Transparency and Intellectual Property Protection in International Law

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Thun, 19 January 2012
Our paper

• Classical issues
  – The internal organisation of IOs (WIPO/WTO/UPOV)
  – Law-making processes of IOs
  – The implementation of international obligations
  – The impact of IOs on the level of domestic transparency
  – A specific focus: transparency in the granting of IPRs (patents)
Our paper

• **Specific angle: Transparency and innovation**
  – Patents (transparency/disclosure in return of exclusion) v. trade secrecy (exclusion only)
    • Both options are legitimate and anchored in international law
    • Question is which is the best for global innovation
      – Answer is not available yet; (too?) many factors
      – Importance differs from sector to sector and along the levels of economic development
  – From ‘public’ to ’private’ transparency
  – Access to knowledge v. access to information
A word on IPRs

- Intellectual Property Rights
  - Patents *disclose* innovative information (in return of a time limited monopoly for new, non-obvious and useful inventions)
  - Trademarks (protected commercial names and signs) are granted under the conditions of a clear list of items covered
  - Copyrights (artistic creations) apply without a necessity for registration in certain countries
  - Trade in IPRs brings transparency issues

- Focus on patents because here exclusive rights are directly squared with disclosure/transparency
METHOD AND MEANS FOR CREATING ANTI-GRAVITY ILLUSION

Inventors: Michael J. Jackson, Los Angeles; Michael L. Bush; Dennis Tompkins, both of Hollywood, Calif.


Filed: Jun. 29, 1992

ABSTRACT

A system for allowing a shoe wearer to lean forwardly beyond his center of gravity by virtue of wearing a specially designed pair of shoes which will engage with a hitch member movably projectable through a stage surface. The shoes have a specially designed heel slot which can be detachably engaged with the hitch member by simply sliding the shoe wearer's foot forward, thereby engaging with the hitch member.
Drawings
Internal Organisation of IOs and Law-making

- WIPO: criticized
- WTO: criticized
- UPOV: criticized
- EPO: Also criticized
- WTO: Trade negotiations
- WIPO: Different - more open
- UPOV: criticized
- EPO: Specific issues
- However: Outside - ACTA
Implen. of int. obligations

• Example WTO
  – Article 66 § 2 TRIPs: ‘Technology transfer’
    • Reporting obligations in relation to LDCs
  – Article 63 TRIPs: ‘Transparency’
    “Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement.”
    “Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1.”
IOs and domestic transparency

WIPO enables and supports domestic transparency

• Databases of laws, decisions and patents
• Training activities

WTO - Article 63 TRIPs (X GATT)

"Laws and regulations, and final judicial decisions,...., pertaining to the subject matter of this Agreement,...., shall be published,...., in such a manner as to enable governments and right holders to become acquainted with them".
Transparency and innovation
Knowledge as a public good

“Non-rivalry”: No-one should be excluded
– The marginal cost (cost of producing one more unit) of benefiting from it is zero
– Consumption by one individual does not detract from one of another individual

“Non-excludability”: No-one can be excluded
– Except by keeping it secret or creating artificial barriers (IPRs)
Result

• Only knowledge at production costs zero would be produced without redress

• Static efficiency
  – Free access to knowledge

• But dynamic inefficiency
  – Under-utilization of the knowledge or underproduction

• Incentive to secrecy if knowledge is to be protected / or risk of no investment
So...

• Patents redress this failure, artificially raising the costs and price, so as to boost the production of knowledge at large, and at the same time disclose it – **double transparency impact**

• Frames in the context of other tools
  • Subsidies
  • Tax incentives
  • Etc.
Yet, disclosure is only an option

- Patents (disclosure)
  - Article 27 TRIPs + Paris Convention
- Trade Secrets (‘undisclosed information’)
  - Article 39 TRIPs
    - Information for which reasonable measures have been taken to keep it secret, and where economic value is being derived from that secrecy; is to be protected against disclosure, acquirement or use by third parties without consent and in a manner contrary to honest commercial practices

- Both are thus recognised in int. law, yet: how much transparency is good or bad for innovation?
Quality of patent information

• Passive v. active transparency
• Increase in accessibility via internet
• But… what about the quality?
  – Disclosure of source in biotechnology
  – Transparency/predictability in the shape of requirements
    • Criteria often are not checked – you get ‘a stamp’
    • Value of a patent is its uncertainty/deterrent effect?
    • Transparency in the rationales of lawmaking and definitions
Conclusion

• Transparency within IOs; on the domestic level; between countries
• The internal organisation of IOs active in IPRs remains opaque. The same is - to a large extent - true for law-making
• IOs however actively promote and enable domestic transparency in IP matters
• Transparency in innovative information is up to private actors‘ decisions today – secrecy and disclosure both are legitimate options
• Transparency as regards the quality of patent information must be increased