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# Challenges in Public and Private Domain Will Shape the Future of Intellectual Property

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### **Challenges in Public and Private Domain Will Shape the Future of Intellectual Property**

Severin de Wit\*

Market failures, troubled access to medicine, impediments to free flow of information, copyright overextension, digital right protection, overkill and patents stifling rather than stimulating innovation are just a few of the disparaging themes around intellectual property. The main drives behind changes in IPR systems are growing discontent with the right to exclude, which is essential to most IPR systems, the diversity of IP policies between the West and the Developing countries, as well as digitalisation of information. The future of IPR will be shaped more by its users than by international IP legislative initiatives. This think piece explores the main drives behind a growing critical view on intellectual property and how the law can change so as to restore confidence in the workings of intellectual property systems.

#### **1. Introduction**

Intellectual property (IP) law practitioners are generally not known for their preoccupation with shaping the future of the law. Engaged with daily routines, IP law practitioners are more concerned with practical issues like the question in which EU country a new, unified, European Patent Court will be established and whether such a court, once in place, will maintain or change long held patent law concepts like “obviousness”, and if so, whether common or civil law traditions will prevail.

#### **2. IP Does Not Feature Prominently in International Law Publications**

Literature on what intellectual property will look like in 2030 is scarce. Well-known writers seem more concerned with the possible future for different fields of law, ranging from criminal and environmental to constitu-

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tional and corporate law. Intellectual property is notably absent. When analysing the inconsistencies or inadequacies of current legal systems, intellectual property rights, also known as IPRs, do not attract the imagination of legal minds when they explore the challenges law systems face in the new millennia. Even a recent publication, *Realizing Utopia: The Future of International Law*, edited by a formidable legal mind in international law, Antonio Cassese, covered all imaginable areas of the law, except intellectual property.

The reason behind this is simply that intellectual property is not a subject that “translates” well into the mind of politicians, scientists, policymakers or even economists. IPR, however, is an important instrument in opening markets for knowledge, increasing Foreign Direct Investment and allowing innovation to spur (that at least still many believe). Therefore, IP should be included when we discuss about changes in the law today and consequently how the law of the future will look like with or without intellectual property.

*Realizing Utopia* is a collection of essays, written by a group of well-known international jurists, reflecting on some of the major legal problems faced by the international community. Remarkably, shaping an improved architecture of world society – or at a minimum, reshaping some major aspects of international dealings – does not seem to include what impact intellectual property laws have on these subjects.

### **3. Intellectual Property as a Historical Public Policy Instrument**

The protection of intellectual property has a history that dates back several centuries. Christopher May and Susan Sell address this in their collaborative work on IP, “Forgetting History is Not an Option! Intellectual Property, Public Policy and Economic Development in Context”, and note that the “[p]rotection of intellectual property has always been a form of public policy, an intervention in markets to transform their functioning”. Tracing the development of IP policy as far back as the Middle Ages, May and Sell elaborate further on the topic:

In the 1300’s patents were grants of privilege awarded to those who brought new techniques into a sovereign’s territory. British kings awarded letters of protection to innovators who developed new weaving techniques and various new industrialist processes. Rulers sought to attract and retain talented artisans in their territory, inspired by the mercantilist

goals of limiting imports and promoting exports. Intellectual property rights emerged during the early mercantilist period as a means for nation-States to unify and increase their power and wealth through the development of manufactures and the establishment of foreign trading monopolies. The term patent, derived from the Latin *patere* (to be open), refers to an open letter of privilege from the government to practice an art. The Venetian Senate enacted the first patent statute in 1474 providing the maker of any ‘new and ingenious device ... reduced to perfection so that it can be used and operated’ an exclusive license of 10 years to practice the invention. Other nations followed suit and the granting of limited monopolies for inventions, and later to publishers and authors of literary works, became the dominant means of promoting innovation and literature.<sup>1</sup>

However, the question now is what has become of this romantic idea of IPRs stimulating innovation?

#### **4. Property as the Leading Justification of IPRs**

Over time, the predominant theme around intellectual property rights has been the right to a creation of the mind – to own this as if it is one’s property – enabling the holders of IP to exclude others. As we will see later in this think piece, in the private domain the concept of “property” has caused many to argue that a right to exclude third parties from using such property should be altered into a compensatory liability regime.

Given the distributional consequences of the ability to own (and control, even temporarily) products of the mind and imagination (books, films, software, trade dress as well as technological innovations), intellectual property has frequently been an instrument of power and, once captured, the basis for further accumulation of power. However, unlike power that comes from the control of sparse material resources, the holders of intellectual property have had to construct the scarcity of property through legal instruments. The very process of defining what constitutes intellectual property effectively reinforces particular perspectives that may bene-

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<sup>1</sup> Christopher May and Susan Sell, “Forgetting History Is Not an Option! Intellectual Property, Public Policy and Economic Development in Context”, George Washington University, USA, paper presented at Intellectual Property Rights for Business and Society Birkbeck College, University of London, 2006, based on the authors’ book, *Intellectual Property: A Critical History*, Lynne Rienner Publishers, 2005.

fit, some at the expense of others, treating some things as “property”, while others remain “freely” available.

### **5. Intellectual Property Rights as a Source of Economic Power**

Patented innovative ideas, copyrighted new creations of the mind, breakthrough product designs and the power of famous brands coincide with economic power as soon as these are exercised on the market. However, this economic power is not equally enforced or exercised. The right to exclusivity that is so quintessential to IP rights also creates asymmetrical economic power between the “have” and the “have not”. As a matter of fact, asymmetrical economic power goes a long way towards explaining why semi-conductor chips are identified as intellectual property, whereas indigenous folklore is not. As Susan Sell and Christopher May describe in their “Moments in Law, Contestation and Settlement in the History of Intellectual Property”,<sup>2</sup> the legal institutional development of IP shows significant difference from other forms of productive relations. In this sense, while other markets emerged prior to capitalistic models of organisation and were slowly integrated into the modern capitalist system, with products entering markets through production processes organised in a multitude of ways, this is not true of intellectual property. For markets in knowledge, the property had to be constructed through law, so that it could be allocated through market mechanisms; but those who sought this commoditisation were essentially nascent capitalists. Thus, unlike other forms of productive relations that were re-configured through the emergence of capitalism, intellectual property relations are the product of the great transformation of the sixteenth and seventeenth centuries.

Economic power has long been the leading force behind the pressure put on developing countries to accept Western intellectual property concepts that were previously alien to those countries. Chile provides a striking example. In 1990, an American-based private business association used its power not only to reject, but also actively to shape, the legislation of a foreign sovereign government. Until 1991, like many developing countries, Chile refused to grant patent protection for pharmaceutical products. This refusal was an effort to keep the prices of necessary medi-

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<sup>2</sup> Susan K. Sell and Christopher May, “Moments in Law: Contestation and Settlement in the History of Intellectual Property”, in *Review of International Political Economy*, 2001, vol. 8, no. 3.

cines affordable by placing public health considerations above property right concerns. Chile faced increasing pressure by a small group, called Pharmaceutical Manufacturers of America (PMA), to revise its laws to extend patent protection to pharmaceutical products. In 1990, Chile proposed a revised patent law, which was rejected by this small but powerful group, forcing Chile to go back to the drawing board and revise its patent law. This exceptional industry lobbying was basically a prelude to the related and even more far-reaching international agreement on IP, the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), administered by the World Trade Organization (WTO).

## **6. Diversity of IP Policies Between Countries is a Function of Their Development Stage**

As Susan Sell and Christopher May have shown, the diversity of intellectual property policies between countries is in part a function of their different stages of development. All other things being equal, a technological leader will prefer strong protection of its innovations, whereas a follower will favour access over protection. Strong economies will be served by expanding the markets for their goods, while weak economies are best served by cheap or free access to the technologies of advancement and development.

In the current world economic climate this is all the more true. In the public domain, India, due to its increasing economic power, allows its national pharmaceutical companies much more legal lenience in using proprietary processes and products, owned by foreign counterparts and covered by foreign owned patents, in order to protect national interests despite TRIPS: interests that collide with internationally recognised patent rights of third parties.

In the early 1960s, the first Indian drug companies came to the market. At that time, foreign multinational companies had mainly dominated the Indian drug market. This did not change until the early 1970s when domestic Indian companies were able to capture only about 25 per cent of the Indian market. The Indian government then decided to implement new legislation to allow its domestic companies to gain a greater market share. The motivation for that was to allow for a better and cheaper supply of medication. The Patents Act of 1970, which was later amended in 1972, 1992, 1995, and 1999, virtually abolished IPRs in the pharmaceutical sector using the following provisions: (1) product patents for pharmaceutical

products were not granted; (2) the available process patents were very weak and offered only insufficient protection due to their restrictive five- to seven-year statutory term; (3) the equity share of foreign companies in Indian drug manufacturers was limited to 40 per cent; (4) price control was introduced to cut prices; and (5) a wide ranging system for compulsory licences was introduced. Of the above, the fifth is the most restrictive to the industry since it virtually eliminates all judicial reliance on the Indian IPRs. Over the years, mainly the production of generic drugs fuelled the growth of the Indian pharmaceutical industry. This was done through copying existing formulations of multinational companies and producing them in a larger scale after making slight process alterations. Since the weak IPR did not allow for litigation, more and more foreign companies ceased investment in the Indian market. Consequently, by 1991, Indian companies had turned market share numbers round in their favour and now served roughly 75 per cent of the market. However, after flourishing by means of the weak IPR for about 24 years, the regulatory framework changed for the Indian companies in 1994. In the process of joining the WTO, the Indian government had to sign the TRIPS agreement.

The case of India and its efforts to protect national generic industries is just one example of an intellectual property system that has come under increasing international criticism. Emerging economic powers, like those in BRIC countries, no longer tolerate a unilateral “dictate” on how to seek equilibrium between protecting national interests and protecting third party rights of foreign investors. Local indigenous knowledge, long ignored by Western pharmaceutical companies, is now at the heart of R&D projects in many developing countries, creating new challenges about who owns the intellectual property in knowledge derived from indigenous sources. The increased self-consciousness of those countries, caused by economic prosperity, provides them with the confidence that they can withstand international pressure to adapt their IP laws.

The overall theme behind the pressure by Western countries on developing countries to meet international TRIPS standards was that IPR strengthening would be a boon for increased Foreign Direct Investment (FDI). A further argument for developing countries to accept TRIPS was that the more importance was given to intellectual property rights, the better the behaviour of their economy would be: a proposition denied by many, among them Joseph E. Stiglitz. Stiglitz concludes that intellectual property regimes designed inappropriately not only reduce access to med-

icine, but also result in a lower economy efficiency and may even slow down the rhythm of innovations, with weakening effects, particularly serious in developing countries.<sup>3</sup>

The evolving trend of developing countries of showing economic growth where Europe and the US are lagging behind will only increase the number of occasions on which Western-originated pressure to adapt IPR regimes will be faced with scepticism and resistance, unless a fairer and more equitable IP system is put into place that allows those countries to develop their own IP legal systems. As Fink and Maskus point out in “Intellectual Property and Development, Lessons from Recent Economic Research”,<sup>4</sup> future empirical work should look for natural experiments that explore within one country how economic variables have changed after a regime shift on a well-defined element of the intellectual property system.

## 7. Property and the Right to Exclude

At the heart of this growing discontent with the functioning of intellectual property systems are a number of developments. Firstly, there is the changing moral and social understanding on how property can be the legitimate reason for an IP right holder to exclude others even if this exercise of ownership has consequences on public health, security or public safety. Can a holder of patented AIDS/HIV medicines prevent countries from delivering generic copies of the patented version to open up a market that would otherwise be restricted to the rich and fortunate? As Susan Sell sets out:

The history of intellectual property protection reveals a complex yet identifiable relationship between three major factors. First, it reveals shifting conceptions of ownership, authorship, and invention. These ideas denote what “counts” as property, and who shall lay claim to it. Second, this history reflects changes in the organization of innovation and the production and distribution of technology. Third, it reflects institutional change with these shifting ideational and material forces.

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<sup>3</sup> Joseph E. Stiglitz, *Making Globalization Work*, W.W. Norton & Company, New York, 2006, p. 106.

<sup>4</sup> Keith E. Maskus and Carsten Fink (eds.), *Intellectual Property and Development, Lessons from Recent Economic Research*, World Bank Publications, 2005.

Legal institutionalization of these changes in law alters power relationships and inevitably privileges some at the expense of others. Property rights both are situated within broader historical structures of global capitalism and serve to either reproduce or transform these structures. Particular historical structures privilege some agents over others, and these agents can appeal to institutions to increase their power.

Furthermore, the age of digital technology, the internet and the greater ease of reproduction have increased the demand for modifications in intellectual property practices. Young people have difficulty understanding why music, videos and other information kudos cannot be freely downloaded. Perceptions of “property” rights on information have undergone an almost revolutionary shift from the powered few having access to proprietary information and resources to a mainstream audience on all kinds of public internet platforms assuming and demanding information to be “freely available”. This shift in perception of access to information has dramatic effects on the most core of traditional IP thinking: property and exclusivity.

The infinite information resources that the internet provides give further impetus to a shift in ideological views on who owns information materials, ranging from the concept that ideas and information should be completely free – unprotected and unrestricted – to the belief that intellectual property laws should remain the ultimate means of regulating who can and should get access to information, and at what price. It is this constant legal and societal battle that forces traditional providers of information, publishers and writers, composers, entertainers, film-makers and inventors alike, to change their business models over time. Again, this search towards the boundaries of private ownership where concepts of “property” and “exclusion” are the main themes will have serious implications on what intellectual property law will look like over time.

For advocates of the commons model<sup>5</sup>, the legacy of the internet's development provides even further reason for questioning the durability of broad intellectual property protection as a means of spurring innovation.

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<sup>5</sup> A model whereby multiple contributors (‘commons’) or authors share their work, without individual authors claiming copyright, yet providing the ‘commons’ to license the use of the entire work back to both the contributors and the general public.

## **8. Power Shift in IP Public Policy**

Lastly, the shifting political power towards emerging economies in the BRIC countries, as discussed above, has a deep impact on legislative processes and global IP enforcement. As the history of TRIPS shows, a handful of powerful industries were able to force countries to adapt their IP laws so as to align them with Western concepts of intellectual property enforcement. Unilateral legislative initiatives use compulsory licensing to break patent monopolies on medicines deemed crucial for public health in developing countries. India's government, in May 2012, authorised a drug manufacturer to make and sell a generic copy of a patented Bayer cancer drug, arguing that Bayer charged a price that was unaffordable by most of the nation. Although the decision by the India Controller General of Patents, Designs and Trademarks was not the first time when a so-called compulsory licence of a patented drug had been granted in India, many believe that this opens the door to a flood of other compulsory licences creating a new supply of cheap generic drugs. This evidence of an increased self-consciousness is a clear sign of a power shift in intellectual property public policy.

## **9. Changes in the Private IPR Domain**

In the private domain, it can be seen that intellectual property concepts – long held to be the cornerstone of the legitimacy of that part of the law – meet increasing criticism, questioning whether intellectual property has a future at all. It is undeniable that the form of intellectual property we have been taught at law schools and propagated by institutions, governments and multinational corporations and IPR practitioners – a system of complex statutorily-defined property rights – is in dire need of reconstruction. The future of intellectual property is at stake. No longer can the IPR establishment – current users of IP systems and law-makers who have been proliferating the advantages of IP – rest on their laurels and rely on fundamentals that have guided them for centuries: that patents reward inventors by granting them a monopoly for a limited time in exchange for the patentee disclosing his invention so that others can rely and build on his work, thus fostering innovation as a theme that slowly develops into anathema.

Criticism of the relationship between innovation and patents is increasing and certainly no longer limited to the academic world. As a result

of modern technology, children of the information age hold different views on “openness” and “free (available) information”. The general idea is simple enough, as Robert P. Merges describes in his recently published book *Justifying Intellectual Property*.<sup>6</sup> Digital media, driven by the internal logic of widespread availability and network effects, will flourish better and better serve the goals of the intellectual property system if digital content, and the platforms that carry it, are freed from property-based limitations. Merges’ book is a legal and philosophical work in search of the best answers to these “openness” and “commonality” trends. He defends the idea that IP protection is in no way inconsistent with the promotion of a flourishing environment for digital media; quite the contrary: IP rights are essential to this goal.

#### **10. Alternatives to Property-Based IPR Systems**

Alternatives have been proposed to intellectual property as a right based on property that allows the owner to “exclude” and “control”. IP laws that favour liability rules have been proposed as an alternative to exclusion. Property rules, as the name suggests, secure “entitlements” (like an injunction against a party that uses the patented invention or the trademarked sign or the copyrighted work, or monetary compensation – a royalty) as “property”. To secure something as property, the rules must effectively prohibit others from taking or damaging the entitlement without first gaining the consent of the owner. Liability rules, on the other hand, neither seek to provide the security of a property rule, nor seek to force those who would take or damage an entitlement from first obtaining consent from the IP right owner. Instead, such rules create an obligation to remedy the usage of the property, for example by paying a reasonable price, or “rent” in economic terms. Failure to honour this obligation would in some cases constitute an infringement for which reparation could be sought.

Jerome Reichman is the leading proponent of using liability rules to address problems concerning the protection of traditional knowledge and sub-patentable<sup>7</sup> inventions. Under his proposed compensatory liability scheme, second comers will be required “to pay equitable compensation

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<sup>6</sup> Robert P. Merges, *Justifying Intellectual Property*, Harvard University Press, 2011.

<sup>7</sup> ‘Sub-patentable inventions’ are inventions falling below the conventional criteria for patentability.

for borrowed improvements over a relatively short period of time”. As Reichman explains, such an alternative regime has several benefits. For example, it “could stimulate investment without chilling follow-on innovation and without creating legal barriers to entry”. Such a regime “would also go a long way toward answering hard questions about how to protect applications of traditional biological and cultural knowledge to industry, questions that are of increasing importance to developing and least-developed countries”.

## 11. Conclusion

Whatever the outcome of academic research into alternative IP systems, the future of intellectual property will be in large part dependent upon the actors in the IP field themselves. No remedy to a failing IP system can be found in new legislative initiatives, as is shown by the legislative process to create a new unified European Patent Court. As Jonathan Koppell shows in his book *World Rule*, Global Governance Organisations like WIPO, the WTO and other legislative bodies entrusted with international IP legislation, tend to face trade-offs between legitimacy and authority, often violating democratic norms, sacrificing equality and bureaucratic neutrality, to satisfy key constituencies and thus retain power. So it is not altogether that strange that no major new treaties on IP can come off the ground. As a result, inequalities caused by intellectual property “ownership” and “exclusivity” in the public domain will most likely in the future not be remedied by more internationally agreed legislation: for example, a change in TRIPS, but rather by domestic and case law, local legal initiatives and common practices. In the private domain, we have already seen the emergence of a new “openness” in intellectual property, evidenced by a “Commons” approach of Open Source in copyright and, in patent law, the Patent Commons Project initiative launched in 2005 by the Open Source Development Laboratories (OSDL). Furthermore, we will see a growing number of limitations in national case law around the world where the exercise of intellectual property-based ownership and exclusivity claims will make way for liability-based remedies. We can expect to get more differentiation between fundamental advances in knowledge and logical extensions of existing knowledge or incremental improvements that will, over time, receive a different kind of intellectual property protection. Societal needs to breach the “exclusivity” rule in intellectual property for the greater good (access to information, basic research, ex-

emptions on patentable subject matter, resistance against overly long copyright term protection and other restrictions of IP exclusivity) will, as we expect, force the judiciary to allow much more room to exceptions to ownership and exclusivity in intellectual property in the future.

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