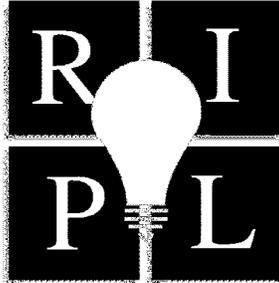


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SOME REMARKS ON THE LIMITS OF HARMONIZATION

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## SOME REMARKS ON THE LIMITS OF HARMONIZATION

GRAEME B. DINWOODIE\*

### I. BACKGROUND: STANDARD SETTING AND ENFORCEMENT

This Anniversary Symposium will address the role of the United States in international intellectual property lawmaking. This session is intended to consider the *establishment* of international norms or standards, which is surely one of the ways in which the United States can, often in concert with other countries, assert its influence on global intellectual property law. Later sessions will focus on the role of the United States as an international *enforcer* of intellectual property policy. However, questions of norm or standard setting, on the one hand, and questions of enforcement, on the other, are very closely connected. Indeed, the nature of the connection between norm setting and enforcement is something that has been in flux in international intellectual property law for the last fifteen years. Moreover, one of the most significant contributions that the United States has made to world intellectual property law over that period has been to alter existing premises about the connection between the setting of norms and their enforcement.

Most notably, when the United States, along with other countries, pushed to have the development of intellectual property norms incorporated within the Uruguay round of multilateral trade negotiations, which in 1994 produced the Agreement on Trade-Related Aspects of

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Intellectual Property Rights (“TRIPS”) and the World Trade Organization (“WTO”),<sup>1</sup> it was in part attracted by the enhanced enforcement mechanism that the trade apparatus would bring to the international intellectual property arena.

Indeed, in many respects the current version of the international intellectual property system was born out of the decision to link norm setting and enforcement. Prior to TRIPS, member states could adhere to international intellectual property agreements, but compliance with those norms was regulated only by the soft influence of diplomatic pressure and the crude trade-distorting instrument of unilateral trade sanctions. To be sure, both principal conventions at the time, the Paris<sup>2</sup> and Berne<sup>3</sup> Conventions, contained provisions enabling resort to the International Court of Justice (“ICJ”) in the event that a signatory nation failed to live up to its treaty commitments.<sup>4</sup> But the relatively toothless nature of the ICJ added little to existing diplomatic persuasion and the avenue of the ICJ was left un-pursued.

Thus, most famously, the United States could elect to be part of the Berne Convention and claim compliance with its obligation in Article *6bis* to provide certain forms of moral rights protection based upon a patchwork of state and federal laws. The tenuous nature of that claim, to put it politely, was only highlighted by the insistence of the United States in TRIPS negotiations that Article *6bis* of Berne<sup>5</sup> not be included within the provisions that were incorporated into the TRIPS Agreement and made subject WTO dispute resolution.

However, the bulk of the substantive provisions of the Paris and Berne Conventions *were* incorporated by reference into the TRIPS Agreement.<sup>6</sup> Signatory countries to the WTO Agreement are required to ensure that their intellectual property laws meet the international standards. If they do not, the countries in question can be brought before the WTO dispute resolution system and, if found wanting, can face the authorization of retaliatory measures, such as trade sanctions. Thus, in assessing the role of the United States in setting international standards, it may be somewhat formalistic to separate from that assessment the decision to strengthen enforcement mechanisms and the enforcement environment.

That said, defining the recent achievements of the United States as a global standard setter *simply* by emphasizing its advocacy of enforcement and WTO dispute settlement may both overstate, and at the same time understate, what the WTO dimension has added to intellectual property norm setting. It *overstates* the importance of the WTO in at least two respects. First, even prior to the advent of WTO dispute resolution, it was true that (to paraphrase Louis Henken) most of the countries in the world complied with most of their international intellectual property obligations most of the time. Moreover, the existence of the WTO enforcement machinery has hardly ensured one hundred percent compliance. Most notably, the United States still has not made the legislative changes necessary to comply with adverse rulings by WTO dispute settlement

<sup>1</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, Apr. 15, 1994, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS].

<sup>2</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

<sup>3</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, S. TREATY DOC. NO. 99–27, 828 U.N.T.S. 221 *available at* [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html) [hereinafter Berne Convention].

<sup>4</sup> *See id.* art. 33; Paris Convention, *supra* note 2, art. 28.

<sup>5</sup> Berne Convention, *supra* note 3, art. 6bis.

<sup>6</sup> *See* TRIPS, *supra* note 1, art. 9.

panels in disputes over the Fairness in Music Licensing Act,<sup>7</sup> and Section 211 of the Omnibus Appropriations Act of 1998 (the Cuban embargo trademark case).<sup>8</sup>

By the same token, focusing only on the outcome of WTO dispute settlement proceedings *understates* the changes that the decision to emphasize enforcement and involve the trade regime has effected. Although signatory countries did indeed largely comply with the set of obligations that they had undertaken pre-TRIPS, the incorporation of Paris and Berne and other international intellectual property agreements within the WTO ensured that an even higher number of countries — every country that wanted the benefits of the global free trade regime — signed on to core intellectual property obligations. Moreover, these countries signed on to a *common* menu of standards because TRIPS required all countries to sign on to the same basic international texts. Prior to TRIPS, different countries were members of a complex web of treaties, and even where two countries were both members of the same treaty regime, they may have signed up to different versions of the treaty (for example, one the Lisbon version of the Paris Convention, and the other the older London Act of the same Convention).

And, we should not forget that TRIPS augmented the substantive standards that had been set out in the Paris and Berne Conventions. It added to the set of common international intellectual property standards. To be sure, the additions did not require the United States or the European Union or other developed countries to make that many changes to *their* laws, but for many other countries, these changes were significant. Furthermore, although there have only been very few reports (seven or eight depending upon how you count) issued by WTO dispute settlement panels regarding intellectual property matters,<sup>9</sup> and although the United States has failed to amend its law in the two cases it has lost,<sup>10</sup> examining reports actually issued by the dispute settlement body is to look only at the tip of a very large iceberg. Many national laws that were not in conformity with international intellectual property standards were amended after other countries raised the fact of non-compliance in informal discussions before the TRIPS Council without the need for the completion of any formal dispute settlement proceedings. That is, the institutional enforcement environment within the WTO is far broader than dispute settlement panels, and that enforcement environment had clearly an effect on international intellectual property standards. So, it is important to acknowledge that the enforcement environment casts an important and ever-larger shadow that will be one of the variables that affects the capacity of countries to harmonize substantive norms.

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<sup>7</sup> See Panel Report, *United States – Section 110(5) Copyright Act*, WT/DS160/R (June 15, 2000); see also Dispute Settlement Summary, *United States – Section 110(5) Copyright Act*, WT/DS160, Summary of the dispute to date at June 2, 2006 at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm) (last visited on October 5, 2006) [hereinafter 110(5) Dispute Summary].

<sup>8</sup> See Appellate Body Report, *United States – Section 211 of the Omnibus Appropriations Act of 1998 – AB – 2001–7 – Report of the Appellate Body*, WT/DS176/AB/R (Jan. 2, 2001); see also Dispute Summary, *United States – Section 211 Appropriations Act*, Summary of the dispute to date at June 2, 2006, [http://www.wto.org/English/tratop\\_e/dispu\\_e/cases\\_e/ds176\\_e.htm](http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds176_e.htm) [hereinafter 211 Dispute Summary].

<sup>9</sup> See World Trade Organization, Dispute Settlement: The Disputes, [http://www.wto.org/english/tratop\\_e/dispu\\_e/disput\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disput_e.htm).

<sup>10</sup> See 110(5) Dispute Summary, *supra* note 7; 211 Dispute Summary.

## II. HARMONIZATION IN THE CONTEXT OF TRADEMARK LAW

In discussing harmonization, I have decided for the remainder of my remarks to focus on trademark and unfair competition law. Trademark law highlights very well the possibilities and limits of the harmonization process.

What exactly is “harmonization?” As a strict legal term of art, it actually has the greatest resonance in the norm setting activities of the European Union. Harmonization of laws in pursuit of the creation of an internal market was one of the stated aims of the European Union<sup>11</sup> — and indeed the jurisdictional basis for much of the intellectual property legislation proposed by the European Commission.<sup>12</sup> Because the norm-setting agenda of the European Union in intellectual property matters has held significant sway over the global agenda, however, the term has come to be used on the multilateral level. Yet, the goals and devices of the European Union in effecting harmonization do, in important respects, differ from the norm setting activities that occur at the global level, into which the United States has greater direct influence.

I do not want to suggest that U.S. interests have had no influence on EU harmonization exercises. Indeed, one of the most important phenomena occurring in the international intellectual property system over the past fifteen years has been the integration of lawmaking at the domestic, regional, and multinational levels. Free trade and enhanced digital communication technologies have given prominence not only to multinational business enterprises, but also to transborder advocacy groups working on the side of both right owners and users. U.S. players, or at least groups whose positions are heavily influenced by Americans and American viewpoints, clearly affect harmonization exercises in the EU just as they affect lawmaking throughout the world.

### A. Norm Convergence

But I do want to differentiate between the EU harmonization process and multilateral norm setting. Both are forms of what might more broadly be called norm-convergence. Descriptively, both are facilitated by the same variables of free trade, social homogenization, and cross-border digital communication technologies; and the agenda for both is set by many of the same economic and political actors. But the processes occur in very different institutional and social settings that generate different descriptive and prescriptive limits on harmonization. Because I am focusing on the contexts in which there has been direct influence of the United States *qua the United States* and not simply through U.S. domination of transborder advocacy groups, my talk should really be entitled “The limits of Norm-Convergence.” But that sounds too abstract, so it is the limits of harmonization (with that definitional caveat).

### B. Hard versus Soft Commitments

Harmonization occurs through formal instruments and informal devices. International treaties are the most obvious formal instruments. In trademark and unfair competition law there

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<sup>11</sup> See First Council Directive to Approximate the Laws of the Member States Relating to Trademarks, Dec. 21, 1988, O.J. (L 40) 11.2.1989 [hereinafter Council Directive].

<sup>12</sup> See Appellate Body Report, *United States – Section 211 of the Omnibus Appropriations Act of 1998 – AB – 2001–7 – Report of the Appellate Body*, WT/DS176/AB/R (Jan. 2, 2001), 211 Dispute Summary, *supra* note 8.

is, most obviously, the Paris Convention, committing signatory countries, for example, to offer defined protection to well-known marks, notwithstanding a lack of registration in the country of protection.<sup>13</sup> But there have always been softer means of effecting norm-convergence. For years, the World Intellectual Property Organization (“WIPO”) has produced instruments that set out best practices in intellectual property lawmaking.<sup>14</sup> In trademark and unfair competition law, for example, we have Model Provisions on Unfair Competition.

This phenomenon has intensified in recent years. In the last seven years, the WIPO Standing Committee on Trademarks (“SCT”) has made far greater use of soft law instruments than its patent or copyright counterparts. For example, the SCT has negotiated and the WIPO and Paris Assemblies have jointly adopted three nonbinding instruments addressing the protection of well-known marks, the concept of “use” on the internet, and trademark licensing.<sup>15</sup> The SCT has also provided influential guidance to the Internet Corporation for Assigned Names and Numbers (“ICANN”) on the development of cyber squatting rules.<sup>16</sup> The United States was extremely active in negotiating these instruments, which articulated much more detailed intellectual property standards than you will typically find in formal treaties.

This may seem to run counter to the strategy of the early 1990s where, as I mentioned a moment ago, the United States sought to embed international standards within stricter enforcement environments. But the United States recognized that, especially at a time when there is great resistance to further hard law obligations, securing softer commitments to the adoption of convergent norms of trademark law might still be valuable . . . especially when those soft commitments can be hardened through later bilateral agreements (as the US has done in several bilateral trade agreements) and through incorporation in treaty form (as the Revised Trademark Law Treaty did with the Licensing instrument).

It is important also to recognize that norm convergence can occur, and does occur, because of systemic social and legal influences rather than legal instruments mandating the adoption of substantive norms. Free trade, world travel, digital communication, and the spread of English as a modern *lingua franca* have helped to establish a network of intellectual property policy makers, administrators, judges, practitioners, and right-holders who increasingly face the same problems and look to each other for solutions. This collaboration need not be formal, or even conscious. It occurs not only through private e-mail or telephone inquires about common problems, but also from the mere exposure of decision makers to the ideas of each others both in person and virtually.

International relations scholars have in recent years begun to explore the significance of these developments, and such networks surely give rise to costs as well as gains. For present purposes, it is sufficient to note that these networks exist in intellectual property law too and that U.S. players are prominent parts of those networks. Indeed, these informal networks may have greater influence in trademark law (and patent law) than in copyright law because the existence of registration and examination ensures greater possible points of intersection (as correspondence

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<sup>13</sup> Paris Convention, *supra* note 2, art. 6bis.

<sup>14</sup> See *Report of the Director General of WIPO*, WIPO Doc. No. WO/GA/23/1 ¶¶ 1–12 (Sept. 4, 1998).

<sup>15</sup> *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* (Sept. 1999), available at [http://www.wipo.int/about-ip/en/development\\_iplaw/pdf/pub833.pdf](http://www.wipo.int/about-ip/en/development_iplaw/pdf/pub833.pdf); *Joint Recommendation Concerning the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet* (Oct. 2001), available at [http://www.wipo.int/about-ip/en/development\\_iplaw/pdf/pub835.pdf](http://www.wipo.int/about-ip/en/development_iplaw/pdf/pub835.pdf); *Joint Recommendation Concerning Trademark Licenses*, (Oct. 2000), available at [http://www.wipo.int/about-ip/en/development\\_iplaw/pdf/pub835.pdf](http://www.wipo.int/about-ip/en/development_iplaw/pdf/pub835.pdf).

<sup>16</sup> See Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 156 (2001).

between the Canadian and American patent offices regarding the Blackberry patents in the last few months shows).

### C. *Multilateral Global Treaties*

One might think that my discussion of this rather nebulous system is avoiding the obvious vehicle of trademark norm-setting, the multilateral global treaty. I am stressing other vehicles intentionally, not only because the current climate may be less conducive to the harmonization of substantive norms through multilateral treaty, but also because it is easy to misconceive the full historical role of the classical intellectual property treaties.

Those treaties, and in the trademark context I speak primarily of the Paris Convention,<sup>17</sup> were adopted in a different moment in time. To be sure, they were designed to cause some convergence or harmonization of norms. But they were more fundamentally aimed at securing commitment from nations to very basic standards of intellectual property protection, and to make that protection available on a national treatment basis. Thus, they were structured around the obligation of national treatment and *minimum* levels of protection, above which nations could (subject to national treatment) diverge as widely as they wished.

That structure, which was a product of history, was reflected not only in the low level of protection mandated, but also in the relatively sparse (and generally-stated) substantive norms to which nations committed. It is perhaps not surprising that in the two trademark-based TRIPS complaints that have resulted in panel reports, the Appellate Body or panel found violation of the national treatment provisions of the Paris Convention but not the substantive trademark provisions.<sup>18</sup> In the early 21st century when, as a result of TRIPS, we have nominal enforceable treaty commitments to core substantive norms across the board, the process of norm convergence will and inevitably does look different. It will, and should be, the product of a different historical moment, and reflect contemporary realities.

### D. *The Future of Harmonization*

So what will modern harmonization look like? There may be a temptation to suggest simply that now that we have a core of common substantive norms, the goal should be to work toward even further commonality. To be sure, there are gains to be realized from the adoption of common substantive standards, both in reducing transaction costs and enhancing the certainty necessary for global economic development. Yet, there are also costs. One might wish to limit more intense harmonization in order to preserve what some might regard as the intrinsic value of diversity or difference. More instrumentally, the ability of nations to tailor their trademark laws to their own economic and social context is likely to produce a more efficient system than seeking to devise a single set of substantive norms that is optimal on a global basis. Setting aside for one moment the politically contested nature of any single “ideal” level or form of protection, what works for the United States may not of necessity work for other countries of quite different economic and social development. And even if one believed that a single optimal trademark law was possible, the

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<sup>17</sup> Paris Convention, *supra* note 2.

<sup>18</sup> 211 Dispute Summary, *supra* note 8; 110(5) Dispute Summary, *supra* note 7.

experimentation of laws that emanates from diverse systems would help identify any such ideal law.

As a result, in the foreseeable future, trademark treaties are likely to focus on reducing the costs and hurdles of securing protection on a worldwide basis, notwithstanding diversity of regimes. This fairly describes the Trademark Law Treaty adopted just after TRIPS,<sup>19</sup> the recently revised TLT adopted in Singapore in March,<sup>20</sup> and discussions about tinkering with the Madrid system to de-emphasize the philosophy of dependency and thus encourage greater use by (most notably) U.S. mark owners.<sup>21</sup>

It should be remembered that the conclusion of the Madrid Protocol in 1989 is a prime example of the modern influence of the United States in the trademark system,<sup>22</sup> in that it was a desire to encourage the participation in the Madrid system of a number of economically significant countries (such as the United States) that led to the modification of the registration-oriented Madrid Agreement.<sup>23</sup> Yet, the influence manifested itself in an *accommodation* of features of use-based systems within the Madrid regime without the imposition of any common substantive standards.<sup>24</sup> Indeed, even the TRIPS Agreement, which permits the United States to adhere to a use-based system (although requiring the availability of an intent to use *application*), does not interfere with the ability of registration-based systems to continue as before. It is likely that the influence of the United States in the context of multilateral trademark treaties will not result in the extension of substantive U.S. trademark norms being extended to other countries.

Even if a normative analysis did *not* call for the maintenance of occasionally different substantive trademark norms, and sought instead to create a utopian ideal of a single trademark law and unitary trademark rights, it is important to recognize the descriptive futility of such an endeavor. In this context, there is an important distinction between the somewhat detailed (and relative) harmonization of EU trademark law and any parallel efforts at global norm convergence. The EU trademark harmonization initiative in 1989 occurred in the context of a political union, with a functioning judicial and administrative infrastructure.<sup>25</sup> During the last year, the European Court of Justice (“ECJ”) issued over twenty trademark opinions on reference from national courts. Convergence can occur absent a centralized court, and for all the formal and informal reasons already mentioned, we can expect continuing general convergence of trademark norms. However, if one wished convergence, for example, of the precise means of assessing a likelihood of confusion (a task that the ECJ appears to have set itself), one will require continuing detailed supervision by a superior court. That does not, and for the foreseeable future will not, exist at the global level. Global harmonization of trademark law cannot move far beyond general commitments, such as to protect against a likelihood of confusion.

Moreover, even if trademark *laws* did reach a state of substantive uniformity, it has to be recognized that trademark *rights* reflect market and consumer understanding. As long as local

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<sup>19</sup> Trademark Law Treaty, adopted on Oct. 27, 1994, 2034 U.N.T.S. 298, *available at* [http://www.wipo.int/clea/docs\\_new/en/wo/wo027en.html](http://www.wipo.int/clea/docs_new/en/wo/wo027en.html).

<sup>20</sup> Singapore Treaty on the Law of Trademarks, adopted on Mar. 27, 2006, [http://www.wipo.int/edocs/mdocs/mdocs/en/tlt\\_r\\_dc/tlt\\_r\\_dc\\_30.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/tlt_r_dc/tlt_r_dc_30.pdf).

<sup>21</sup> *See* Madrid System for the International Registration of Marks, Meetings/Seminars, <http://www.wipo.int/madrid/en/meetings/index.html> (last visited on July 18, 2006).

<sup>22</sup> *See* Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 28, 1989, *available at* [http://wipo.int/madrid/en/legal\\_texts/trtdocs\\_wo016.html](http://wipo.int/madrid/en/legal_texts/trtdocs_wo016.html) (last visited on July 18, 2006).

<sup>23</sup> *Id.*

<sup>24</sup> *See id.*

<sup>25</sup> *See* Council Directive, *supra* note 11.

markets exist, as they inevitably will, application of a common substantive norm may give rise to different legal conclusions in different markets. Marks that are distinctive in one country may be generic in others.

#### E. *Political Limits on Harmonization*

Finally, of course, there are political limits on harmonization. Despite convergence of markets globally, and despite the existence of systemic influences described above, the current political economy of intellectual property lawmaking nationally and internationally makes it hard to see much progress on substantive treaty-based harmonization in the next few years. Ironically, bringing us back to the connection with enforcement, it may be the softer nonbinding instruments and systemic influences that bring about great convergence. Of course, the same political forces that are bringing a stalemate (or political equilibrium) to the multilateral treaty process have now recognized that softer instruments are being used to advance harmonization agendas, and that avenue is likely (and perhaps appropriately) to become subject to the same slower political dynamic.

So, does this just leave us with harmonization through systemic influences? Well, that will surely continue. And, in trademark law, systemic influences may be quite potent and go beyond judges, policy makers, and trademark lawyers. The convergence of markets and consumer communities may affect a commonality of consumer meaning across borders that brings about more common trademark rights. Certainly, the growing number of claims under the well-known mark doctrine in the U.S. courts suggests that this might be happening. And if convergent global meaning is to grow through social developments, you can be sure that U.S. influence will be substantial.

But if I had to suggest a more conscious process of convergence of norms in trademark law, where would it be? Well, first, let me suggest that it might be more likely to occur in trademark than in copyright and patent law. Unlike copyright, there is less historical, philosophical entrenchment in trademark law. And unlike patent, trademark law has not been seen as implicating fundamental social policy choices such as access to essential medicines. The lesson for trademark law, perhaps, is that harmonization is unlikely only in areas of trademark law where *there are* philosophical, historical, or political entrenchments. For example, one should not expect harmonization of rules regarding geographic indications any time soon, unless those rules are part of a broader political package.

The United States Trade Representative clearly continues to see bilateral norm-setting as a viable vehicle. Yet, the bilateral picture is more complex than might first appear. By including very detailed obligations in bilaterals (e.g., compliance with the SCT resolution on well-known marks), the United States also binds itself to such norms as a matter of international law.<sup>26</sup> It turns the soft commitments it made in Geneva to hard law international obligations. This degree of inflexibility can be inconvenient. The Well-Known Mark Resolution, for example, requires protection of certain marks against a likelihood of dilution.<sup>27</sup> *V Secret*<sup>28</sup> is inconsistent with that

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<sup>26</sup> *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* (Sept. 1999), available at [http://www.wipo.int/about-ip/en/development\\_iplaw/pdf/pub833.pdf](http://www.wipo.int/about-ip/en/development_iplaw/pdf/pub833.pdf).

<sup>27</sup> *Id.* art. 4(1)(b)(ii).

<sup>28</sup> *Mosely v. V Secret Catalogue, Inc.* 537 U.S. 418 (2003).

international obligation. And such intellectual property commitments, nominally granted to a bilateral partner, are by virtue of MFN obligations owed to all other WTO countries.

Moreover, as I mentioned a moment ago, the bilateral context is beginning to assume the same controversial character as the multilateral treaty forum. Within intellectual property law more generally, the newest aspect of the harmonization debate has been efforts by user groups to harmonize by creating ceilings on protection as well as the floors set by substantive minima. These efforts are now being pursued in lobbying on bilateral as well as multilateral initiatives.

However, if one examines these efforts by user groups, one finds very few references to trademark law. There are no broad efforts to mandate particular defenses, for example, under trademark law. Indeed, the most likely source of limits on trademark rights may not emanate from user groups, but rather from other right-holders whose rights may come into conflict with trademark rights, such as GIs. The WTO panel decision on the EU GI Regulation<sup>29</sup> left open the extent to which trademark rights could be limited by the coexistence of GI rights in the same term.

Trademark harmonization is also more likely where we are presented with Internet-related challenges. There, entrenched philosophical positions are less likely, and the quasi-international nature of the Internet helps to justify harmonizing only incipient national norms. This explains, in part, the favorable reception to the SCT Nonbinding Resolution on Use.

The success of the Uniform Domain-Name Dispute Resolution Policy (“UDRP”)<sup>30</sup> in establishing itself as an international standard for resolution of cyber squatting disputes might also be explained by its online focus. But, the UDRP did intrude upon very firmly held political views, not entrenched for centuries like the debates over the work for hire doctrine in copyright law, but forged in the equally contested context of Internet governance.

With these competing forces — difficult politics, but essentially international subject-matter — aligned against each other, the success of the UDRP in becoming an international standard and the influence of the United States can again only be explained by enforcement. But here it is a slightly different notion of enforcement. We are talking about the capacity not to enforce a nation’s compliance with an international standard, but rather the capacity to enforce a legal judgment. That capacity, for technological reasons, largely belonged to the United States, and that variable greatly enhanced the influence of the United States.

### III. CONCLUSION

So what are the lessons in understanding the role of the United States as a standard setter? First, that influence may be affected as much by strategic decisions about the institutional and enforcement environment in which debate is pursued as by the substantive content of the standards. Second, the process of harmonization has inherent limits, both descriptively and prescriptively. In light of that, much of our effort in trademark law might best be focused on developing systems that build bridges between, and accommodate, the different national and regional trademark systems.

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<sup>29</sup> Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs – Complaint by Australia – Report of the Panel*, WT/DS290/R (Mar. 15, 2005). Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs – Complaint by the United States – Report of the Panel*, WT/DS174/R (Mar. 15, 2005).

<sup>30</sup> *Uniform Domain Name Dispute Resolution Policy*, <http://www.icann.org/dndr/udrp/> (last visited October 5, 2006).