



**BOND
UNIVERSITY**
GLOBALISATION & DEVELOPMENT CENTRE

Owen Morgan

**HARMONISATION OF INTELLECTUAL PROPERTY:
ISSUES IN THE SOUTH PACIFIC**

No. 18, October 2008

ABSTRACT

Globalisation has been a major force driving developed and developing economies alike to reform their intellectual property regimes in order to be competitive in the global marketplace. This has taken the form of pressure to match the level of protection provided by the United States and the European Union – the harmonisation of intellectual property standards and norms. This paper will introduce issues relating to harmonisation of intellectual property as that process impacts on the small states in the South Pacific. It will use New Zealand as a model because its economy is the largest and most developed of those states and the one for which intellectual property is the most significant.

In order to draw out the issues of harmonisation, the paper will explore the meaning of harmonisation as that term has been used in relation to intellectual property. It will show that those issues are essentially ones associated with lifting the levels of global intellectual property protection. It will then go on briefly to consider harmonisation in the context of bilateral negotiations between parties mismatched in negotiating strength to illustrate the pressure that is exerted to lift those levels. The paper concludes by identifying harmonisation as a means adopted by stronger nations of imposing higher standards of intellectual property on nations in a poorer bargaining position. The result is that protection for the intellectual property interests of the stronger nations is implemented whether that protection meets the needs of the weaker states and whether or not it fetters the ability of those weaker states to protect their own nationals and their interests.

The underlying theme of the paper is that the small South Pacific states should use negotiations to harmonise intellectual property rights as an opportunity to further their own goals. If obtaining better access or other concessions for agricultural products means making concessions in the area of intellectual property, then the answer is to concede gracefully. There is another possibility – that those states may be able to use trade negotiations to gain gradual acceptance of a global regime that protects their specific intellectual property interests such as traditional knowledge.

HARMONISATION OF INTELLECTUAL PROPERTY: ISSUES IN THE SOUTH PACIFIC

INTRODUCTION

Globalisation has been a major force driving developed and developing economies alike to reform their intellectual property regimes in order to be competitive in the global marketplace. This has taken the form of pressure to match the level of protection provided by the United States and the European Union. For New Zealand, the most developed of the South Pacific economies, upgrading its intellectual property regime in response to that pressure became a real issue when it acceded to the WTO Agreement and became obliged to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Agreement Establishing the World Trade Organisation, done at Marrakesh on April 15, 1994 ('TRIPS'). With what seemed to some observers to be unseemly haste, New Zealand quickly moved to comply with the new standards and norms required by TRIPS. The most significant act was to enact a completely new copyright statute, the Copyright Act 1994. The impact of TRIPS was easy to see in the new copyright statute – e.g. in compliance with the requirements of TRIPS, the legislation contained provisions dealing with moral rights and performers' rights, both rights that were new to New Zealand.¹ Although the possibility of implementing these rights had been considered by various domestic reviews, they had concluded that the need for those rights had not been demonstrated and there was little demand for them.² The implementation of higher levels of protection was part of what has become known as a period of harmonisation of intellectual property rights ('IPR's).

This paper will introduce issues relating to the harmonisation of intellectual property standards and norms as that process impacts on the small South Pacific states. It will use New Zealand as a model because its economy is the largest and most developed of those states and the one for which intellectual property is the most significant. Although New Zealand is a member country of the

¹ Another important action was to insert a new definition of a trade mark into the Trade Marks Act 1953. This foreshadowed the complete review of the legislation that resulted in the Trade Marks Act 2002.

(**Note:** unless otherwise stated, references to legislation in this paper will be references to New Zealand statutes.)

² The first of these reviews was by the Dalglish Committee - the Dalglish Committee 'Report of the Copyright Committee', Wellington, 1959, para 333, 125.

There have been no reported cases in New Zealand involving either moral rights or performers' rights since the Copyright Act 1994 was enacted.

OECD, it should not merely be regarded as a smaller version of a European economy. It is a small state that has to depend on moral influence rather the strength of its economy to establish influence on the world stage. Another difference that it shares with its Pacific neighbours is a specific interest in the developing issue, related to intellectual property, of the protection of indigenous rights.

In order to draw out the issues of harmonisation, the paper will explore the meaning of harmonisation as that term has been used in relation to intellectual property. It will show that those issues are essentially ones associated with lifting the levels of global intellectual property protection. It will then go on briefly to consider harmonisation in the context of bilateral free trade agreements to illustrate the pressure that is exerted to lift those levels. The paper concludes by identifying harmonisation as a means adopted by stronger nations of imposing higher standards of intellectual property on nations in a poorer bargaining position. The result is that protection for the intellectual property interests of the stronger nations is implemented whether that protection meets the needs of the weaker states and whether or not it fetters the ability of those weaker states to protect their own nationals and their interests..

BACKGROUND

IPR's have always flowed outward from Europe and the United States. New Zealand has traditionally looked offshore, particularly to the United Kingdom, when drafting its intellectual property legislation and for the common law precedents that govern actions such as breach of confidence and passing off.³ One might say that New Zealand has had a policy of harmonising its intellectual property standards and norms with those of the United Kingdom. It was not that very long ago that the more important intellectual property issues were largely theoretical and were considered to be the province of academics who were concerned with matters such as the rationale for copyright protection. Even academics showed little interest in more practical matters such as how New Zealand's intellectual property protection compared with its trading partners. Patent attorneys and some commercial solicitors enjoyed a steady business but intellectual property was

³ New Zealand's intellectual property legislation still owes much to the United Kingdom. Current legislation includes the Patents Act 1953 is modelled on the Patents Act 1949 (UK); the Designs Act 1953 is modelled on the Registered Designs Act 1949 (UK); and the Copyright Act 1994 is based on the Copyright, Designs and Patents Act 1988 (UK).

not a matter that interested the average commercial manager or the man or woman in the street in the way that it does today.

Times have changed and in the late 20th century intellectual property became a critical factor in the global economy.⁴ Managers of firms, ranging from Fortune 500 corporations to SME's (small to medium sized enterprises), and their advisors have had to develop a good understanding of intellectual property and its value to their firms in order to protect their investments and maximise profits. Being at least aware of intellectual property issues is important whether the firm is a large corporation or a small enterprise. As well as managers, individual creators, such as authors and composers, have become increasingly aware of the need to protect their intellectual property rights and, where they have sufficient bargaining power, increasingly determined to protect their rights.

However, it is not just persons in commerce who have been affected by intellectual property's extending reach. It has become important in the lives of ordinary people, many of whom have acquired a reasonable understanding of the protection provided by the categories of intellectual property rights – copyright, patents and trade marks – the nature of infringement of those rights and the possible consequences of infringing activities. For example, it is impossible to play a cinematograph film on a legitimately purchased DVD without first viewing a warning about copyright infringement; advertisements containing similar warnings are routinely screened in cinemas; members of the public are frequently exhorted to report instances of copyright infringement; and copyright 'piracy' has become a category of criminal offence.⁵

At the same time as levels of awareness of intellectual property have risen, the standards and norms that govern intellectual property have become increasingly numerous, complex and robust and that trend has continued. Criminal offence provisions are common in intellectual property legislation

⁴ In 2003, the United States IP industries comprised nearly 20% of the US private industry's contribution to GDP. SE Siwek 'Engines of Growth: Economic Contributions of the US Intellectual Property Industries (2005, Economists Incorporated) 6.

⁵ See the website of the Motion Picture Association of America, 'Anti-Piracy' <http://www.mpa.org/piracy.asp> (Accessed 26 March 2008).

For example, see section 131 of the Copyright Act 1994 which provides for criminal liability for making or dealing with infringing copies of copyright works. On conviction, a person who commits an offence is liable to a fine not exceeding \$150,000 or imprisonment for a term not exceeding five years.

and related legislation.⁶ The push to lift the levels of intellectual property protection has been most obviously fuelled by large corporations anxious to protect their investments. Organisations such as the International Intellectual Property Alliance have exerted, and continue to exert, a considerable influence on the United States government policy.⁷ A consequence for the trading partners of the United States has been the need to respond to pressure to implement higher levels of intellectual property to protect the interests of United States corporations.

⁶ An example of intellectual property related legislation is the recently enacted the Major Events Management Act 2007 which provides for both civil and criminal remedies for breaches of provisions relating to ambush marketing and even includes restrictions on street trading.

⁷ See below n 16 and accompanying discussion; see also www.iipa.com.

HARMONISATION

Harmonisation is a term that is used readily in reference to intellectual property rights and it is often used without explanation or without comment. It is one of those terms whose meaning or use people instinctively understand or think that they do. But what does harmonisation really mean in the context of intellectual property rights? To understand harmonisation, it is expedient to consider it from the perspectives of “what, why and how?”

What is harmonisation?

It may be trite, but it is still true that a dictionary definition is a convenient starting point for determining the meaning of a term. Unfortunately, the dictionary is not useful: ‘harmonisation’ is defined in the *OED Online* as ‘the action or process of harmonizing. **1. a.** Reduction to harmony or agreement; reconciliation.’ The essence of this definition is ‘harmony or agreement’.⁸ However, it is made clear later in this paper that while harmony and agreement are desirable, neither is an essential element of the process of intellectual property harmonisation. At least this is the conclusion one can attribute to those states that are obliged to align their intellectual property regimes with the regimes of other, more powerful states.

Nor can a definition be reached from examining the way the term ‘harmonisation’ is used in the literature. The following examples demonstrate that its meaning cannot be discerned with any certainty:

- “Harmonization of standards means the adoption of the same standards by different countries.”
- “Optimal trade harmonization, meaning that all countries must set the same level of IP.”
- “Users also pressed for harmonization of legislation on the premise that it is important to achieve unified standards and procedures.”
- “Should the national and regional IP systems of the world be harmonized so that the rules governing IP protection standards and enforcement are identical everywhere?”

⁸ ‘OED Online’, 2nd ed. 1989 Oxford University Press <http://dictionary.oed.com/cgi/entry/50102729?> (Accessed 20 February 2008)

In these examples, the term harmonisation has been used in ways that are similar but are not the same. The first two examples refer to the 'same' standards or level. The third equates harmonisation with 'unified' standards and the final example suggests that harmonisation means that the rules governing intellectual property standards should be identical. If harmonisation involves agreement and a reconciliation of competing objectives, then one might reasonably expect a level of give and take resulting in standards and norms that could be described as being the 'same' without necessarily being 'identical'. If intellectual property rules are to be harmonised then a level of certainty (that the rules are the same) is desirable, however it should be accompanied by sufficient flexibility to take account of individual conditions in each state.

The way the term has been used does little more, therefore, than provide a pointer to its meaning. In order to understand what is meant by harmonisation, it is useful to review some of the characteristics of the process of harmonising intellectual property rights as it occurs and the consequences of that process:

- The instruments of harmonisation, whether they are bilateral or multilateral agreements, build on what has been established before. They normally specify minimum levels of protection but they do not specify maximum levels. The primary example of this process is the TRIPS Agreement. In respect of the term of protection of works of copyright, TRIPS provides: 'Whatever the term of protection of a work ... such term shall be no less than 50 years from the end of the calendar year of authorized publication'.⁹ However, the United States term of protection, which for many years was 50 years from the death of the author ('p.m.a.'), was recently extended to 70 years p.m.a. and states that wish to negotiate a free trade agreement with the United States are expected to extend their copyright protection to the same duration.¹⁰ Harmonisation of IPR's is an upward process which results in ever higher levels of protection. The instruments of harmonisation specify the floor but not the ceiling.

⁹ Article 12, Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Agreement Establishing the World Trade Organisation, done at Marrakesh on April 15, 1994 ('TRIPS').

¹⁰ When Australia negotiated a Free Trade Agreement with the United States in 2004, this was one of the requirements, see the discussion below at n 26 and accompanying discussion.

- When multi-lateral agreements, such as TRIPS or World Intellectual Property Organisation ('WIPO') treaties, are concluded, they may mandate protection for new IPR's, whether or not there has been any pressure for these new rights from within the states that were now obliged by those instruments to implement them, with detrimental effects. 'The absence of any comparable legal regime in developing countries meant that they were required to grant monopoly rights to IP holders without any meaningful or credible instruments to regulate the exercise of these rights. Given the huge disparities existing across the world, it could be questioned whether IP harmonization benefited developing countries.'¹¹

Agreements have been concluded that provide protection for the owners of databases; protection for audio performers; and patent protection for business methods. Other potential rights holders who may benefit from extended protection include producers, audiovisual performers and the owners or custodians of traditional knowledge. However, the recent failure to conclude WIPO Treaties – first, for the protection of audiovisual performers and, very recently, for the protection of broadcasters – suggests that the difficulty of achieving consensus amongst competing national interests has resulted in the multi-lateral agreement losing favour as a means of implementing the harmonisation of intellectual property.

- Harmonisation of intellectual property regimes may be achieved in three main ways – bilateral agreements, regional agreements and multilateral agreements.¹² Whichever method is chosen, harmonisation frequently involves the imposition of norms and standards by a stronger state or group of states on a weaker state or group of states. It is not surprising that New Zealand acted hastily to comply with TRIPS. New Zealand and the other South Pacific islands have little bargaining power and they will often link themselves to other powers such as Australia or the United States to achieve their aims. The only means of resistance for these states, such as it is, is to delay acceding to multi-lateral treaties until pressure from their major trading partners forces them to do so. New Zealand has still not acceded to either the WIPO Copyright Treaty 1996 ('WCT') or the WIPO Performances and

¹¹ Statement of the Delegation of India 'Report of the WIPO General Assembly' Thirty-First (15th Extraordinary) Session Geneva, September 27 to October 5, 2004, W0/GA/31/15, para 201.

¹² See the discussion below under 'How to harmonise'.

Phonograms Treaty 1996 ('WPPT'), the so-called 'digital agenda treaties', although it has made moves to implement some of the more important provisions of those treaties.¹³

- Harmonisation of intellectual property encompasses a variety of measures including moves taken to harmonise substantive law relating to intellectual property; the procedural aspects of protection under that law; and harmonisation may even refer to measures of practical cooperation, such as strategies undertaken by two or more states to apprehend intellectual property pirates. This extended use of the term suggests that harmonisation of intellectual property has such a breadth to it that the term may not be open to definitive definition.

Nevertheless, after taking all the above factors into consideration, a statement of definition can still be attempted.

What does harmonisation of intellectual property mean for New Zealand and, by implication, for the other small states of the South Pacific? The answer to that question is determined by a number of factors including the size of the economy, the make-up of the economy and the significance of intellectual property within that economy. On virtually any measure, the South Pacific states are small countries with small economies. Two key economic indicators show that New Zealand may be a big fish in the South Pacific but, in global terms, it is very much a sprat: in September 2007, the national population was 4,237,000 and the Nominal GDP was NZ\$169.4 billion.¹⁴ New Zealand is still an agricultural trading nation, largely dependent on primary produce. There are pockets of innovative activity that generate valuable intellectual property.¹⁵ Notwithstanding those few exceptional efforts, New Zealand is and will remain a net importer of intellectual property. In the global context, and in terms of the harmonisation of intellectual property, New Zealand and the other South Pacific states wield little influence and therefore have little bargaining power.

¹³ The Copyright (New Technologies and Performers' Rights) Amendment Bill was introduced in 2007. The Bill amends the Copyright Act 1994 to clarify the application of existing rights and exceptions in the digital environment and to incorporate various aspects of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

¹⁴ Investment New Zealand 'New Zealand Facts and Figures' <http://www.investmentnz.govt.nz/section/14341.aspx#gdp> (Accessed 21 February 2008).

¹⁵ For example: special effects are now a central part of the moviemaking process and visual effects studio, Weta Digital, rendered a number of computationally intensive special effects shots for the Lord of the Rings trilogy. Weta have won a number of Oscars. See <http://www.wetadigital.com/digital/> (Accessed 26 March 2008).

To answer the question posed above, for the nation states of the South Pacific, harmonisation of intellectual property means the adoption (willingly or unwillingly) of higher levels of intellectual property protection modelled on the standards and norms of the United States and those of the European Union to ensure the protection of the rights of the nationals of those blocs without consideration being given to the interests of users and consumers in the South Pacific states. As well, harmonisation goes beyond lifting existing levels of intellectual property protection; it includes the implementation of IPR's which have not previously existed in the law of a state that is harmonising its regime with the United States or the European Union; it may also include a reduction in the existing exceptions and limitations that exist in the regime if those exceptions reduce the protection available to corporations domiciled in the stronger states.

The question can be answered another way: in the present context, harmonisation involves the adoption of intellectual property standards and norms by the weaker nations of the South Pacific in response to demands from stronger states. Those standards and norms have the objective of protecting the IPR's held by the nationals of the major developed blocs although there is little respect for the policy objectives of the individual states which are being asked to assume international obligations. It is another aspect of the conflict between the developed and developing states, between the North and the South, which does not deliver benefit to the poorer states.

Why harmonise?

The general reason given by many countries for trying to align many of their legal standards with those of other countries is so that they may trade more freely. This objective is seen most clearly within the European Union, where harmonisation has had the ultimate objective of advancing the establishment of a common market. In global terms, the United States and the members of the European Union advocate harmonisation of intellectual property standards and norms as a means of protecting their economic interests. Those states are significant exporters of intellectual property, most obviously in the entertainment industry and in the industries that depend on information technology. The economic importance of the intellectual property industries means that it is not surprising that those states have succumbed to internal pressure from the major corporations domiciled within their borders to seek higher standards of intellectual property protection for their

nationals in the states to which the products of the intellectual property industries are exported.¹⁶ The representatives of the intellectual property industries are constantly on hand to provide background expertise and data to United States and European trade negotiators that enable them to be sure that the standards of protection obtained from weaker states is sufficient to protect the interests of those industries.

The ideal situation for the holders of IPR's in the developed states would be if agreed standards and norms could be established (that is harmonised) on a world-wide basis at a high level, with the result that a rights holder who was a national of State A – such as the United States or a state within the European Union – would be treated in the same way in State B – such as a small South Pacific nation – as in State A without argument and with certainty. Likewise, if a national of State B could expect the same treatment in State A as it receives in its home state, this would constitute true national treatment. Of course, establishing the ideal situation pre-supposes that State B is willing to provide the nationals of State A with certain rights; rights that it may not even provide to its own nationals. And, as importantly, it also pre-supposes that a rights holder is in a position to enforce its rights in State B and other states around the world. After the negotiation of harmonised standards and their implementation in national law, there remains the problem of enforcement. The difficulty and cost for a rights holder of enforcing IPR's in states than the one in which it is domiciled – particularly, the cost of enforcement in the United States – limits the application of the principle of national treatment to major multi-national corporations that have the necessary resources. Finally, there is the question whether the nationals of State B have rights or interests that they wish to protect at a high level in other states.

¹⁶ The International Intellectual Property Alliance ('IIPA') is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of seven trade associations, each representing a significant segment of the U.S. copyright community. One of those trade associations is the Business Software Alliance ('BSA') which claims to be 'the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace'. Members of the BSA include major corporations such as Microsoft, Apple, IBM. <http://www.iipa.com/aboutiipa.html> ; <http://www.bsa.org/globalhome.aspx> (Accessed 25 February 2008).

For New Zealand and the other states of the South Pacific, the answer to the question as to why to harmonise is as easily answered as it is for the United States and the states comprising the European Union. The answer is two-fold. (i) There are benefits for small states to be had from accepting aspects of harmonised intellectual property, particularly in terms of administrative or regulatory matters. For example, there are no obvious downsides for New Zealand in adopting the patent examination practice of major patent offices,¹⁷ provided any specific indigenous issues are protected, such as the referral of an application that raises issues for Māori to a Māori reference group.¹⁸ (ii) More importantly, New Zealand and its South Pacific neighbours have few options. The process of establishing the international level of IPR's is ultimately tied to trade considerations. New Zealand must keep its big trading partners happy. If that means upward harmonisation of its intellectual property standards to match those of its major trading partners, then so be it. New Zealand has too much to lose by refusing to comply with their wishes. The states of the South Pacific are really not in a position to refuse to harmonise their intellectual property standards, norms and practices if they seriously believe that they can achieve other benefits by agreeing to provide to the stronger states the levels of protection that are demanded of them. Although this paper has noted that awareness of intellectual property matters has developed considerably in recent times, the reasonably complicated issue of the harmonisation of IPR's is not one that the public has taken note of or has shown an interest in. Opposition to the harmonisation of intellectual property law is not an issue that will win the hearts and minds of New Zealanders. It is not a nuclear ships issue of the 21st century.¹⁹

¹⁷ The [Patent Law Treaty](#) is a WIPO treaty that was adopted on June 1, 2000. It is intended to harmonise and streamline formal procedures in respect of national and regional patent applications and patents, although New Zealand is not a member.

¹⁸ In New Zealand, applications for registration of trade marks that may be derivative of a Māori sign and therefore may be offensive to Māori are referred to a Māori advisory committee which advises the Commissioner of Trade Marks, section 17(1)(c) and sections 177 – 180 of the Trade Marks Act 2002.

¹⁹ Although it was a member of ANZUS, New Zealand took a stand against the visit of United States nuclear ships. In 1984, the Labour party became the government and made clear its intention to pursue policies that would establish New Zealand as a nuclear-free country. It announced its decision to ban ships that were either nuclear-powered or armed. As a result, Washington severed visible intelligence and military ties with New Zealand and downgraded political and diplomatic exchanges. The United States was no longer willing to maintain its security guarantee to New Zealand, although the ANZUS treaty structure remained in place. This was a popular stand and, despite the obvious dangers of irritating the major world power, it had support across the public. By 1990 the opposition National party had aligned itself with the anti-nuclear policy.

How to harmonise?

If harmonisation of intellectual property standards is essentially the process by which states agree to adopt the higher standards and norms of other states, then this must be formalised by agreement between those states. (The exception is when a state adopts those standards and norms under direct or indirect pressure from a trading partner in a way that does not result in a formal agreement. In other words, the state adopting the standards and norms does so in order to maintain good relationships with a stronger partner.) Essentially, there are three ways in which State A can ensure in a formal fashion that its nationals are protected in other states at the level that it requires. (i) It can enter into bilateral agreements. (ii) It can enter into regional agreements with other states. (iii) It can enter into multilateral agreements that have broad international effect. Of course, if State A enters into an agreement with State B, it is not the end of the process. State A must be confident that the standards and norms contained in the agreement will be implemented into national law and practice by State B.

In the formalisation of agreements, there is a pattern to the process of intellectual property harmonisation that has been described by Peter Drahos as a ‘global intellectual property ratchet’.²⁰ The intellectual property ratchet is a device that has been employed by the United States and the European Union to impose their intellectual property standards on other states with the objective of improving the protection available to their nationals. By definition, a ratchet moves in one direction only.²¹ In the context of the harmonisation of intellectual property norms and standards, that direction is upwards to implement higher levels of intellectual property protection. Drahos has identified the operation of the intellectual property ratchet in the waves of bilateral agreements initiated by the United States that began in the 1980s.²² These were followed by a number of multilateral agreements including TRIPS, the WCT and the WPPT. Since the WCT and the WPPT were concluded, the United States has turned away from WIPO and the use of multilateral agreements and has instead concentrated on negotiating bilateral agreements with its trading

²⁰ P Drahos ‘Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach’ (2004) *Temple Law Review* 401, 406 ff.

²¹ ‘Ratchet - mechanical device consisting of a toothed wheel or rack engaged with a pawl that permits it to move in only one direction’, see <http://www.webster-dictionary.org/definition/ratchet>

²² Drahos above n 20.

partners including Australia and Singapore. The bilateral agreements that the United States has employed to harmonise its intellectual property norms and standards with its trading partners currently take the form of Free Trade Agreements (FTAs). These agreements are not restricted to intellectual property rights; they cover a wide range of topics including access for agricultural products, tariffs, Government procurement contracts, protection for service providers and reduction in investment barriers.

It is not surprising that the United States has returned to the strategy of negotiating bilateral trade agreements incorporating intellectual property provisions. In those two-party negotiations, it can bring the full force of its bargaining power as the world's most important economy to the negotiating table in order to achieve its objectives which include the upward harmonisation (ratcheting) of intellectual property protection. In those negotiations, its bargaining power is not diluted by having to work within the confines of an organisation, such as WIPO, where the need to achieve consensus may result in compromises and the watering down of provisions. Limitations, exceptions and reservations have to be allowed within multilateral agreements in order to ensure that the greatest number of nations will accede to those international instruments. Those compromises show just how difficult it is to achieve true agreement to harmonise. This is especially so in fora in which the developing states are able to form blocs that can match the voting strength of the developed states.

Because harmonisation, as an upward movement of standards and norms, is sometimes achieved through the mechanism of complex multi-lateral agreements, the issue must be faced as to how real that harmonisation really is. Multilateral agreements, including TRIPS, permit limitations and exceptions to the protection that they provide which limit the application of certain provisions or permit signatories to include exceptions to the general application of a provision.²³ Signatories are, in some circumstances, also permitted to make a reservation and further limit the level of protection that they give to the nationals of other states.²⁴ Limitations, exceptions and reservations all have the effect of reducing the force of an international instrument by introducing flexibility and therefore variation into the way signatories translate the treaty language into national legislation.

²³ Article 14(6) of TRIPS provides: 'Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent provided by the Rome Convention.'

²⁴ A reservation permits a party to a treaty to declare that it will exclude or modify the operation of some of the provisions of the treaty, for example, see Article 72 of TRIPS.

Different states may introduce different exceptions into their national legislation and take advantage of different reservations; therefore, the effective level of harmonisation that is achieved is reduced. Coupled with the difficulty of converting treaty language into the language of national legislation, the inclusion of limitations, exceptions and reservations in the international instruments means that while agreement may be reached in treaty negotiations, it does not mean that uniform protection is thereby available on an international basis.

The FTA Road to Harmonisation

New Zealand has actively sought to negotiate an FTA with the United States for some time on the basis that ‘there are strong economic, political and trade policy reasons’ for launching FTA negotiations.²⁵ Australia and the United States concluded an FTA which entered into force on 1 January 2005 and it is therefore a useful reference point for New Zealand for at least two reasons. The first reason relates directly to negotiations with the United States. If New Zealand is successful in persuading the United States to enter into FTA negotiations, it can expect that the United States will regard Chapter 17 of the FTA with Australia – or its more recent equivalents in FTA’s with other states – as its baseline position in respect of intellectual property. (The intellectual property provisions of the Australia-United States FTA are contained in Chapter 17 and its associated letters.) It is unlikely that New Zealand will be prepared to take a strong stance in respect of intellectual property provisions if it hopes to achieve trade liberalisation on a wider front. New Zealand, and its South Pacific neighbours, must therefore be prepared to make concessions that match those made by Australia in Chapter 17 and may be obliged to go further because of the upward movement of the intellectual property ratchet in the intervening years.

²⁵ ‘In March 2002 a report prepared by Fred Bergsten and Rob Scollay found strong economic, political and trade policy reasons for the early launch of negotiations between New Zealand and the United States. They advocated that the agreement be pursued alongside or together with negotiations between Australia and the United States since the New Zealand and Australian economies were already closely integrated through CER.’ See The New Zealand United States Council ‘Towards a comprehensive free trade agreement’ http://www.nzuscouncil.com/index.php/section/free_trade_agreement (Accessed 26 February 2008)

The second reason the Australia-United States FTA is a useful reference point relates to the indirect influence on the development of New Zealand's intellectual property norms and standards that the United States is able to exert as a consequence of concluding an FTA with Australia and other states. Australia is one of New Zealand's most important trading partners and the major economic power in the region. The effect of the Australia-United States FTA on trans-Tasman relations with New Zealand has not been determined. In particular, it has not yet been established whether Australia will require New Zealand to match the new levels of intellectual property protection that Australia was required to implement under its FTA with the United States. New Zealand has not yet faced this demand from Australia or other important trading partners, such as Chile and Singapore, that the United States has recently concluded FTAs with, but that does not mean that it will not face the demand in the future.

Chapter 17 is one of the largest and most detailed chapters in the Australia-United States FTA. It has been the subject of severe criticism including the conclusion that the FTA represents the imposition of certain United States rules – but isn't this just harmonisation as it is defined above? Other criticisms of Chapter 17 and its associated letters have included the following:²⁶

- Australia was required to make immediate changes to existing law in order to implement higher standards of protection. Among the most notable of these changes was the extension of the term of copyright from 50 years p.m.a. to 70 years p.m.a.
- Chapter 17 is exceedingly complex and detailed. Whereas the multilateral instruments, such as the WCT, provide for limitations, exceptions and reservations drafted in broad language; Chapter 17 exhaustively proscribes what exceptions may be provided, when and how new exceptions may be created and the criteria to be used when those new exceptions are created. Including detailed provisions such as these ensures that Australia, and any other partner of the United States that signs a similar FTA, is not in a position to dilute the effect of the agreement by introducing limitations or exceptions into legislation or by taking advantage of reservations. The issue of achieving a consistent level of harmonisation that was raised above has been addressed, but it has been addressed on the basis of adherence to the stronger partner's interpretation.

²⁶ For example, see K Weatherall 'Locked In, Australia Gets a Bad Intellectual Property Deal' (2004 -05) 20 (4) *Policy* 18.

- Australia is now locked into the United States model of intellectual property law and has therefore lost a significant level of flexibility in developing its own intellectual property policy. It has not been shown that the United States model is better and is worth being locked into.
- It is ironic to note that, despite the exhaustive nature of Chapter 17, a number of differences in intellectual property law remain between the legal systems of Australia and the United States. For example, in copyright law, the two countries have a different level of originality; different exceptions; and, a different approach to works created by employees.

If the critics are correct and Australia did not gain the benefits under the FTA that it was seeking, including increased access to the lucrative United States market, then it has aligned itself with the United States vision of intellectual property law and practice for little reward – a salutary lesson for small nations. In fact, the lessons to be learnt from the Australian experience in respect of Chapter 17 do not relate to negotiating intellectual property rights but rather to negotiating trading rights. If obtaining better access or other concessions for agricultural products means making concessions in the area of intellectual property, then the answer is to concede gracefully.

There is another possibility – that New Zealand can use trade negotiations to gain gradual acceptance of a global regime that protects specific intellectual property interests such as traditional knowledge. However, traditional knowledge has been largely consigned to multi-lateral negotiations at WIPO and negotiations in other areas at that forum have recently been unsuccessful. As well, the states leading the demands for the protection of traditional knowledge are generally small (e.g. New Zealand) or developing (e.g. India). It is likely, therefore, that the United States and Europe will ignore developments in this area unless they succumb to moral pressure.

CONCLUSION

This paper has provided an overview of the harmonisation of intellectual property as it relates to New Zealand and its South Pacific neighbours. It considered the meaning of harmonisation particularly by reference to the primary questions: what, why and how? The paper then went on to consider harmonisation of intellectual property standards and norms in the context of bilateral negotiations between parties mismatched in negotiating strength.

The underlying theme has been that the small South Pacific states should use negotiations to harmonise intellectual property rights as an opportunity to further their own goals. Those goals will usually be trade related. An example of this strategy was New Zealand's determination to become a member of the WTO. Membership of that body required New Zealand to accede to TRIPS. The trade off was successful – although TRIPS required New Zealand to update its intellectual property legislation, this was a task that was arguably long overdue in a number of areas and it provided the opportunity and the incentive for New Zealand to attend to matters such as updating its copyright legislation to comply more fully with the Berne Convention (1971). Apart from requiring the implementation of new IPR's for which there was no national demand, there was little in TRIPS that a developed state would quibble with, although the small island states in the South Pacific may not have found anything in TRIPS that added to their understanding of the need for extended intellectual property standards and norms. Nor would they have found anything that required developed states to implement improved protection for indigenous rights. Certainly, there was nothing in TRIPS or any other agreement that requires a recycling of the profits derived from monopoly IPR's to the domestic economies in which they were derived.

Likewise, New Zealand participated in the discussions at WIPO that resulted in the conclusion of the WCT and the WPPT. This has been desirable. Participation has enabled New Zealand to maintain an international presence and to remain up to date with initiatives in that forum without the need to accede to either treaty. From a trading perspective, the pragmatic response has been that there was nothing immediate to be gained from accession to either treaty and, therefore, there was no incentive to accede to either treaty. However, those treaties have been kept under review and as piracy and the digital environment have become more important, New Zealand has responded by extending its protection of the interests of the intellectual property industries.²⁷

The crunch will come if New Zealand continues its strategy of pursuing FTAs with its trading partners. If New Zealand is successful in persuading the United States to enter into free trade agreement negotiations, it can be assumed that Chapter 17 of the Australia-United States FTA, or the latest version taken from the most recent FTA, will be the starting point for negotiation of the intellectual property provisions. It can also be reasonably assumed that those negotiations will be a

²⁷ See the Copyright (New Technologies and Performers' Rights) Amendment Bill, above n 13.

one way street in the sense that New Zealand will be forced to accede to the demands of its much stronger trading partner. The strength of the United States is likely to be felt by New Zealand in other negotiations. The United States has already secured a number of FTAs with countries with which New Zealand, in turn, is seeking trade agreements. One might reasonably assume that a country which has harmonised its intellectual property standards and norms upwards as a consequence of negotiating an FTA with the United States will seek to impose those same standards on the other countries that it negotiates with. New Zealand may find that it will be forced to adopt, by proxy, American and/or European intellectual property standards and practices. That result may well be to the disadvantage of New Zealand and the other small South Pacific nations without compensatory benefit to their specific needs in areas such as the protection of the traditional knowledge of their indigenous populations.