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The Impact Of Intellectual Property Rights On The Enjoyment Of Certain Human Rights And Freedoms

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Keywords: Intellectual Property Rights, Human Rights, Competition, Free Trade, Employment, Biotechnology

Abstract

Intellectual property rights are an important class of rights which help to secure some form of reward for the owners of the ideas giving rise to such rights. However, as important as those rights for the purpose of adequate compensation and encouragement of creative minds, they often give rise to certain legal concerns in the area of human rights. These issues arise because of the nature of rights which exist to exclude non-owners from appropriating the value attached to a property. If the right to exclude others granted to the right holder is too far-reaching, then it encroaches on certain rights of other individuals and groups. Thus, there is always a need to create a balance between the need for the protection of intellectual property and that to ensure the preservation of certain fundamental societal norms. The existence of other rights which must be balanced against intellectual property rights are largely based on the notion that nature and everything it comprises, as well as the knowledge that has accumulated over generations of human existence, is a common wealth held jointly by all men. It is therefore necessary to guard the common wealth against the onslaught of privatization and the consequent exclusion that results from such. This is needed to secure the enjoyment of human rights.

1.0 Introduction

Intellectual property rights are an important class of rights which help to secure some form of reward for the owners of the ideas giving rise to such rights. However, as important as those rights for the purpose of adequate compensation and encouragement of creative minds, they often give rise to certain legal concerns in the area of human rights. These issues arise because of the nature of rights which exist to exclude non-owners from appropriating the value attached to a property. If the right to exclude others granted to the right holder is too far-reaching, then it encroaches on certain rights of other individuals and groups. Thus, there is always a need to create a balance between the need for the protection of intellectual property and that to ensure the preservation of certain fundamental societal norms such as the right to

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The existence of these rights which must be balanced against intellectual property rights are largely based on the notion that nature and everything it comprises, as well as the knowledge that has accumulated over generations of human existence, is a common wealth held jointly by all men.

These intellectual property-mitigating rights could be seen as falling largely within the categories of economic, [2] social [3] and cultural rights. [4] However, if these rights are breached in a way that is consistent and systematic as regards a particular person or group, then such breach may also be seen as an affront on civil and political rights. This is because human rights by their nature are not mutually exclusive and the enjoyment of one form of right is usually a determinant of the ability or inability to enjoy another form of right. The approach of this paper will not be to discuss these rights from a general and theoretical perspective but to identify specific issues that border on different expressions of human freedom and use as a pointer to those human rights which an unfettered exercise of intellectual property rights may unfairly restrict.

2.0 Intellectual Property and Competition.

Resulting from the particular situation that may be prevalent in particular countries, intellectual property protection, if not properly suited to local needs may become anti-competitive and indeed stifle competition and reinforce monopolies and cartels. There are provisions for compulsory licensing in the IP laws of nations as well as in the TRIPS Agreement. [5] Another mechanism used to prevent unwanted effects of IP legislations is the use of competition policies

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This right is contained in article 6 of the International Covenant on Economic, Social and Cultural Rights.

Economic rights like the right to profit from and sustain the economic base of a group. This is in turn leads to a right to protect resources from theft and wrongful exploitation. Economic rights lead to questions about the way the traditional resources of traditional people have been excluded from protection and how these people have not been adequately compensated when their resources are exploited, through means like profit sharing.

Social rights like the right to health care. Social rights such as the right to health, question the appropriateness of the protection given to corporations who produce essential drugs, especially when the knowledge and resources from which these drugs were made were gotten from traditional or indigenous people who are now unable to afford these drugs.

Cultural rights such as the right to a culture, and all other accompanying benefits, right to cultural identity without forceful or wrongful threat or encroachment from outside, etc. Cultural rights challenge the western indifference to the cultural uniqueness of traditional people. These rights challenge the way the so-called developed world has failed to acknowledge the world view of traditional people in relation to the environment and existence in general. In a way the claims made under these rights sustain those made under both social and economic rights. The failure to acknowledge and respect traditional perspectives leads to the assumptions of notions or positions that encourage social and economic exploitation and oppression. See generally the provisions of Chapter 2 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) on economic, social and cultural rights.

See section II, Part I of the First Schedule to the Patents and Designs Act, Cap P2, LFN 2004. See also article 31 of the TRIPS Agreement.

expressed through legislations and other governmental action. [6] India's first compulsory licensing order in favour of Natco Pharma has garnered a lot of attention all over the globe, [7] and compulsory licensing has been viewed as a remedy to curb abuse of exclusivity protected by IPR's. In Nigeria compulsory licensing of patents is provided for in section 1, Part 1 of the First Schedule to the PDA 1970. This section reads as follows-

> 1. Subject to this part, at any time after the expiration of a period of four (4) years after the filing of a patent application or three years after the grant of a patent whichever period last expires, a person may apply to the court for the grant of a compulsory licence on one or more of the following grounds-
> (a) that the patented invention, being capable of being worked in Nigeria, has not been so worked ;
> (b) that the existing degree of working of the patented invention in Nigeria, does not meet on reasonable terms the demand for the product;
> (c) that the working of the patented invention in Nigeria is being inhibited or prevented by the importation of the patented article; and
> (d) that, by reason of the refusal of the patentee to grant licenses on reasonable terms, the establishment or development of industrial or commercial activities in Nigeria is unfairly and substantially prejudiced.

International agreements such as WCT, TRIPS and the Paris Convention have given several grounds to their contracting states for the use of compulsory licensing like promotion of public health and nutrition or to promote the public sectors of vital importance to their socio-economic technological needs. [8]

Article 5A of the Paris Convention on Industrial Property provides as follows-

> A-
> (1) Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent
> (2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example failure to work
> (3) Forfeiture of the patent shall not be provided for except in cases where the grant of compulsory licenses would not have been sufficient to prevent

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6 In Nigeria, there are no legislations dealing exclusively and specifically with competition issues, such as antitrust laws found in other jurisdictions. What we have in Nigeria are few provisions dealing with competition and antitrust issues that overlap with other areas of law. An example is the provisions of the Investments and Securities Act on Mergers.

7 See Bayer v Natco C.L.A. No. 1 of 2011, Order pronounced on March 9, 2012.

8 Articles 7, 8, 30 and 31 of the TRIPS Agreement; Article 5A of the Paris Convention on Industrial Property; Article 10 of the WIPO Copyright Treaty; Article 11 bis (2) and 13(1) of the Berne Convention on the Protection of Literary and Artistic Works.

> ...and abuses. No proceedings for the forfeiture or revocation of a patent may be instituted before expiration of two(2) years from the grant of the first compulsory license
> (4) A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four(4) years from the date of filing of the patent application or three(3) years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license
> (5) The following provision shall be applicable , mutatis mutandis, to utility models.

Article 8, 31 and 40 of the TRIPS Agreement also contain provisions on compulsory licensing. Concerning the use of IP by government agencies, section 15 , Part II of the First Schedule to the PDA 1970 provides as follows-

> 15. Notwithstanding anything in this Act, where a Minister is satisfied that it is in the public interest to do so, he may authorize any person to purchase, make, exercise or vend any patented article or invention for the service of a government agency in the Federal Republic.

A lot of countries have issued compulsory licenses for anti-competitive misuse of IPR's by companies. The Indian Patent Controller awarded compulsory license on a cancer drug Nexavar patented by Bayer to generic drug maker Natco Pharma. [9] In the instant case, Bayer v Natco, Mr H Kurien while awarding the license observed, "a right cannot be absolute. Whenever conferred upon a patentee, the right also carries accompanying obligations towards the public at large. These rights and obligations, if religiously enjoyed and discharged, will balance each other. A slight imbalance may fetch highly undesirable results. It is this fine balance of rights and obligations that is in question in this case." The cancer drug Nexavar became available at just three percent (3%) of its earlier price. [10]

Compulsory licensing, it has been counselled, should be resorted to only in exceptional circumstances. [11] It has been said that compulsory licensing may deter foreign direct investment in industrial sectors of an economy. In *Pärke Davis v Probel & Centraform,* [12] the ECJ held that the existence of

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[9] Abhilash Chaudhary, "Compulsory Licensing of IPR's and Its Effects on Competition", Competition Commission of India, http://cci.gov.ng.in/images/media/ResearchReports/Compulsory %20% Licensing%20of %20IPR's%20and%20Its %20Effects%20on%20Competition. pdf

[10] Abhilash Chaudhary, "Compulsory Licensing of IPR's and Its Effects on Competition", Competition Commission of India,http://cci.gov.ng.in/images/media/ResearchReports/Compulsory%20%Licensing%20of%20IPR's%20 and%20 Its%20Effects%20on%20Competition.pdf

[11] Id.

[12] [1968] CMLR, 47

intellectual property rights did not in itself mean that a firm was dominant. although it was relevant to any assessment of dominance. The ECJ also held that a dominant firm with intellectual property rights might be guilty of abusing its dominant position, for example by charging excessive prices.

From the foregoing, it must be re-iterated that a suitable balance between IPR's and competition laws and policies must be created in each jurisdiction. The effect on IPR's on competition affects access to vital needs, resources, services, and this has deep implications for the realization of economic and social rights. [13] It is however, sad to note, that not all countries, not even all developing countries have comprehensive competition legislations or provisions to tackle the unwanted effects of IPR's.

3.0 Intellectual Property and Free Trade

IPR's affect international trade flows in several ways. [14] Countries usually have no incentives to enter into a trade agreement unless there is also an agreement on IPR's protection. [15] Developed countries tend to converge in support of stronger IPR's protection, while the developing and least developed countries tend to be united against stronger IPR's protection. In the end, the true effect of IPR protection, despite certain general trends, is determined on a case-by-case basis. What will determine how stronger IPR'S protection affect a nation is the combination of such protection and several other factors. It must however be admitted that in an unbalanced economic and political world as we live in today, the combination is usually not very favourable to the developing and least developed countries. The implementation of stronger IPR'S tend to perpetuate and may even create, new imbalances in the world order. Since TRIPS went into force, the US has negotiated bilateral and regional free trade agreements (FTA's) with many countries. The FTA's include intellectual property measures negotiated out of earlier texts of the TRIPS Agreement, generally referred to as "TRIPS-Plus". These TRIPS-Plus provisions have been highly controversial in developing countries.

From the way things are currently, one might be persuaded to conclude that the geographical spread of free trade at the international level would be slow unless more nations join in the creation of strong IPR regimes. This is

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13 Article 3 of the International Covenant on Economic, Social and Cultural Rights provides generally for the protection of all economic, social and cultural rights. See also article 11 which provides for the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

14 However, opposing market-expansion and market-power effects imply that the overall effect of IPR's protection on bilateral trade flows is theoretically ambiguous. See Carsten Fink and Carlos A. Primo Braga, "How Stronger Protection of Intellectual Property Affects International Trade Flows", eLibrary, THE WORLD BANK GROUP, available at http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2051.

15 Ai Ting Goh and Jacques Olivier, "Free Trade and Protection of Intellectual Property Rights: Can We Have One Without the Other?", Centre for Economic Policy Research, http:// www. cepr.org. uk/meets/ wken/2/ 2315/ papers/olivier.pdf.

because developed countries do not ideally enter into trade relationships with other nations, under conditions which would entail endangering rights belonging to firms in which they have interest. This is only a predictive statement and should not be taken to mean that this writer generally favours stronger IPR regimes as they are currently framed and implemented. As a matter of fact, it is the opinion of this writer that the demands of some countries for the protection of intellectual property held by entities domiciled its territory as a pre-condition for bilateral trade relations, might be protectionist in effect and adversely impact the ability of individuals and groups in other countries to have access to certain necessities. An example of such a demand is that repeatedly made by the United States to India for the protection of the intellectual property rights of American pharmaceutical concerns. India's IPR regime was a subject of discussion during the visit of the former president of the United States Barrack Obama to India in 2015. [16] It would be recalled that India has made very productive use of compulsory licensing in the area of pharmaceuticals and as a result has made it possible for people across many developing and least developed countries (LDC's) to access otherwise expensive medication. This is particularly concerning antiretroviral drugs used for the treatment of HIV positive individuals. Section 3(d) of India's patent law, which protects against improvidently granted patents. [18] The attack on India's intellectual property rights became intense after 2012, when the Indian patent controller allowed local production of an expensive cancer drug which reduced its price by 97 percent. What perhaps enraged them more is that just before Obama's visit, the controller refused to grant patent to American pharmaceutical company, Gilead, for an extremely expensive drug for hepatitis C. The drug costs $ 1000 a pill in the US, while it can be produced locally at $ 1 a pill. [19] A strong IPR regime may lead to monopolies and high cost of goods, but that is exactly one of the conditions usually included in bilateral trade terms the United States agrees with other countries. A proof of this assertion is the effect that the free trade agreement the US and Jordan had on the prices of drugs. [20] India's Prime Minister and his Government one of whose major economic policies is to attract foreign companies to manufacture in India, has been

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16 Patralekha Chatterjee, 'Special Report: Will India Bend to US Pressure on IPRights?', Intellectual Property Watch', https://www.ip-watch.org/2015/01/31/special-report-will-india-bend-to-us-pressure-on-ip-rights/ accessed May 13, 2017.

17 Patents Act 1970 (as amended in2015).

18 Matthew M. Kavanagh, 'The Patent Puzzle', DECCAN Chronicle, Jan 10, 2016, http://www.deccanchronicle.com/150127/commentary-columnists/article/patent-puzzle accessed May 13, 2017.

19 G Pramod Kumar, 'Will Modi Give Up India's Intellectual Property Stand Just to Please Obama?', FIRSTPOST, Jan 28, 2015 http://www.firstpost.com/business/obamas-pressure-on-india-over-intellectual-property-rights-betrays-his-double-standards-2067809.html#top accessed May 13, 2017.

20 Oxfam International, 'All Costs No Benefits: How TRIPS-Plus Intellectual Property Rules in the US-Jordan FTA Affect Access to Medicines', Oxfam Briefing Paper, March 2007, available at http://www.oxfam.org/sites/www.oxfam.org/files/all costs no benefits.pdf.

adjudged to be gradually giving into American demands for greater often unfair protection of IPR's.A group of non-governmental organisations (NGO's) pointed out that the National Intellectual Property Rights Policy of Modi's government deviates from the usual Indian practice of balancing IPR's and public interests. It urged the Prime Minister to "withstand the pressure from the US government and corporations and to defend the people's interests" and to reject any demand to either initiate negotiation on free trade agreements and/or bilateral investment treaty with the US or joining the Trans Pacific Partnership (TPP).[21] This again shows how some countries as a bargaining chip for securing excessive protection for IPR's to the detriment of other countries and their citizens. And it is necessary to note that the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[22]

4.0 Intellectual Property and Employment

Another possible effect of IPR's is the loss of jobs due to closure of companies normally engaging in imitation of foreign goods. This is because though IPR protection may bring foreign investment, the new investments may not be large enough to employ as much as the imitating firms which may not be able to meet up with conditions for licensing, were employing. An effect of low demand for labour is low wages, going by the operation of market forces.

The foregoing is more likely to be true in cases where IPR protection does not succeed as an incentive for local firms to carry out their own innovation. In such a case, IPR protection would have failed to create dynamic competition[23] from local firms while creating a larger control power for foreign firms if not creating total monopolies. It must be added here that the foregoing identified problems would not be changed by the mere fact that the companies holding the protected rights are also local firms. Neither would the situation be different if the firms involved are a few mix of foreign and local firms controlling large chunks of market share. There would only be a kind of positive effect when dynamic competition to capture the local market is successfully triggered, with considerable and preferably greater local

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21 DNA Daily News and Analysis, 'NGO's Tell Modi Not to Succumb to Pressure from US on IPR http://www.dnaindia.com/india/report-ngos-tell-pm-modi-not-to-succumb-to-pressure-from-us-on-ipr-222105 accesed May 13, 2016

22 Article 12.

23 Dynamic competition refers to the kind of competition where the competitors try to outsell each other by improving the state of the art. IPR's are supposed to protect the unique features of each competitor's products and therefore prevent a situation where one or more powerful competitors can include in their products all known features of a particular product, a situation which may encourage or perpetuate dominance by a few powerful competitors. Dynamic competition may be understood in contrast with other kinds of competition like price competition where competitors seek to gain advantage by offering better pricing, and which is more often static in terms of innovation.

participation. Even with IPR protection, firms may not engage in foreign direct investment, which would create more employment, but rather set up sales and distribution systems. Whether protection would be helpful or detrimental to the welfare of a country's citizens would depend on how many different factors are involved and how they combine. All this is said against the backdrop of the right to work [24] and the right to just and favourable working conditions. [25]

5.0 Traditional Knowledge

As a result of the requirements for the enjoyment of protection under formal intellectual regimes, traditional knowledge is usually left unprotected. These pre-conditions include originality, labour, novelty, inventive step, industrial application etc. It is these requirements that are used as an excuse for excluding traditional knowledge from protection. Having these conventional filters in mind, it might be true that not all traditional knowledge would be protectable, but in many cases traditional knowledge does filter through these conditions when critically considered.

As regards the requirement of novelty, while westerners are individualistic, most traditional peoples are communalistic. Thus the community is regarded as one body. And any knowledge they had as one body, as long as it has not been made known to other groups remains new to the rest of the world. [26] Moreover, traditional knowledge is not static as some would want to believe. Pre-existing traditional knowledge is from time to time supplemented and enriched by innovation. [27] Thus whether from a group or individualistic perspective, traditional knowledge is able to meet the requirement of originality or novelty. Whenever traditional knowledge is supplemented or enriched by innovation, the requirement for labour is also met. As for the requirement of industrial application, the repeated industrial use by western companies, condemns any claim that traditional knowledge is not industrially applicable as untenable.

The issues surrounding traditional knowledge have a wide range of effects. The traditional knowledge controversy becomes even more important in the light of growing dissatisfaction with the international trading system among less developed countries and the opposition of some persons and groups to the surge of globalization. [28] Some of the issues have been raised and discussed within the framework of the Convention on Biological Diversity and by such international intergovernmental organizations as the Food and

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[24] ICESCR article 6.

[25] ICESCR article 7.

[26] Ayoyemi Arowolo, "IntellectualProperty Rights", (Ibadan: Ababa Press Ltd, 2012) 139- 141.

[27] Id., 50-52.

[28] Peter K. Yu, Traditional Knowledge, Intellectual Property, and Indigenous Culture: An Introduction, (2003) available athttp://www.peteryu.com/tk.pdf

Agricultural Organization (FAO), UNCTAD, UNESCO, WHO. [29] Questions include how to define folklore and traditional knowledge, whether traditional knowledge and indigenous creations should be protected under the existing intellectual and cultural property regimes. What are the implications of protecting folklore for art and museums? How can policy makers balance the protection of traditional innovations and genetic resources of indigenous peoples against the need for those materials in genomic research and in the development of pharmaceuticals, nutriceuticals, and bio-engineered products? Should the international community develop a global regulatory regime or should it strive for diverse protection that is consistent with the local conditions of each individual country? How can governments effectively negotiate traditional knowledge in the domestic and international fora?

Failure to protect traditional knowledge rights results in a denial of traditional people's right to be the economic benefit issuing from their knowledge. It also encourages a chauvinistic disregard for the values of traditional people and their preferred means of appropriating their cultural heritage. [30] Africans must therefore work to ensure that there is fairness and justice in the intellectual property regime and must help others to develop a perspective of intellectual property that contemplates the African dimension. This also goes for all other traditional and indigenous peoples all over the world. A system must be created that grants rights and protects traditional resources generally and those that are associated with traditional knowledge.

6.0 Issues in Biotechnology

The biotechnology that raises the most concerns are those that use natural-occurring human, animal or plant materials to develop subject matters which are thereafter sought to be protected by intellectual property rights. This process of developing new biotechnological materials is what this writer refers to as "weaving new patterns with the thread of nature".

The most prominent IPR in biotechnology is patents. As at the year 2001, there was already extensive use of the US and European patent systems to mark out monopoly positions along the genetic chain that might lead to medical advances. [31] There are genome maps for various animals and plants and the number is mounting rapidly, and bioinformatics [32] now has a major role to play. The European Patent Convention by virtue of its art 52(2) states that patents are

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29 Peter K. Yu, Traditional Knowledge, Intellectual Property, and Indigenous Culture: An Introduction, (200
available athttp://www.peteryu.com/tk.pdf

30 See article 15 of the ICESCR which provides for the right of everyone to take part in cultural life, to enjoy t
benefits of scientific progress and its applications, to benefit from the protection of the moral and material intere
resulting from any scientific, literary or artistic production of which he is the author.

31 William Cornish, David Llewelyn, and Tanya Aplin, 'Intellectual Property', 919-920

32 Bioinformatics is the application of computer technology to the management and application of biologi
information. Computers are used to gather, store, analyze and integrate biological and genetic information wh

"invention" as distinct from "discovery, scientific theory or mathematical method".The European Commission reached an arrangement which did not remove genetics from patentable subject matter but excluded certain classes of subject matter. The provisions of the controversial Biotechnology Directive stipulate that: [33]

> (1) The fact that an invention concerns either a product consisting of or containing biological material or an associated process is expressly declared not to place it outside the scope of patenting; in particular it may concern biological material isolated from its natural environment by a technical process, as distinct from its occurrence in nature-art3(1).
> (2) To this there is one categorical exception: the human body at the various stages of its formation and development, cannot be patented; this includes the simple discovery of one of its elements, including the sequence or partial sequence of a gene-art 5(1).
> (3) Nonetheless there may be a patent for an element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, even if identical to a natural element-art 5(2).

However, those who are suspicious of the increasing use of patenting in biology, remain unpacified. Apart from the conditions of novelty and inventive step, for an invention to be patentable, it must also be capable of industrial application. This has not always been complied with in genetic engineering. The EPC also precludes the grant of patents upon inventions the commercial exploitation of which would be contrary to public policy or morality. [34] (see also art 27(1) of TRIPS).The European Commission's Directive on Rights in Biotechnological Inventions [35] prescribes that they shall not be granted for processes for: [36]

> (1) cloning humans;
> (2) modifying in humans their germ-line genetic identity (i.e the inheritable gene characteristics);
> (3) uses of human embryos for industrial or commercial purpose; and
> (4) for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes- article 6.

In Plant Genetic Systems, [37] an opposition by Greenpeace to a patent in respect of crops encoded with a resistance to certain weed killers was rejected. The Board of Appeal required that there be sufficient evidence that there would be environmental damage. In its view, that crops might be transformed into weeds, that the herbicide-resistant gene might be spread to other plants or that

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Directive 98/44/EC of the European Parliament of 6 July 1998

See also Art 27(1) of the TRIPS Agreement

98/44/EC

William Cornish, David Llewelyn, and Tanya Aplin, 'Intellectual Property', 931-932

[1995] E.P.O.R. 357

the eco-system might be damaged, were only possible hazards and that was insufficient.Concerning the issue of morality, it was the Board's view that the mere fact that genetic manipulation was used did not render an invention immoral. Traditional selective breeding also brought about genetic alteration and genetic intervention and that had long been treated as acceptable.

One acute confrontation over the morality of patenting has been presented by the extraction of embryonic cells (e.SC's) from fertilized human ova.Some persons disapprove of a positive intervention which destroys the nucleus and saves the e.SC's. This in their opinion should prevent patenting by virtue of art 53(a) of the EPC, as well as the more specific provision in the Biotechnology Directive that excludes patents for "uses of human embryos for industrial or commercial purposes" [38] . A 2002 report of the European Group on Ethics concluded that whatever their source, processes involving human e.SC's could not be outlawed on ethical grounds. (Report No 16, May 7, 2002).The decisions concerning stem cell research however do not settle all issues relating to the patentability of e.SC inventions.

Another contentious issue is that of consent. There is no positive requirement in the EPC for consent, although the Biotechnology Directive Recital 26, states that a donor must have had an opportunity of expressing that consent "in accordance with national law". Where a medically useful substance has been developed from genetic material obtained from a donor, is the donor's informed consent to commercial use a pre-requisite for a valid patent to be granted for an invention derived from the material obtained from the donor? A particular man, John Moore was held as having the right in principle by the law of California to sue in respect of the multiplication and commercialization that took place. Despite this, the case did not conclude that he had any intangible property right in his body and elements taken from it which would entitle him to share in the proceeds from patents or to receive royalties as a source. As currently conceived in most systems, patents are for inventors, not for those who in any other sense make the invention possible. There is no unequivocal conferment of such right in the EU even though the EU's Biotechnology Directive, Rec 26 requires that, where an invention is based on human biological material and a patent application is made, the person concerned should have opportunity to give his free and informed consent to the application.

Another IPR that is used in the realm of biotechnology, but not in connection to humans is plant breeders' rights. This is used to protect plant varieties that have been developed, from unauthorized exploitation by others. These plants are usually developed by genetic manipulation, and they also raise issues similar to those raised in other areas of biotechnology already

[38] William Cornish, David Llewelyn, and Tanya Aplin, 'Intellectual Property', 932

discussed.

Apart from compulsory licensing and government or official use provisions, there are also provisions for private and experimental use which have been variously interpreted and applied in different jurisdictions. Competition law may also come in to curb excess practices as regards IPR's in biotechnology. Other rights which are not as exclusive have been proposed. [39]

The use of IPR's in biotechnology gives rise to issues that may trigger arguments bordering on the right to life, [40] dignity of the human person, [41] the right to adequate health care, [42] animal rights etc. It affects the right to life because the protection of genes might restrict access to certain genetic resources vital to the survival of some sick persons. Again, the processes involved in the development and deployment of some of these technologies involves the destruction of certain life forms. Closely connected to the right to life is the right to the dignity of the human person and freedom from torture in the sense that a severe violation of these rights may lead to death and hence a violation of the right to life. The rights to dignity of the human person and freedom of torture feature in the biotechnology discourse mainly as a result of the research methods applied in biotechnology which may involve undesirable pain, harm, death and other manifestations of a disregard for ethical values. When such disregard is directed to animals, it raises animal rights concerns. And due to the general exclusive nature of IPR's, they cause concerns about access to health care when used in the biological sciences, most especially with regard to biological material taken from humans.

Recommendations

Also in the area of patents, in order to be able to take full advantage of compulsory licensing provisions, developing and least developed countries need to overcome the manipulation an bullying of multinational companies and developed countries. Pharmaceutical companies cleverly extend patents over drugs by adding little advancements to existing patents which might result in little or no practical improvement. [43] This practice should be discouraged as has been done by the Supreme Court of India which refused to grant Novarts a patent over an improvement on an existing drug. [44]

These include copyright which entails payment of royalties for access to knowledge without a limitation of access, the British Unregistered Design Right, and a database right.

See article 6 of the International Covenant on Civil and Political Rights (ICCPR) and section 33 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

See article 7 of the ICCPR and section 34 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

See article 12 of the ICESCR.

Glyn Moody 'Indian Supreme Court Rejects Trivial 'Evergreening' Of Pharma Patents', techdirt.https://www.techdirt.com/articles/20130401/09233022536/indian-supreme-court-rejects-evergreening-pharma-patents.shtml, accessed 27-06-2014

Novartis AG v Union of India, Civil Appeal Nos. 2706-2716 OF 2013 with Civil Appeal No. 2728 OF 2013 Natco Pharma Ltd v Union of India and Ors and Civil Appeal Nos. 2717-2727 OF 2013 M/S Cancer Patients Aid Association v Union of India and Ors

The exhaustion doctrine [45] should also be employed in Nigeria to allow the parallel importation of certain products. The ECOWAS Competition Rules which make provision for the doctrine have not been domesticated in Nigeria. Nigeria is as a matter of fact in need of competition and antitrust legislations.

While it may be possible for single countries to devise sui generis protection for traditional knowledge, the protection granted under such a system may not be well recognized in other countries. It may thus be better to secure the enactment of an international legal instrument for the protection of traditional knowledge which would give a protection that is both defensive and positive. Apart from formulating new approaches, countries, especially developing and least developed countries, should be assisted to enable them take maximum advantage of existing protections. [46] For example countries may be helped in documentation of traditional knowledge with a view to enjoying protection. [47] In 2000, WIPO members established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), and in 2009 they agreed to develop an international legal instrument that would give traditional knowledge, genetic resources, and traditional cultural expressions effective protection. [48] `It is recommended here that such an instrument should not be merely recommendatory but binding.

Concerning biotechnology, despite swaying arguments, it is suggested that human-related biotechnological inventions should only be merchantable. with all the rights ordinarily accompanying sale of goods and being available in respect of such goods and not be applied so as amount to a privatization of natural biological phenomena. The consent of individuals from whose bodies materials are taken for research should be obtained before extraction, and commercialization of resulting inventions. It is also important to strengthen ethical safeguards against the abuse of biotechnology.

Concerning access, it is suggested that technological barriers should allow certain persons access subject to specified requirements. Requirements may be ones like scanning of ID cards to websites, or provision of id's and passwords. In the United States, there is prohibition of the circumvention of access control technology. However, persons wishing to make fair use of IP may circumvent copy control technology. [49] In the EU and Germany, neither

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45 Legal principle that, in general, the first sale of a copyrighted, patented, or trademarked good exhaust... copyright, patent or trademark owner's intellectual property right (IPR) in that he or she cannot contr... distribution or resale of the good. Therefore if 'A' (the IPR owner) sells to 'B,' then 'B' can sell to 'C' witho... approval of 'A.' Also called doctrine of first sale.

46 WIPO, World Intellectual Property Organization, Traditional Knowledge and Intellectual Property- Backg... Brief,http://www.wipo.int/pressroom/en/briefs/tk_ip.html, accessed 27-06-2014.

47 See article 8(j) of the Convention on Biological Diversity

48 WIPO, World Intellectual Property Organization, Traditional Knowledge and Intellectual Property- Backg... Brief,http://www.wipo.int/pressroom/en/briefs/tk_ip.html, accessed 27-06-2014

49 Wencke Basler, "Technological Protection Measures in the United States, the European Union and Germa... Much Fair Use Do We Need in the "Digital World"?", Virginia Journal of Law and Technology, Vol. ... 2003

there permission for circumvention of access control nor copy control technology. However, in the EU and Germany, there is an obligation on right holders to furnish fair users with the right to circumvent copy control technology subject to payment of compensation to the right holder by such users. [50] The recommendation here is that it would be better to combine elements of both the American and the Euro-German approach. Fair uses who possess the capability for circumvention of copy control technology should be allowed to do so. As regards those who don't, there should be an obligation on right holders to furnish such fair users with means of circumvention or access. The users should then be made to bear the cost of making the IP available, which may cover material and other costs, subject to checks against extravagant assessment.

It would be noted that most of the rights that are implicated in the discourse of the effect of intellectual property on human rights are economic, social and cultural (ECOSOC) rights. ECOSOC rights however have been declared as non-justiciable in the constitutions of some countries. An example is Chapter 2 of the Nigerian constitution. But a consistent and systematic deprivation of these rights in relation to a person or a group could lead to the denial of a political right. This makes it necessary for both legislative and judicial attitudes to be changed in favour of the enforcement of ECOSOC rights when the situation justifies such. The courts should view ECOSOC rights as been inextricably linked to other justiciable rights, and in appropriate circumstances their enforcement should be seen as incidental to the realization of justiciable rights.

Conclusion

Human relations, whether involving individuals or groups, implies an intersection of rights. This requires a proper balancing of the rights of all interacting parties. Rights are hardly absolute, and are limited by the rights of others. The limitation on a particular right is in essence a duty owed by the right holder towards others. In the case of intellectual property rights (IPR's), it is necessary to guard the common wealth against the onslaught of privatization and the consequent exclusion that results from such. This is needed to secure the enjoyment of human rights.

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[50] Id.