

GLOBAL INFORMATION SOCIETY WATCH 2007

Focus on Participation



Global Information Society Watch

2007



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World Intellectual Property Organisation (WIPO)

Robin Gross

Introduction

Objectives and main activities

The World Intellectual Property Organisation (WIPO)¹ is the United Nations specialised agency that coordinates international treaties regarding intellectual property rights. Its 184 member states comprise over 90% of the countries of the world, who participate in WIPO to negotiate treaties and set policy on intellectual property matters such as patents, copyrights and trademarks.

WIPO was established in 1967 by the WIPO Convention, which states that WIPO's objective was "to promote the protection of intellectual property throughout the world..." (WIPO, 1967, Article 3). Headquartered in Geneva, Switzerland, WIPO currently administers 24 treaties and facilitates the negotiation of several proposed treaties covering copyrights, patents and trademarks.

Although WIPO was originally established explicitly to promote the protection of intellectual property, when it joined the UN family in 1974 its objective had to be redefined as a public-interest or humanitarian goal. Article 1 of the key agreement establishing WIPO's relationship to the UN restates WIPO's purpose as: "for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development..." (WIPO, 1974).

The five strategic goals laid out by WIPO in its 2005-2006 programme and budget are:

- To promote an extensive intellectual property culture
- To integrate intellectual property into national development policies and programmes
- To develop international intellectual property laws and standards (partially defined as promoting laws forbidding the circumvention of technological restrictions)
- To deliver quality services in global intellectual property protection systems
- To increase the efficiency of WIPO's management and support processes.

WIPO is unique among UN organisations in that its activities are largely self-funded. Approximately 90% of WIPO's 2006-2007 budget of CHF 531 million (USD 440 million) comes from the fees its earns for international trademark registrations and patent applications. The remaining 10% of WIPO's budget is earned from fees for its arbitration and mediation services, publications, and from small contributions from member states.

WEBSITE: www.wipo.int

HEADQUARTERS: Geneva, Switzerland

FOUNDED: 1967

UN STATUS: UN specialised agency since 1974

TYPE: Intergovernmental organisation (184 member states)

Key members/participants and decision-making structures

WIPO is made up of 184 member states and operates on a "one country, one vote" basis. It is governed by a General Assembly, which convenes each autumn and oversees the activities of the organisation, including its budget, while a number of issue-specific committees work on the substantive issues. The revenues generated from patent and trademark fees enable WIPO to support a staff of approximately 1,000 people, which is rather large by UN standards.

The agency operates through individual member states meeting in committees, assemblies, and working groups, which are coordinated by the WIPO Secretariat. Most member states appoint career civil servants from their capitals to participate in meetings and negotiations. WIPO committees work according to a consensus-based decision-making structure, which generally means no action is taken unless all member states agree.

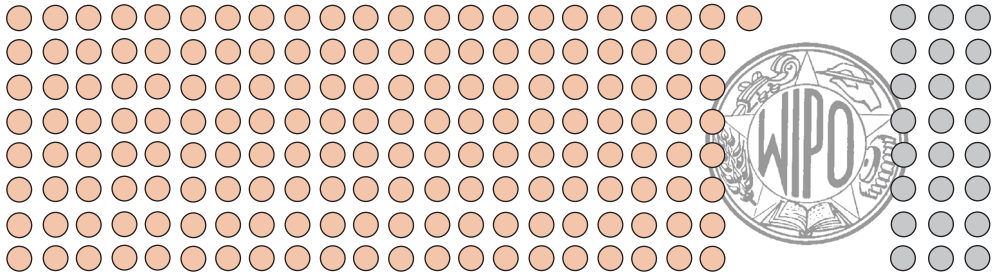
In theory, WIPO's strategic direction and activities are decided by the member states, but in practice, the WIPO Secretariat, based in Geneva, is given enormous power to influence and direct the work and objectives of the organisation under the WIPO Convention.

Furthermore, on any particular issue, not only top WIPO staff but also the chair of the relevant WIPO committee wield the power to drive the organisation's agenda through the framing of the debate in that committee. The election of the chair is the first item on the agenda of meetings. Member state delegates, including the chair, participate at WIPO with the costs paid by the member state. Committee chairs decide which proposals become text for a treaty and which proposals are deleted from draft treaty texts; they decide how the proposals are framed, and whether or not civil society may speak at WIPO meetings.

Civil society or non-governmental organisation (NGO) participation is allowed at WIPO through an accreditation process that takes place once a year to obtain official "observer" status. Besides governments and civil society, WIPO also allows for intergovernmental organisation (IGO) participation in its meetings. While WIPO boasts that over 250 NGOs and IGOs currently have official observer status at WIPO, the vast majority of these NGOs are trade industry organisations from wealthy countries participating for the purpose of maximising private gain. Participation at the 2005-2006 WIPO Development Agenda meetings is illustrative of this fact.

¹ <www.wipo.int>.

Balance in the WIPO Development Agenda?



Hardly. Of the 193 non-governmental organisations (NGOs) eligible to attend WIPO's Development Agenda summit, only 24 work explicitly on improving conditions in developing countries. So when WIPO holds a meeting about intellectual property in the developing world, the groups that actually work there will be outnumbered 7 to 1.



Relations with other international institutions and the multilateral system

WTO-TRIPS

Although WIPO administers 24 treaties that deal with intellectual property rights, the World Trade Organisation (WTO) administers what is arguably the most important treaty on the subject, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Unlike WIPO treaties, the TRIPS Agreement includes powerful enforcement mechanisms such as trade sanctions and litigation before the World Court² that force countries into compliance with the provisions in the agreement.

The WTO's TRIPS Agreement was signed in 1994, and states in its preamble the desire to "establish a mutually supportive relationship between the WTO and the World Intellectual Property Organisation" (WTO, 1994). In 1996 the WTO and WIPO signed a cooperation agreement to facilitate the implementation of the TRIPS Agreement.

The 1996 WTO-WIPO cooperation agreement provides for cooperation in three main areas, specifically the notification of, access to and translation of national intellectual property rights laws; implementation of procedures for the protection of national emblems; and technical cooperation. Since the 1996 agreement, the WTO and WIPO have launched two additional technical cooperation agreements in 1998 and 2001 to spur developing nations into conforming with the TRIPS requirements in their national laws.

Internet Corporation for Assigned Names and Numbers (ICANN)

WIPO also maintains a close relationship with the Internet Corporation for Assigned Names and Numbers (ICANN).³ In 1999 ICANN instituted a regime for trademark dispute resolutions that was originally proposed by WIPO, the Uniform Domain-Name Dispute-Resolution Policy (UDRP). Under the UDRP most ICANN-accredited generic top-level domain name (gTLD) registrars – and the country code top-level domain name (ccTLD) registration authorities that have adopted the policy⁴ – are contractually bound to submit to arbitration through WIPO's Arbitration and Mediation Centre. The UDRP allows anyone to challenge the registration and ownership of domain names based on the claim that the domain name infringes a trademark, and the actual dispute resolution process is handled by independent service providers accredited through the Centre (ICANN, 1999).

A WIPO press release in October 2006 announced that its Arbitration and Mediation Centre, which accredits the dispute resolution service providers, had decided its 25,000th case, ordering the transfer of the domain name to the trademark owner.

Besides the UDRP, WIPO and ICANN have also implemented policies dealing with the introduction of new gTLDs that give trademark holders special rights to preemptively register and challenge registrations of new gTLDs. Under these so-called "sunrise" provisions, trademark holders are given the right to pre-register their name before anyone else can. Although trademark law does not grant trademark holders

² Formally known as the International Court of Justice (ICJ), the United Nations' highest court, based in The Hague.

³ <www.icann.org>.

⁴ More information is available from: <www.wipo.int/amc/en/domains>.

the special rights that ICANN's policies for domain name registrations give them, the policies were instituted at the suggestion of WIPO to privilege trademark owners in cyberspace.

Another ICANN policy that was recommended by WIPO is the controversial policy on ICANN's WHOIS database and its publication of private information on the internet. Under ICANN's WHOIS policy, the personal contact information – including home address and telephone number – of everyone who has ever registered a domain name is put into a free online database available to anyone for any reason. As a result of ICANN's policy (which originated from WIPO), the WHOIS database is one of the largest sources of data for engaging in consumer abuses such as identity theft, fraud, and other privacy violations.⁵

In 1998 WIPO issued a report in response to the creation of ICANN insisting that publicly available databases for the complete and accurate contact information of all domain name registrants should be made available, regardless of privacy concerns. WIPO's report proposed that providing any inaccurate registration data should be grounds for forfeiting the domain name, regardless of whether there has been any violation of intellectual property rights or of any other kind.

Although ICANN's Generic Names Supporting Organisation (GNSO) Policy Council voted in April 2006 that the purpose of the WHOIS database is narrow and only technical, large intellectual property holders continue to argue that the database of personal information must remain open to all in order to protect intellectual property interests.

Commitment to development, equality and openness

As noted above, Article 1 of the 1974 agreement between WIPO and the UN redefined WIPO's mission as: "to accelerate economic, social and cultural development" in alignment with the UN's humanitarian objectives (WIPO, 1974). But despite its obligation to the UN, WIPO officials still point to the 1967 WIPO Convention to state WIPO's purpose as: "to promote the protection of intellectual property" (WIPO, 1967).

In response to this attitude, a global civil society movement began coalescing in 2004 around the Geneva Declaration on the Future of WIPO,⁶ which is aimed at reforming WIPO's policies and practices to address the needs of developing countries and the objective of promoting access to knowledge. In addition, a number of member states themselves have also risen to the call for change at WIPO by working for the adoption of a "Development Agenda". WIPO has responded by "circling the wagons" and obstructing the attempts for reform. Both efforts are discussed more thoroughly below.

In leadership positions, WIPO remains heavily dominated by males consistently filling the top posts. As of January 2007, WIPO's director general and all four deputy director general posts were all filled by men, as are the top posts of assistant director general, legal counsel, and senior counsellor. There are a number of women work-

ing at WIPO, but they are not in top leadership positions.⁷ The top officials at WIPO on each of the substantive issues of copyrights, patents, and trademarks are all men.

However, a growing number of member states send women to participate at WIPO as part of their delegations, and many of these women provide leadership in an unofficial but remarkably successful fashion. Women delegates from developing countries in particular, such as Argentina and India, have proven instrumental in building consensus and promoting the Development Agenda at WIPO. But a woman has yet to be elected the chairperson of the copyright committee or Development Agenda negotiations.

As noted above, NGOs may participate in WIPO deliberations as observers, upon completion of a prescribed process. But there is no distinction between public-interest and private-interest NGOs at WIPO, and consequently, private industry NGOs largely outnumber public-interest NGOs. However, these numbers are constantly in flux and public-interest participation has grown significantly since 2004. Until recently, there were few voices at WIPO to challenge industry groups such as the international pharmaceutical manufacturers who claimed to be a "public-interest NGO" at the 2005 Development Agenda talks and were quickly taken to task by a number of library groups. But by and large, only NGOs who can afford to regularly send representatives to Geneva or maintain an office there can participate at WIPO and this represents an enormous barrier for developing country NGOs in particular.

Role and responsibilities in ICTs

WIPO "Internet Treaties"

Before the 1990s WIPO played a minimal role in setting rules in the area of information and communications technologies (ICTs). This has much to do with the evolving role of intellectual property rights in general. In the past, intellectual property rules did not apply to personal communication technologies, since they mainly concerned large publishing houses or major companies. But with the development of personal communication technologies, particularly computers and the internet, intellectual property rules have become one of the most important determinants in setting ICT policy and regulation. Because digital technology inherently requires making copies of data, copyright rules are automatically triggered in the digital environment. And because the internet provides a new forum for infringement of copyright and trademark, intellectual property rules have been catapulted into prominence. Patents and trade secrets are increasingly used in technical standards, so such rules are similarly growing in importance in setting ICT policy. As intellectual property rules in general become more relevant in regulating communication, WIPO's role has also increased.

5 More information about WHOIS is available from: <gns0.icann.org/issues/whois-privacy>.

6 Available from: <www.cptech.org/ip/wipo/futureofwipodeclaration.pdf>.

7 In 2001 the WIPO post of deputy director general for copyrights was filled by Rita Hayes, a female appointee from the administration of then US President Bill Clinton, but Ms. Hayes was replaced by a male from the George W. Bush administration in 2006.

In 1996 WIPO passed two treaties collectively known as the “Internet Treaties” in response to the demands of intellectual property holders worried about infringement in cyberspace. The passage of the WIPO Copyright Treaty (WCT) (WIPO, 1996a) and the WIPO Performances and Phonograms Treaty (WPPT) (WIPO, 1996b) marked an important change for WIPO’s involvement in setting ICT regulation (and for copyright law).

Among other ambitions, the WCT and WPPT gave copyright owners the unprecedented right to use technological restrictions to control the use of digital media by making it illegal to bypass those restrictions. Specifically, the WCT/WPPT require member states to provide adequate legal protection and effective legal remedies against the circumvention of technological restrictions used to protect a copyrighted work.

These WIPO treaties have been implemented in the US in the form the 1998 Digital Millennium Copyright Act (DMCA), and in Europe through the EU Copyright Directive (EUCD) and the various national legislations that outlaw circumvention of technological restrictions. However, the DMCA and EUCD actually outlaw much more activity and technology than the WIPO Internet Treaties require. The DMCA, in particular, is often referenced at WIPO and by large intellectual property rights holders as the “model” for implementing these treaties, despite its extremity. The DMCA is very controversial in the US since its overbroad anti-circumvention provisions have been invoked to prevent competition in markets unrelated to copyright, stifle criticism about technical weaknesses, and force consumers to pay extra to engage in otherwise lawful uses of digital media.

The WIPO Internet Treaties of 1996 were only the beginning for WIPO’s involvement in ICT policy-making. Increasing the rights of broadcasting companies in the digital environment has been on the agenda of WIPO’s copyright committee since the late 1990s. In 2005, after seven years of negotiation at WIPO over a treaty to create new rights for broadcasting companies, the US proposed that the scope of the proposed broadcasting treaty be widened to include the regulation of webcasting or “internet transmissions of media” as well. The US was virtually alone in the desire to include webcasting in the broadcasting treaty, but was initially unwilling to change its position.

However, at the May 2006 meeting of the WIPO Standing Committee on Copyright and Related Rights, the backers of the proposed broadcasting treaty feared it was in danger of outright rejection if the US insisted on extending it to the unpopular webcasting rights. Consequently, a deal was reached that removed the US webcasting provisions in exchange for a promise to bring them back in 2007 in the form of a much larger and more encompassing treaty to deal with internet transmissions of media. Thus WIPO announced that it intends to embark on a whole new “Internet Treaty” to regulate webcasting and the transmission of audio and video programming over the internet.

Even with the removal of webcasting provisions from the text of the proposed broadcasting treaty, the draft treaty still regulates all internet retransmissions of broadcast programming. WIPO is definitely seizing the moment to regulate ICT policies to a much greater extent than it has in the past.

Internet governance

WIPO has also begun to play a role in the more general “internet governance” debates. As described above, WIPO has worked closely with ICANN to set its UDRP policy to deal with infringement claims over domain names and to institute provisions that privilege trademark holders with early registration and cancellation rights for new domain names.

WIPO also participated in the UN World Summit on the Information Society (WSIS), which took place from 2003 to 2005 in Geneva and Tunis,⁸ although it did not play a significant role there. WIPO’s main goal at WSIS appeared to be to prevent any serious discussion about the appropriate balance of intellectual property rights in cyberspace. WSIS organisers similarly deemed intellectual property rights “too controversial” for serious discussion at WSIS.

However, WIPO did hold an Online Forum on Intellectual Property in the Information Society in June 2005 to “encourage debate on the topic of intellectual property in the information society and in furtherance of the goals of WSIS.”⁹ The conclusions of the Online Forum became a significant part of WIPO’s contribution to WSIS. WIPO was given a speaking slot during the plenary session at the 2003 Geneva Summit and the 2005 Tunis Summit, but did not significantly contribute to the overall WSIS debate, apart from keeping serious international property rights (IPR) discussions “off the table”.

In 2005 WIPO was given a seat on the UN Working Group on Internet Governance (WGIG), a WSIS initiative. However, the WGIG deemed its sub-committee’s paper on IPR issues too controversial to become part of the WGIG final report. WIPO has not made any significant contributions to the UN Internet Governance Forum (IGF), either. WIPO did not participate in the May 2006 IGF Open Consultations; nor did WIPO attend the meeting of the IGF Advisory Group, though it was entitled to as a UN specialised agency. Indeed issues about the appropriate balance for intellectual property rights in cyberspace were prominently on the agenda at the inaugural IGF meeting in Athens in November 2006, although WIPO officials did not play a large role in those discussions. The IGF is a discussion forum, not a treaty-making body, so participation in the IGF may be less of a priority for WIPO.

Description and analysis of ICT activities

In recent years WIPO has attracted controversy in a number of areas where its mandate and activities apparently diverge from the UN’s humanitarian goals.

Geneva Declaration on the Future of WIPO

In September 2004, many prominent legal scholars, scientists, activists, public-interest NGOs, a 2002 Nobel Prize winner for physiology, a former French prime minister, and several thousand other concerned global citizens published the Geneva Declaration on the Future of WIPO.¹⁰

8 <www.wsis-online.net>.

9 WIPO’s Online Forum on Intellectual Property in the Information Society: <www.wipo.int/ipisforum/en>.

10 <www.cptech.org/ip/wipo/futureofwipodeclaration.pdf>.

The Geneva Declaration called upon WIPO to reform its “culture of creating and expanding monopoly privileges, often without regard to the consequences.” The declaration said that WIPO’s “continuous expansion of these privileges and their enforcement mechanisms has led to grave social and economic costs, and has hampered and threatened other important systems of creativity and innovation.”

The Declaration called upon WIPO to:

...enable its members to understand the real economic and social consequences of excessive intellectual property protections, and the importance of striking a balance between the public domain and competition on the one hand, and the realm of property rights on the other.

The Declaration also requested that WIPO undertake a Development Agenda and new approaches to supporting innovation and creativity. It asked WIPO to take into account the different developmental needs of member states in setting IPR policies:

A “one size fits all” approach that embraces the highest levels of intellectual property protection for everyone leads to unjust and burdensome outcomes for countries that are struggling to meet the most basic needs of their citizens.

While the well-publicised Declaration did not itself have legal significance or power to reform WIPO, it served well as a “shot heard around the world” that highlighted WIPO’s poor record on protecting the public interest and the need for reform.

Development Agenda

The timing of the Geneva Declaration on the Future of WIPO in September 2004 coincided with a proposal from member states Brazil and Argentina before the WIPO General Assembly for the establishment of a Development Agenda for WIPO (WIPO, 2004). The 2004 WIPO General Assembly adopted the resolution for the establishment of a Development Agenda to reform WIPO’s practice of blindly increasing intellectual property rights:

Intellectual property protection cannot be seen as an end in itself, nor can the harmonisation of intellectual property laws leading to higher protection standards in all countries, irrespective of their levels of development.

The role of intellectual property and its impact on development must be carefully assessed on a case-by-case basis. Intellectual property protection is a policy instrument the operation of which may, in actual practice, produce benefits as well as costs, which may vary in accordance with a country’s level of development. Action is therefore needed to ensure, in all countries, that the costs do not outweigh the benefits of intellectual property protection.

In April 2005 Brazil and Argentina were joined by twelve other developing countries, collectively called the Group of Friends of Development (FoD), to elaborate on the goals of the Development Agenda at WIPO. The FoD proposal calls for a fundamental review of WIPO’s overall mandate and governance structure. It asks WIPO to adopt pro-

development norm-setting standards. The FoD proposal suggests principles and guidelines for WIPO’s technical assistance programme, as well as guidelines for technology transfer and competition policy work at WIPO. The FoD proposal also calls on WIPO to live up to its role as a UN specialised agency by promoting the public interest and development concerns in all WIPO activities.

WIPO held three intersessional meetings in April, June and July 2005 to debate the various proposals for a Development Agenda. Global public support for the FoD proposal swelled. Over 138 public-interest NGOs from all corners of the globe signed a statement in support of the FoD proposal for reform at WIPO and a rebalancing of global intellectual property rules.¹¹ But in the final intersessional meeting in July 2005, the US and Japan refused to agree to any of the proposals for a Development Agenda and were able to prevent a consensus from being reached. As a result of two hold-outs and lack of consensus, no substantive recommendations could be made to the 2005 General Assembly for a Development Agenda at WIPO.

Member states at the 2005 WIPO General Assembly once again voted to endorse a Development Agenda and to continue and complete discussions through intersessional meetings in 2006. Intersessional meetings were held in February and June 2006 to again discuss proposals related to a Development Agenda at WIPO. FoD proposed a set of draft recommendations at the June meeting for specific concrete reform to present to the 2006 General Assembly. But the so-called Group B countries – i.e. the wealthiest member states, including the United States and Europe – refused to endorse any of the proposals, again preventing consensus and any progress on a Development Agenda. The meeting’s chair, Paraguayan Ambassador Rigoberto Gauto Vielman, put forth an alternative proposal for recommendations that contained mostly suggestions from the wealthy countries, but that proposal gained even less support.

Despite the lack of concrete recommendations for a second year in a row, the WIPO General Assembly in 2006 voted for the third time to hold discussion of proposals for a Development Agenda at WIPO. The General Assembly agreed to hold two week-long sessions in 2007 to discuss the 111 proposals made thus far. The first meeting would address the 40 controversial proposals identified by Chairman Gauto Vielman, and the second would address the remaining 71 proposals that are mostly from developing countries. If member states reach a consensus, recommendations will be made to the 2007 WIPO General Assembly for action on proposals with agreement and a framework to move forward with the remaining proposals. Without support from the wealthy member states, reform at WIPO is almost impossible.

Proposed WIPO broadcasting treaty

As noted above, the controversial proposal to create unprecedented new rights for broadcasting companies represents another opportunity for WIPO to regulate ICTs. More than seven years into discussions, even the most basic provisions of the proposed WIPO broadcasting

¹¹ See: <www.ipjustice.org/WIPO/NGO_Statement.shtml>.

treaty have not been agreed upon by member states. Whether the treaty will create entirely new intellectual property rights (as proposed by Europe) or take a traditional “signal theft” approach to protecting broadcasts is still up in the air. The extent to which the treaty will regulate internet retransmissions of broadcast programming remains contentious. The inclusion of the unpopular anti-circumvention rights for broadcasting companies in the treaty text is disputed by most member states. Limitations and exceptions to the new rights created for broadcasting companies are yet to be determined, and key terms such “signal” have yet to be defined in the treaty.

Nonetheless, in September 2006, the chair of the Standing Committee on Copyright and Related Rights (SCCR), Jukka Liedes, called for “silent approval” of his proposal for the Committee to recommend to the 2006 General Assembly that a diplomatic conference be convened to conclude final treaty drafting. A number of member states expressed disapproval of Liedes’ push to conclude the treaty, including India, Brazil, Argentina, Chile, Bolivia, Iran and South Africa. Even the US dropped its support for the proposal at the September 2006 SCCR meeting after the US technology industry began to complain about the draft’s harmful impact on technological innovation.

At the 2006 WIPO General Assembly, member states rejected the controversial recommendation of SCCR Chairman Liedes to convene a diplomatic conference and instead called for two additional meetings in 2007 to try to reach agreement on the many points of contention. The autumn 2006 General Assembly voted to convene a diplomatic conference on the broadcasting treaty *only if* agreement could be reached before the 2007 General Assembly.

This was not the first instance in which Chairman Liedes ignored the WIPO principle of consensus-based decision-making. In November 2004 Liedes had called for moving the discussions on the broadcasting treaty to regional consultations in 2005. Many member state delegates claim that Liedes’ move was illegal since a number of countries openly objected to his proposal for regional consultations.

Developing countries, including Brazil, India, Egypt, and Argentina, requested intersessional meetings in Geneva with all member states present to discuss the proposed treaty’s provisions. Because this would offer both developed and developing countries an opportunity to discuss their differences together, and allow for the input of public-interest organisations in the debate, intersessional meetings seemed the appropriate next step.

But Chairman Liedes recommended instead to send debate on the proposed broadcasting treaty to secretive regional meetings, where it is easier to pressure individual countries into accepting the treaty through a “divide and conquer” strategy. WIPO regional meetings take place completely outside of the public eye, and accredited NGOs are not permitted to attend or participate in regional meetings without a special invitation from WIPO. In the past, however, the US and the EU have been allowed to participate in other region’s meetings, such as the African Group’s regional meetings, to help convince African countries to pass certain WIPO treaties.

In November 2006 WIPO convened a secret meeting in Geneva to persuade key member states to accept the proposal on broadcast-

ing. WIPO officials, Chairman Liedes, and representatives of Europe, the US, Japan, Brazil, India, and South Africa attended the secret meeting, but no agreement could be reached. Liedes and European officials continue to push for an “exclusive rights” approach even though the 2006 General Assembly voted that treaty discussions should take a “signal theft” approach.

Debate over the proposed broadcasting treaty continues in 2007 with discussions at WIPO scheduled for January and June, and possibly a diplomatic conference in November 2007, if differences can be eliminated.

Stakeholder participation

In many respects WIPO has been slow to accept its revised role as an entity accountable to the global public interest and unfortunately continues to view its main objective as promoting intellectual property rights and the interests of major intellectual property holders. In part, this tendency is reinforced by WIPO’s main funding source: fees from trademark and patent applications and registrations for large companies. WIPO, like any organisation, operates in the interest of its funders. While WIPO’s financial autonomy is in some senses an asset, there can be unintended negative consequences. Without financial accountability to the values of the UN, WIPO is further divorced from pursuing a public-interest mission and work plan.

IPR “maximalist” culture in WIPO power structures

One of the main barriers to balanced policy-making at WIPO is the strong culture of promoting intellectual property rights within its staff and personnel. WIPO tends to hire and work with people who hold the viewpoint of industry and who therefore tend to be IPR “maximalists” in their training and perspective. This is particularly true at WIPO’s highest levels, and the culture easily permeates on down throughout the entire organisation. Countries such as the US appear to be guaranteed key posts at WIPO in order to direct global IPR policy in the interest of the US more effectively.

WIPO’s Secretariat, or International Bureau, draws staff from over 90 countries, but leadership positions and policy-making roles tend to be dominated by representatives from wealthy countries with a particular legal tradition and perspective on intellectual property rules. Indeed three of the four deputy director general positions at WIPO are held by officials from Group B member states – the world’s wealthiest nations – and they tend to be united in their approach.

Top WIPO posts, such as the deputy director general for copyrights, are successively held by representatives of the US government. In 2006, the US government replaced Rita Hayes, a US Democratic Party supporter, with Mike Kepplinger, a US Republican Party supporter, in the WIPO post of deputy director general for copyrights. A number of member states complained about the apparent presumption that the top position for setting global copyright rules would be once again filled by a representative of the US government. Under the WIPO Convention, the director general appoints the deputy directors general after their approval by a Coordination Committee.

The Uniform Domain-Name Dispute-Resolution Policy

WIPO's UDRP, which adjudicates trademark infringement disputes for domain names, has also come under growing criticism.

WIPO announced in October 2006 that since the inception of the UDRP, 84% of the panels had awarded the domain names to the claimants (i.e. the trademark holders), ruling in favour of the original registrant in only 16% of cases.

The one-sided decisions of WIPO panels can be partially explained by the procedural bias in favour of complainants that is built right into the UDRP. The procedure allows the complainant to choose the dispute resolution service provider, and since the arbitrators are all competing for business, there are obvious incentives to find in favour of claimants. Over the years, most "independent" WIPO arbitrators have obtained the reputation for being favourable to trademark holders in their decisions; and those arbitrators who find in favour of the original registrant are not hired to settle disputes for long and eventually leave the business. Besides being inherently favourable to trademark holders by permitting "forum shopping", the UDRP also provides inadequate time for registrants to react to a claim of trademark infringement in order to defend a registration.

Further issues arise over WIPO's technical assistance programmes, which tend to reflect the viewpoint of large intellectual property holders in the US and EU. Developing countries are not fully informed about their rights and obligations by the WIPO technical assistance programmes. For example, the right under international law that member states have to enact limitations and exceptions to exclusive rights is inadequately addressed. WIPO tends to favour funding innovation via traditional IPR business models over innovative new models for rewarding creativity.

Consensus-based decisions problematic

Because WIPO decisions are taken according to consensus, meaning that no action can be taken unless all member states agree, reform at WIPO will be difficult to achieve. A striking and important example is the proposal for a Development Agenda at WIPO, where the overwhelming majority of member states have been calling for specific reforms for three General Assemblies in a row, yet no action has been taken because the US along with Japan or Europe are able to block any reform.

Another example is the proposed broadcasting treaty, where a WIPO committee chair is willing to ignore the explicit objections of member states and claim he has "silent approval", thus attempting to circumvent WIPO's consensus-based decision-making structure. In this case, however, it should be noted that the 2006 WIPO General Assembly refused to allow the SCCR chair action by ultimately rejecting his recommendation.

Too much power in hands of WIPO Secretariat

The WIPO Secretariat is given a great deal of power to set agendas for meetings and prepare drafts of texts for consideration.

In the SCCR, for example, it is the chair who prepares all the draft proposals for a broadcasting treaty. The chair has consistently refused to remove unpopular provisions from the draft, such as the

anti-circumvention rights, even though the overwhelming majority of member states have requested the removal of the controversial provisions. Committee chairs decide where there is agreement and which proposals to include or not include in the treaty drafts. Some, as noted, even claim to have "silent approval" as they bang the gavel to close the meeting, even after a number of explicit objections are raised.

Member state delegates also complain about the one-on-one "arm-twisting" sessions they have to endure from WIPO officials on policy matters. This issue raises the question of why WIPO is trying to tell member states what their laws will be. It is astonishing to observe member state delegates having to argue with a chair regarding what to include in a treaty proposal. Is it not WIPO's role merely to facilitate the wishes of the member states?

At some level, however, it is the member states who must take responsibility for allowing the WIPO Secretariat and chairs to get away with so much. Member states elect the chair for each meeting and they have voluntarily chosen to re-elect chairs who ignore their concerns. SCCR Chairman Jukka Liedes has been re-elected as chair for ten years in succession, although some delegates argue WIPO rules do not allow the same person to serve as chair in back-to-back sessions, a point which sparked controversy at the November 2004 SCCR meeting.

The committee chairs and the WIPO Secretariat also have much leeway in regulating the way in which civil society is allowed to participate in the meetings. At several recent SCCR meetings on the broadcasting treaty, Chairman Liedes announced that civil society would not be allowed to take the floor during the meeting. At the January 2007 SCCR meeting, Liedes announced that NGOs would have to leave the meeting at which the substantive discussion was to occur, because he decided the substantive debate would be called "informal discussions", something NGOs are not allowed to participate in at WIPO. In fact, despite WIPO's claim of open participation, NGOs have not been allowed to speak for several SCCR meetings. More informally, the SCCR Secretariat has reduced (or eliminated in some cases) the coffee breaks between formal consultations, which is particularly important because that is often the only time for civil society representatives to talk with delegates about the issues. And the "overflow" room at WIPO which seats additional civil society representatives is no longer available during meetings.

These attempts to silence NGO voices are nothing new. At the November 2004 SCCR meeting, delegate briefing papers from public-interest NGOs were stolen from the floor table and later found in the lavatory rubbish bin. When civil society representatives asked WIPO officials for assistance over the stolen documents, WIPO Deputy Director General Rita Hayes said security would not be provided because she was unhappy about civil society publishing reports about the meetings on the internet.

General challenges for effective participation

Another obstacle confronts poorer countries in their attempts to participate effectively at a highly technical and legalistic agency such as WIPO: the inherent imbalance between the capacity of wealthy and poor countries to participate.

Large and wealthy countries such as the US send teams of delegates from the US Patent and Trademark Office, the US Department of Commerce, and the US Copyright Office. They consist of specialists in trade negotiation and international intellectual property rights, and are trained to represent the perspective of industry. Wealthy countries can maintain a constant presence at their permanent missions in Geneva with delegates who are able to focus their efforts exclusively on WIPO.

But the less wealthy countries cannot afford to send large delegations to Geneva, and instead send a single person who might be responsible for covering all the activities of WIPO, WHO, UNESCO, the ILO, and other UN agencies. These representatives are less likely to be specialists in intellectual property rights and less likely to be aware of a diversity of viewpoints on issues. And representatives from the poorest nations remain in their capital city and rely on communications with Geneva to try to keep on top of what is happening at WIPO. However, official final committee reports and meeting notes can take from six to nine months to be published by WIPO and are therefore always out of date with the actual negotiations.

Conclusions and recommendations

WIPO's problems

Undemocratic

While WIPO can claim some degree of equality among member states because each country has one vote, the reality is rather different. It is often the wealthy countries and blocs, particularly the US and Europe, whose opinions matter and who drive the agenda at WIPO. WIPO could be more accurately described as a forum in which the loudest or most insistent voices from the wealthy countries prevail. It is also a forum in which the Secretariat and chairs are given a great deal of power to circumvent the wishes of the member states.

Private interests trump public interest

Intellectual property rights have become an “end” in and of themselves at WIPO. WIPO officials are the first to claim that WIPO’s mission is to promote intellectual property rights at a global level. Since intellectual property rights are ultimately private rights, their promotion is the promotion of private interests, mainly those of major record labels, movie studios, publishing houses, and large pharmaceutical companies. The UN, and WIPO as its agent, have a primary obligation to promote the global public interest, an obligation that appears to be in jeopardy here.

Lack of transparency

Many decisions at WIPO are taken behind closed doors and are not part of the official record. Deals are often brokered during informal consultations, although this is not unusual for international treaty negotiations. However, the lack of transparency over WIPO’s technical assistance programmes is a real problem. Much of the technical assistance materials are not available on the internet for journalists,

legal experts, and others to read and comment on. And WIPO’s practice of sending controversial discussions such as the proposed broadcasting treaty to secretive regional consultations, where civil society cannot attend, reflects poorly on WIPO’s record on transparency.

Too “diplomatic”

Geneva-based member state delegates tend to be career diplomats, working in Geneva only for a few years on IPR issues and then moving on to other issues. Because the delegates are career diplomats, they tend to be very “diplomatic” and rarely wish to offend or openly disagree with anyone. This “Geneva culture”, while having its benefits, particularly in dealing with delicate international negotiations, can also have its drawbacks. The situation becomes particularly problematic for delegates in voting for a new committee chair, since they do not wish to offend. The diplomatic Geneva culture helps WIPO to stay away from controversial issues and maintain control of leadership. For the most part, delegates have no personal interest in “rocking the boat.” Only the more powerful countries like the US and the EU can afford to take controversial and unpopular positions. Often, the US and the EU agree upon who should fill a post at WIPO, putting other member states in the position of having to dissent with a powerful trade partner in an undiplomatic fashion.

Recommendations for improving WIPO

Development Agenda and A2K Treaty

WIPO should pay attention to the message of the member states at the last three General Assemblies and incorporate a Development Agenda into WIPO’s core policies and practices. WIPO should update its mission to more explicitly align itself with the UN and its humanitarian objectives. WIPO’s mission and activities should explicitly recognise that countries in different stages of development have different needs and responsibilities. WIPO should pass an Access to Knowledge (A2K) Treaty¹² that encourages the use of technology to promote education and individual empowerment.

New leadership in key WIPO positions

WIPO needs to incorporate people who hold a diversity of viewpoints into its leadership, particularly in top policy-making positions. Developed-country officials hold three of the four deputy director general positions, even though these countries tend to speak with a united voice at WIPO. It is time that an Argentine, Indian, Brazilian or other developing-country delegate served as chairperson of the SCCR or filled the post of deputy director general for copyrights at WIPO. This is something that member states must do themselves through sustained organisation and coalition-building. WIPO will not change unless member states force it to change, so there is no escaping the responsibility of member states to take control of WIPO.

¹² For more information see: <www.access2knowledge.org/cs/>.

Encouragement of more diverse views

WIPO should do more to encourage input and participation from a diversity of viewpoints. Rather than allow a single nation to dominate global policy on a given subject by successively filling WIPO's top post on that issue, WIPO should rotate according to geographic region and in an unbiased way which government fills top WIPO posts. Public-interest NGOs, particularly those from developing countries, should be allowed to speak at the meetings and make their papers available, and more WIPO seminars and technical assistance programmes should include speakers from public-interest NGOs and developing nations. The concerns of librarians, civil liberties groups, open source software developers and teachers, and especially those from developing countries, need to be given voice in WIPO's corridors.

IPR "agnosticism"

WIPO should become "IPR agnostic" and not insist on blindly promoting intellectual property rights out of a simple belief that "more is better." WIPO should explore new models of rewarding creativity and promote whatever models encourage the creation and dissemination of knowledge and culture. Traditional business models that rely upon copyrights and patents are not the only means of promoting creativity and rewarding innovation. New viral distribution marketing channels take advantage of the benefits of digital technology and work by spreading information, as opposed to preventing access to information. WIPO should not favour traditional business models over innovative new models in its work programme, and it should refocus its efforts on promoting creativity and innovation by whatever means possible.

Greater oversight and accountability from the UN

If WIPO were more financially dependent upon the UN to carry out its work programme, its work programme would be more closely aligned with the UN's humanitarian objectives. It is time that UN officials realise what has been going on at WIPO in the UN's good name for the last fifteen years. The UN will also have to rein in WIPO and make it more accountable to the global public interest for WIPO to gain any legitimacy in international treaty-making. As long as WIPO's budget is entirely independent from the UN, the UN will have little means of holding it accountable to the global public interest. As long as WIPO's funding continues to come from major intellectual property holders, the objectives of those industries will continue to be promoted at WIPO. The UN and its member states must together reform WIPO to more accurately reflect the global public interest. ■

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