

บทคัดย่อ

การพัฒนาและความก้าวหน้าทางเศรษฐกิจในโลกยุคปัจจุบันมุ่งเน้นไปยังด้านเทคโนโลยีข้อมูลข่าวสารเป็นหลัก ดังนั้นสิทธิในทรัพย์สินทางปัญญาจึงมีบทบาทสำคัญในการคุ้มครองผลประโยชน์ของชาติที่พัฒนาแล้วทั้งหลาย โดยผลของการริเริ่มองค์การการค้าโลกและกระบวนการในการทำความตกลงเกี่ยวกับมาตรฐานของสิทธิในทรัพย์สินทางปัญญาที่เกี่ยวข้องกับการค้า ซึ่งได้รับการหนุนหลังจากมาตรการที่เข้มงวดจากสหรัฐอเมริกา ทำให้ระบบของการคุ้มครองทรัพย์สินทางปัญญาทั่วโลกได้รับการอภิวัฒน์ไปพร้อมกัน อย่างไรก็ตามประเทศกำลังพัฒนาที่จำเป็นต้องเผชิญกับปัญหาบางประการที่เกี่ยวข้องกับการบังคับใช้กฎหมายทรัพย์สินทางปัญญาที่ได้อิทธิพลจากประเทศตะวันตก

Abstract

The development and advancement of economy in today's world focuses on information-based technology. Therefore, an intellectual property right has played a major role as a protection of considerable interest of developed nations. As a result of initiation of the World Trade Organization (WTO) and the progression of an agreement for standards of trade-related intellectual property rights, backed up by tough measures from United States, system of intellectual property rights protection has been globalized. Nevertheless, developing countries have to encounter some problems with regard to enforcing and implementing westernized intellectual property rights law.

The Enforcement of Intellectual Property

Rights in Developing Countries

Praphrut Chatprapachai*

I. Introduction

Since economy in this modern world has increasingly developed and is forwarding themselves further into information-based community, intellectual property rights protection has become a considerable interest for developed nations. According to the initiation of the World Trade Organization (WTO), the progression of an agreement for standards of trade-related intellectual property rights along with tough measures from United States, world society is moving to a global system of intellectual property rights protection. However, there are some problems with regard to enforcing and implementing intellectual property rights protection especially in developing countries. By analyzing the implementation of TRIPS agreement and the tools which it is enforced, this paper illustrates the consequences of progressive system of intellectual property rights protection for developing countries and the problem of implementation and enforcement of intellectual property law in developing countries. Part II will provide a broad background of intellectual property. Part III will state the principles of TRIPS agreement. Part IV illustrates the unilateral pressures from United States to developing countries.

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Part V will discuss the problems of IPRs enforcement in developing countries. Finally, Part VI reaches the conclusion by providing some recommendations to deal with IPRs problems in developing countries.

II. Background Information of Intellectual Property Rights

An intellectual property, mostly known as IP, allows people to own their creativity and innovation in the same manner as they can own physical property. The owner of IP can control and be rewarded for its use.¹ In some cases, IP gives rise to protection for ideas but in other areas more elaboration of an idea shall be proven before protection can arise. It will often not be possible to protect IP rights (or IPRs) unless applications for registration have been submitted to and be approved by the IP authorities, but some IP protection such as copyright arises automatically, without any registration, as soon as there is a record in some form of what has been created.²

Common description of intellectual property law often divides the IP to include patent, copyright, trademark and trade dress and trade secret law. These descriptions can be indistinctive sometimes. However, these categories provide general information of these subjects.

1. *Patent*: Patent specifies “inventions” and offers the inventor the right for a limited period of time to prohibit others from copying, using, selling or even developing products that incorporate the invention without the permission of the inventor.³ It is an agreement between an inventor and the state in which the inventor is allowed a short term monopoly in return for allowing the invention to be publicized. Patents include practical and technical expressions of products and processes. Most patents are for expansionary developments in known technology - evolution rather than revolution. However, the technology does not have to be complex, in order to get a patent.

¹ World Trade Organization, *What are intellectual property Rights?*, available at http://www.wto.org/english/tratop_e/trips_e/intell_e.htm.

² The IP Portal Team at the UK Patent Office, *What is intellectual property or IP?* available at <http://www.intellectual-property.gov.uk/std/faq/question1.htm>.

³ John H. Jackson, William J. Davey & Alan O. Sykes, Jr., *Legal Problems of International Economic Relations Cases, Materials and Text* 921 (West Group 4th ed. 2002).

Some conditions are also required to obtain a patent. Firstly, the invention must be new which means it must not come from parts of the "state of the art." The state of the art is everything that has been made available to the public before the date of applying for the patent. This includes published documents and articles, but can also include use, display, spoken description, or any other way in which information is made available to the public before the applying date of such patent.⁴

Secondly, obviousness is another requirement. The patentable invention must involve an inventive method. As well as being new, the patentable invention must not be obvious to someone with knowledge and experience in the subject. The final condition of obtaining a patent is that such invention must be industrially applicable. This condition requires that the invention can be made or used in any kind of industry.⁵

When all above conditions have been fulfilled, the patented invention will be recorded in a patent document. The patent document must have a description of the invention, possibly with drawings, with enough detail for a person skilled in the area of technology to perform the invention. It must also contain claims to define the scope of the protection. The description is taken into account when interpreting the claim.⁶

A patent can be of value to an inventor. As well as protecting his business, patents can be bought, sold, mortgaged, or licensed to others. They also benefit society other than the inventor himself because large amount of information can be learnt from other people's patents. Patents can also deter people from reinventing things. Patents also help many people develop an idea further, and once the term of the patent expires it can be freely used or dealt with by anyone in order to benefit the public and the economy.⁷

2. *Copyright*: Copyright may be created by the creators from a wide range of sources, such as literature, art, music, sound recordings, films; and broadcasts. These economic rights entitle creators to control the use of their materials. It also provides moral rights to be identified as the creator of certain kinds of material, and to object to any distortion or impairment of it. However, copyright does not protect ideas, or such

⁴ The IP Portal Team at the UK Patent Office, *What is Patents?* available at <http://www.intellectual-property.gov.uk/std/faq/patents/what.htm> .

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

things as names or titles. The purpose of copyright is to allow creators to gain economic rewards for their efforts and to encourage progressive creativity and the development of new material which benefits whole society. Copyright materials are usually the result of creative skill and devoted labor. Without protection, it would be too easy for others to exploit materials without compensating the creator.⁸

Therefore, most copyright material uses require permission from the copyright holder. However, certain uses may not infringe copyright such as for non-commercial or academic purposes “which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder”⁹.

Copyright protection is automatically applicable as soon as there is a record in any form of the material that has been created, and there is no official registration form or fee. Creators, nevertheless, can take certain steps to help prove that they are the true creators, such as depositing a copy with a bank or solicitor.¹⁰

3. *Trademark and trade dress law* involve the rights of a seller to market a product or service in a particular manner and to prohibit others from transferring their goods and services in misleading fashion.

Trademarks are beneficial for a seller when they come to symbolize a level of quality or value of existing goods or services. Moreover, trademarks enable sellers to use a symbol or brand to identify their goods and increase uniqueness of their products. Concurrently, trademarks enable consumers to instantly identify the goods of a manufacturer or services of the service providers.¹¹

If there is no trademark protection, other sellers might then be tempted to deceive consumers by using the trademark belonged to another entrepreneur which owns more popular products. Additionally, even when the trademark itself is not used by another, similar packaging or other manner of presentation (trade dress) can lure consumers into making mistaken purchases. Falsifications or misguiding manifestation of geographic

⁸ The IP Portal Team at the UK Patent Office, *What is Patents?* available at <http://www.intellectual-property.gov.uk/std/faq/patents/what.htm>.

⁹ TRIPS agreement Art.13.

¹⁰ The IP Portal Team at the UK Patent Office, *What is Copyrights?* available at <http://www.intellectual-property.gov.uk/std/faq/copyrights/what.htm>.

¹¹ See above n 3 at 924-925.

origin is another source of concern. Moreover, misleading statements can cause people to engage in fraudulent transactions.

In addition, if sellers can misguide purchasers with impunity, purchasers will no longer trust trademarks or trade dress as symbols of quality. It will later become more difficult for sellers to obtain the rewards from efforts to produce high quality goods and services, and the ambition to provide quality in the marketplace will deteriorate.¹²

4. *Trade secret law* is closely related to patent law. Generally speaking, a trade secret is information that has value to the holder, which will be impaired if it is broadly known. Some trade secrets are the appropriate matter of patents, but their holder may choose not to follow a patent for some reasons, such as the fact that many significant information must be disclosed in the patent application procedure or that the application procedure and subsequent litigation may be costly.

Other trade secrets are simply unpatentable (such as customer list). Protection for trade secrets is usually limited to a prohibition on the use of “improper means” to secure them. Corporate espionage is actionable, such as the reveal of trade secret by a former employee. However, there is usually no protection if a trade secret is discovered through proper means, for example, reverse engineering or independent innovation, which is opposite to patent rights. These differences increase a number of questions that are not fully understood. One might wonder why protection for trade secrets is not broader or, why it exists at all if the secret is not patentable. We shall not try to solve these questions here, but simply note that some form of trade secret law seems to have evolved in most developed nations, although the details of that evolution and the extent of protection under the law has considerably varied.¹³

Worldwide Unity of Intellectual Property Rights

Intellectual property may probably be the most global nature commodity in history in today’s world, where another side of the world can be reached within less than one second. Intellectual property rights (IPRs), at the international level, have been subjected to many series of international conventions and treaties. One of the most

¹² *Id.*

¹³ *Id.*

prominent is Paris Convention for the protection of Industrial Property of 1883 and the Berne Convention for the protection of Literary and Artistic Works of 1886 which are under the supervision of the World Intellectual Property Organization (WIPO).¹⁴

The protection under Paris and Berne Conventions is conceptualized on the doctrine of “national treatment”, which confirms that each sovereign state shall grant foreign nationals the same protection as they do for their own citizens. Another concept also standardize the minimum requirement that the laws of any member state shall be “no less favorable” with respect to foreigners than with respect to nationals.¹⁵

In the meantime, the trend toward global markets and the considerably increasing number of multinational enterprises has pressured many countries to liberalize their trading laws by treating domestic and foreign producers equally, and by giving the same standards of intellectual property protection as their trading partners. Therefore, there was an increasing motivation to promote wider uniformity in the content of domestic IP law.¹⁶

As a result, at the end of 1980s, developed countries, especially the United States which its economy was definitely affected from IPRs infringement, began to take out the IP infringement debate from WIPO, attempting to combine the intellectual property rights issue with the issue of free trade. This was the reason why the Uruguay Round trade negotiations under the General Agreement on Tariffs and Trade (GATT) included negotiations about intellectual property. This told us that free trade negotiation was attached with negotiation on IPRs, which became the Agreement on Trade Related Aspects of Intellectual Property (TRIPS). TRIPS now prescribes the minimum standard for national and regional IPRs systems in the world.¹⁷

Accordingly, in Marrakesh on April 15 1994, 111 countries signed the GATT agreement which contains the outcome from the Uruguay Round of multilateral trade negotiation. TRIPS is attached in Annex 1C of the GATT Agreement, which enforce the

¹⁴ See Mark Wu, *Intellectual Property Rights in Global Trade Framework: IP Trends in Developing Countries*, 98 Am. Soc’y Int’l. L. Proc. 104 (2004).

¹⁵ Art. 3 , *Paris Convention for the Protection of Industrial Property of March 20, 1883*.

¹⁶ Joshua J. Simons, *Cooperation and Coercion: The Protection of Intellectual Property in Developing Countries*, 11 Bond L. Rev. 60 (1999).

¹⁷ *Id.*

protection of intellectual property by signatories.¹⁸ The TRIPS Agreement created common minimum baseline standards in significant scope of intellectual property, higher than the Paris and Berne Convention. This emphasizes the prominence of shifting IPRs protection to a universal level of protection.¹⁹ However, in the mean time, this is also a challenging problem for many developing countries to enforce their IP law to meet such international standards and to further their own priorities in terms of economic and social development.

Different Legal Tradition of IPRs: Difficulty for Developing Countries

Before the signing of TRIPS Agreement, member nations were not bound to develop intellectual property protection systems. The Paris and Berne conventions only require a member nation to grant the same rights and obligations of intellectual property to non-nationals as it does to its own citizens. However, under TRIPS, states can be obliged through WTO enforcement mechanisms to adopt certain standards that are unfamiliar with their legal tradition.²⁰

Each nation has different cultures, traditions and histories which result in differences of each unique domestic legal system. There are various attitudes in intellectual property between developed and developing countries especially in the east.

In Westerners' attitudes, copyright is a social incentive and a reward to encourage individual creators to create. On the contrary, Eastern artists gain validity from mimicking previous works instead of from creating. Since, in eastern cultural view, comprehension of the concept of the civilization is proven by mimicking, therefore, South Korea used this as an argument in the delegation at the Uruguay Round, reasoning that copying the work from other creators was a form of flattery; hence they were not culturally suitable for certain copyright protection.²¹ Additionally, in Japan, a katana (Japanese sword) is not only a lifeless metal object, but also the residue of creator's living

¹⁸ *Id.* at 61

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

spirit. This cultural perception still exists in the craftsmanship of Japan industrial products.²²

Lack of individualism is another source that differentiate attitude concerning IPRs between Western developed and developing countries. In Western countries, only the individual (or corporate juristic person) is considered a “creator.” Conversely, in many developing countries, for example, to the Balinese, artistic knowledge is not restricted to a special intellectual class. The words of art or artist do not exist in Balinese. If someone have made a beautiful contribution such as carving a temple gate, or playing a musical instrument and doing any works of esthetic importance that are produced incognito. They are deemed to be done entirely as a service to society and religion with no thought of personal gain.²³

This kind of cultural attitude also exist among Koreans who pursues a similar historical viewpoint on scientific inventions. They consider intellectual property as “public goods” for everyone to share freely instead of treating it as a private property. By this traditional way of thought, creativity is encouraged by cultural esteem rather than material gain.²⁴

Nevertheless, concepts of “private rights” and “trade-related” rights of intellectual property are clearly defined in the preamble of TRIPS Agreement but exclude community intellectual property rights. This exclusion nullifies all kinds of knowledge, ideas and innovations produced by the intellectual community.²⁵

In developing countries, intellectual property is seen as the product of intelligence or cultural heritage, embodying the soul and spirit of the people. Such concept is unfamiliar in the Western legal system. However, since TRIPS is a prerequisite to accession of WTO, developing nations had to inevitably accept the intellectual property laws of the West. This causes an everlasting dispute between developed and developing countries until now.²⁶

²² *Id.* at 62

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 63.

III. The Principles of TRIPS Agreement

The TRIPS came into effect on January 1, 1995. Member countries are bound to strengthen their IPR laws by providing the minimum degree of IPR protections. Countries are mandated to accept the provisions of the four previous IPR agreements²⁷ and are bound to give the same treatment accorded to their own foreign intellectual property.²⁸ The TRIPS emphasizes significance of patentability²⁹ ; and imposes protection for plant varieties³⁰, computer programs³¹ and databases.³²

The minimum standards of IPRs protection which each state is mandated to implement are illustrated in Part II of the Agreement. It stipulates, defines and names fundamentals of IPRs protection and the subject-matter to be protected; the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. Under this TRIPS, member states shall standardize their IPRs laws to comply with the substantive obligations of the main convention to the WIPO, and the Paris and Berne Conventions in their most recent versions. Moreover, TRIPS Agreement fulfills numbers of obligations on the issues which are ignored by the pre-existing conventions or were seen as inadequate.³³

Although it is quite common knowledge that TRIPS standard is more difficult for developing countries to enforce than for developed countries which already have previous similar standard, since TRIPS standard is the obligation which must be primarily met by member countries before entering WTO protection, developing nations must inevitably accept such commitments despite they are excessive for the actual level in any developing country.³⁴

²⁷ Those four agreements are Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits. *See* Art. 1, *TRIPS Agreement*.

²⁸ Art. 3, *TRIPS Agreement*.

²⁹ Art 7, *TRIPS Agreement*.

³⁰ Art 27.3(b), *TRIPS Agreement*.

³¹ Art 10.1, *TRIPS Agreement*.

³² Art 10.2, *TRIPS Agreement*.

³³ World Trade Organization, *A Summary of the Final Act of the Uruguay Round: Agreement on Trade Related Aspects of Intellectual Property Rights*, available at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#nAgreement.

³⁴ *See* above n. 16 at 64.

The regulations about enforcement of intellectual property rights that the states must follow are illustratively structured in Part III of TRIPS. Effective enforcement, fair and equitable procedures are identified as general commitments which states must respect.³⁵ The Agreement also delineates remedies in both civil and administrative aspects that Members must preserve, including injunctions, damages, and –under certain circumstances- the removal from commerce or destruction of infringing goods.³⁶ Furthermore, Part III contains provisions relating to provisional enforcement measures, special requirements related to broader measures, and criminal sanction procedures on “willful trademark counterfeiting or copyright piracy on commercial scale”.

In addition, with intention to strengthen IPRs protection, TRIPS agreement requires that member nations must enforce sufficient measures to “provide a deterrent consistent with the level of penalties applied for crimes of a corresponding gravity”.³⁷

Article 41.5 of TRIPS may seem to limit the comprehensive outline of civil, administrative, and criminal remedies. In brief, the provision merely states that states do not have to put in place a specific judicial system for enforcement of IPRs (such as a court of specialty) distinct from court system that already exist in member states.³⁸ Nevertheless, the language that urges a member state to equally distribute resources between intellectual property enforcement and general law enforcement may impact the developing countries where the governments have limited resources to devote even for general laws enforcement.³⁹

Handicap for Developing Countries.

Because the TRIPS Agreement is a prerequisite to accession of WTO⁴⁰, developing nations, in order to enjoy the benefits of membership of the WTO, have to fully implement it while encountering large amounts of difficulties. Fortunately, Part VI

³⁵ See above n. 32

³⁶ Part3;Section 2, *TRIPS Agreement*.

³⁷ Art. 61, *TRIPS Agreement*.

³⁸ See above n. 16 at 65

³⁹ See above n. 14 at 105.

⁴⁰ Art 4, *WTO agreement*.

of TRIPS describes transitional arrangements that developing member states can enjoy.⁴¹ The TRIPS transitional arrangements provide a special extension period and give some exceptions to the implementation of TRIPS to certain members. For instance, under special situations, TRIPS allows developing countries and members which are transforming their economies from centrally-planned to market, free-enterprise economies to benefit from a period of delay for following up TRIPS provisions⁴².

The obligations under the TRIPS Agreement apply the same to all Members, but least developed countries are granted a longer period to phase them in⁴³. However, the transitional period granted for developing countries to enjoy the delay of implementing intellectual property protection seems to confront with obstacles due to the use of unilateral pressure from United States to tackle its IPR disputes⁴⁴.

IV. Tension from United States

In the past 20 years, compared to other countries, United States has been more devoted to the innovation of establishment of uniform intellectual property rights.⁴⁵ In addition, the prospect of United States' economy significantly depends on the export of intellectual property.⁴⁶

Therefore, United States has tried to build up a harmonious connection between requirement of enforcement of universal intellectual property standards and the international trade regime and the development. Then, finally, countries which desire to enjoy free trade had to agree on TRIPS.

Most member nations, especially developing countries normally import intellectual property rather than export. Therefore, they have less concentration than the United States to firstly prioritize IPRs legal protection because it did not worth enough for their budget to devote resources to serve the benefits of foreign IPRs holders, or to

⁴¹ Art 65,66, *TRIPS Agreement*.

⁴² Art 65.3, *TRIPS Agreement*.

⁴³ Art 66, *TRIPS Agreement*.

⁴⁴ See above n. 16 at 67.

⁴⁵ *Id.* at 70.

⁴⁶ *Id.* at 67.

hinder local duplication industries from doing imitation business since such hindrance could negatively impact their national economies.⁴⁷

United States enforced section 337 of the Tariff Act of 1930 (as amended) to pressure developing countries. By virtue of this provision, U.S. companies can protect themselves from imports into the United States of goods made by foreign companies that infringe U.S. intellectual property rights. It legalizes complete exclusion of imports which has been produced in such a way as to violate the intellectual property rights of American companies or individuals under domestic US law. However, only the products that are imported into United States are subjected to this provision.⁴⁸

Generalized System of Preferences (GSP) is another tool enforced by United States to pressure developing countries which are under GSP agreement. If intellectual property protection, either de facto or de jure, of particular developing countries is decided to be vulnerable, any tariff preferences that previously granted to such nations under GSP can be withdrawn. In order to use this tool, a particular American industry is not required to show the injury nor something that shows the discriminatory practice or inferior-international-standard of intellectual property laws of the country concerned.⁴⁹

‘Special 301’ is another well-known, multi-purpose and roomy provision which U.S. has relied on. It is a part of the of the Trade Act of 1974 since U.S. Trade Law was amended by the Omnibus Trade and Competitiveness Acts of 1988. The so called section 301 provision of the Trade Act of 1974 empower the U.S. government to penalize countries which apply inadequate or ineffective protection of intellectual property rights. Under Special 301, the U.S. Trade representative (USTR) is assigned to identify foreign countries that impair adequate and effective protection of intellectual property rights or impair fair and equitable market access for US persons who rely on intellectual property

⁴⁷ See above n. 44.

⁴⁸ United States Tariff Act of § 337, 19 U.S.C. 1337 (1930).

⁴⁹ See also Office of the United States Trade Representatives, *USTR to Examine Operation of GSP Program*, available at http://www.ustr.gov/Document_Library/Press_Releases/2005/October/USTR_to_Examine_Operation_of_GSP_Program.html?ht=gsp%20gsp.

protection.⁵⁰ Moreover, with the intention to optimize the effectiveness of Special 301, its amendment came out in the 1994 Uruguay Round Agreement Act clarifying that although a country is in compliance with its obligations under the TRIPS Agreement, it still can be determined to deny adequate and effective intellectual property protection. It was also amended to direct USTR to consider a previous status of a country under Special 301.⁵¹

Once a country is identified because it does not follow up on its commitments for IPR protection and enforcement, the USTR is required to decide whether it should be designated in priority watch list as Priority Foreign Country. Such country is defined as the one that:

- (1) has the most onerous and egregious acts, policies, and practices which have the greatest adverse impact (actual or potential) on the relevant U.S. products; and
- (2) is not engaged in good faith negotiations or making significant progress in negotiations to address these problems.

If a trading partner is identified as a Priority Foreign Country, USTR must decide within 30 days whether to start an investigation of those acts, policies, and practices that were the basis for identifying the country as a Priority Foreign Country.⁵²

Such amendments of the Trade Act, furnish weapon for U.S. to be able to enforce trade sanctions upon a watched country if it fails to adequately protect its intellectual property. Section 301 authorizes the United States Trade Representative (USTR) to compel special duties on imports, establish the charges by negotiating new bilateral agreements, suspend trade agreement preferences, accomplish any other ‘appropriate and feasible’ functions to perpetuate U.S. rights under trade agreement or implement a responsive measure to a country which its own government practices are found to be unreasonable and afflict U.S. commerce⁵³.

⁵⁰ Office of United States Trade Representatives, *Background on Special 301*, available at [http://www.ustr.gov/assets/Document_Library/ Reports_Publications/2005/2005_Special_301/asset_upload_file223_7646.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file223_7646.pdf) (accessed on Oct 2005).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Ronald J. T. Corbett, *Protecting and Enforcing Intellectual Property Rights in Developing Countries*, 35 Int’l L. 1092 (2001).

The U.S. executive branch uses the power granted by Section 301 to drive foreign countries to protect overseas U.S. intellectual property by genuinely enforcing intellectual property laws. Furthermore, although the infringing product or process has never been conveyed to the U.S., the President can strike back by enjoining restrictions or duties against the infringing country on other goods that such country produced and imported to U.S.

Such threats of sanction under Section 301 had remarkably success in pressuring developing countries to provide effective legislative protection of intellectual property rights. For example, in 1987 and 1989, Mexico was indicated in the Section 301 watch list because its legislation failed to suffice patent protection. Nevertheless, promptly after the “Program of Modernization of Industry and Foreign Trade” was proclaimed in 1991 by Mexican government, Mexico was withdrawn from the Section 301 watch list. This is because the Program clearly emphasized the implementation for strengthening intellectual property protection. As a result of legislation enacted, it influenced Mexican government to commonly advance the integrity of intellectual property, especially for more active patent legislation.⁵⁴

Another accomplishment derived from U.S. pressure is the case of Brazil which started to amend its IP law in April 1996. The redesigned enactment included a launch of modern property law which implemented patent protection. In addition, the market accessibility of any products relying on such protection was increased. This was an attempt to resolve a section 301 investigation previously committed by Brazil in February 1994.⁵⁵

Developing Countries under US Approaches

The trade-dealing functions of the U.S. pertaining to developing countries are illustrated in the *Trade Act*. Because the United States realizes that arguments of countries that do not provide strong intellectual property protection are inconceivable, under the 1988 Trade Act, the U.S. aims to “ensure that developing countries promote economic development... by providing reciprocal benefits and assuming equivalent

⁵⁴ *Id.* at 75

⁵⁵ See above n. 16 at 74.

obligations with regard to their import and export practices”.⁵⁶ Typically, the U.S. contends that both industrial and developing countries will be benefitted from such measure.⁵⁷

Obstruction of the transfer of technology is one of the strongest arguments raised by developing countries. They maintain that intellectual property protection restrains the transfer of technology to developing countries. The United States then counter that the transfer of technology into a country cannot be optimally encouraged without fair protection and effective enforcement of intellectual property rights as long as effective IP laws will increase the confidence of a rights holder to market his invention outside his home country. Additionally, this can lead to the reduction of price of imported technology.⁵⁸

The U.S. also claims that it will be too risky for a country that state-of-the-art technology may never be promoted if effective intellectual property rights protection is not practically enforced.

Some scholars consider this argument convincing. Suppose a creator had newly created an innovation, if an adequate and effective IP protection were provided, he might tend to reveal his creation to public rather than keeping it as trade secret. This is the reason why speedy approaches to the most recent innovations of technology are necessary for scientific researchers or technology developers who are responsible for setting up new industries or modifying old ones. It also prevents researchers from accidentally devoting their experimental resources on work already done. Furthermore, since resources are not spent to imitate the outcome already known, it enhances the further advancement of innovation and increase the efficiency of research⁵⁹

Nevertheless, public disclosure of technology under IP protection seems not to advantage developing countries as previously expected. Because deficiency of adequate infrastructure to conduct innovative research still dominates many developing countries which always thirst for new technology and where the concept of commercial intellect

⁵⁶ Trade Act, § 1101(b)(4)(a), 19 U.S.C. 2581 (1979).

⁵⁷ See above n. 16 at 80.

⁵⁸ *Id.*

⁵⁹ *Id.* at 88.

may be too distant to be aware of, thus, for them, the logic that they can gain profit from effective intellectual property protection is often considered unpersuasive.⁶⁰

In addition, governments of developing countries have affirmed that free sharing of the benefit of creativity and free transfer of technology are necessary. Excessive protection may economically cause a monopoly on knowledge and exclude competitors who may be able to adapt or imitate the invention in a valuable way for the whole society. They allege that as a result, such strictness will stimulate the cost of products to become higher.⁶¹

Despite of those arguments, unfortunately, since the economic growth and development of majority of developing countries mainly depend on their trading with the U.S., the pressure from United States for demanding developing nations to solidify their intellectual property protection has continuously proceeded. Therefore, the most powerful scheme for the U.S. to carry on such pressure is to commingle the affiliation between more cooperative trade relation and stronger protection of intellectual property rights.⁶²

V. Problems of Enforcement of Intellectual Property Rights

Although the TRIPS Agreement and US unilateral action may achieve results on paper, there still are several factors that impair the enforcement of IPRs in developing countries.

The first factor that contributes to problem in IPRs enforcement in developing countries is technological change. The necessary technology and equipment for generating counterfeit or pirate goods have become cheaper and more sophisticated, for example, the rapid growth of cheaper CDs and DVDs burners, high-quality scanners and photocopiers. This has made things easier to make production more worldwide. It means that if infringing operations are freezed in one country, they easily shift to another.⁶³

Political will becomes the second influential factor. Strengthening IPRs is not politically attractive enough to be the best interests for every national government. Some are intimidated by the powerful organization involved in IPRs-infringing operations.

⁶⁰ See above n. 57.

⁶¹ See above n. 16 at 87.

⁶² See above n. 52 at 1099-1102.

⁶³ See above n.14 at 105.

Others worry about the impact of unemployment, even though illegal, on a struggling local economy if the authorities clamp down too hard. Although stronger IPRs protection and enforcement may be able to advance new local industries and additional foreign investment and increase accessibility to the information and technology necessary for growth, economic growth also significantly depends on other factors, such as high levels of human capital attainment, efficient capital allocation, political stability, and strong physical infrastructure. Therefore, without many of these factors in place, the idea which asserts that increased IPRs protection and enforcement leads to increased economic growth will face difficulty in carrying weight with many governments. The lack of domestic ballotters who are actively supporting stronger IPRs in some countries further enlarge the suspicion of politicians about the political benefit they can gain after strengthening IPRs enforcement.⁶⁴

Weak politics lead to the third factor which is inadequate resources. Not so many developing countries have invested substantial funds in IPR training for customs official, judges, and prosecutor. Some, such as Thailand, have set up specialized IP courts. But most developing countries have not seriously armed their authorities to encounter IPRs crimes either because they do not have sufficient resources or because they are not willing to commit additional resources. Equipping specialized knowledge of IPRs among those prosecuting alleged infringers, deciding IP cases, and inspecting seizures of suspected goods should be included in the mission to be accomplished⁶⁵

Another significant factor is about the problems of TRIPS. It is not too difficult for developing countries to raise a reasonable argument on the issue why they will resist incorporating the TRIPS' minimum standards into their domestic law. Most intellectual property belongs to foreigners; therefore, enforcing TRIPS provisions leads to a transfer of wealth from developing to developed countries. Moreover, enforcing TRIPS negatively impacts domestic business that developed in the past because they were able to steal intellectual property from others. TRIPS also affects the sovereign rights of countries to develop independently from foreign influence. Finally, although individual

⁶⁴ *Id.*

⁶⁵ *Id.*

ownership of intellectual property is considered as a basic right in western developed countries, this may not be the case in some developing countries.⁶⁶

The TRIPS also has enough ambiguities and exception to allow developing countries to interpret the agreement in a manner that is best suitable to their short-term needs. For example, the TRIPS allows nations to deny protection to intellectual property rights in the interest of protecting the health and safety of its citizen-thus presenting a large loophole through which developing countries can maintain trade barrier in the pharmaceutical industry. In addition, as a concession to developing countries, the TRIPS gives countries direction to grant licenses to remedy anti-competitive abuses of intellectual property rights.⁶⁷

The minimum standards for the domestic enforcement of the substantive rights mentioned in the TRIPS have also been criticized as weak because they merely provide wide legal standards and mandate respect for differences in national legal systems rather than present a set of narrow well define rules. For example, the TRIPS explicitly waives any requirement for WTO members to “put in place a judicial system for the enforcement of intellectual property rights distinct from that [used] for the enforcement of law in general.”⁶⁸

Although indicating to harmonize intellectual property rights by holding all WTO members to the same standards, the transitional arrangements built into the TRIPS contains the mean to perpetuate a double-standard system. The TRIPS expressly allows extensions of the eleven-year transition period for least developed countries if they have “special needs and requirement...and the need...to create a viable technological base.” The TRIPS may also provide a means by which developing countries may get an extension beyond the five-year transition, which ended on January 1, 2000.⁶⁹

However, some critics said that developed nations should not view these flexibilities as a weak point that may jeopardize their economic gain because significant evidence shows that a lenient policy on IPRs law enforcement advantages both developing countries and their industrial partners. They indicate that stricter intellectual

⁶⁶ See above n. 16 at 62.

⁶⁷ See above n. 52 at 1093-1094.

⁶⁸ Art. 41(5), *TRIPS agreement*.

⁶⁹ See above n. 67.

property rights detriment the developing nation, and if the infringement rate is fairly minimalized, it will benefit the developed country.⁷⁰

The critics also exemplifies that there are numbers of countries that their level of economic growth highly increases due to low level of IPRs protection. Japan, Taiwan, Singapore and Hong Kong included weak patent laws as a part of economic plans. These countries succeeded in developing industrial infrastructures that based on high level of technology simply by neglecting the patent rights of semiconductor companies from the U.S. After developing countries have successfully shifted themselves to manufacturing new technologies and innovations, then, strengthening IPR laws and regulations will become their incentives.⁷¹

VI. Recommendation and Conclusion

Due to the globalization driven by information technology, it is almost impossible to deny the essential of implementing transnational intellectual property protection. TRIPS Agreement has been inevitably framed and internationally adopted, in spite of its cultural inappropriateness. Uniform system of global IPRs protection seems to be the last chapter of the epic.

Do the provisions of the TRIPS Agreement which urge developing countries to level up their IPRs protection systems really benefit them? The answer seems to be *yes* in the long run because these countries would be in a more advantageous position if they deliberately level up stronger intellectual property.⁷²

As previously analyzed, although the United States has succeeded in applying coercive measure to pressure developing countries to achieve legal compliance on black letter law, enabling them to develop the implement action of the basic systematic framework of intellectual property protection, consequent enforcement is still far from achievement. Once a new legislative foundation has been framed, more necessary measures are required to be fulfilled. Not only the difficulty and tardiness that they need

⁷⁰ See above n. 16 at 96.

⁷¹ See above n. 16 at 94.

⁷² *Id.*

to face during the process of training officials, they also have to seriously revise national court system according to TRIPS.⁷³

Besides struggling at level of officials, many developing countries are trying to educate their citizens about importance of intellectual property rights, and the effect of IPRs which relates to development of their own countries. For example, Costa Riga has launched public campaigns to provide knowledge concerning IPRs to its citizens, together with implemented new intellectual property laws. This is a good model for perpetually strengthening IPRs regime in which “states need to concern themselves not just with signing international instruments or passing law but they also have to deal with educational programs that reach the public.”⁷⁴

Cooperative engagement between developed and developing nations is unavoidable to tackle problems concerning enforcement of intellectual property rights in developing countries. Moreover, instead of using trade barrier scheme to pressure developing countries to enhance their IP protection, developed nations should sincerely advocate them by supplying proficiency and fund to solve these problems. TRIPS may not be a healer-of –all and should not be deemed as a broad-spectrum drug. However, an equitable and universal system of IPRs protection cannot be achieved without TRIPS as an origin.

⁷³ See above n. 70.

⁷⁴ *Id.*

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