**Intellectual Property Protection: A Patchwork of Confusion?**

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Practically everything distributed, marketed and sold has one or more forms of intellectual property incorporated or embedded in the product. Whether copyright, trademark, patent, trade secret or other form of intellectual property right (IPR), they are the subject of sometimes complex and mind-numbing rules for protection. Today, the complexity grows not only due to the introduction of new products, inventions, creations and technology, but also due to legal instruments at the national and international levels that are complicating the landscape.

The proliferation of new directives, regulations and agreements regarding intellectual property will require companies with expansive intellectual property portfolios to analyze the new developments and adapt their activities to the changing landscape of intellectual property protection. Given the proliferation of the directives, regulations and agreements, help will likely be needed to understand how these new instruments will impact a company's strategies and tactics in protecting intellectual property assets.

While the world's largest multi-national corporations (MNCs) are likely to be more aware of these developments, small and medium enterprises may be in shock as the speed of developments stretches human and financial resources as they try to understand what is happening (and we may all need to beware of the individual professing to know it all).

The "developments" discussed here are not about the new inventions and technologies being developed and the related debates about the relevant type of intellectual property that attaches or the scope of their protection. Rather, the discussion is about the rapid developments in new IPR standards agreed to at the bilateral and regional levels and how companies may need to cope with the fast-paced changes occurring at these levels.

The current global flood of counterfeit and pirate products finds numerous MNCs compelled to search for an answer about ways to combat this ever-growing problem. One element of a possible solution is to look to governments to raise enforcement standards. In the absence of any indication that there will be a multilateral effort to raise IPR enforcement standards within the WTO context in the near future, bilateral and regional governmental efforts have provided alternatives.

***Europe***

Perhaps while long in coming, intellectual property owners operating within the boundary of the European Union will have a new border enforcement regime to consider in their day-to-day enforcement efforts beginning July 1, 2004. In addition, the new European Union intellectual property enforcement directive is already the subject of analysis to determine any possible changes to the day-to-day enforcement of intellectual property.

These are the obvious and near term changes that will be analyzed so that companies can adapt to these immediate changes. Although it takes time to understand how the authorities—police, customs, prosecutors and the courts—will actually implement these new regulations and directives, at least these provisions are available for initial analysis. Therefore, these regulations and directives that have either been concluded recently or will become final in a matter of weeks or months are not the complicating factors for intellectual property owners. Rather, it is the patchwork of free trade agreements that are being negotiated or will be negotiated that create a complicated global environment.

At the moment, the European Union's activities in FTA negotiations may not be a factor as much as those the United States is now negotiating. To the extent that an EU-Mercosur FTA is concluded later in 2004 to promote trade, with IPR standards not part of the overall agreement, it leaves European MNCs that are active in the Mercosur countries (Argentina, Brazil, Paraguay and Uruguay) vulnerable, without improving legal tools, to high levels of piracy and counterfeiting. The region is known for its high levels of trade in pirated and counterfeit goods.

Regarding the EU-Gulf Cooperation Council (GCC) FTA, it is unlikely to raise IP standards given the 15-year effort to conclude an FTA, which is now expected by the end of 2004. Here again, however, the GCC poses serious challenges to MNCs due to the region's high levels of counterfeit and pirated goods. The EU has been pursuing an FTA with Syria, which would include an IPR chapter, though unclear if it would do anything more that reaffirm current international obligations. While the EU-Syria negotiations have run into problems in recent months, the negotiations for this and other FTAs provide some indication of how the EU is addressing (or not) IPR enforcement standards.

European MNCs will have to make a special effort to persuade the EU to engage trading partners in raising standards of IPR enforcement given the efforts by other countries.

***United States***

The numerous bilateral free trade agreements (FTA) concluded recently between the United States and its trading partners (e.g., Australia, Central America, Chile, Morocco, and Singapore) are concrete examples of raised IPR enforcement standards in the absence of any other multilateral vehicle to raise enforcement standards. Even here, however, the U.S.'s model agreement is simply that—a model. Each FTA must be analyzed as a separate agreement having its unique features and requiring IPR owners to look closely at all the provisions, including the IPR chapter and its enforcement provisions. Thus, as the U.S. Government and its trading partners reach agreement, industry will have to examine the texts and determine what is different with each agreement.

Moreover, in agreements such as the one with Central America, some IPR enforcement provisions are subject to different transition periods. Thus, a particular enforcement provision may be required to be in effect in one country on one given date while the same provision will not go into effect in another country until a later date. Such an agreement will require IPR owners who are beneficiaries of these enforcement provisions to monitor

the effective dates of enforcement provisions in each of the five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) given that the effective dates are likely to differ. The fact that the United States is a party to all of the FTAs mentioned, should not lead us to assume that the enforcement provisions are identical in each case. The resources needed simply to track the FTAs the U.S. has concluded is a chore, but will be necessary.

Because each of the FTAs concluded recently include an IPR chapter, IPR owners seeking to benefit from the enforcement provisions will have no choice but to analyse each FTA. Indeed, each of these negotiations has been an opportunity for IPR owners to ensure that weak enforcement provisions are strengthened and that the ambiguities in the WTO TRIPS are clarified. Tracking just those FTAs being negotiated and concluded by the U.S. will become a bigger challenge as many new FTAs are expected in 2004 and 2005. Indeed, several more FTAs will be forthcoming, including agreements with Thailand, Panama and the Southern African Customs Union.

***Broader View***

While IPR owners are taking advantage of the U.S. FTAs to raise the bar on IPR enforcement, are IPR owners in other countries lobbying and prodding their governments to promote stronger IPR enforcement provisions? In recent months, reports of FTA negotiations have been plentiful. The initiation of or announcements of FTA negotiations have been numerous and include the following: ASEAN-China, Australia-China, Chile-China, India-China, MERCOSUR-China, SACU-China, Japan-South Korea, Australia-ASEAN, Chile-India, and Singapore-Pakistan.

Many issues of concern should be evident from the list of FTAs that will likely be concluded in coming years, but only a few are raised here. First, in view of the massive international trade in counterfeit and pirated products, MNCs should be ensuring that Governments include IPR in all of these FTAs. The short list above demonstrates the future patchwork global environment of trade pacts that will dictate trade issues, including IPR. The short list includes China as a party to numerous future agreements and this one fact should be of concern and an opportunity to attempt to impose higher enforcement standards on China to take effective enforcement steps to protect IPR. Conversely, the possibility exists that China will use its economic leverage to avoid IPR obligations and require its trading partners to reduce or eliminate any procedures that might slow the movement of goods, legitimate or otherwise, across borders.

Second, because MNCs are IPR owners in numerous countries and can seek to have their rights enforced in multiple national jurisdictions, they should be lobbying to obtain as much harmonization of the IPR provisions as possible regardless of the parties to the FTAs. Globalization makes MNCs corporate citizens in numerous countries, contributing to numerous national economies. Therefore, they have a vested interest in ensuring that FTAs contain provisions that are the same in as many agreements as possible and lessen the resources needed to understand the differences that can result from agreement to agreement.

Third, IPR owners and governments will have to engage in determining how to resolve the many conflicts that are likely to arise. There is no doubt that one situation we can expect is that a particular trading partner will agree to different obligations with different trading partners. Illustrating this point, given that Australia has an FTA with the United States and seeks to conclude one with China, how might China-U.S. trade be affected if Australia's obligation as to a specific IPR enforcement provision is different with each FTA partner? While there may be no impact on the China-US trade relations, it may still require the investment of some resources simply to conclude that there is no impact.

Fourth, does this patchwork environment of FTAs lead the international community to confront a more contentious multilateral negotiation in the future due to the widening gap of IPR enforcement standards between the TRIPS-plus provisions in the FTAs involving the U.S. and those that simply recognize TRIPS as the standard? MNCs that see the successful inclusion of TRIPS-plus IPR enforcement provisions in FTAs are unlikely to give ground in the future. Thus, when a multilateral agreement is pursued in the future, industry and government may be confronted with difficult choices.

Indeed, any future multilateral effort is likely to expose inconsistencies on the part of governments as well. Where a Government may be willing to commit to high IPR standards in a bilateral context, that same Government may balk at offering the same level of higher standards in a multilateral agreement. While a government's negotiating position may differ depending upon the number of governments involved in the negotiation, companies must be involved to ensure that their interests are served and protected.

***Conclusion***

There are trends in FTAs based upon commonality of a party. For example, the United States does work from a basic set of provisions it seeks in all FTAs; albeit, it may need to yield ultimately on some provisions. However, rarely, if ever, are any two FTAs absolutely identical. Thus, IPR owners are now confronting a global situation that requires them to monitor all the agreements, analyze the impact of the agreements and, upon implementation, evaluate compliance with the obligations.