The Harmonization Myth in International Intellectual Property Law

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There is a dominant narrative in international intellectual property law of ever-increasing harmonization. This narrative has been descriptive, prescriptive, and instrumental—approximating the historical trend, providing justification, and establishing the path forward. This narrative is a myth. Appeals to harmonization are attractive because they evoke a worldwide partnership, entailing shared sacrifices to meet common goals of innovation through certainty, global free trade, efficiency, and increased competition through lowered barriers. Countries with strong intellectual property protections consistently and successfully tout the importance of certainty and lower trade barriers when seeking new and stronger protections from countries with lower levels of protection. But harmonization can account for only some attributes of international intellectual property law development. The narrative that is more fitting is maximization. Maximization of intellectual property rights better explains much of the substance of international intellectual property law development, including the TRIPs Agreement, which sets floors—but not ceilings—for intellectual property protections. Maximization is particularly evident in the forum-shifting behavior that has resulted in a proliferation of intellectual property commitments in investment, bilateral, and regional trade treaties in the years since the TRIPs Agreement went into effect. These commitments often increase intellectual property protection in signatory countries in ways that bring them out of harmony with the majority of the world. Prior commitments to harmonization are discarded for maximization. Because harmonization does not fully explain the historical development of international intellectual property law, and because it does not justify many of the recent changes in intellectual property commitments, its force as a determinant of future-looking policy deserves scrutiny and skepticism.

This Article uses the example of the term of protection, because it is the strongest case for harmonization. If the term of protection under a patent or copyright is much shorter (or longer) in one country than another, then for some period of time, there is protection in one country and not in the other. Advocates of harmonization ought therefore to be willing to trade uniformity for terms that are less ideal for national interests in some situations. Through the lens of term, the article describes the harmonization narrative and its strength leading up to the TRIPs Agreement before showing the superiority—for explanatory purposes—of a maximization narrative, even in the provisions of TRIPs. Next, the Article shows how maximization of intellectual property has driven many of the post-TRIPs treaties and agreements—at the expense of harmonization.

There are a number of implications for the future of international intellectual property law that a full recognition of maximization as explanation suggests. First, it removes the presumption that all countries should have the same level of IP protection. This is in fact a big deal. Second, it weakens arguments that countries ought to sacrifice their own national agendas in order to bring their IP protection into harmony with other countries.