**Transnational Issues and Intellectual Property**

International law making is based on the notion of sovereignty and territoriality principle, thus the law of a nation applies to its territory. A right that is granted by law, in one country is, in principle, valid within the territory of such country. Exceptions to this principle do exist. In addition, sovereign nations bilaterally or multilaterally recognise and sometimes enforce the corresponding rights based on laws of other countries, through international conventions and treaties.

Intellectual property (IP) is one of such rights that are granted by law. Thus without international treaties and conventions that recognise foreign intellectual property right, IP is only protected within a territory of a country where it has been granted. The laws of the country where it has been granted define and determine what is to be prohibited as infringements to this right. Thus the exploitations or infringement cannot extend beyond the territory of the country. In case of cross border transactions, the branch of law called “conflict of law” rules determines which country’s law should be applied.

This way of enforcing IP is based on the territoriality principle. This has been the ground for many international Conventions and treaties on IP1. Even the international conventions that seek global harmonisation of IPR laws are based on this territoriality principle. For example, Paris Convention2, and WTO-TRIPs Agreement3 which is one of the most overarching international legal instrument on IPR so far, are based on territoriality principle of IP. Thus, they call for a “national” treatment of foreign nationals which represent basic rules based on reciprocity4, not a uniform protection of IPR throughout the world.

The territoriality principle, however, is currently challenged from many different angles of law and changes in society. First of all, technological developments such as Internet and information technology have fundamentally challenged the established method of adjudicating and the concept of jurisdiction. Today, infringing activity does not happen in one jurisdiction alone nor the impact is felt in single country. In a similar manner, production or creation of IP does not happen in one jurisdiction alone. A “cyber space” complicates the matter even further. As shown in the recent iCrave TV case5, enforcement based on territoriality principle may not be efficient nor fair anymore, whether it is in physical space or cyber space.

The territoriality principle of IPR creates uncertainty, especially in enforcing the IPR in different countries. Ideally, one way to remove this uncertainty and to promote predictability in the enforcement of IPR is to devise a set of standardised norms that would apply equally to the procedure of enforcement. Globally, it is widely suggested that a multilateral convention that recognises and enforces foreign IPR related judgement may do the work. An example of this is the on-going discussion of the Hague Judgement Convention6. In reality, however, without an authority that monitors the implementation, it is questionable whether it would be effectively applied.

In the European Union, the possibility does exist already. Recently, many IPR practitioners in EU have noted the use of the Brussels Convention with the supranational organisation (European Court of Justice) in transnational IPR litigation, with interest7. The Convention allows a person residing in EU with a bundle of IPR in EU to consolidate its proceedings in one of the EU forum based on the IPR in that territory. Therefore, a Dutch plaintiff domiciled in UK could bring a suit against a defendant in the Netherlands for infringements in the Netherlands8.

The problems or the concerns of this way of adjudicating IPR globally are plenty. Of foremost concern is whether a national court should adjudicate the infringement suit based on foreign intellectual property. Following the territoriality principle, the answer should be negative. Would this promote certainty or would this rather create a downright forum shopping and proliferation of conflicting judgements? Once this question is settled, further issues such as if we should devising new norms or which forum to consolidate the proceedings should follow.

It has been suggested that not adjudicating foreign IPR is against the territoriality principle, because as the result, a court ends up refusing to respect the legal effect of the IPR granted by a foreign sovereign. One commentator9 maintained that by granting a remedy against the infringer of a foreign patent, a court pays respect to the sovereignty of the nation that granted the right. Devising a system where an application for IPR leads to a right having international effect and which needs to only be litigated in one forum may solve the problem. However, this leaves us with more questions. Efficiency and predictability of transnational litigation are but parts of many other values legal institutions seek to promote. Fairness is another value, and whether such idealistic system with a forum concentration would be fair is yet another question to address.