19 A Model of Intellectual Property Rights Enforcement for Developing Countries

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As intellectual property rights have encountered an expansive growth throughout the world, the debate on the differences of substantive intellectual property laws in developed and developing countries have regained enormous attention for decades. Nonetheless, the discussion about the dissimilarity of practices, especially for the enforcement approaches in developed and developing countries, seems to be overlooked.

This paper aims at considering and comparing the diverse approaches of intellectual property enforcement outlined above. It starts with a compressed treatment of the conceptual justification in the frame of John Locke's labor theory and the interpretations of Hegal's and Marx's theory of property. The historical perspectives of abstract objects in intellectual property law in the United States and the United Kingdom are additionally analyzed.

The paper then explores and compares the approaches of intellectual property enforcement in 3 developed countries (Japan, the United Kingdom, and the United States of America) and 4 developing countries (China, Taiwan, Thailand, and Vietnam). Focusing on practical perspective, it discusses certain procedural issues, including current law, civil remedies, criminal remedies, other remedies, court, and statistics.

Based on the comparing analysis, the paper finds that most developed countries mainly apply and develop civil remedies to protect intellectual property rights, while a number of developing countries rarely apply such remedies. In some developing countries, criminal sanction is the only option to enforce intellectual property right; civil remedies and justification of intellectual property have been abandoned. The paper proposes a model with a minimalist solution to enforcing practices, which is based on the justification of intellectual property right and the need to harmonize the differences of practices.

I Introduction

While intellectual property rights have encountered an expansive growth throughout the world, the debate on the differences of substantive intellectual property laws in developed and developing countries have regained enormous attention for decades. Numbers of intellectual property scholars in developed countries are questioning whether the framework or justification of intellectual property protection is suitable for the knowledge society, or the problem of proper scope for enforcing intellectual property right, through civil litigation. Indeed, more and more voices are debating against a law that is considered to be "overprotective" and the consequences of which on both the economy and on common welfare are regarded increasingly as rather negative. Conversely, the intellectual property enforcement agencies in some developing countries have not only ever wondered, but applied typically criminal prosecution to enforce intellectual property rights.

Thailand might be an example: the Thai Department of Intellectual Property and the Thai Police have kept promoting the criminal enforcement of intellectual property since 1990s. Campaigns to enforce criminal proceeding by the Department of Intellectual Property and police raids have been performed throughout the country for several years. The caseloads in the Central

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Intellectual Property and International Trade Court in Bangkok may evident such campaigns and practices. In 2005, there are 35 new civil copyright cases filed, but 2,943 new criminal copyright cases filed. Particularly, 98.82% of all copyright cases in the court in 2005 are criminal cases.

According to these facts, we meet a bizarre contradiction. Intellectual property rights, which are designed to stimulate intellectual activity and to provide incentives for creativity as well as to be protected through civil remedies are increasingly becoming criminal penalties in some developing countries. This research aims at considering and comparing the diverse approaches of intellectual property enforcement in developed and developing countries. It starts with a compressed treatment of the conceptual justification in the frame of John Locke's labor theory and the interpretations of Hegel's and Marx's theories of property. The historical perspectives of copyright in intellectual property movement in the United States and the United Kingdom are additionally analyzed.

The research then explores and compares the approaches of intellectual property enforcement in three developed countries (Japan, the United Kingdom, and the United States of America) and four developing countries (China, Taiwan, Thailand, and Vietnam). Focusing on practical perspective in each country, it discusses certain procedural issues, including current law, civil remedies, criminal remedies, other remedies, court, and statistics. The research then compares the differences of enforcing practices and proposes a model with a minimalist solution to developing countries, which is based on the justification of intellectual property right and the need to harmonize the differences of practices.

Based on the comparing analysis, the paper finds that most developed countries mainly apply and develop civil remedies to protect intellectual property rights, while a number of developing countries rarely apply such remedies. In some developing countries, criminal sanction is the only alternative to enforce intellectual property right; civil remedies and justification of intellectual property have been totally abandoned. The paper proposes a model with a minimalist solution to enforcing practices, which is based on the justification of intellectual property right and the need to harmonize the differences of practices.

II Justifications of Intellectual Property Rights

Unlike property which ties the right holder with "thing" or "object," the justification of intellectual property posits these intangible rights to "abstract object." This intangible feature generates the ambiguous and confusing nature to intellectual property rights. Although the original works related to property from Locke, Hegel, and Marx do not focus on rights of abstract property, such standpoints help us to clarify the justification of intellectual property rights.

In particular, the justifications of intellectual property rights through Locke, Hegel, and Marx's perspectives share one similar idea of limiting the scope of this abstract object's right. Intellectual property rights in these perspectives are more likely in the form of privilege which bears certain duties. In the labor theory, Locke makes clear the idea of "positive community" which people can properly utilize the resources of the community and "negative community" which the commons is open to ownership by all. The proper exploitation of intellectual property rights have to be within the certain limits.

Viewing property as a fundamental mechanism of survival for individuals, Hegel concerns both the origins of property and its evolutionary chance within the context of a social system. For Hegel, the recognition of intellectual products by others as well as the transmission of knowledge or well-establish thoughts is benefit for the society. The

further concern is intellectual property right, through its nature and form, has the potential to endanger community in various ways.

For Marx, his concentration with the materiality of production perhaps leads him to ignore the importance of the abstract object to capitalism's processes of commodity accumulation. However, his analysis of the commodity nature of capitalism, the understanding of individual capitalist behavior, and the contributing to growth of economic capitalism does explain the justification and the need of intellectual property right within capitalism. In addition, concern of real dangers in allowing the intellectual commons to be propertied is also relevant.

Unlike property, intellectual property does not have relation between the holder of the right and the thing (or object). Instead, intellectual property rights relate to "abstract object." Such rights may be easily and endlessly expanded if we do not define a proper scope and provide a decent justification. The grant of these monopoly rights accordingly should be tied to the proper limit and duty.

Additionally, the need of decent balance is later emphasized in most international convention related to intellectual property right. Article 27 of the Universal Declaration of Human Rights stresses that every country may maintain the delicate balance between the limited monopoly and the public interest to enjoy the arts and share in the scientific progress. Likewise, the balance conception is highlighted in the Preamble and content in most WIPO treaties and TRIPS Agreement.

From the historical perspective, English copyright began in the sixteenth century as a device for maintaining rules among members of the book trade organized as the Stationers' Company. Aided by preceding laws and regulations of press control and censorship, the rights were developed and gradually misused to be the basis of a monopoly in the book trade. With the end of censorship and government support, this book trade regulation was replaced with the statutory rights. The enacted copyright statute, the Statute of Anne, was modeled on the stationer's right, but with two main different features for removal the monopoly: the limited members of the stationers and the perpetual existence. The copyright therefore was swift from an instrument of monopoly as the stationer's copyright to be a trade-regulation device under the statutory law.

The notion of monopoly moved to posit with the right of author within limit period in the provision of the Statute of Anne, the Constitution of the United States, and several major case laws. The limit monopoly for the author seems justified to reward his labor and encourage new creative activity. But again, the monopoly has gradually moved from the right of author to the publisher, on behalf of the author's. The copyright therefore is used to protect the economy interest of the publisher or investor and against his competitors. This important replacement cuts the limit monopoly from the link of the need of creative encouragement and promoting of science and useful arts.

The reasoning in *Millar v. Taylor*, *Donaldson v. Beckett* and *Wheaton v. Peters* show clear explanation between the conclusions based on individual's interest and public's interest. These different foundations brought to the different conclusions as to how to resolve the conflict of interests. The holding in *Millar* supports the individual's interest and grants perpetual protection to a bookseller, while the majority in *Donaldson* and *Wheaton* sustains public's interest and provides only limit monopoly to authors and publishers, under the conditions prescribed by laws.

From the discussion in Chapter II, the research shows that the justifications of intellectual property right by Locke, Hegel, and Marx share the need to preserve common or public interest owing to the justification and nature of intellectual property rights, while the historical perspectives in England and the United States explain the need to limit the monopoly power of the right holders.

Besides these needs, intellectual property protection under the international scheme has always called for the harmonization of national laws and the need for public to access to science, technology, and culture. The context in all WIPO treaties as well as the TRIPS Agreement joins the same premise of harmonizing national legislatures for the intellectual property protection. In particular, such protection reasonably enforces through civil remedies and maintains decent balance between the civil rights of right holder and the larger public interest. Member of such international convention is abided by international obligation to provide adequate and effective civil protection and remedies for the intellectual property right holders to enforce their civil right efficiently.

Recently, the rapid development and value of intellectual property rights in most developed countries has stimulated business investors, not the creators themselves, to expand the limit of monopoly. It turn even further in the practices in some developing countries, the business investors mainly enforce intellectual property rights through criminal prosecution and criminal punishment. Within the monopolistic frame, in other words, monopolist criminalizes people who are monopolized but refuse to be monopolized.

III Model of Intellectual Property Right Protection in Developed and Developing Countries

Chapter III examines and compares the approaches of intellectual property right protection in specific developed and developing countries as well as the framework of major international agreement relating to intellectual property right. To set the frame of international obligations and harmonization, the research begins by examining some key concept in three types of international instruments—Universal Declaration of Human Rights, WIPO Treaties, and the TRIPS Agreement. The research further considers the practices of intellectual property right enforcement in seven countries.Three are selected from the developed countries—Japan, United Kingdom, and United States, comparing to four developing countries—China, Taiwan, Thailand, and Vietnam. Specific concerns includes eight main issues, (i) historical background, (ii) current law, (iii) civil remedies, (iv) criminal remedies, (v) other remedies, (vi) court, (vii) statistics, and (viii) perspective.

IV Considerations for Developing Country Model

Based on the comparing analysis in Chapter II and III, the enforcing practices and intellectual property law in most developed countries go along with the need to preserve common interest and the need to maintain a decent balance of interests as well as international obligation. Japan, the United Kingdom, and the United States are good examples.

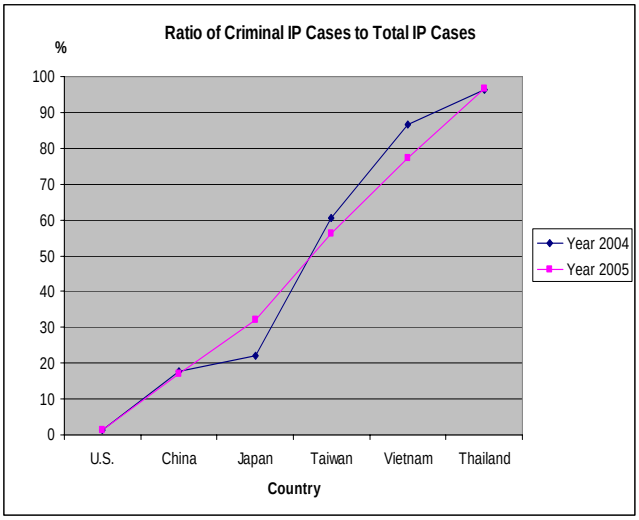
Nonetheless, practices and laws in most developing countries are much more questionable. The need to maintain a decent balance of interests seems to be substituted by loads of criminal penalties. The comparison of criminal prosecution in intellectual property cases in developed and developing countries shows severe contradiction of enforcing practices. The following Table I and Chart I show the ratio or percentage of criminal intellectual property cases, compare to all intellectual property caseload in six countries (due to the statistics available, Chart I applies information in year 2003 and 2004 for Vietnam, and year 2004 and 2005 for the rest). From the number of criminal caseloads in Chart I, most developed countries have applied a very low percentage of criminal prosecution, while the ratio of criminal prosecution in most developing countries is very high. The similar differences of ratio happen similarly in both years. In the year 2004; for example, the United States prosecuted only 1.33% of criminal

intellectual property cases, while Japan has 23.06% of criminal prosecutions. On the other hand, most developing countries apply very high ratio of criminal prosecutions; Taiwan has 60.61% of criminal prosecution while Vietnam prosecution is 77.42%. The exceptional high ratio of criminal prosecution is Thailand which went up to 96.19%. Only 3% left for all civil litigation related to intellectual property matters.

Table I: Number of Criminal IP Cases in Six Countries

	Year 2004		Year 2005	
	Criminal Cases (number)	Ratio (%)	Criminal Cases (number)	Ratio (%)
U.S.	129	1.33	169	1.37
China	2,753	17.78	3,567	17.21
Japan	196	23.06	302	34.28
Taiwan	2,333	60.61	1,555	56.10
Vietnam	52 (Year 2003)	86.67	24 (Year 2004)	77.42
Thailand	5,354	96.19	5,565	96,68

Chart I: Ratio of Criminal IP Cases to Total IP Cases in Six Countries



From what we have discussed in the last chapter about the practices of intellectual property enforcement, it shows that most developing countries have developed misunderstanding foundations and left the proper justification of "intellectual property right," "monopoly," and "harmonization" behind. Accordingly, it is important to stress that it is obligatory for both developed and developing countries to frame a decent protecting system of intellectual property right in their legislature and enforcement processes. Particularly, legislation and enforcement organizations in developing countries need to realize the necessity of the balance of interest and integrate such balance into every part of legislation and protection processes.

Based on the comparing analysis, the research proposes a model with a minimalist solution to enforcing practices, which is based on the justification of intellectual property right and the need to harmonize the differences of practices.

1 Justification of Intellectual Property Right

As discussed in the previous chapters, intellectual property right has its own distinctive characteristic and nature. Countries, especially developing countries, should be aware of the implication and justification of intellectual property right as well as its unique nature. Without adequate consideration, drafting intellectual property laws or taking part of enforcing intellectual property right by government authorities may cause the long term difficulties.

2 Balance of Right of Holder and Public Interest

The objectives of most international convention related to intellectual property right share one same concept—the balance of right of intellectual property holders and public interest. The content of most WIPO

(*1) *See* The Preamble of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Article 7 of the TRIPS Agreement also clearly states the objective of the Agreement that *"The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."*

treaties and the TRIPS Agreement are excellent examples.(*1) Besides, most developed countries have applied such balance into their legislatures and practices. The United State Constitution, Art 1, Section 8, Clause 8 and enforcing practices of state authorities in Japan, the United Kingdom, and the United States are good examples. Developing countries also have international obligation to follow as well as the need to recognize and apply the balance of right of holder and public interest into their intellectual property legislatures and enforcing practices.

The content of article 32 and 60 of the Vietnam Constitution and other Vietnam intellectual property laws may be an example showing that Vietnam legislature is concern of decent balance of interests as well as justification of intellectual property right. On the contrary, severe criminal penalties in Thai intellectual property laws and several amendments to increase such penalties show that Thai legislature has been in the conception that criminal law should be the major solution of intellectual property disputes. Moreover, the amending of article 76 of the Copyright Law by the Department of Intellectual Property in 1994 to share one half of the criminal fine paid under a judgment to the owner of copyright or performer' right, so called "fine sharing," shows that the Department of Intellectual Property and Legislature still do not understand the differences between criminal fine and civil damages for the right holder. It also illustrates the lack of understanding of intellectual property right's justification.

3 The Need of Harmonization

Due to its intangible nature, the intellectual property right is very extensive and does not attach to any tangible object. Such right can be claim and can be infringed worldwide, not just within territory of any country. Accordingly, harmonizing intellectual property laws and related practices is necessary for efficient protection. Countries, especially developing countries, should be aware of international standard and the need of harmonizing their legislatures and practices in a proper degree.

Ratio of criminal prosecution and civil caseload is one of the best examples showing the cry for harmonization. The difference between 1 percent of the United States criminal prosecution and 96 percent criminal prosecution by Thai police and public prosecutors is not just the dissimilarity of practices, but the opposite polar. Such differences can not provide the decent benefit and efficiency for intellectual property right protection in the long term.

4 Type of Remedy

The justification and nature of intellectual property right as well as the well-established ground in most international instrument shares the same standpoint that civil remedies are fit to protect intellectual property right than criminal penalties. Therefore, developing countries should recognize and harmonize their legislatures and practices to provide adequate and effective civil remedies for the right holders to enforce their civil right efficiently.

On the other hand, criminal remedy is necessity only in certain large scale of infringement those right holders could not enforce their right efficiently. Accordingly, developing countries should limit criminal intellectual property offences in the proper scope and be aware of justification and nature of intellectual property rights. In addition, developing countries should avoid enforcing intellectual property rights through governmental authorities and should prevent "over-criminalization" situation.

5 Other Considerations

For developing countries, enforcing intellectual property right through criminal prosecution is not without cost. On the contrary, immeasurable number of government budget is spent each year on criminal prosecuting civil disputes. Moreover, without exceptional managing plan, several social impacts may follow in some developing countries. Concisely, some considerations

those should be aware of include issues of (i) cost of criminal prosecution, (ii) lack of human resources and technical equipment, (iii) prosecuted infringer, and (iv) public resistance.