

The TRIPs Enforcement Puzzle

Prof. Peter K. Yu
Kern Family Chair in Intellectual Property Law
Director, Intellectual Property Law Center
Drake University Law School
Email: peter_yu@msn.com
Website: www.peteryu.com

From the EU Directive on the Enforcement of Intellectual Property Rights to the recent WTO dispute between China and the United States, and from the free trade agreements or economic partnership agreements to the proposed Anti-Counterfeiting Trade Agreement, international enforcement has become a major issue in the international intellectual property arena. Although the TRIPs Agreement sought to strengthen international enforcement by introducing the mandatory dispute settlement process and detailed enforcement provisions, the Agreement's purported strength is also its biggest weakness. As I have explained in the context of the WTO dispute between China and the United States, the enforcement provisions in the TRIPs Agreement do not provide effective enforcement as expected by rights holders and developed countries.

To help us better understand what I describe here as the "TRIPs Enforcement Puzzle," this paper explains why enforcement is particularly difficult in both the TRIPs context and in international intellectual property agreements in general. Among the factors examined are the politics behind the TRIPs negotiation process, the institutional incompetence of both the WTO and WIPO, the eagerness for negotiating parties to conclude agreements that can be only partially implemented, the need for the establishment of an enabling environment for effective intellectual property protection, and the residual effects of prior international intellectual property agreements, such as the Paris, Berne, and Rome Conventions.

To solve this puzzle, this paper offers strategies to strengthen the international enforcement of intellectual property rights. It also highlights the ongoing challenge concerning the subscription of developed and less developed countries to different concepts of enforcement. The paper nevertheless offers hope by pointing out that these two country groups share common ground in strengthening the international enforcement of intellectual property rights, especially if traditional cultural expressions and local knowledge are to be protected within the intellectual property system.