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UNSETTLED INTERNATIONAL INTELLECTUAL PROPERTY ISSUES

Tshimanga Kongolo



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Unsettled International Intellectual Property Issues

Dedication

To my wife, Mieko, my son, Kazadi, and my daughter, Aoi

To the memory of my dad, Kazadi, and my mum, Nsumpi

Foreword

Dr. Tshimanga Kongolo graduated from the Faculty of Law, Kinshasa University, Democratic Republic of Congo, before he undertook his graduate and post-graduate studies as a foreign student under my supervision at the Faculty of Law, Osaka University, Japan. After obtaining his Doctor's Degree in the field of International Intellectual Property Law, he also worked as Assistant Professor under me at the same university. Through his several publications and research carried out, from the time he was at the university to the current moment at WIPO, his keenness to find ways for a better balanced intellectual property system is perceived by a particular attention he always devotes to intellectual property issues. This may also be witnessed through this book.

In this book, Dr. Kongolo explores the issues relating to the interface between intellectual property and public health; intellectual property and traditional knowledge, traditional cultural expressions or expressions of folklore; intellectual property and biodiversity, genetic resources; use of marks on the Internet; and international protection of geographical indications.

I served for many years as the Chairman of the Japan Association of Industrial Property and had always advocated a worldwide intellectual property system that takes into consideration the interests of all stakeholders, not a system which is imbalance. Intellectual property system must contribute to narrow the gap of wealth in the earth and must be hopefully a framework system that benefits the entire 6.6 billion of the world population.

This book will serve as a useful scientific material that will provide an invaluable resource for all professionals, scholars, policy makers wishing to enhance global understanding of issues that are scrutinized in this study.

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The author is indebted to Congolese music, the source of his inspiration.

Disclaimer

The views expressed in this book are of the author and should not be considered or interpreted as those of the World Intellectual Property Organization.

Abbreviations

AU:	African Union
CBD:	Convention on Biological Diversity
DSB:	Dispute Settlement Body (WTO)
EC:	European Communities
EU:	European Union
EoF:	Expressions of Folklore
FAO:	Food and Agriculture Organization
IGC:	Intergovernmental Committee on Intellectual Property, Genetic Resources, and Traditional Knowledge and Folklore
IP:	Intellectual Property
IPR:	Intellectual Property Right
IGWG:	Intergovernmental Working Group on Public Health, Innovation and Intellectual Property
LDC:	Least Developed Country
OAU:	Organization of African Union
PCT:	Patent Cooperation Treaty
PLT:	Patent Law Treaty
PMA:	Pharmaceutical Manufacturers Association of South Africa
SPLT:	Substantive Patent Law Treaty

TRIPs Agreement:	Agreement on Trade-Related Aspects of Intellectual Property Rights
TCE:	Traditional Cultural Expressions
TK:	Traditional Knowledge
UNESCO:	United Nations Educational, Scientific and Cultural Organization
UPOV Convention:	International Convention on the Protection of New Varieties of Plants
WIPO:	World Intellectual Property Organization
WHO:	World Health Organization
WTO:	World Trade Organization

Introduction

Disputes over protection of intellectual property rights (IPRs) are not new. It should be remembered that since the adoption of the Paris Convention on the Protection of Industrial Property¹ in 1883, debates on the importance of protecting IPRs have taken place at both international and national levels.

Up until the past decade, the developing world questioned the importance of intellectual property (IP), particularly its impact on their overall economy. There were countries favouring strong protection and those against such protection. There was a sharp divide and divergence between developed and developing countries' interests.

The environment changed with the globalization of the world economy and also with the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement) of the World Trade Organization (WTO), which sets the so-called minimum standards of protection of IPRs. In the same vein, the tremendous efforts of the World Intellectual Property Organization (WIPO) to demystify IP worldwide must be acknowledged.

The importance of IP is recognized worldwide, although in some parts of the planet its economic implication is not yet visible and is far from being foreseeable. From the same perspective, it is still questioned by a large number of developing countries² how IP could serve as a tool for their national development. The real question is how to integrate IP into the development process of developing countries.

Besides 'the globalization of the world', it is likewise true to mention that the issues pertaining to access to medicine or public health have attracted the world's attention to take into consideration the relationship between IP and public health. The interface between public health and IP in general and patents in particular

1. The Paris Convention is administered by the World Intellectual Property Organization (WIPO).

2. In the context of this book, the term 'developing countries' refers to least developed countries as well.

raised concern in recent years with the rise in the numbers of HIV/AIDS-infected people in need of anti-retroviral drugs. According to patent law, the owner of a patent or the patentee is entitled to exclusive rights to use his/her invention (patent). That is to say, in countries where the invention related to these types of drugs (anti-retroviral drugs) is protected via patent, the consent of the patentee is required, for example to manufacture these drugs in that country. What if these drugs are not affordable or not available on the market? What should be done? The main question has been how to strike a balance between the exclusive rights of the patentee and the right to public health or access to medicines, especially in the context of the HIV/AIDS crisis. Is compulsory licencing a solution? The debate over this issue has taken place within the framework of the WTO, the World Health Organization (WHO) and other forums. As a political compromise, the Doha Declaration on the TRIPs Agreement and Public Health and other Decisions were adopted to tackle and respond to the issue. Accordingly, the amendment of the TRIPs Agreement has been proposed. Will the amendment of the TRIPs Agreement be part of the solution or further deepen the gap between countries possessing manufacturing capacities to make the needed drugs and those lacking this capacity? The present study will address this issue and will attempt to contribute to the debate.

From a different angle, given that IP is about 'creativity' and 'knowledge', it is also important that all creators be considered equally without any discrimination. It would be inequitable to protect modern creations but deny protection to traditional ones. That is to say that owners or possessors of traditional knowledge (TK) or traditional cultural expressions (TCE) or expressions of folklore (EoF) must be rewarded accordingly. The question here is how to protect such knowledge and expressions. Is it reasonable to deny them protection just because they do not meet some of the (IP) requirements to be granted protection? Or could we not come up with a 'protection instrument' that takes into consideration particular features of traditional knowledge and traditional cultural expressions? The most important question will be the legal nature of the instrument to be adopted. Binding international treaty or a non-binding one? This issue is still being actively debated at international forums including WIPO and the WTO. It is meaningful to mention that some positive initiatives have been taken at the national level by a number of countries to acknowledge protection of TK and TCE or EoF. The international aspect of these issues will be addressed in the book with a particular emphasis on the work of the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, and Traditional Knowledge and Folklore (IGC). Reference will also be made to the work of the WTO on the matter.

Another phenomenon of these days is the expansion of biotechnology, which has brought about new IP issues. Countries possessing huge biological resources (and diversities) are keen to gain from the IP system, not only by safeguarding (preserving) their biological resources but also by controlling the access to their genetic resources through prior informed consent and benefit sharing and by preventing misappropriation and biopiracy. The requirement of disclosure of the country of origin of genetic resources on the patent application, which has been proposed by a number of countries, has led to a deadlock in some of the forums.

What is the way out? Within the same framework, in the context of protection of new varieties of plants, the balance of rights between breeders and farmers and other actors is also questioned, particularly in the developing world. The main conventions pertaining to these issues are: the Convention on Biological Diversity (CBD); the Food and Agriculture Organization (FAO) International Treaty on Plant Genetic Resources for Food and Agriculture; the International Convention on the Protection of New Plant Varieties (UPOV Convention); the African Model Legislation; and the TRIPs Agreement. The issues arising in this context will be addressed in this book mainly within the framework of the TRIPs Agreement and the IGC, and tentative responses will be provided.

It must be noted that debates over protection of traditional knowledge and cultural expressions of folklore, control of biological diversity and access to genetic resources have raised expectations and interests within the developing world.

From a different angle, it is important to recognize that the global nature of the Internet has brought about new issues. In this regard, given that the protection of IPRs is territorial in nature, it is questioned whether current IP laws are able to resolve issues arising from the use of intellectual property on the Internet. In this context, issues relating to the use of marks or other signs on the Internet will be addressed, mainly within the context of the WIPO Joint Recommendation on the Use of Marks and other Signs on the Internet.

Another important debate that takes place mainly at the WTO pertains to the challenges in regard to protection of geographical indications at the international level. The establishment of a system for multilateral notification and registration of geographical indications in respect to wine and spirits and the extension of the higher protection of geographical indications to other products (beyond wines and spirits) are the two main issues debated.

The aim of this book is to address all the issues mentioned *above* and to provide thoughtful responses that may serve not only to contribute to the ongoing debates but also to help move them closer to resolution in a manner beneficial to all interested parties.

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