for using and developing intellectual property. Such incentives do not come purely from importing technology, which may well be costly to license, or developing predominantly domestic-based businesses. They may well come from New Zealand-based entities (including businesses and researchers) being part of global value chains.

There is an overused statement that, as net importers of intellectual property, we are in a different position from net exporters. That's almost certainly so when it comes to products such as Hollywood movies and smart phones. Buyers always have different interests from sellers, but the position is now vastly more complex. Part of that complexity arises from the way in which intellectual property and global value chains are developing. If we use the definition of global value chain which includes research and development (R&D), manufacture and distribution, we can see that intellectual property can be involved at various points in that chain. Studies of global value chains will often show that the most valuable parts of the chain involve intellectual property (see, for example, NZPECC, 2013). New Zealand's traditional goods and even some service industries are generally adept at being at parts of the value chain other than where intellectual property resides. However, we do see examples of businesses where this is not so, and these include businesses that both generate intellectual property and contribute to R&D.

Globally, it has become a fallacy to treat R&D as always emanating from one entity based in one jurisdiction, with another entity (related or contracted) undertaking manufacturing and distribution. Global value chains are, of course, diverse in their make-up (Mumford, 2014), but they now include not only contributions of physical components or added services, but also contributions of intellectual property (including R&D) at different

parts of the chain. Much intellectual property law, however, has evolved from a system which assumes a type of business model in which R&D is mostly based in one jurisdiction (manufacturing may have moved offshore). This model assumes that, apart from unauthorised or even unavoidable free-riding, R&D and distribution remain components of a value chain within the control of the key player (which may be licensed in some instances). There seem, however, to be few New Zealand businesses that operate in this way. While nothing in the law requires use of an explicit business model, certain assumptions about the relationship between intellectual property and innovation are based on that model. Consequently, we can ask whether aspects of intellectual property law are a bad fit for differing business

and economic policy. The parameters of intellectual property law are multifaceted, and its impacts not always immediate. So sometimes (as with all forecasts) it has been difficult to predict long-term effects of over-protection. The expansive creep of intellectual property protection into business methods – know-how, for example – has already had significant impacts on innovation, and will continue to do so.

At the beginning of this article I noted the call of the Australian Productivity Commission to look at the costs and benefits of intellectual property protection before adding to it. There are many who are trying to do exactly that in a variety of ways. The evidence-based policy industry has spawned an evidence-based intellectual property research industry.

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models, such as those that are part of a global value chain but not in control of that chain. The answer is almost certainly yes, as New Zealand businesses make very little use of the New Zealand patent system.⁶ Some businesses make more use of overseas patent registration where their markets are. This would be one reason why we need a patent system, but it is questionable whether that system is appropriately tuned for local interests. Do we, for example, have enough exceptions in patent law?

The overlap of intellectual property and other regulatory issues

Because intellectual property involves matters such as pharmaceuticals, it has an impact on the cost of health care. Patented green technologies have an impact on the environment (Blakeney, 2013). Protection of copyright works may control access to information and cultural goods, which in turn shapes our culture. In short, intellectual property law affects social

data to effectively answer all questions about the impacts of much regulation, including intellectual property law (Frankel and Yeabsley, 2014). We may not even have resources to gather all data, or indeed to answer all questions, but evidence about the effects of intellectual property law on New Zealand innovation is worth pursuing. We need better data to answer some of the detailed questions because bad intellectual property law can have considerable adverse economic effects. The relationship between New Zealand's service industries and their uses of intellectual property is one key example.

Like other countries, we need to better monitor and review intellectual property law, especially where we have New Zealand experimentation (Colon-Rios, 2014). An example is provided by the computer software exception in the Patents Act 2013. That ensures that computer software as such (which is really an algorithm) is not patentable.⁷ We will

need to review if and how this has helped New Zealand businesses. In copyright law, has our unique legislation around technological protection mechanisms benefited users of copyright works?

Conclusion

There are at least two key questions about New Zealand intellectual property law and our consequent approach to trade and investment agreements. What effect do increased standards have on businesses which generate intellectual property (including R&D) components in the value chain? And what effect does intellectual property law have on businesses where a commodity (e.g. milk, meat, dairy) is produced in New Zealand and the greatest value added to it is offshore and by others. The answers

are likely to be very different, but trade agreements create an alliance between these concerns. In both instances, the tighter the policy space around intellectual property, the less likely New Zealanders will be able to increase and benefit from innovation opportunities.

- 1 These agreements provide for minimum standards of protection in intellectual property and require that those minimums are enacted in domestic law. Flexibilities exist where terms are not defined, such as patent laws, criteria of novelty and inventive step. Exceptions are a matter of national discretion within compliance with certain parameters known broadly as the three-step test. There are some variations between these tests in the different areas of intellectual property. There are relatively few exceptions outside of this test, such the permitted act of attributed quotation in copyright and exceptions for methods of medical treatment in patent. Consequently, the ability as a practical matter to limit the making exceptions is open as a matter of practice in trade agreements; whereas the rights cannot be so limited they can only be expanded.
- 2 *In Intercity Group (NZ) Ltd v Nakedbus NZ Ltd* [2014] NZHC 124, the particular ad words at issue were found not to amount to trade mark infringement. In other situations, use of Google ad words may amount to trade mark infringement: see *Interflora v Marks and Spencer* [2013] EWHC 1291.

- 3 Protection of well-known marks is already required under the Paris Convention, which is incorporated into and expanded in the TRIPS Agreement, article 16. The protection of well-known trade marks from so-called diluting effects is an ever-expanding area of trade mark law. See WIPO and Assembly of the Paris Union for the Protection of Industrial Property, Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks, available at <http://www.wipo.int/export/sites/www/freepublications/en/marks/833/pub833.pdf>, which some trade agreements are now requiring compliance with.
- 4 Australia is subject to an investment dispute claim brought by tobacco company Philip Morris Asia under the 1993 investment treaty between Australia and Hong Kong: see the claim and response, available at <http://www.ag.gov.au/tobaccoplainpackaging>.
- 5 Eli Lilly is presently suing the government of Canada for the revocation of two patents under the investment chapter of the North American Free Trade Agreement (NAFTA). The revocations in question have been considered by nine different judges in the Canadian system. See *Eli Lilly and Company v Canada* (ICSID case no. UNCT/14/2) claim and response, available at <https://icsid.worldbank.org/ICSID>.
- 6 The answer is likely different for trade marks, and different again for copyright.
- 7 Patents Act 2013, section 11.

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