Is There a “Middle Way” in International Intellectual Property?

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“What side are you on?” is now a common question in intellectual property (IP) debates. IP is viewed as reflecting fundamentally binary and opposing positions of “right holders” and “users”. The discussion is all about new rights and enforcement tools on one side, and flexibilities (exceptions and limitations) on the other. It is, if one listens to advocates on both sides, a zero-sum game. What one side wins the other side must lose.

This IP civil war has taken many forms. At the World Intellectual Property Organization (WIPO), on the one hand there is a slew of new treaties to protect rights including the Beijing Treaty for Audiovisual Performers signed in 2012; the Geneva Act of the Lisbon Agreement to protect geographical indications (GIs) (signed in May 2015), and ongoing work on a treaty to protect broadcasters’ rights. On the other hand, there are instruments and initiatives to protect users: the Marrakesh Treaty providing access to visually impaired users signed in 2013, and ongoing work on a treaty on libraries and archives. These new agreements are liable to create a patchwork of instruments, ratified by different countries, resulting in a tapestry of varying levels of protection, which is likely to be impractical. How such a tapestry might be enforceable and whether it functions effectively in an environment where many valuable uses take place online are valid questions.

To make matters even more complex, regional and like-minded trade agreements add new norms that typically favor right holders. Those norms differ from agreement to agreement and in some instances are specifically aimed at reducing the space available for flexibilities. In the worst case scenario, a country may have to choose to violate treaty A in order to comply with treaty B. Indeed, the interface between various sets of norms is often unclear, both normatively and doctrinally. The determination of the conditions under which a GI becomes generic in the

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Transpacific Partnership Agreement (TPP) as compared with the Geneva Act of the Lisbon Agreement comes to mind. Unlike Lisbon, the TPP comes with dispute-settlement teeth, however, which might give it *de facto* political supremacy over other sets of norms. The interface between patent protection of pharmaceuticals and data protection (essentially the period of time during which a generic manufacturer is prevented from relying on the marketing approval granted to a patent holder) is another example. A flexibility available under the patent norms of the TRIPS Agreement may not be available to limit protection of clinical data submitted for regulatory approval of a new drug, or a new version thereof. A final example is the US Digital Millennium Copyright Act. Instead of coherent legislation to implement the WIPO Copyright Treaty's anti-circumvention provision based on clear principles, the DMCA contains a series of rights and liability exemptions for those lobbies powerful enough to get them. Fortunately a small safety valve in the form of "rule-makings" by the Copyright Office (Library of Congress) was added to the statute.

Advocates on "both sides" use terms to label their opponents. One is either an IP maximalist or an IP reductionist (or, in a more extreme version, an IP abolitionist). What are we to make of this? One can of course accept that a binary situation (pro or against IP) is the only realistic path, and thus accept the need for these two "sides" to battle it out on every issue, leading to rickety public choice outcomes – with few if any guiding principles is the way things must be. Another option is to seek a middle way. There was a time when middle way was not a dirty word. It is, for example, a central tenet in Buddhism. The Buddha apparently used the term "Middle Way" in his first Discourse. Somehow, however, I doubt that Buddhist direction will be enough to drive the outcome of IP discussions. Buddha aside, then, one might be forgiven for thinking that the task of policymakers is to listen to all views and find policy outcomes that ideally satisfied the needs of various constituencies. A world in which one constituency wins and the other loses – the current international IP negotiation posture – is thus suboptimal. Is finding middle ground, a compromise, a "deal" and staying away from extremes unacceptable?

The two "sides" are often pale reflections of the colorful interests of stakeholders they purport to represent. In copyright, the debate is too often between major media companies and major Internet intermediaries. In patent law, it is between research-based pharmaceutical companies and generic manufacturers, with increasingly important input by telecommunications and software-based industries. Whether the much-maligned "public interest" is adequately reflected by those proxies is a question worth pondering. It is unlikely that the public interest is best served by having always more or always less IP (the two extreme positions). Then, unless one agrees with the abolitionist positions, including deleting the Berne and Paris Conventions and TRIPS Agreement, all ratified by at least 160 countries, one could posit that IP is there to stay and that major international IP instruments are unlikely to be jettisoned. That provides a baseline.

I suggest a better approach is to go back to "normative basics"; namely why do we have these IP systems of rights and exceptions. What are they supposed to achieve? Then one can ask how to make the system work for all stakeholders, taking

due account of the fact that each country or region needs some room to calibrate their intellectual property regime to their own situation.

If one takes copyright, for example, we know that most authors want attribution, many want remuneration, and some want control over at least certain forms of exploitation. This can be achieved by focusing rights on commercially significant uses and proper licensing accompanied by exceptions and limitations and a mechanism to deal with orphan works. As long as the discussion is binary and polarized between “it should all be free” and “I want to decide each time someone uses my property”, the discussion will go nowhere. A new Act of the Berne Convention (last revised on substance in 1967 with an Appendix added in 1971) is an example of middle way forward: redraft the rights, exceptions and limitations to reflect digital uses and add appropriate enforcement (there is very little in the 1971 Act of the Convention).

It is not just copyright that is afflicted with the “one-side-must-win” virus. Every area of IP can tell a stalemate story. The Lisbon Agreement redraft effort that ended with the adoption of the Geneva Act in May 2015 is a good lesson in what not to do. It would have been possible to reconcile the interests of GI producers (many of whom are European) with the needs of countries where certain GIs are considered generic. A reasonable proposal to allow countries to refuse to enforce a GI when the owner of that GI had abandoned it or failed to take reasonably diligent action to enforce it was removed, without discussion or explanation a few hours before the text was open for signatures. One side had to “win”. The result is that the potential bright future of Lisbon and GI protection is now much less promising.

To list all of the binary positions that are likely to achieve suboptimal IP unfortunately goes on. The point is made without cataloguing polarities. If everyone wants to partake in the innovation and creativity opportunities that IP can support then the middle way, compromise and “bi-partism” should lead the way.