

Commission on Intellectual Property Rights Urges Rethinking of IPR Regimes

By Graham Dutfield

The development-related impacts of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) make it the most controversial of all WTO Agreements. Many developing countries consider TRIPs unbalanced in that it favours the developed countries and transnational corporations while being unhelpful or even harmful to their own interests. In addition, concerns have been raised about moves outside of the WTO to ensure that developing countries accept higher-than-TRIPs standards of intellectual property protection even before they have determined how best to implement TRIPs itself in ways that support economic development and poverty alleviation. Non-governmental organisations have also criticised TRIPs on the grounds that it imposes costs on developing countries in the form of more expensive drugs, agricultural inputs and foreign-owned technologies without producing sufficient longer-term gains in areas like trade and investment to offset these costs. Unfortunately, critical views on TRIPs and other processes such as the World Intellectual Property Organization's new patent agenda are often dismissed on the grounds that they are based on ignorance or on ideological hostility to private property (see related article on page 17).

This makes the new report on *Integrating Intellectual Property Rights and Development Policy* by the Commission on Intellectual Property Rights extremely timely. The UK government-sponsored Commission was mandated to look at how intellectual property rights might work better for poor people and developing countries by providing balanced, evidence-based policy recommendations. Launched in Geneva on 16th September, the 178-page document contains quite far-reaching recommendations (55 in all) directed at the global IPR system including the institutions within it (such as the WTO and WIPO), national IPR policy-making, and covering the following six areas: intellectual property and development; health; agriculture and genetic resources; traditional knowledge, access and benefit sharing and geographical indications; copyright, software and the Internet; and patent reform.

Overall, the Commission expresses serious doubts that the international IPR regime in its present form, and current processes to further strengthen IPR protection, are in the interests of the poor. It also considers that the TRIPs Agreement imposes onerous costs on most developing countries. In raising these doubts and concerns, the Commission does not break new ground; what is truly significant is their source. This is a high-level Commission established by a developed country government which also appointed the six members. These members, headed by Professor John Barton of Stanford University, are all eminent and widely-respected authorities on intellectual property from developed and developing countries with expertise covering science, law, ethics and economics, and working in industry, government, academia and the legal profession. As such, the Commission can hardly be accused of bias against the intellectual property system. Moreover, their findings drew upon not only their own varied backgrounds but also on fact-finding missions to developing countries on three continents, consultations with stakeholders, eight expert workshops, a series of study papers authored by international authorities, and an international conference.

The report makes many telling points. It makes an overwhelming case that a one-size-fits-all approach to IPR protection simply does

not work, especially when the required levels of protection are as high as they are today and are likely to become in the near future (which is even higher). At certain stages of development, weak levels of IPR protection are more likely to stimulate economic development and poverty alleviation than strong levels. The Commission presents well-documented historical evidence to support this view. Present-day empirical data is, as the Commission reveals, somewhat lacking. But what there is points to the same conclusion. A clear inference of the Commission's findings in this regard, is that the TRIPs Agreement can be regarded as an experiment being conducted on the poor to see whether the lessons of history are applicable to the present-day situation or not. It would appear that TRIPs is a risky experiment indeed!

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The Commissioners present strong evidence for their critical stance with respect to the international intellectual property regime, but at the same time avoid the error of treating developing countries as a homogeneous group. Rather they argue that due to their different scientific and technological capacities and social and economic structures, an optimal IPR system is bound to vary widely from one country to another. For example, developing countries that have relatively advanced scientific and technological capacities like India and China may well benefit from high levels of IPR protection in some areas, whereas the least-developed countries almost certainly will not.

Among the specific recommendations relating to particularly controversial matters are that developing countries should establish workable laws and procedures to allow them to use compulsory licensing and to provide for government use in order to improve access to urgently needed medicines. As for the patenting of life, the Commission recommends that developing countries should not provide patent protection for plants and animals and should be permitted to develop *sui generis* systems for plant varieties that suit their agricultural systems. With respect to traditional knowledge and genetic resources, the Commission recommends that all countries should provide in their legislation for the obligatory disclosure in patent applications of the geographical source of genetic resources from which the invention is derived. Interestingly, in the very week that the report was published, the UK government dropped its opposition to an EC offer in the Council for TRIPs to consider the introduction of a multilateral system for disclosing and sharing information about the geographical origin of biological material used to support patent applications in order to help prevent 'biopiracy'. One important recommendation relates specifically to least-developed countries, who the Commission believes should be granted an extended transition period for implementation of TRIPs until at least 2016.

The report has been widely welcomed albeit with various degrees of enthusiasm. And yet, all stakeholders should be grateful to the Commission. In explaining in such an authoritative fashion why a rebalancing of the global IPR regime is absolutely essential, especially at a time when the imbalances are becoming even more acute, the Commission may end up helping to save the global IPR regime from itself.

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