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Flexibility and Balance: Solutions to the International IP Problem

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FLEXIBILITY AND BALANCE: SOLUTIONS TO THE INTERNATIONAL IP PROBLEM

Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS

By Ronald O'Leary

I. INTRODUCTION

Countries have recognized for centuries the importance of Intellectual Property (IP) to public welfare. However, IP is now being more strongly enforced than before and on a global scale.¹ The objects of protection have expanded, IP is now protected over greater geographical scales, and the duration of IP rights are now longer.² The work entitled “Intellectual Property Rights in A Fair World Trade System: Proposals for Reform of TRIPS” discusses one of the global IP enforcement mechanisms: The World Trade Organization’s Agreement on Trade Related Aspects of Intellectual property (TRIPS). This work questions the extent to which TRIPS benefits developing countries, and it suggests that the treaty should be more flexible with IP being balanced against considerations of social welfare.

This review first discusses the alleged problems with TRIPS and how these problems manifest themselves in the areas of human rights and piracy. Fundamentally, the problems are a lack of flexibility that prevents countries from pursuing their own welfare and a prioritization of IP over social welfare where the two conflict. This review then discusses the proposed solutions to these problems. The work states that the WTO’s interpretations of TRIPS should be more flexible so that countries may pursue their objectives without conforming to strict international standards. The book also says that TRIPS should contain more clauses balancing the interests of right holders and the public. This would supposedly ensure that special interests cannot control the implementation of TRIPS at the expense of public welfare. Overall, this work effectively describes the problems with TRIPS in the areas of human rights and piracy. It also presents a compelling case for interpreting TRIPS more flexibly so that countries can address their own situations without conforming to international standards that are strict and potentially harmful. However, I do not understand how the balancing requirements would improve the situation.

II. SUMMARY

A. Problems with TRIPS

1. Background

This work first discusses the historical rationales for protecting rights in ideas. The rationale for IP has shifted from natural rights to a utilitarian balance of the innovators’

¹ Marianne Levin, *The Pendulum Keeps Swinging – Present Discussions on and around the TRIPS Agreement*, in *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS 3* (2011).

² *Id.*

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interest and those of the public.³ IP is necessary to ensure that innovators will be rewarded for expending their time and labor.⁴ This profit incentivizes the innovators to create new products that will benefit the public.⁵ Countries must balance this interest of the innovators against the risk of monopolization and market dominance.⁶ However, this balance is threatened by the fact that legislation is initiated by industrial right holders and the fact that this legislation is negotiated in secret.⁷ This could possibly encourage countries to pursue economic competitiveness instead of social benefit when protecting IP.⁸

2. *Human Rights and Social Welfare*

Since the late 19th century, countries have attempted to harmonize IP law. The first IP treaties, the Paris Convention on the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, did not require states to conform to international standards when protecting IP.⁹ However, this changed when the World Trade Organization (WTO) enacted TRIPS in 1995.¹⁰ The WTO's goals in enacting TRIPS were to facilitate global trade and to strengthen protection of IP rights.¹¹

However, the risk is that TRIPS might strengthen IP monopolies, which could prevent free trade and hinder technological and social progress.¹² In fact, TRIPS might not actually benefit developing countries because it includes the norms of developed countries.¹³ For example, TRIPS was drafted to promote corporate control over new ideas.¹⁴ These norms might not encourage IP protection in developing countries but merely protect the economic leadership of developed countries. TRIPS requires member states to conform to minimum standards when protecting IP rights.¹⁵ Member states may give greater IP protection than TRIPS requires, and they may include other forms of protection not mentioned in TRIPS.¹⁶ However, member states may not enact more lenient forms of protection.¹⁷ This standardization has consequences for such aspects of human security as nutrition and public health. Countries have accordingly fought to make TRIPS more flexible so these countries could pursue their own national objectives.¹⁸

However, TRIPS only allows countries limited discretion when pursuing their own national objectives. One article in TRIPS, Art. 8:1, seems to allow countries to implement public measures that would override IP protection. Art. 8:1 says:

³ *Id.* at 5.

⁴ *Id.* at 6.

⁵ *Id.*

⁶ *Id.* at 6-7.

⁷ *Id.* at 7.

⁸ *Id.*

⁹ *Id.* at 12.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 13.

¹³ *Id.* at 16.

¹⁴ *Id.* at 12.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 17.

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Members may, when formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public's 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.¹⁹

Art.8:1 leaves countries with broad discretion when deciding on what policy goals to adopt.²⁰ However, the requirement of consistency with TRIPS leaves countries with fewer options than one might expect when first reading the article.²¹ The treaty evaluates domestic exceptions to IP protection based on whether they economically harm the right holder.²² Specifically, TRIPS requires that exceptions to IP protection be "limited and confined to 'certain special cases'; these exceptions may not (unreasonably) conflict with a normal exploitation of the protected subject matter and may not unreasonably prejudice the legitimate interests of the right holder."²³ Therefore, right holders' interests overrule public policy objectives when the two conflict, and countries do not have much policy space to work around this problem.²⁴

This conflict between IP rights and other human rights is exacerbated by the origins of international law on these subjects and the enforcement of these laws. International human rights were meant to be comprehensive. Additionally, individuals may, under international law, assert their rights against governments.²⁵ In contrast, trade rules, such as those found in TRIPS, were adopted gradually and involved many compromises.²⁶ Furthermore, trade rules are seen as rights of states, not of private parties.²⁷ IP rights are the only private rights that the international trade regime recognizes.²⁸ Regarding enforcement, trade rules are binding treaties, while the Universal Declaration on Human Rights is not binding.²⁹ Furthermore, there is no judicial means of quickly and efficiently addressing human rights violations; in contrast, there are means of addressing violations of trade rules.³⁰ As trade rules have taken more authorities from national governments, the risk of conflict with human rights increases.³¹ To sum up, TRIPS prioritizes IP rights over human rights, and countries have little flexibility to legislate on important social issues; this problem is compounded by the inefficient enforcement of human rights on an international scale. The next paragraphs discuss how this conflict has negatively affected national legislation on health and food.

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognizes rights to both health and food.³² The lack of flexibility in TRIPS has negatively

¹⁹ Henning Grosse Ruse-Khan, *Assessing the Need for a General Public Interest Exception in TRIPS*, in *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* 169 (2011).

²⁰ *Id.* at 172.

²¹ *Id.*

²² *Id.* at 182.

²³ *Id.* at 183.

²⁴ *Id.* at 184.

²⁵ Frantzeska Papadopoulou, *TRIPS and Human Rights*, in *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* 270 (2011).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 274.

³⁰ *Id.*

³¹ *Id.* at 272.

³² *Id.* at 284-85.

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affected national legislation regarding these rights. Before TRIPS, many developing countries failed to adopt patents for drugs because these countries saw patents as a barrier to public health.³³ After the WTO adopted TRIPS, drug companies used it to restrict developing countries' access to essential drugs.³⁴ This was occurring as countries were fighting the spread of HIV/AIDS. The WTO made TRIPS more flexible in 2001 so that countries could address their public health concerns.³⁵ However, there are still concerns that these amendments have not sufficed because drug companies have other free trade agreements have undermined the flexibilities in TRIPS.³⁶ This problem is strengthened by TRIPS' requirement that any public health measures be consistent with the agreement.³⁷

Regarding food security, the biotechnology industry has recently focused its efforts on developing a few commercially profitable crops at the expense of agricultural diversity.³⁸ This could negatively impact farmers in developing countries, who use diversity in crops to protect against pests and changes in climate.³⁹ If these farmers start using a small variety of crops, this could make seeds more vulnerable to destruction, thereby undermining food security in developing countries.⁴⁰ None of the current forms of IP protection are useful in addressing the problem, and most of the useful means would conflict with TRIPS.⁴¹

3. Piracy

Piracy has become a major problem in the beginning of the 21st century.⁴² TRIPS defines pirated copyright goods as:

any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.⁴³

Pirated goods have recently included foods, pharmaceuticals, clothing, cigarettes, electrical equipment, CDs, and DVDs.⁴⁴ Piracy has had several negative effects. Industry groups have estimated that pirating and counterfeiting make up 15-20% of total sales. It is also estimated that these activities cost \$250 billion worldwide, but the total loss due to piracy is impossible to determine.⁴⁵ Additionally, piracy could negatively affect consumer welfare

³³ See Levin, *supra* note 1, at 34.

³⁴ *Id.*

³⁵ *Id.* at 35.

³⁶ *Id.*

³⁷ *Id.* at 36.

³⁸ *Id.* at 38.

³⁹ *Id.* at 38.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Andrea Wechsler, Spotlight on China: Piracy, Enforcement, and the Balance Dilemma in Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS 71 (2011).

⁴³ *Id.* at 72.

⁴⁴ *Id.* at 74-75.

⁴⁵ *Id.* at 76.

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because the products that consumers buy may have a low quality.⁴⁶ Finally, piracy could discourage companies from innovate because others may pirate the innovators' goods.⁴⁷

Despite these negative effects, piracy could also benefit developing countries. Piracy generally affects developed countries more adversely than it affects developing countries because most right holders come from developed countries.⁴⁸ In fact, piracy could benefit developing countries in some respects by providing consumers with products at a lower price.⁴⁹ Developing countries cannot access original products because of the IP rights surrounding them; this incentivizes the piracy of these original goods.⁵⁰ In summary, the overall effects of piracy are hard to determine.⁵¹ Consequently, policies regarding piracy should be tailored to each country's circumstances.⁵²

China shows how current anti-piracy efforts are futile. China is the world's largest source of pirated goods.⁵³ Chinese authorities have conducted raids that have resulted in them seizing 400 million counterfeit goods and \$500 million worth of software. The government has also increased damage awards to plaintiffs.⁵⁴ Nevertheless, the value of pirated goods has increased due to the stronger enforcement of IP rights.⁵⁵ Therefore, China has been fighting a losing battle by confronting piracy with its current methods. Additionally, piracy allows consumers to access products that they could not afford otherwise.⁵⁶ This point is strengthened by the fact that China is still a developing country where 200 million people live on less than 1 per day.⁵⁷ Therefore, the Chinese government has little incentive to protect IP rights of people in developed countries because piracy provides access to alternative goods while China's economy continues to develop. In short, the current international hostility to piracy does not account for how piracy benefits China.⁵⁸ This is another example of how TRIPS does not adequately ensure that countries can promote their own welfare.

B. Solution

This work says that the international community can solve these problems by allowing countries more flexibility when integrating TRIPS into their public policies.

1. Interpretation

One proposal is to interpret TRIPS in a manner that recognizes TRIPS' objectives of balance and sustainable development. Art.7 of TRIPS sets out the objective of balancing the

⁴⁶ *Id.*

⁴⁷ *Id.* at 77.

⁴⁸ *Id.* at 78.

⁴⁹ *Id.* at 77.

⁵⁰ *Id.* at 82.

⁵¹ *Id.* at 77.

⁵² *Id.*

⁵³ *Id.* at 84.

⁵⁴ *Id.* at 85.

⁵⁵ *Id.* at 86.

⁵⁶ *Id.* at 90-91.

⁵⁷ *Id.* at 88.

⁵⁸ *Id.* at 91.

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rights of IP holders and the public's interest in the dissemination of technologies.⁵⁹ This is in addition to the public interest provision in Art.8:1, which says that countries may legislate for the public health as long as such legislation is consistent with the rights of IP holders.⁶⁰ Therefore, the WTO should interpret ambiguities in TRIPS in a way that recognizes both the balancing objective of Art.7 and the public interest provisions of Art.8:1.⁶¹

Furthermore, TRIPS should be interpreted to further the objective of sustainable development. This objective is set forth in the preamble of TRIPS, which seeks:

the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [the parties'] respective needs and concerns at different levels of economic development.⁶²

In other words, TRIPS should be interpreted in a way that reconciles the economic interests of right holders with the public's social and environmental interests.⁶³ Because TRIPS does not provide the means for reconciling these interests, countries must reconcile these interests themselves. This requires sufficient flexibility in TRIPS.⁶⁴ Of course, the WTO cannot provide flexibility when a term of TRIPS is unambiguous.⁶⁵ When a term only has one meaning and that meaning prioritizes IP over public welfare, the WTO cannot give countries flexibility in that case. Consequently, the flexibilities that will allow countries to act will come from the interpretation of ambiguous provisions in TRIPS.⁶⁶

2. Amending TRIPS

The work also suggests some amendments to Art. 8 of TRIPS. These amendments would allegedly balance more effectively the interests of right holders and of the public. For example, one amendment would require the establishment of an IP system in each country that accounts for that country's level of economic development.⁶⁷ The work also suggests additional balancing clauses that would balance the private interests of right holders and the larger public interest.⁶⁸ The hope is that these changes would prevent large right holders from using their rights to undermine a country's social welfare.⁶⁹

III. ANALYSIS

This work throws light on important issues and proposes some interesting solutions to these problems. As companies operate in more countries, they will naturally want more uniform and predictable IP laws. However, most of these companies are from developed countries, which need not worry about food and health as much as developing countries must.

⁵⁹ Grosse Ruse-Khan, *supra* note 19, at 200.

⁶⁰ *Id.* at 201.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 202.

⁶⁵ *Id.*

⁶⁶ *Id.* at 203-04.

⁶⁷ Wechsler, *supra* note 42, at 92.

⁶⁸ *Id.*

⁶⁹ *Id.*

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Consequently, developed countries, which have significant power in the international community, have an incentive to prioritize protecting IP while developing countries focus their priorities on increasing their social welfare. This does not necessarily imply any malice on the part of developed countries. As the work says, this priority results from the fact that developed countries want to ensure that their companies' IP rights are protected. Developing countries surely have this goal as well; however, conflicting concerns about social welfare are probably more pressing than in developed countries. Because developing countries must contend with the developed countries' priorities, developing countries do not have much space to address these problems within their own borders.

The work's argument regarding piracy is also compelling. If IP owners refuse to let their products into developing countries, this leaves a lot of unsatisfied demand. There is thus a vacuum waiting to be filled. This incentivizes "pirates" to copy or counterfeit these original products and to meet the demand in developing countries. As the work says, the pirates sell these illegal copies at a lower price. It is true that these products might have a lower quality, but consumers are getting a service they would not get otherwise.

This being the case, no international body should impose a one-size-fits-all regime on every country. A country's government knows its country's situation much better than a distant, international authority. Therefore, it follows that countries should be given ample policy space to legislate for their own welfare. Interpreting ambiguous TRIPS provisions in favor of flexibility would be an effective way to give countries policy space while not undermining TRIPS as the WTO enacted it.

However, it is unclear how amending Art. 8 to include balancing clauses would improve the situation. Art. 7 already seeks to balance private and public interests. So, the WTO could interpret Art. 7 in a way that would give countries more policy space. Someone might respond that the WTO has not interpreted Art. 7 to give countries sufficient flexibility; therefore, the Art. 8 amendments are necessary. However, my response is that just because Art. 8 of TRIPS is amended, that does not ensure that the WTO will start giving countries more flexibility. If the WTO has not adequately applied the Art. 7 balancing clause, it might not adequately apply Art. 8 balancing clauses. Therefore, I would have liked to see a discussion on why Art. 7's balancing clause is insufficient and how additional balancing clauses would address the problem.

IV. CONCLUSION

Overall, this work is persuasive when discussing the problems with TRIPS. This work describes how the different values of developed and developing countries cause the developed countries' interests to take precedence. The work is also persuasive when arguing for greater flexibility in TRIPS so that countries can address their own situations regarding social welfare. However, I am unpersuaded that additional provisions regarding balance would address the problem. If the current provisions in Article 7 regarding balance are inadequate, I do not know how additional balancing provisions in Article 8 would improve the situation. Nevertheless, this work offers a valuable perspective on TRIPS, which is one of the most important contemporary international IP agreements.

