

The WIPO Development Agenda: The campaign to reform international intellectual property policy-making

The Issue

Over the past four years NGOs have actively engaged in a growing debate on the future of the international intellectual property system. The main points of contention are two-fold: (i) whether or not higher standards of intellectual property protection and harmonization have a positive impact on social, economic and cultural development, particularly in developing countries; (ii) and whether there is a need for reform in multilateral institutions dealing with intellectual property and innovation in order to ensure that they promote countries' development objectives related to the promotion of domestic innovation and creativity, investment and technology transfer.

Only a few years ago, the notion that improved intellectual property rights promote development remained largely uncontested. International policy-making in the field of intellectual property largely focused on ensuring that national intellectual property regimes provided strong protection for right-holders. The recent engagement of public interest NGOs and consumer groups has brought new understanding of the interface between intellectual property and development and has served to shift intellectual property policy-making away from only emphasising the benefits of intellectual property rights to giving greater emphasis to public policy objectives that concern sections of society other than industry right-holders. In particular, NGOs have highlighted the fact that intellectual property rights can stimulate, but also hinder, development if a balance between rewarding innovation and promoting the diffusion of knowledge and the public domain for the wider public good is not achieved.

Recent NGO engagement in the seemingly technical and complex field of international intellectual property rights has been driven by the fact that intellectual property has become part of the broader debate about global justice and equity, trade rules and economic development strategies, and the indications of the negative consequences of an unbalanced intellectual property regime, particularly in relation to public health, sustainable agriculture and the protection of biodiversity. Many NGOs have come to view the current international intellectual property regime as potentially damaging for developing countries from the perspective of their different fields of expertise; sustainable development, environment, public health, agriculture, technology, education, etc. at the expense of strong industry interests. They have thus begun to participate actively in international and national fora to monitor policy-making activities and technical assistance related to intellectual property rights,

bringing forth new voices previously unheard to the debate. NGOs are leading critics of the current intellectual property system because they deem that it is unbalanced, and thus call for its reform.

In large part stimulated by the 2002 UK Commission on Intellectual Property Rights (CIPR), since 2004 the World Intellectual Property Organisation (WIPO) has been at the centre of this debate¹ and subject to intense criticism by NGOs, academics, legal experts and some developing countries that view WIPO as exacerbating the unbalance in the intellectual property system.² Dating back to 1883, WIPO remains the main international inter-governmental institution for the administration and negotiation of intellectual property treaties.³ WIPO is comprised of and driven by member states serviced by a permanent Secretariat based in Geneva. WIPO formally came into existence in 1970 with the aim to promote the protection of intellectual property internationally as a way of rewarding and promoting innovators in the fields of science, technology and culture.

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In 1974 WIPO became a United Nations (UN) agency and thus subject to the competence and responsibility of the United Nations (UN). Nonetheless, WIPO is unique in the UN system in that it directly provides services to the private sector from which the organisation derives the vast majority of its income, unlike most other UN organisations that rely on member states' financial support. Most of the other core activities of the organisation, including norm-setting and providing technical assistance to developing countries, have also focused on the priorities of strengthening intellectual property protection and harmonizing intellectual property regimes among its 183 member states.

It is worth noting that in recent history there is little evidence of dissent in WIPO concerning the *raison d'être* for strengthening intellectual property protection and its positive correlation to development as strongly advocated by the WIPO Secretariat.⁴ Moreover, few NGOs or member states openly questioned the role of WIPO as a UN agency and its activities in relation to intellectual property rights. Multiple factors help explain this.

First, intellectual property systems are relatively recent legal regimes in developing countries. This means that because developing countries are still implementing and experimenting with intellectual property legislation, it will take time before the full impact becomes visible. This is also why until recently developing countries' main concern in WIPO has been accessing technical and legal assistance from the Secretariat for implementing their newly-acquired intellectual property-related obligations, in particular the 1994 World Trade Organisation (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).⁵ While developed countries together with industry associations and other interest-groups representing right-holders were pro-actively driving the WIPO agenda towards harmonization and increased intellectual property protection through new norm-setting and treaty-making activities, developing countries focused their demands on increased technical assistance.

Second, unlike industry associations and other right-holder interest groups that have historically participated in the policy-making process and enjoyed close ties with WIPO and some member states, public interest NGOs and consumer groups have only recently become observers and active participants in international intellectual property discussions, particularly in the WIPO. Non-withstanding their limited experience, the new NGO presence has already influenced the debate at WIPO.

The campaign for a Development Agenda at WIPO

At the September-October 2004 session of the WIPO General Assembly, Brazil and Argentina formally presented a proposal to establish a "Development Agenda" in WIPO,⁶ later co-sponsored by many other developing countries and strongly supported by public interest NGOs.⁷ The proposal, currently under discussion, was groundbreaking in several ways. It presented for the first time an encompassing, alternative agenda to guide international intellectual property discussions at WIPO based on developing country interests, and called for far-reaching reforms in WIPO on the premise that the organisation has not fully incorporated development concerns into its activities.

The establishment of a Development Agenda would serve to re-define the priorities of the WIPO work programme and activities in order for enable it to better respond to the new challenges of the knowledge society for countries at different stages in their development process, including, but not limited to, improving the technical assistance provided to developing countries.

The Development Agenda calls on WIPO to mainstream the "development dimension" in all areas of its work to ensure that the policy outcomes do not protect the interests of right-holders at the expense of

consumers and the attainment of public policy objectives.⁸ To establish a Development Agenda at WIPO, specific proposals that have been suggested cover a wide range of issues from the organisations' mandate and governance structure, to its norm-setting and technical assistance activities. The institutional reforms are broadly targeted at ensuring that the organisation is member-driven, inclusive, accountable, transparent and supportive of the larger development goals of the UN system.

From the perspective of its proponents, the establishment of a Development Agenda would serve to re-define the priorities of the WIPO work programme and activities in order for enable it to better respond to the new challenges of the knowledge society for countries at different stages in their development process including, but not limited to, improving the technical assistance provided to developing countries. On the other hand, supporters of the status quo in WIPO and the current intellectual property system, particularly some developed countries and industry groups contest the basic premises on which the proposal is based, with the view that improved intellectual property serves to promote development and that WIPO already has had a robust "development agenda" in all of its work for a considerable time, delivering high-quality development activities to member states on a demand-driven basis.⁹

After lengthy discussions and somewhat difficult negotiations, at its General Assembly in 2004 the member states of WIPO decided to take forward the process of implementing a Development Agenda by establishing an Inter-sessional Intergovernmental Meeting on a Development Agenda for WIPO (IIM) to discuss the proposals embodied in the Development Agenda proposal, as well as others that member states wished to submit. A year later and after three IIM meetings, the WIPO General Assembly in its September-October 2005, session decided to constitute a Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) to meet in two sessions to complete the discussions on the multiple proposals made by member states,¹⁰ with a view to report any recommendations to the General Assembly at its September 2006 Session. Currently all the 111 proposals have been listed and grouped in a set of six clusters¹¹ without reference to who made the proposal, that will be the basis of the discussions at the second and final session of the PCDA to be held from June 26 to 30, 2006.¹²

Public interest NGOs have played an important role in shaping and advancing the Development Agenda process. Many of the concerns of developing countries regarding the impact of the expansion of intellectual property rules on access to knowledge, educational materials, public health protection, and other public policy issues are shared by NGOs, which had been

voicing their concerns for years before the Development Agenda proposal was presented. The "Future of WIPO" conference organised prior to the WIPO General Assembly session in 2004 was a landmark event organised by public interest NGOs that helped give shape to the Development Agenda.¹³ At the event, attended by member states and multiple stakeholders including academics, experts, NGOs, industry groups and the WIPO Secretariat, issues such as the proper mandate, mission and objectives of WIPO and its organisational structure were discussed. Importantly, the conference led to consensus and strong support among many public interest NGOs, consumer groups, academics, experts and many developing country governments with respect to the need for Development Agenda for WIPO. The statement "Geneva Declaration on the Future of WIPO," that emerged from the conference and signed by many public interest NGOs, consumer groups, academics, experts and individuals is considered to have been one of the driving forces behind the formulation of the Development Agenda proposal.¹⁴ At the same time, the Development Agenda proposal also presented an opportunity for public interest NGOs and other stakeholders concerned with the current deficiencies of the intellectual property regime to come together to reflect on alternatives and devise action-oriented proposals. The proposal for an Access to Knowledge Treaty and the civil society movement surrounding it is a case in point.¹⁵

Public interest NGOs and consumer groups such as the Center for International Environmental Law (CIEL), the Consumer Project on Technology (CPTech), Consumers International, Médecins sans Frontières (MSF) and the Third World Network (TWN) have also been actively involved in bringing in public policy issues into intellectual property related discussions in other international institutions.¹⁶ They have brought to the WIPO Development Agenda process new evidence and information that has enriched the debate. These NGOs also helped to mobilize support for the Development Agenda and brought other public interest NGOs into the debate. The participation of public interest NGOs in WIPO is stronger today than before the Development Agenda process.¹⁷

Successes and lessons learned

The process of establishing a Development Agenda at WIPO was initiated by developing countries, in close collaboration with public interest NGOs and consumer groups. The main achievement of the WIPO Development Agenda process has been that development and public interest concerns have been highlighted in the work agenda of WIPO, having achieved consensus among all member states on the need for WIPO to prioritise development concerns related to intellectual property, alongside promoting the protection of intellectual property. This has allowed for

different constituencies and non-traditional stakeholders to enter the WIPO discussions and enrich the debate with new ideas and alternatives to promote innovation and creativity such as open source models.

Public interest NGOs provided support to developing countries to push their own agenda through a practical proposal on how to reform WIPO to make the organisation work to their advantage. They have generated a counter movement to the previously dominant role that industry had in influencing policy at WIPO and brought to the process new ideas, recommendations and proposals on how to ensure that development and public interest concerns are fully integrated into the activities and programmes of WIPO. However, they also fostered a broader international discussion and debate concerning the international intellectual property regime, beyond WIPO and the traditional North-South line of debate.

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Two years after the Development Agenda process began, the debate in WIPO has taken a new form; it is more transparent and inclusive, allowing for the participation of a broad range of organisations and expression of different views.¹⁸ Whether these actually influence the inter-governmental process and substantive outcomes, and in particular whether the specific proposals embodied in the original Development Agenda proposal will be taken forward remains to be seen. The many proposals are yet to be discussed and recommendations made to the General Assembly. The challenge is to permeate the main points of the Development Agenda into the WIPO committees and the organisational structure so that future activities, including norm-setting, will give due consideration to development and public interest concerns in relation to intellectual property. The implementation of the Development Agenda in WIPO will be a long-term process, which also serves a broader purpose of reshaping the international intellectual property debate, and thus it should not be limited to the WIPO. This also presents additional challenges to NGOs, who will need to maintain the momentum, continue to monitor the discussions and pro-actively engage in the debate in WIPO as in other fora.

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¹ UK Commission on Intellectual Property Rights (CIPR) *Integrating Intellectual Property Rights and Development*

Policy (2002), see: <http://www.iprcommission.org/home.html>. See also Sisule Musungu (2005), "Rethinking Innovation, Development, and Intellectual Property in the UN: WIPO and Beyond", Issue Papers, No. 5, QIAP, Ottawa, p. 12. Among the recommendations the CIPR report made were that WIPO should act to integrate development objectives into its approach to the promotion of IP protection in developing countries; draw a wider group of constituencies with an interest in the IP system into its policy-making process, such as consumer organisations, and; reinterpret or change its constitutional mandate to integrate development objectives.

² See, for example, Sisule Musungu and Graham Dutfield (2003), "Multilateral Agreements and a TRIPS plus World: The World Intellectual Property Organisation – WIPO", Issue Papers, No. 3, QUNO, Geneva, QIAP, Ottawa.

³ In 1883 the Paris Convention for the Protection of Industrial Property was established. It was the first major international treaty on intellectual property. The Convention's international secretariat that was set up to administer the treaty is the earliest predecessor of WIPO.

⁴ For an example of the work of the WIPO Secretariat highlighting the positive link made between intellectual property protection and development, see Kamil Idris – Director General of WIPO- (2003), "Intellectual Property: A powerful tool for economic growth", WIPO.

⁵ Under the 1995 "Agreement between WIPO and the WTO", WIPO is obliged to provide legal-technical assistance and technical cooperation to developing country WTO and WIPO members relating to the TRIPS Agreement. See http://www.wipo.int/treaties/en/agreement/pdf/trtdocs_wo030.pdf.

⁶ The "Proposal for the Establishment of a Development Agenda in WIPO" is contained in the WIPO document WO/GA/31/11. The Development Agenda proposal was then developed further in the WIPO document IIM/1/4 and WIPO document PCDA/1/5.

⁷ The "Friends of Development" group of co-sponsors of the Development Agenda proposal consist of the delegations of Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela.

⁸ Some of the specific proposals made in the Development Agenda proposal in order to integrate the development dimension into WIPO's activities include the safeguarding the exceptions and limitations in domestic national intellectual property regimes, possible alternative models for the promotion of innovation and creativity, and the establishment of a Treaty on Access to Knowledge and Technology to ensure the effective transfer of technology to developing countries.

⁹ See "Proposal from the United States of America for the establishment of a partnership program in WIPO", WIPO document IIM/1/2, Para 3 and 4. For the position of industry groups, see IP-Watch, "Industry Concerned about Development Agenda at WIPO", November 4, 2005.

¹⁰ In addition to the original and elaborated Development Agenda proposal by the Friends of Development group, other proposals for the establishment of a Development Agenda for WIPO include a proposal by the African Group, WIPO document IIM/3/2 Rev., a proposal by Chile, WIPO document PCDA/1/2, a proposal by Colombia, WIPO document PCDA/1/3, and a proposals by the United States of America, WIPO document IIM/1/2, further elaborated in WIPO document PCDA/1/4.

¹¹ The clusters are Technical Assistance and Capacity Building, Norm-Setting, Flexibilities, Public Policy and Public

Domain, Technology Transfer, Information and Communication Technology (ICT) and Access to Knowledge, Assessments, Evaluation and Impact Studies, and Institutional Matters including Mandate and Governance, and other issues.

¹² For the full list of proposals, see WIPO Document PCDA/1/6 Prov. 2, Annex 1.

¹³ The Future of WIPO Conference took place on the 13-14 September, organised by the Trans Atlantic Consumer Dialogue (TACD). See "Future of WIPO Conference Summary Report", <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=261>

¹⁴ See Eric Nguyen, "A Development Agenda at WIPO, Interview with James Love, CPTech", University of California, Davis, School of Law, <http://blj.ucdavis.edu/article/561/>.

¹⁵ The text of the draft treaty and collection of discussions surrounding the Access to Knowledge movement, see <http://www.cptech.org/a2k/a2k-debate.html>.

¹⁶ An example in the area of public health is the Doha Declaration 2001 achieved at the WTO.

¹⁷ Some of the new public interest NGOs that are actively participating in WIPO include: the Electronic Frontier Foundation (EFF), IP Justice, Union for the Public Domain (UPD), and 3D-Trade-Human Rights-Equitable Economy.

¹⁸ For example, the WIPO discussions on patent law harmonization greatly benefited from the Informal Forum on a draft Substantive Patent Law Treaty (SPLT); an open discussion that for the first time allowed for different views of stakeholders to be expressed. The Development Agenda proposal made demands for this type public discussion on future WIPO norm-setting activities. See http://www.wipo.int/meetings/2006/scp_of_ge_06/en/scp_of_ge_06_inf1.html.