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Author(s): Errol D'Souza and Peter de Souza

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# Restating Arguments on Intellectual Property Rights

Errol D'Souza  
Peter de Souza

*There are various levels and arguments involved in the debate on Intellectual Property Rights (IPRs). Four aspects have merited attention, the consequentialist, where the dispute is shown to be primarily empirical, the intrinsic, where the disagreement concerns the norms of a free society, the incentive, where IPRs are seen as incentives that are socially beneficial, and the desert, where the inventor's desert is the basis of dispute. The authors make a case for an alternative patent regime.*

## INTRODUCTION

THE recent observation of the United States Trade Representative (USTR) that no foreign country currently meets every standard for adequate and effective intellectual property protection [USIS, 1989, p 3] is a statement that quite unintentionally touches upon several controversies in political philosophy. What appears merely as the empirical observation of a faithful bureaucrat, routinely going about her duties, is in effect a significant statement on the 'good society'. Concealed in the officialese is the normative rule that every free society should adequately and effectively protect intellectual property rights (IPRs) since such protection is a measure of the freedom in that society.<sup>1</sup> The US is regarded as providing the model of such freedom. This demand by the USTR has, quite naturally, caused considerable indignation among developing nations who have responded to it at many levels, from seeing it as an expression of the discredited paradigm of development and modernisation to seeing it as the normative cover for the interests of MNCs.<sup>2</sup> These varied responses need to be looked at more rigorously especially since the information revolution has made the issue of IPRs the new battleground for the conflict between the OECD and the developing countries.

In the six sections of this paper we shall try to first separate out and then assess the different arguments involved in this claim to rights of IPRs. In the first section we show how the controversy concerns both empirical claims and normative principles. Here we define our use of keywords such as 'rights', 'property', and 'freedom'. In the second section we show how many of the arguments are consequentialist in nature referring to consequences which are either negative or positive. Disagreement here is primarily on the empirical claims being made and not on the normative rules of a free society. To highlight this disagreement we can even assume a consensus on the normative ground rules of a free society.<sup>3</sup> In the third section, the intrinsic argument, we evaluate the normative claims forwarded by those who argue for and against a strong patent regime. We examine the status of IPRs in a

free society and show how no particular preference ordering can claim to have universal validity. In the fourth section we formalise the arguments about patents and property rights in inventions and show how it is linked to the incentive argument which sees a patent as an incentive to undertake invention and thereby to facilitate the future availability of the diversity of goods. In the fifth section we question the validity of the patent system itself and argue that it is not necessary to meet the objective of future production by appealing to the notion of deserts. We see that the Utilitarian J S Mill also argued for property rights on grounds of expediency and that such rights in an invention are not warranted when the desert of the inventor is taken into account. We conclude by exploring the possibility of an institution that we name the Intellectual Property Institution (IPI) which could replace the institution of property rights by conferring appropriate deserts while at the same time making the invention widely available to society.

## I

### Identifying Arguments

Two levels of argument can be identified in this debate over IPRs. At the first level there is general agreement over the principles that sanction IPRs and the disagreement is only over the means to be used to promote these principles. There is thus a clash of opinions on the consequences of a strong/weak patent regime, a difference that is primarily at the empirical level and hence resolvable by empirical testing. These consequentialist arguments can, in turn, be classed into the negative utilitarian and the positive utilitarian groups. At the second level, in contrast, the argument is about the principles that sanction IPRs themselves. The moral grounds given by the USTR for a strong patent regime are disputed and grounds for a weak regime, or for no regime at all, are advanced. These discussions involve controversial concepts such as 'freedom', 'rights', 'property', 'obligation', etc. Let us therefore begin by defining what we mean by some of them.

A free society is one which seeks to provide its citizens with the opportunities to develop their powers and capacities and thereby to lead a fulfilling human life. This

is the conception favoured by the advocates of a weak patent regime. It is also however, one which recognises the minimum inviolable area within which the citizen is free from interference by external authority, 'to do or not to do, be or not be' whatever he wishes to do, be, or become. This area of non-interference is an area where basic rights are protected and is an important pre-requisite of any free society. This is the emphasis preferred by the advocates of a strong patent regime. A free society has thus both an enabling and a protective function, enabling human self-realisation and protecting basic human rights [Berlin, I 1969]. The question of relevance for us, therefore, is whether IPRs qualify for the status of 'basic human rights'? How do they rank with respect to other basic rights in the preference ordering of any free society? Under what circumstances can they be overridden? These are questions that have to be addressed by anyone wishing to adjudicate in this debate about patent regimes.

By rights we shall mean "the moral justification for limiting the freedom of another and that he has this justification not because the action he is entitled to require of another has some moral quality but simply because in the circumstances a certain distribution of human freedom will be maintained if he by his choice is allowed to determine how that other shall act" [Hart, HLA, 1984, p 56]. Talk of rights concerns the requirements of a relationship of justice where one of the parties is owed something and who, therefore, would be wronged if denied that something [Finnis, J, 1980]. Denial of rights is hence morally unacceptable since such denial involves either an abrogation of the special conditions under which the rights in question originate or a violation of the general principles that underlie the free society. Four aspects need to be specified in any claim for rights: (i) the *object* of the rights (intellectual property), (ii) the *subject* of the rights (the inventor), (iii) the *respondent* (the state) and (iv) the *justifications* [Gerwith, A, 1984]. The granting of a right to an individual by a state imposes a correlative duty on the state to safeguard that right. Without such a duty the attribution of a right is meaningless.<sup>4</sup> In the case of IPRs the debate is over the justifications advanced. Are they derived from some special

circumstances such as a promise or a compact (the Paris Convention) or are they derived from a Natural Rights argument? This question we shall discuss in detail after we have finished this exercise of defining our terms.

By property we shall mean a legal right "of using and disposing of some good together with a security against other people using or disposing of it" [Lucas, R, 1966, p 183]. The good in question here is intellectual property defined as patents, trademarks, industrial designs and copyrights. The keywords here, particularly for this debate on IPRs, are 'the right of using and disposing'. The demand is that this right should be adequately and effectively protected and that such protection ranks very high in a free society's preference ordering. The demand has gained momentum because intellectual property, unlike land or other goods, relates to 'pieces of information' which is very hard to protect, yet it is such pieces of information that are the main factors in promoting technological development [Lall, S, 1981, ch 6].

The objects of intellectual property are the creations of the human mind, the human intellect. This is why this kind of property is called "intellectual property". In a somewhat simplified way, one can state that intellectual property relates to pieces of information which can be incorporated in tangible objects at the same time in an unlimited number of copies at different locations anywhere in the world. The property is not in those copies but in the information reflected in those copies. Similar to property in movable things and immovable property, intellectual property, too, is characterised by certain limitations, for example, limited duration in the case of copyright and patents [WIPO, 1988, p 3].

All parties to an IPR protection regime are agreed that the rights in question can be only of a limited duration, a limitation which is considered as justified because of the general argument that IPRs should be protected but not at all costs, i.e., not absolutely. This limitation is important since it concedes that other rights/values are either always more important and tend to override IPRs, or occasionally more important and hence have a higher rank in a particular preference ordering. The debate is therefore, over what constitutes an acceptable cost, over where IPRs should feature in a particular preference ordering, over why a particular trade-off which establishes ranks is justifiable, in short, over conflicting visions of the 'good society'.

To focus the analysis further we shall limit the discussion to patents only because, of all the other IPRs, patents have the most significant bearing on the domain of production where the basic needs of any society are met and where major trade-offs are made. The value conflict between 'private rights' and 'public interest' is most clearly seen on this issue of patents. In the case of developing countries this is more strongly so since these countries are still struggling to meet the basic needs of adequate food, minimal clothing, necessary health-care, and

a basic education. The 'public interest' gains precedence over 'private rights' in policy making in developing countries because they have a large percentage of their population living under conditions of absolute poverty. The public interest is thus a valid reason for a weak patent regime. Value-conflicts, trade-offs, preference orderings are key features of the liberal paradigm and when they are used to argue for a weak patent regime, or for weak protection of IPRs, then it is important to note that this is being done from within the liberal paradigm.<sup>5</sup>

Having defined the central terms of the discussion it is time now for us to examine the merits of the arguments for/against a strong new IPR protection regime. As briefly stated earlier the case is made at two levels, at the 'consequentialist' level where a weak regime is seen as more harmful than beneficial and at the 'intrinsic' level where a weak regime is seen as violative of the fundamental principles of a free society.

## II

### Consequentialist Argument

The consequentialist argument is of the following form:

*Major Premise* (universal ought-principle): Whatever is harmful to society ought to be prevented.

*Minor Premise* (is-statement): A weak patent regime is harmful to society.

*Conclusion* (particular ought-judgment): An adequate and strong IPR protection regime ought to be developed or a weak patent regime ought to be prevented.

The minor premise (the is-statement) in the consequentialist argument is the subject of the debate since the assessment of what constitutes 'harmful consequences' varies because the protagonists are located in life-worlds at variance with each other since their constituent elements are not the same. This causes them to see harm differently and thus to measure it using different yardsticks. This debate has two aspects to it, the 'negative utilitarian' and the 'positive utilitarian'. The negative utilitarian argument basically states that it is desirable for a state to have a strong patent regime, in line with the Paris Convention for the Protection of Industrial Property, or else it will invite sanctions and other such penalties from other countries. The cumulative effect of such penalties would be harmful to its economy and hence it would be better-off with a strong patent regime.<sup>6</sup> This argument of negative utility is disputed by the argument that strong patent regimes are regarded as fostering the abuse of monopoly rights by those with patents especially by MNCs who in today's world have an overwhelming majority of patents. Countries thus become vulnerable to MNCs and hence their ability to perform their other important duties, of providing welfare and meeting basic needs of its people, is weakened. A strong patent regime gives excessive protection to MNCs who tend to abuse these monopoly rights which results in a decrease

in social utility.<sup>7</sup> Hence in the former case harmful consequences are seen to accrue from a weak patent regime, in the latter case from a strong patent regime. In the latter case safeguards against abuses are recommended such as compulsory licensing and exclusions from patentability of items in the public interest [Unctad, 1977].

An additional argument is made by the negative utilitarians which is that the fact of states not joining the Paris Convention would result in the erosion of the legitimacy of the system of international law. Such an erosion is harmful since relations between nations must be conducted within the ambit of law and if this does not happen then there will be a gradual decline to a Hobbesian state of nature where a war of all against all takes place. Such anarchy cannot be to the benefit of the weaker nations who do not have the ability to safeguard their interests. Such interests can, at least minimally, be safeguarded by the system of international law and hence 'respect for the law', in the Burkean sense, must be promoted. This scary scenario of a breakdown in international law is empirically disputed by the opponents of the Paris Convention who see the Convention itself as the cause of the diminished legitimacy of international law since it was framed in 1883 when a large part of the world was under colonial domination. It is therefore unsuited to today's world. Both these arguments of the negative utilitarians are based on the fear of consequences, sanctions in the one case, anarchy in the other, that flow from a weak patent regime. These are empirical arguments and can, therefore, be challenged simply by showing (i) that the predicted harmful consequences will not occur and (ii) that if they do occur they will be preferable to those which would follow a strong patent regime.

The positive utilitarian argument is based on the assumption that exclusive monopoly rights granted by states to inventors provides them with an incentive to be creative and, thereby, to develop new products and processes which in turn promote the greater good of society. It is interesting to note here that the only incentive being considered is a monetary incentive since social honours such as titles, awards, status, are not regarded as incentive enough. An IPR regime based on social honours would be very different from one based on monetary gain since the former would require only the granting of social status and hence can be more easily conceded by a state than a regime which seeks the exclusive monopoly rights to make profit from the invention (see final section). The model of the inventor as an egoistic individual is common to both regimes. The positive utilitarians, however, use a qualified version of this model of the inventor who invents only for the sake of money. A criticism similar to that made by Macpherson against Hobbes and Locke [Macpherson, C B, 1962] and more recently against Rawls [Macpherson, C B, 1973] can be used quite successfully against

the positive utilitarians which is that they wrongly generalise about inventors in all societies from their specific conclusions of the inventor under capitalism.

The positive utility argument that a strong patent regime will promote inventions, which in turn contribute to the greater good, can be invalidated simply by showing that the benefits of innovation will continue to accrue to society even if exclusive monopoly rights are not granted. Studies in many sectors show that firms continue to develop new products and processes, even if patent protection is not available, when technological innovation is seen as the key to maintaining their market position and profitability. Competition between firms is a more important motive for innovation than exclusive monopoly rights and if a choice has to be made between 'innovation without protection' and 'no innovation' the former is chosen because of the logic of profit which is the basis of capitalism. Patent protection is merely a guarantee of greater profits because it creates a monopoly situation.<sup>8</sup> The positive utility argument can be further undermined by showing that one of the consequences of monopoly is that it actually inhibits inventiveness since it allows the patent holder to determine the flow of future innovations related to the same product or process. This results in a decrease in social utility.<sup>9</sup> It is important to note here that no distinction is made between individuals and firms.

### III

#### Intrinsic Argument

The second level of the debate on IPRs, the intrinsic level, concerns the fundamental principles of a free society. The disagreement is over the status of IPRs in the preference ordering of a society, over whether those values which rank higher deserve that rank and whether those that rank lower should be placed higher up. A strong regime accords high ranking to IPRs and sees IPRs as promoting the public interest. A weak regime accords low ranking to IPRs since it sees them as opposed to the public interest.

The first issue of discussion is whether IPRs are 'rights' at all in the sense that they provide a moral basis for demanding that the state orient its policies to accord them protection. The justification for IPRs derives from the Lockean argument that the "labour of his body and the work of his hands" belong to a man who has a property in his own person. This right of ownership entitles individuals to "dispose of their Provisions, and Persons as they think fit, within the bounds of the law on Nature, without asking leave, or depending upon the Will of any other Man" [Locke, J, 1960, Section 4]. Intellectual property is the result of an inventor mixing his intellectual labour with the commonpool of resources and therefore it becomes his property which he can dispose of as he thinks fit. Thus IPRs can be accorded the status of 'rights'. They get these rights

from the Lockean tradition of Natural Rights which sees a property right as a right in a state of Nature (see also Section 5). Governments, Locke argued, were set up to preserve 'life, liberty, and property'. Strong patent regimes perform this obligation of protecting property while weak regimes fail to do so.<sup>10</sup> IPRs do not fall into the category of what HLA Hart classifies as 'special rights' since they do not derive from special circumstances such as promise, consent, etc. IPRs have the status of 'special rights' only in the case of those countries that have signed the Paris Convention. The main grounds, however, forwarded in their defence is that they derive from a state of nature which regards these rights as basic to the human personality. Without property rights the human person would be unable to realise his humanity. They must therefore be guaranteed and a society which can provide this guarantee is a free society.

The IPRs argument treats the inventor as a person who cannot be denied IPRs on the same grounds that a person cannot be denied property rights. The inventor in today's world, however, is not a person but the corporation, an entity that did not exist in the state of nature. Thus the natural rights argument cannot be extended to give the protection of rights to corporations and hence some other justifications, other than that of realising the inventor's humanity, will have to be advanced.<sup>11</sup> This can be done by arguing for IPRs from the direction of a free society which is one that allows such protection of property rights since it contributes to freedom.

A free society is one where there are trade-offs between the various primary values that underlie that society. The only value not amenable to such trade-offs is possibly what HLA Hart refers to as the 'equal right of all to be free'. All other values are subjects of trade-offs and hence a free society can be characterised as one where there is a value-matrix that is the product of a series of complex trade-offs. Since conflicting ends are basic to a free society, trade-offs between these ends, under conditions of maximum liberty, produce a value-matrix that serves as the value foundation for all societal institutions. As new ends emerge, with the changes in societal structure, new trade-offs are enacted. A free society is measured by its ability to develop and maintain a value-matrix that is sensitive to the conflicting ends in play and that is as inclusive of these ends as is practically possible. The key to a free society is the inclusiveness of conflicting ends. A free society is not measured in terms of any set of ends considered basic by a particular society, such as the US, even if that is the dominant society. Matrices will vary in content and hence the claim to freedom of their society is determined not by the content and elements of the matrices but by the extent of their inclusiveness of conflicting ends. Each society must strike its own balances between public interest and private rights, enabling and protective func-

tions, incentives and constraints.<sup>12</sup> To impose a uniform matrix on all societies, as would happen if countries were forced to join the Paris Convention, would not serve the cause of freedom since member countries would be restricted from developing policies that would in any way provide weak protection to IPRs. Such choices countries should be allowed to make if these choices allow them to satisfy basic needs. The arguments put forward by developing countries, who are willing to have only a weak patent regime, is that their other duties such as that to preserve 'life and liberty' (to use the other values referred to by Locke) comes into conflict with their duty to preserve 'property'. A weak patent regime allows them to balance these duties, a balance that is perfectly consistent with the principles of a free society. In the case of developing countries a strong protection of IPRs is overridden by the duty to preserve life and liberty which are considered higher order values ones that would have been constrained by a strong patent regime.

This reference to duties draws attention to an allied point that follows from the correlation between rights and duties. The duty which is the correlate of IPRs is the duty to guarantee the inventor's right to the using and disposing of intellectual property. This relationship, however, only gains moral force within an environment in which there are many other rights-duties relationships. The enjoyment of a right requires the person/entity enjoying that right to respect other rights and in general to promote this environment in which rights-duties relationships can flourish. Moral considerations and behaviour are primary in such an environment. Individuals must be treated as ends in themselves and not as means to an end. Such treatment, however, is not available to individuals in a market-type situation where individuals are regarded as means in the production process to the ends of profit. This violates the Kantian dictum. To argue for IPRs, therefore, outside this context of the moral environment is to make what is an expedient, not a moral argument.

A further undermining of a strong patent regime can be carried out, from within the liberal paradigm, by reference to the Lockean proviso that the products of his labour belong to a man provided that there is "at least enough and as good left in common for others" which means in short that third parties should not be made worse off as a result of the exercise of the intellectual property right. Worse off here refers to the individual's ability to promote their interests and to improve their life-chances. In a strong patent regime the granting of protection for a long period, for all classes of inventions, would result in inventors having the power to undermine social policies that go against the inventor's interests. Since technology is the cornerstone of contemporary society such rights give inordinate power to inventors, the MNCs, who in any case already have such an ability to determine future

states of affairs because of their greater financial resources. This concentration of power is liable to abuse, as any concentration of power will be, and hence in the interests of the inclusive matrix of a free society such concentration of power must be prevented. A weak patent regime restricts such monopolistic practices.

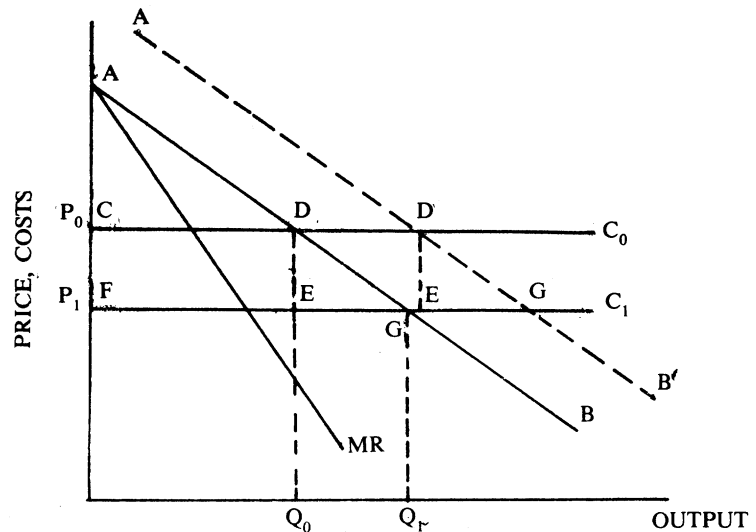
#### IV Incentive Argument

The argument most widely used to justify intellectual property is utilitarian and grounded in the necessity to provide incentives. For the creation of intellectual works this argument opines that property rights should be granted to the creators of those works. This is so because if others could simply copy inventions, etc, there would be no incentive to spend resources like time and money to conceive of new products and techniques.

To consider the argument in some detail we assume the existence of an industry that uses a given old technology with unit production costs  $C_0$ . An inventor can with some expenditure of resources develop a new technology that would reduce unit production costs to  $C_1$  such that  $C_1 < C_0$ . The industry has a linear demand curve AB, and the innovation is a process innovation.<sup>13</sup> Let this innovation be represented as 'information' that can be replicated at zero cost.<sup>14</sup> The industry in the initial state is competitive and so price is equal to unit costs, or  $P_0 = C_0$  and output is  $Q_0$ . The accompanying figure represents this situation. Now, as the new technology is freely available to everyone in the industry, competition would generate price  $P_1$  and output  $Q_1$  with welfare increasing by the area CDGF. However, with the industry operating at  $(P_1, Q_1)$  there is no excess profit being made, no return to the inventor, and thus no incentive to encourage the development of the cost-reducing technology. This is the utilitarian dilemma. Given the technology, optimality requires zero profits, but if there are zero profits there is no way the market economy can provide an incentive to generate and develop the technology.<sup>15</sup>

The utilitarian response to this is to give some monopoly power to the inventor via a patent system. The inventor on being granted a patent right may charge a royalty for use of the invention. The royalty rate maximising the return to the inventor will be  $C_0 - C_1$ , and at this royalty rate the post-innovation industry price will stay at  $P_0$  and output will remain at  $Q_0$ , but costs will now be  $C_1$ . The inventor makes a profit of CDEF, which being the increase in producer surplus is the increase in welfare resulting from the innovation. The welfare gain CDEF is less than the maximum possible gain CDGF, but there is now an incentive equal to CDEF for the inventor to do research. The patent system is a compromise—it provides an incentive to R and D, but that incentive is less than the value of the technology to society.

FIGURE



A measure of the cost of providing the incentive is the monopoly welfare loss DEG. It is the cost to society of giving monopoly power to the inventor. The figure is an appropriate starting point for the analysis of some problems posed by intellectual property. However, being static in nature it ignores the time dimension of the problem. In reality, patents are granted for a limited period of time. So, extending the argument to take care of the time dimension amounts to defining the cost of providing the incentive when the life of a patent is T years. Then, assuming all research is undertaken in time period zero, and no obsolescence, and letting  $\Delta W$ : measure of increase in social welfare as a result of the innovation (CDGF in the static case)

$\Delta CS$ : gain in consumer surplus

$\Delta \pi$ : gain in producer surplus and the return to the inventor (CDEF in the static case)

R: cost of developing the technology

r: discount rate

(I) there will be an undertaking of an invention if

$$\int_0^T \Delta \pi e^{-rt} dt > R$$

(II) there is a welfare gain in developing the technology if the increase in welfare

$$\Delta W = \int_0^T \Delta CS e^{-rt} dt + \int_0^T \Delta \pi e^{-rt} dt > R$$

Without a patent system, where  $\Delta \pi = 0$ , a welfare improving technology may not be developed, whereas with a patent system it may be developed but the maximum potential increase in welfare will not be realised. As  $\Delta \pi < \Delta CS$  (CDEF < CDGF in the static case),  $\Delta W$  is a declining function of T. However, the return to the inventor  $\Delta \pi$  is an increasing function of T. Thus, the optimal patent life is got by seeking that value of T which maximises net welfare gain,  $\Delta W - R$ , subject to the technology being made available, or the return to the inventor being sufficient. Nordhaus (1969) opened

up this line of advance as to optimal patent lives.<sup>16</sup>

Utilitarianism, then, balances welfare with incentives by granting monopoly power in the form of private property in the invention, i.e. a patent for a specified period of time. The current international debates on intellectual property have taken this as the organising framework and accordingly the central issues in this debate concern monopoly rights in the form of property rights, the issue of welfare losses from conferment of these rights and consequent attempts by the developing world to fix obligations, and the time duration of patents which are adequate for incentives. In fact, the document placed before the Negotiating Group on TRIP (Trade Related Intellectual Property) by India at Geneva in July, 1989, expresses the view that

it is... imperative that the protection of the monopoly rights of the patent owner... without any regard or concern for his obligations or the possible adverse implications of such protection for the host country will be particularly detrimental to the developmental efforts of the developing countries [Government of India, 1989].

As to the question of the time duration of patents the above document expresses the view that "there should be no uniform standard for patent duration", and finally it sees compulsory licensing as necessary to meet the public interest needs of host countries. Thus, "compulsory licensing should be clearly recognised as the mechanism for preventing the abuse or misuse of his monopoly rights by a patent owner". Thus it is clear that India's stand at least on TRIP and patents adheres to the ground rules of utilitarianism as we have outlined above. We now argue that this argument is restrictive mainly because by focusing on incentive aspects it neglects the argument from desert which we now argue is a much stronger framework in which to analytically ground the issue of TRIP and patents.

## V Desert Argument

The basic argument for inclusion of TRIP under GATT is that as a world-wide costs of R and D are going up, for sufficient recoupment of expenditure and further research to take place there is a need for a world market without any restrictions or any working requirements and complete important monopoly in all countries [Rao, C Niranjana, 1989, p 1056]. Now, what this argument is saying in other words is that inventors would like to take advantage of the properties attributable to the shape and position of the demand curve. A larger market implies a shift in the demand curve and possibly a more elastic curve. In the figure, if AB shifts to the right, the area CDEF would increase and this increase would be totally appropriated by the inventor.

Suppose the AB curve shifts to A'B'. Immediately  $\Delta \pi$  increases by the area DD'EE'. Now, there is no reason for the inventor appropriating this as he did not create this increase in value which resulted totally from the side of demand. The inventor did not produce this gain at all. In fact, the argument is more general. Even when we take the demand curve to be given as we did for the analysis in the previous section, value is as much determined by demand as by supply. The market value of an invention is got by the intersection of demand and supply curves and is the resultant of consumers' preferences and inventors' production. Both consumers and inventors determine market value which is thus a socially created value.

This Marshallian scissors argument that we are promoting essentially says then that no inventor has a right to receive the market value of his creation for he did not create market value. The amount he should receive is thus a question for public policy to decide as value is a social phenomenon. In fact, market value depends on the prices and availability of substitutes, the money demand of consumers, the interaction between various producers in the industry, market structure, property rights, and a host of factors, for none of which is the inventor responsible. He is thus not entitled to the market value but only to a reward that reflects the value of his labour. His *entitlement* is connected with his sole contribution whilst what he *deserves* for his invention is a social issue. The invented object may itself be affected by extraneous factors having nothing to do with the inventor's deserts.

Immediately it becomes obvious that whereas the inventor deserves something, it is a social decision as to what that something is, and it is not necessary that it be private property in the invention. Ascribing desert to the inventor implies the inventor should receive something for his action or effort. The 'something' that the inventor deserves to get need not be a patent. It is surprising that the argument for inventions and innovations specifies intellectual property rights. So far we have been looking at the demand

side but the situation from the side of costs is also revealing.

Whilst undertaking R and D the inventor is not operating in a vacuum. There already exists a certain technique which results in unit costs  $C_0$ . There is a history on which he is creating new history. He is as much a product of that history as he is the creator of a new history. The technique resulting in  $C_0$  and the demand curve were the building blocks which were given to the inventor and on which he developed further. At most he is entitled to the labour value he added. He is entitled to the marginal product of his labour. He is definitely not entitled to private property in the invention for the invention is a function of previous intellectual development and if property rights are to be given they must be given jointly to the historical contributors as much as to the current contributor.

The argument for property rights seems to flow from the Lockean argument that a person owns his body and hence his labour which is what his body does. Hence, he must also own what he mixes his labour with—the product of his labour [Waldron, 1983]. Thus the argument runs from property rights in one's body to property rights in the product of one's labour. However, as the utilitarian J S Mill argued at most what a person deserved was the rights of use and the right to the product—he did not deserve rights of ownership and property. Mill discusses the case of property in land which was Locke's aim to justify (see also Section 2).

Mill argued that "When private property in land is not expedient, it is unjust" [Mill, 1965, p 230]. Thus, as far as the appropriation of land is concerned, it is wholly a matter of expediency as opposed to justice or right. Mill was of the opinion that the "The rents or profits which he can obtain from it are at his sole disposal; but with regard to the land... he is morally bound, and should whenever the case admits be legally compelled, to make his interest and pleasure consistent with the public good" [Mill, 1965, p 232]. Mill accordingly concludes that "The principle of property gives them no right to the land, but only a right to the compensation for whatever portion of their interest in the land it may be the policy of the state to deprive them of" [Mill, 1965, p 230]. In fact, Mill would go so far as to stop defending landed property as soon as the proprietor ceases to be the improver or innovator.

The argument that the inventor deserves private property in his invention is thus unjustified. To have developed a new technique is privilege enough for an inventor. Having been the first to do so he already has an advantage over those who have not been able to invent the invention and giving him property rights would allow him to convert that advantage into an inequality out of proportion with entitlement. Some other mechanism of reward is necessary to give recognition to the inventor.

## VI Policy and Institutional Options

So far we have been making a case that inventors do not necessarily deserve property in their invention. What they deserve is a matter for social policy to decide. However, some agent is necessary to confer the deserts. Some agent should actually provide the advantage specified according to the deserts deemed appropriate socially. We argue that an Intellectual Property Institution (IPI) would be a fitting candidate to undertake this responsibility. The IPI would decide the reward on behalf of society and an appropriate one seems to be a retainer for the effort undertaken (see also Section 2). Financial compensation and a certificate of acknowledgement or an award by the IPI pose themselves as appropriate deserts. The advantage is that on doing so, IPI could straightaway disseminate information on the invention to society. Thus, there is no restriction on use of the invention which is what the patent seeks to do. The invention will not be owned by anyone in particular, its availability would increase, and discussions on the optimal life of a patent would become meaningless.

All societies must recognise full ownership of at least some items—apparel, ornaments, etc. But in those goods that are important to the economic maintenance of society limited rights only are allowable. Rights to inventions belong to this latter category and such rights are best vested in society and not the inventor. The invention has a social relevance and society cannot be unconcerned about it and leave it to the free choice of individuals. Thus an invention should be owned by society and the rights of use would ideally be decided by an institution like the IPI. The IPI would solve the recurrent problem of deciding what is an appropriate desert and would ensure the invention is made widely available.

The IPI may be organised as a semi-autonomous body, able to recruit its own staff, to control its own fees and other charges, and to manage its own finances. The IPI would best be judicially autonomous as its decisions are quasi-judicial ones, not administrative. For checks it must have an advisory committee of representatives of R and D personnel, chambers of commerce, user organisations, etc. It would receive applications for the grant of recognition as to an invention, examine them as to their substance as to whether the claim is new, non-obvious and industrially applicable, etc, and accordingly grant recognition via a certificate and an appropriate retainer or refuse it as the case may be. The IPI would accordingly provide the technical information to potential users at a cost and disseminate the information via an official gazette, exhibitions, etc. These functions are not much different from that which patent offices the world over today perform. Accordingly, the administrative costs of shifting to an IPI type regime would at best be

marginal. This is nothing compared to the gains to societies the world over.

## Notes

- 1 The importance of the issue of intellectual property rights for the relations between nations, particularly between the US and the developing world was underlined by the Special 301 provisions of the Omnibus Trade and Competitiveness Act of 1988 which requires the USTR to develop an "overall strategy to ensure adequate and effective protection of intellectual property rights". The USTR fired the first salvo when it singled out 25 countries whose IPR regimes deserved special attention of which 17 were placed on a 'watch list' and 8 on a 'priority watch list'. India was among the 8 and has been required to (i) assure improved and adequate patent protection for all classes of inventions, (ii) eliminate discrimination against the use of foreign trade marks, (iii) register service marks, (iv) improve access and distribution for US motion pictures, (v) improve enforcement against piracy, (vi) include an intellectual property annex to the bilateral science and technology agreement, and, (vii) participate constructively in multilateral intellectual property negotiations [USIS, 1989, p 7].
- 2 The anti-imperialist response of the NWGPL is certainly one valid way of challenging Special 301 seeing it merely as an intellectual front for the exploitative ambitions of MNCs. The worst offenders are pharmaceutical companies who are most seized with this issue of adequate protection for IPRs. The case of Roche which charged \$ 925 per kg for the ingredient of a tranquilliser that was available for \$ 22.50 per kg elsewhere is an instance to prove the abuse of exclusive monopoly rights. Normative language is often used by MNCs to justify their rapacious practices and hence the demand for a strong patent regime is seen as just another instance of this [NWGPL, 1988; Patel, S J, 1974].
- 3 India too has accepted in principle the validity of IPRs. It only differs from the US in terms of the conditions, features and procedures of the required IPR protection regime.
- 4 India's reluctance to accept the US claim for IPRs can be seen as a reluctance to impose certain duties on itself since it disputes the empirical as well as the moral claims advanced by the USTR.
- 5 A patent is a document, issued, upon application, by a government office (or a regional office acting for several countries) which describes an invention and creates a legal situation in which the patented invention can normally only be exploited (manufactured, used, sold, imported) with the authorisation of the owner of the patent. The protection conferred by the patent is limited in time (generally 15 to 20 years). 'Invention' means a solution to a specific problem in the field of technology. An invention may relate to a product or a process. An invention is 'patentable' if it is new, involves an inventive step (i.e., it is not obvious) and is industrially applicable [WIPO, 1988, p 75].

- 6 The demand being made by the US is for an expansion of the "traditional boundaries of the intellectual property system, implying (i) its internationalisation, (ii) the broadening of the scope of protectable new ideas, (iii) extension of the lifetime of protection, (iv) reduction of the restrictive or regulatory measures that are normally associated with a monopoly situation, and (v) improvement of the enforcement mechanisms, at both the national and international levels" [Bifani P, 1989, p 170].
- 7 India has catalogued some of these abuses. They take the form of (i) tied purchases of inputs from the licensor or sources designated by him and prevention of purchases from any other source, (ii) prohibition or restriction of exports from the host country, (iii) prohibition of the licensee or the recipient from using articles, processes or technology which do not belong to the licensor or the supplier or his nominee, (iv) restrictions on the use of the patents, trade-marks and knowhow, especially in matters such as volume of production, marketing, distribution and pricing of the products, (v) restriction on the use of the technology after the expiry of the agreement, (vi) restriction on competition as between licensees as well as between the licensees and third parties, (vii) abusive transfer pricing practices in the supply of raw materials, obliging the licensee or the recipient to make assign improvements free of charge, (viii) package licensing obliging the licensee or the recipient to make unwanted purchases as a device for carving up markets among patent owners [Mainstream, 1989, p 29].
- 8 This is India's claim to point 6 of the documents placed by the Indian Representative at the first meeting of the Negotiating Group on Trade Related Intellectual Property rights held in Geneva on July 12, 1989 [Mainstream, 1989].
- 9 This decrease in social utility is more so when product and not process patents are given. International pharmaceutical companies are demanding product patents so that they can price their products very high and also control the market.
- 10 Protection of property rights is more acute in the case of intellectual property since there is, in today's world, a growing capacity to imitate products and processes as a result of growing technological mastery and more rapid transmission of information. The arguments used to justify property such as land will be used to justify intellectual property although specifying just what IP constitutes is a difficult exercise since compound walls here are not easy to build. The question of how does one erect a perimeter fence around intellectual property is the subject of a separate study.
- 11 MNCs however have such IPRs in countries that have joined the Paris Convention.
- 12 The trade-off advocated by LDCs to balance public interest and private rights are (i) a short duration of 7 years versus 15-20 years advocated by developed countries, (ii) compulsory licensing versus no such licensing, (iii) some items excluded versus all items included, etc.
- 13 A product innovation is not assumed for

simplicity as it would affect the position and shape of the demand curve. Moreover, the assumptions of a process innovation is not damaging to the results.

- 14 This is also an excellent way of simulating the public good nature of the problem.
- 15 Arrow (1962) is the seminal work on this issue.
- 16 See also Scherer (1972).

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