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US Looking For New Tack On IP Rights With BRIC Countries

By Catherine Saez on 3 September 2010 @ 3:31 pm

Developed countries are looking for ways to address the ongoing lack of intellectual property enforcement and efforts to bypass international trade obligations in the four biggest emerging global economies, as well as emulation of this behaviour by other emerging economies in particular as the four countries have a stronger voice in international fora, a panel of United States trade experts said this week.

Brazil, Russia, India and China, often referred to as the "BRIC" countries, were the subject of a 1 September discussion gathering entitled, "The BRIC effect – part three: intellectual property rights and future paths for US policy." The event was meant to explore "how best to calibrate the US policy toward these countries in the years ahead," but mainly offered a description of the problem.

The event was the last in a three-part series held by the Washington, DC-based United States Chamber of Commerce International Division and Global Intellectual Property Center.

China remained at the head of the discussions with speakers describing concerns and challenges with intellectual property protection, counterfeiting and piracy in the country. A Chamber speaker said that these are a concern both for US and Chinese companies. If the copyright sector has shown improvement in terms of copyright protection, the levels of counterfeiting and piracy have not dropped significantly, he said. Dialogue between the two countries is important, he said, citing as an example the US-China Joint Commission on Commerce and Trade or JCCT ([*IPW, Copyright Policy, 1 June 2010*](#)^[1]).

Many speakers supported continued dialogue with the countries, as part of the solution.

For Stanford McCoy, assistant United States Trade Representative for intellectual property and innovation, the BRIC countries are four trading partners with four different IP standpoints. He described several problems among which is statutory infrastructure, such as Section 3 (d) of Indian patent law. Section 3 (d) is aimed at preventing the evergreening of patents, according to Indian sources.

McCoy also cited challenges inherent in IP systems as another problem, such as significant application backlogs, and opposition procedures. The enforcement of rights is also a challenge as it is one thing "to have the appropriate machinery for granting rights" in place and another thing to enforce those rights, he said.

On innovation and industrial policies, McCoy said it "can cut both ways in the IP sphere." He gave the example of China's indigenous innovation policy and its impact on US companies. The negative challenge of those innovation policies is that in the name of innovation policies, it restricts market access for US companies, he said.

Those challenges are brought by several factors, McCoy said, including the economic development challenge, the lack of strength of the rule of law in BRIC countries compared to the US, and the lack of political will. The Olympic Games in Beijing with obvious efforts at IP enforcement around the games are a good example of the effect of political will, he said.

Rethinking Trade Remedies, Policy

Emery Simon, counsellor for the Business Software Alliance, acknowledged that there was a high level of piracy but warned against solutions that could stifle innovation, impede free speech or endanger privacy. He gave the example of France and the United Kingdom where legislation against internet piracy raises important questions on privacy. There

should not be "too much emphasis on stopping the pirates" without considering the price of doing so, he said.

The lack of political will to resolve the issue of one of the major problems, he said, engaging governments to stop limping "from ministerial to ministerial."

"We work on concessions from ministerial to ministerial" and "as soon as the ministerial [is] over we claim victory that we made progress" with no particular result on the marketplace and the process is repeated, he said.

What counts are sales, Simon said, adding, "We need to look at the metrics." "We deal with the Chinese as a market-based economy but it's not" he said. They have broad access to the US market, but "what kind of market access do we have" in China, he asked.

"We looked at trade remedies, we looked at World Trade Organization, at the customs authorities," and the remedies are often imperfect, very hard to use, very challenging and "it is unclear, even if we win what we would gain," he said.

"We need to rethink how we look at trade policy," Simon said, "the way we look at trade remedies," and consider piracy as a "here" problem. US trade policy should be recast and be focused on results, on sales and exports, not "on these interesting, good-looking on paper commitments that occur at ministerial meetings."

BRIC Countries' Ripple Effect

BRIC countries now have an effect on other emerging countries in global policymaking, according to Jon Santamauro, counsel for Sidley Austin and former US IP attaché in Geneva. Several policies such as section 3(d) of the Indian patent law create uncertainty about whether or not they are consistent with international laws such as the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, and which recourses exist if they are not.

A recent illustrative example in Brazil procurement is quite unprecedented with the ministry of health given a role in the granting of patents. "These extra pair of eyes" might impact the ability to patent pharmaceuticals in this country, he said.

Santamauro, who represents the US biotechnology industry, also described challenges related to the Convention Biological Diversity with Brazil, India and China having introduced new requirements into their patent laws. That creates uncertainty about what consequences those new requirements will mean for inventions, and whether this is consistent with international laws. Russia is closer to the European Union approach, he said.

However, he said that compulsory licences were raising the most concerns for the patent-based industry, particularly in Brazil, China and India. In China, the patent law amendments maintain permission to grant compulsory licences on the basis of public interest and India is seeking comments on guidelines for applying their statutory provisions on compulsory licences. The notion of public interest is too vague, according to Santamauro.

Brazil, China and India are also "becoming much savvier in the patent sector" and more vocal on the global patent law debate in international organisations, as can be seen at WIPO, he said. In particular, Brazil was a spearhead in the World Intellectual Property Organization Development Agenda "which really has changed the focus of this organisation away from more traditional type of harmonising exercises, comparing IP laws," and working to facilitate protection in different countries and "more towards a focus of limitations and exceptions to those rights," he said. Brazil is driving the effort, with China and India being very supportive, he added.

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[1] *IPW*, Copyright Policy, 1 June 2010: <http://www.ip-watch.org/weblog/2010/06/01/us-china-weaving-closer-trade-and-ip-cooperation-focus-on-innovation/>

[2] As WTO Reviews China, EU, US Criticise Its Policy On Innovation, IP Rights: <http://www.ip-watch.org/weblog/2010/06/03/as-wto-reviews-china-eu-us-criticise-its-policy-on-innovation-ip-rights/>

[3] European Union Prepares A New Intellectual Property Rights Strategy: <http://www.ip-watch.org/weblog/2009/10/15/european-union-prepares-a-new-intellectual-property-rights-strategy/>

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