INTELLECTUAL PROPERTY IN INTERNATIONAL BUSINESS

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Intellectual Property in International Business

**Introduction**

Intellectual property is a broad area of law that covers copyrights and other related areas such as patents, image rights, and design rights, and much more over a decade ago TRIPS agreement introduced the minimum standards of intellectual property protection globally[[1]](#footnote-1). These obligations have been implemented widely with every nation implementing the laws in their different ways. The European Union, the United States of America, and Japan made efforts to harmonize international intellectual property laws. To follow through with this agenda they announced that intellectual property is one of the top agendas of the G8 and that they will create an anti-counterfeit treaty that operates differently from the WIPO[[2]](#footnote-2). This prioritization of intellectual property is an indication of how important the issue is in the global market.

While some researchers have emphasized the need to have strong IP rules to attract bigger multinational corporations. Others think that the strong rules will be detrimental to the local business, thus harming innovations in the countries[[3]](#footnote-3). Moreover, supranational organizations tend to put external pressure on countries that are finding their footing economy-wise more than the already developed ones. Such pressures may harm the innovation systems. Therefore, following these conflicting ideas on strengthening IP laws, it becomes challenging for policymakers and academics to find the balance[[4]](#footnote-4). In as much as Intellectual property aims at protecting creations and inventions in Free trade agreements (FTAs)[[5]](#footnote-5) it may also have some negative impacts. Therefore, this paper looks at the impact intellectual property has on international business extensively and how to strike the balance between saving the local innovations while protecting the ones that are already in existence.

**What is Intellectual Property and Its International Recognition?**

Intellectual property is a mind creation that is transformed into digital and physical assets. Once the inventions are up the inventor is given a legal right by the government known as intellectual property rights (IPR). These rights aim to fuel innovation and creativity. After the expiry of these rights then other innovators can build on them and advance them further even without the owner's consent. Such rights include; patent, copyrights, trademarks, and trade secrets[[6]](#footnote-6). Countries have put policies in place to protect these rights. For example in the U.S, Congress plays an oversight role in addressing both intellectual property rights and trade policies[[7]](#footnote-7).

Intellectual property is one area of law that is recognized internationally, hence the major role it plays in international business. The Paris convention on the protection of industrial property which was concluded in 1883 was the first international instrument to incorporate patents and innovations. Furthermore, the Berne convention for artistic works protection was held after the Paris convention was introduced to cover copyrights. After covering copyrights and patents, other rules that cover trademarks needed to be developed. This was done at the Madrid Agreement on international registration of marks[[8]](#footnote-8). These three conventions and agreements dealt with the three major types of intellectual property internationally.

Trade policy has been used to propel intellectual property rights internationally since the North America Free Trade Agreement (NFTA) and the World Trade Organization (WTO) agreement on trade matters involving intellectual property which happened in 1995[[9]](#footnote-9).The Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement was made between parties of the world trade organization. It contains certain set standards of managing intellectual property which all nations that are party to this agreement must follow. To date, it is the most extensive multilateral agreement to be made on matters concerning intellectual property[[10]](#footnote-10). These agreements are a clear indication that intellectual property is recognized globally and thus has an impact on the global markets.

The most significant discussion on intellectual property rights occurs during bilateral talks through free trade agreements. Developing countries mainly enter into these agreements to strengthen their ties politically and gain access to different markets. For a long time, free trade agreements have allowed countries such USA the European Union to buy a pass

**Intellectual Property Laws Available in Various Jurisdictions**

Unlike trade agreements, enforcement of laws that regulate intellectual property rights go a while back[[11]](#footnote-11). Over the past years, there has been a push to harmonize IP legislations worldwide. Various countries have made strides towards strengthening their IP laws even though there are still gaps in the global coverage of laws protecting innovations[[12]](#footnote-12). Differences in jurisdictions are expected and can be solved. Such differences are enhanced by the geopolitical environment of a country. For example the ongoing discussions on Brexit which leaves Europe’s hunt for uniform patent rights[[13]](#footnote-13). Furthermore, in the United States of America Donald Trump's election brought to question his support of intellectual property since he withdrew his support for trans-Pacific partnerships which would have boosted intellectual property rights with most of the United States business partners[[14]](#footnote-14). These partners now maintain their relationship with China a country that has consistently strengthened their intellectual property rights.

The best way to ensure intellectual property rights are observed is to go further than ensuring these rights are protected. To ensure there is a balance in the enforcement of these rights, there have to be substantive laws protecting the rights of third parties and the public and procedural rules that are equal to all parties[[15]](#footnote-15). Industries that deal with the intellectual property have pushed developed countries to embrace IPR and create stronger laws. It is evident from the TRIPS agreement where section III has been dedicated to Intellectual Property rights enforcement. Since TRIPS was concluded developed countries have been struggling to adopt these regulations into their legal system.

The main areas covered under the European Union are intellectual property and patents. The patents act of 1977 has been in action and has been influencing several decisions on intellectual property matters. In the UK laws governing patents and their enforcements are regulated by this act[[16]](#footnote-16). The 2014 intellectual property act is among the recent laws passed on intellectual property that target the improvement of efficiency in the IP laws in the UK. The changes covered by the act include design law and patents that are registered and unregistered. Section 88A wasn’t available in the 1977 act however, it has now been introduced to give the secretary of state powers to make orders to give provisions in the UK on a patent court agreement[[17]](#footnote-17). Article 35ZA-C elaborates further the offense of knowingly copying a design that is registered to make a similar design or one that is only different materially. Additionally, if the person copies the design without the knowledge of the proprietor.[[18]](#footnote-18)

The European Union has been according to ways to harmonize the enforcement of intellectual property. For example, in 2003, a common regulation on customs actions to be taken against goods that infringed on IPR was introduced[[19]](#footnote-19). This regulation was extended to trademarks and pirated goods. Furthermore, it also goes on to provide for border measures that can be carried out by the customs authority. These measures include removal of the pirated or counterfeited goods from the European market, detention of these goods for three days, or their destruction pending a legal ruling by courts or tribunals with the consent of the owner of the goods or the declarant[[20]](#footnote-20).

The most important stride made by the European Union towards achieving strong intellectual property laws was the adoption of the 2004 directive on enforcement of IPR. The main aim of this directive was to estimate the legislative system to promote a uniform level of protection of IPR in the market[[21]](#footnote-21). The directive dealt with any intellectual property infringements that were been harmonized within the European Union including those that are not provided for in the TRIPS agreement[[22]](#footnote-22).

Recent developments in the UK on IP laws have been propelled by courts and the country's legislation. In the case of Actavis v. Eli Lilly, the Supreme Court of the UK put aside a long-term standing jurisprudence on the tort of patent infringement assessment and introduced the doctrine of equivalents. Whereby, the protection given by UK patent is not limited to the claim, however, if it is considered to be similar to the claim invention then it will be a patent infringement[[23]](#footnote-23). In the case of unwired planet v. Huawei, the high court of England came up with license terms that free, fair, and non-discriminatory otherwise known as FRAND between the conflicting parties. The FRAND license that was determined was global.

For the first time, a global license was determined by a high court in the world. This was a landmark ruling since from it the court also initiated FRAND injunctions which would be given if Huawei agreed to the FRAND license[[24]](#footnote-24). The court of appeal upheld the ruling and approach taken by the high court in 2018. Moreover the case of Synthon BV v. SmithKline Beecham plc [2005] UKHL 59brought to light what can be considered as a new invention. The court ruled that if an invention does not form part of a state of the art then it may not be new. As such, the court went on to elaborate what state of the art meant by stating that a state of the art is made up of everything available to the public worldwide either, in written or oral form even before the European patent is filed. Furthermore, the contents of patents that have been filed but not published yet in the United Kingdom are also considered to be under the state of art category. The court went further to state that a patent lacks originality if it has been claimed and disclosed to the public[[25]](#footnote-25). These landmark cases have marked the development of intellectual property in the UK. The cases have expounded on areas where there were gaps in intellectual property law.

In the United States, intellectual property rights have been strengthened by measures implemented by the government. The implementation has been done by agencies such as the patent and trademark office, homeland security department, commerce, and international trade Administration departments. These organs are being coordinated by one umbrella body which is the National Intellectual Property Law enforcement coordination council which came into existence in 1999[[26]](#footnote-26). In 2004 U.S.A launched a campaign dubbed STOP which targeted planned piracy[[27]](#footnote-27). Additionally, Article 4 of the council regulation authorizes the customs authority department to take such measures if requested by the right-holder.

The main goal of this strategy was to engage partners in an increasing effort to stop the passing of counterfeit goods in the United States border and going after companies that carried out counterfeiting and piracy[[28]](#footnote-28). Furthermore, the United States justice department has come up with a comprehensive strategy to curb intellectual property crimes. One of these strategies is to ensure coordinated efforts from the international government through formal and informal agreements such as treaties and agreements[[29]](#footnote-29).

The Supreme Court has been at the forefront of intellectual property rights especially since the creation of the United States Court of Appeal for the Federal circuit[[30]](#footnote-30). Moreover, the Supreme Court has been reviewing decisions of cases on patents made by appellate courts[[31]](#footnote-31). In the case of MedImmune, Inc. v. Genentech, Inc. the supreme court gave a ruling that the subject matter of the jurisdiction stands despite the licensee agreeing to make payments for royalty[[32]](#footnote-32). This ruling follows the precedent set in Illinois Tool Work, Inc. v. Independent Ink, Inc. where the court decided that patent did not necessarily grant market power on the patentee and that in such cases where there is an arrangement the burden of proof lies on the plaintiff to prove that the defendant has market power[[33]](#footnote-33). Metro-Goldwyn-Mayer Studios Inc. v. Grokster case brought to light the stand of the court on the issue of secondary liability. The court stated that a person who distributes an object with the motive of selling it or promoting its usage has infringed copyrights[[34]](#footnote-34).

**The Role of Industries in Enforcement of Intellectual Property Rights**

The inclusion of TRIPS in the world trade organization was a direct need due to the advancement of information technology, biotech, and the entertainment industries in developed countries[[35]](#footnote-35). These industries have continuously played a role in aiding the implementation of intellectual property rights and upgrading standards of protection. These industries make tracking the progress governments have made in enforcing relevant intellectual property laws easier.

Counterfeiting and piracy do not have specific definitions. However, they are used in various business entities WIPO and developed countries equate these terms to infringement trademarks. Such infringements such as piracy are being escalated by digital media industries such as CDs. Additionally, the industry debates that have been going on have been taking new forms and campaigning against piracy like in the United States and the European Union. However some industries have linked piracy and counterfeit to criminal activities such as terrorism hence, intellectual property rights may lose their meaning amid this rigorous campaign against these breaches.

**Recommendations for Countries to Achieve Stronger Intellectual Property Rights**

The measures and actions being implemented must be fair and equitable. This a precedent set in the Huawei case whereby the court came up with the Free reasonable and non-discriminatory policy otherwise known as FRAND. For there to be equality there has to be a balance between third parties' rights and holder's rights. Additional the IP system of a country should have minimal limitations.

Implementation and enforcement measures should be stronger than the ones found in the TRIPS agreement especially for developing countries. The TRIPS agreement has standardized measures which consider all factors that may arise during enforcement. Before coming up with stronger measures countries must assess these measures to determine whether they will bring national changes.

Countries should also be flexible with the TRIPS agreement while enforcing IPR. For example, flexibility in their legal systems, flexibility in granting injunctions, and flexibility in terms of damages awarded in case of a breach. Additionally using criminal law to deal with intellectual property is one area countries go wrong. Intellectual property breaches should be dealt with as civil breaches especially the ones that occur in a commercial setting. Governments should be acting against IPR infringements directly. in intellectual property cases. In as much as it is their role to protect right holders from infringements, they should let these right holders initiate the case and pay for the costs. Furthermore, there is a need for thorough vetting when it comes to applications for patents and copyrights to avoid abuse of IPR.

**Conclusion**

Enforcement of intellectual property is gaining momentum across the globe. Developing countries have also been forced to keep up with this international agenda. For these international goals to be achieved there is a need for better coherence for the laws being enforced and the initiatives being taken to end intellectual property rights breaches across various borders. the continued forming of agreements and treaties has been the greatest aid towards achieving stronger intellectual property laws. The current sharing of information and experiences among nations is one way towards achieving harmonized intellectual property laws. However many developing countries are still facing challenges in the implementation of FTA and TRIPS agreements due to financial constraints. The unwillingness to adopt the FTA regulation is mostly due to the expenses associated with its implementation[[36]](#footnote-36).

Tailored domestic solutions and legislations are some of the best ways to achieve proper intellectual property laws. Countries such as the UK and the USA have been making strides towards meeting intellectual property rights. They have landmark cases that have been decided to propel the adoption of practical intellectual property rights. Countries should learn how to enforce laws that are best suited to their needs to protect against illegal breaches of IPR. Members of the WTO have always adopted a less expensive way of solving piracy and counterfeit problems and to address the main agenda of WTO which are; stake holders rights comes before the right holders and the role of government in the enforcement of private rights.

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