

WIPO/INV/BEI/02/2

ORIGINAL:English

DATE:May2002



STATEINTELLECTUALPROPERTYOFFICE  
THEPEOPLE'SREPUBLICOFCHINA



WORLDINTELLECTUAL  
PROPERTYORGANIZATION

**SECONDIINTERNATIONAL FORUMON  
CREATIVITYANDINVEN TION –ABE TTERFUTUREFOR  
HUMANITYINTHE21<sup>ST</sup> CENTURY**

organizedby  
theWorldIntellectualPropertyOrganization(WIPO)

incooperationwith  
theStateIntellectualPropertyOffice(SIPO)of  
thePeople'sRepublicofChina

**Beijing,May23to25,2002**

INTELLECTUALPROPERTYINAKNOWLEDGE BASEDSOCIETY:  
THEROLEOFCOPYRIGHTANDFUTURECHALLENGESTO  
CREATORS,INDUSTRY,LEGISLATORSANDSOCIETY  
ATLARGE;INVENTORS' ANDCREATORS' RIGHTS  
ASBASICHUMANRIGHTS

*DocumentpreparedbyMr.HenryOlsson,SpecialGovern mentAdvisor,  
MinistryofJustice,Stockholm*

## EXECUTIVE SUMMARY

1. This presentation discusses briefly the development of intellectual property in the knowledge-based society and the challenges that are inherent in that development.
2. The traditional legal-political rationale for intellectual property are the need to:
  - a) stimulate creativity and inventiveness in the society thereby promoting the social, economic and cultural development of nations;
  - b) to protect the considerable investments which are necessary for the exploitation of intellectual property rights;
  - c) to give recognition of and protection for the moral investments of creators and inventors.
3. The growing importance of intellectual property in a knowledge-based society, where globalization is a keyword, is, however, also controversial and disposing challenges. This also affects the role and operations of the major intergovernmental organizations, such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO). The relations to the "civil society" are becoming an important element; another such element relates to the decision-making process in those organizations and the influence or lack of influence of important groups of countries.
4. In addition to these concerns, also some specific elements are coming to the forefront of national and international discussions. Some of those elements are general in nature; this presentation discusses such factors as the effects of a never-stronger protection of intellectual property and the beneficiaries of such protection. More specific controversial issues relate to, for instance, patent protection of pharmaceuticals, the effects of plant variety protection, the protection of geographical indications, patent protection for the genome and the problems related to enforcement.
5. The presentation also deals briefly with the possible remedies to the negative perception of intellectual property. Important elements in this context are better information about intellectual property and its effects and the need to give practical advice to countries which have to handle intellectual property in the ever more complex situation of today's world. Also the role of competition law and the need for economic and technological analysis as a basis for designing the intellectual property framework are being discussed.

## I. INTRODUCTION

1. The knowledge-based society which we are discussing here is based on knowledge and information and how to use those assets for the benefit of either private economic interests or the interests of society at large or –preferably –both.
2. Knowledge and information are terms, which relate to facts and ideas, which are precisely the material, which intellectual property aims at preserving and protecting. This brings intellectual property to the forefront of the discussions and also makes it much more controversial than before because the interests at stake are so much more important than in the "oldeconomy."
3. This also brings to the forefront the issues of the acceptance of intellectual property. It is also undoubtedly true that the development in both industrialized and developing countries poses important challenges both in the relations between countries and in the relations between different groups in the society (the creators, the legislators, the consumers and all those who have to implement the legislation). All the same it has to be stressed that intellectual property relates to invisible subject created purely through legislative acts and may therefore be somewhat difficult to grasp in large strata of the population. A number of court cases have abundantly showed the controversies, which appear in this context. It turns legal issues into political ones and political issues into legal ones and thus creates a completely new landscape.
4. The title of this session includes and illustrates all these different elements. It includes thus the issue of the importance of creativity in society, the challenges and the basic human rights involved. I will try to make some remarks on the challenges, which we all may have to face.
5. First, one basic consideration is which basic legal and political rationale is for the protection of intellectual property.

## II. THE RATIONALE FOR INTELLECTUAL PROPERTY (IP) PROTECTION

6. Evidently, the overall basic rationale is to organize in the best possible way human, economic and social relations, thus providing for a fair and reasonable distribution of the limited resources available.
7. On the basis of this basic consideration, the legislators have found three basic rationale for granting protection to intellectual property. Those are, in my understanding:
  - the need to stimulate creativity and inventiveness in the society, which are in fact decisive factors in the social, economic and cultural development of any nation;
  - the need to give protection to the considerable investments which are necessary for the creation and dissemination of works of the mind and of, for instance, complicated pharmaceutical substances and medicines;
  - the need to give some recognition of, and protection for, the moral interests of those who invent and create against other persons' misappropriation of the results of their creativity.

8. This protection of intellectual property is intended to be beneficial for the society. The protection should result in greater divulgation and dissemination of works and inventions. For instance, an inventor obtains patent protection for his or her invention in return for making it known to the society through the publication of it in a register. This is in fact the beauty of the system; exclusive rights are granted in return for a wide dissemination of the results of inventiveness and creativity. This serves the society at large because the protected productions may then serve as a basis for further creative and inventive work.

9. In fact, the need to protect inventors and authors and other creators has found its most eloquent expression in Article 27 of the United Nations Declaration on Economic, Social and Cultural Rights, of 1966. This provision obliges the State to recognize the right for any person to enjoy protection for the moral and economic interests, which flow from the scientific, literary or artistic production to which he is the author. This is the fundamental basic principle which must underlie all considerations on the protection of intellectual property, not only in the field of authors' rights but also as regards inventors and other creators.

10. The protection of intellectual property thus serves important legal -political objectives. For instance, in the European Union (EU), intellectual property is high on the political agenda, especially in certain fields such as biotechnology, copyright, designs and the issue of a common patents system. There are two overall reasons for this. One is of course to support the knowledge-based industries and thus strengthen the competitiveness of the European industry. Another reason is to create a level playing field among the 15 member states comprising a population of almost 300 million.

11. But of course there are frictions in the system, which frictions become more and more accentuated as the importance of the intellectual property system grows. For instance, there are grey areas where conflicting interests are put against each other. Furthermore, there are, in some contexts, what is considered to be exaggerated effects of the practical application of some provisions. In addition, there are areas where new provisions need to be established and where economic and moral interests oppose each other very vividly. The discussion on biotechnological inventions are an apparent example of this.

12. Another challenge, which becomes more and more apparent with the expansion of intellectual property lies in the relation to competition law. IP law grants exclusive rights and in some cases monopolies and thus also the aspect of fair competition comes into focus.

13. Those frictions pose challenges not only to the legislators but also to all -you and me - have to face. Those are challenges also to the intergovernmental organizations, which operate in this field, for instance the World Intellectual Property Organization (WIPO). In the following I shall try to make some remarks on these problems.

### III. THE CHALLENGES

14. In recent times the issue of globalization and its effects and the influence of the "civil society" in national and international decision-making has come into the forefront of the discussions. This also concerns intellectual property law and its effects and the role of

intergovernmental organizations, among them also WIPO. These discussions seem to concern two major elements.

15. One such element concerns the relation to the “civil society” and the other one concerns the decision-making process in international organizations and, in that context, the influence or lack of influence of important groups of countries. It has been said, for instance, that the controversies which have surrounded the World Trade Organization (WTO) could also happen to other intergovernmental organizations and take the form of challenging the “legitimacy” of their decision-making. From this point of view it is of great importance that WIPO is as open as possible in the discussion of fundamental interests, such as the protection of traditional knowledge, etc., where the peoples closest and entities which are the closest concerned are allowed to participate actively.

16. Other elements of the discussion concern the challenges to WIPO and WTO in the information age and the role and legitimacy of those organizations. All these opinions expressed and the developments which have occurred merit to be taken seriously, even if one does not agree with the criticism. As they concern broad political issues it would, however, seem appropriate that they be discussed. The purpose of such discussions should obviously be to see whether any special action is needed in order to meet future political and other challenges flowing from the developments described.

17. Globalization, even if it is inevitable, is being challenged, including the effects of globalization in the intellectual property field. Someone has even compared the present negative feelings against globalization with the movement for environment protection in the 1950s, which no one took very seriously at that time.

18. The inherent risk is, as we all know, that there might be more and more resistance against the rapid imposition of high standard protection of intellectual property rights in all countries regardless of traditions and stage of development and regardless of which interests in the “civil society” are being hurt. The question is how to deal with this growing sentiment and see whether the situation should be discussed so as to consider whether any actions should be taken to counter it.

19. In the discussion it would seem that there are two main fields of concern. One consists of some areas which are particularly controversial and where it could be considered how the process should be conducted. The other one consists of the ways in which the intergovernmental organizations, for instance WIPO, approach the general issue of the development of intellectual property law.

#### IV. THE “CONTROVERSIAL ISSUES”

20. One general background issue is that intellectual property protection is, as a consequence of globalization and of technological developments, being ever further strengthened (copyright term extended, patents available in new areas and for both processes and products, strong protection in crucial technological areas, such as computer programs and non-original databases).

21. The general concerns inherent in this context seem to be threefold:

- a never stronger intellectual property protection is in some quarters being seen as counterproductive and harmful to the society;

- intellectual property is by some being seen more and more as a means of protecting right -owner's economic interests as such rather than (which is its original purpose) to stimulate creativity through time -limited exclusive rights in return for making the result of intellectual creativity available to the society;
- intellectual property is being seen by some as more and more protecting producers rather than the creative people.

22. As an example of the controversies flowing from strengthening the intellectual property protection can be mentioned the debate in the European Union (EU) about the patentability of computer programs, where it is said from some that patents on computer programs would entail a monopoly that copyright does not give and thus stifle development in this area.

23. The more specific controversial issues seem for the time being to be mainly the following:

- patent protection for certain pharmaceutical products and the Doha Declaration calling for a solution of the effects of patenting medicines against AIDS, malaria and some other endemics;
- plant variety protection which is seen as harmful for farmers in developing countries;
- patent protection for the genome (human and other);
- the long and strong protection in the high -technology field;
- the protection for geographical indications (important for some countries and less so for others);
- the so -called cultural exception;
- the fact that public funds are being used for the fight against piracy and for protection of private interests;
- the investments required for setting up efficient enforcement systems (e.g. in developing countries), for the benefit of right- owners whose times are in other parts of the world.

24. The possibly counterproductive effects of a particularly strong protection in the intellectual property field are, at least in most industrialized countries, being mitigated by competition law while such measures do not always exist to the same extent in other countries.

25. In view of the complexity of the issues and in view of the difficulty to handle the economic and political effects of the development, it would seem that (in addition to considering with particular care the developments in this area) for the time being, the main remedies available would consist of:

- improving the information efforts relating to intellectual property and its effects;

- providing practical advice in order to assist countries to handle intellectual property matters in the international context (existing examples are the centre set up within WTO to assist developing countries in disputes and also the fact that certain countries have devoted specific funds to assist developing countries in such WTO matters). It could be considered which contributions of other intergovernmental organizations, such as WIPO, could bring in this context.

## V. THE APPROACH TO THE ISSUES AT HAND

26. Quite naturally and inevitably some critical views have emerged on the approach taken to intellectual property matters by, among others, WIPO. Those views seem to focus on the following main points.

27. Attention must be given to competition law and policy and, in a broader perspective, to the economic justification and effects of increased intellectual property protection. (By way of example, reference could be made to the EU compilation/disassembly provisions in the field of computer software which are being disputed by the major software industries but which were introduced just in order to promote competition). An argument which is sometimes made is that there must exist an economic analysis of the effects of the intellectual property legal framework and the effects in various ways of change therein.

28. There is a need for a good technological analysis as a basis for proposals for an appropriate legal framework (as an example can be mentioned the intense debate and confusion within the EU concerning the nature and legal treatment of incidental copies made in the course of transmission over the Internet or in other information networks).

29. Attention should be given to the need for an analysis of to what extent existing intellectual property frameworks can properly "absorb" new phenomena, in particular in the fields of high technology and biotechnology. The present patent and copyright systems can be stretched to a certain extent to cover such new phenomena and the law on trade secrets can take care of some problems but there are limits to this. (An example of this concern is the application within WTO of what is called "non-violation complaints" now also in the context of intellectual property, with the effects that may have). This situation may eventually lead to a consideration of the need for specific protection systems outside the traditional ones.

30. There is a need to see intellectual property in the broad context of structural organization of a country or a region and to adapt intellectual property to the prevailing circumstances. This body of law exists and operates in the specific existing environment. Also in this context the positive and negative effects of "non-violation complaints" come into mind.

## VI. CONCLUSION

31. As was said above, these are some of the critical remarks made. One does not necessarily share the concerns and views expressed in the international discussion. The discussion is, however, going on and it would be important to be aware of those views and to discuss them and see which actions could be appropriate.

[Powerpoint presentation follows]