

STRIKING A BALANCE BETWEEN SOCIAL COSTS AND SOCIAL BENEFITS OF INTELLECTUAL PROPERTY RIGHTS

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ABSTRACT

This study underscores the need to reevaluate traditional IP paradigms and explore alternative models that strike a better balance between the resultant social costs and benefits. These alternatives encompass a range of strategies, including copyleft principles, trade secrets, etc., each offering unique pathways to mitigate social costs while preserving incentives for creativity.

This research contributes valuable insights to the ongoing discourse on reshaping IP frameworks to create a more harmonious and sustainable environment that nurtures innovation and creativity while minimizing unintended societal repercussions.

Keywords: Intellectual Property, Balance, Social Welfare, Social Costs, Alternatives.

INTRODUCTION

'Intellectual Property' is a class of intangible rights that protect products of human ingenuity which are commercially valuable in nature.¹ It constitutes a set of legally enforceable rights ensuing from intellectual activity in the industrial, scientific, literary, or artistic fields.²

Authors' and innovators' works are atypical in nature. These are expensive to create but significantly easy to copy, which makes them unlikely to be produced under normal market conditions, unless specific steps are implemented to make their copying unlawful.³ The economists call them "public goods". Intellectual Property Rights provide exclusive rights to the inventors or creators to protect their inventions/creations for a specified time period, enabling them to reap the commercial benefits of their products for such time.⁴

As evident from the limited protection accorded for a definite period, the ownership of authors' and inventors' works are essentially

qualified and subject to the rights and interests of the public.⁵ As stated by Thomas Jefferson, "Inventions [...] cannot in nature be subject of property. Society may give an exclusive right to the profits arising from them as an encouragement to men to pursue ideas that may produce utility. But this may, or may not be done, according to the will and convenience of the society, without claim or complaint from anybody."⁶

The world has evolved from the industrial age to the information age where we don't build as many tangible goods anymore and the focus has shifted to intangible property such as ideas, technologies, etc. and thus, the intellectual content involved is of much more importance now; to protect which intellectual property laws came into being.

Intellectual Property has taken center stage in the world's most valuable companies, not to mention IP-based companies are more valuable and generate more revenue per employee as compared to traditional companies.⁷ It has been conclusively established

¹ ICAI v Shaunak H. Satya. (2011). 8 SCC 781.

² Ananda Ranasinghe. (n.d.). Balance between Traditional Knowledge and Intellectual Property. Retrieved April 18, 2022, from 303463817_Balancing_Intellectual_Property_Rights.

³ Biagioli, M. (n.d.). Weighing Intellectual Property: Can we Balance the Social Costs and Benefits of Patenting? Retrieved April 19, 2022, from <https://journals.sagepub.com/doi/full/10.1177/0073275318797787>.

⁴ Singh, R. (2004). Law relating to intellectual property (A complete comprehensive material on intellectual property covering acts, rules, conventions, treaties, agreements, case-law and

much more) (Vol. 1). New Delhi: Universal Law Publishing Co. Pvt. Ltd. [Google Scholar].

⁵ Supra, Note 4.

⁶ Jefferson, T. (1813, August 13). Thomas Jefferson to Isaac McPherson. Founders Online, National Archives. <http://founders.archives.gov/documents/Jefferson/03-06-02-0322>

Original Source: Looney, J. J. (Ed.). (2009). The Papers of Thomas Jefferson, Retirement Series, vol. 6, 11 March to 27 November 1813. Princeton University Press.

⁷ "The US Economy Demonstrates the Value of Intellectual Property." (n.d.). Clarivate. Retrieved April 18, 2022, from <https://clarivate.com/blog/the-us-economy->

that the intellectual labour associated with innovation shall be given due importance to ensure that public good emanates from it.⁸ Intellectual Property Rights are thus critical to our national industrial policies.

The utilitarian theory is tremendously dominant and postulates that IPR is granted as a means to an end, the 'means' here being the incentives and the 'ends' being the creative works of expression, innovations, inventions et al. This is also evident in the US Constitution where Intellectual Property is seen as a tool to achieve the progress of science and useful arts, by granting exclusive rights to authors and inventors, thereby providing limited protection to their works.⁹

To give effect to the utilitarian theory, the laws create an artificial scarcity of knowledge sans which the creators do not have sufficient incentive. They are thus bestowed with the means to control the use and dissemination of their intellectual property.¹⁰

This theory entails that all original creations such as works of expression, inventions, innovations, etc. will be severely under-produced in the absence of some intervention offering these authors and creators adequate economic incentives to produce them in

the first place. Therefore, granting exclusive rights over such intellectual property to use and commercially benefit from the products of intellectual labour by the author or creator gives them their due recognition, reputation, and financial gains which serves as motivation for them to undertake such tasks. Society benefits as a whole through this approach.

PROBLEM FORMULATION

This research endeavors to address the challenge of reconciling intellectual property (IP) protection with its potential societal costs. The central query revolves around achieving a balanced framework that fosters innovation while mitigating adverse social effects. How can the existing IP landscape be recalibrated to harmonize the incentives of IP rights with equitable access to knowledge and socio-economic advancement? Through the exploration of alternative models, this study seeks to illuminate a path toward a more balanced and sustainable approach to intellectual property, in line with its role in promoting both innovation and societal welfare.

RESEARCH METHODOLOGY

The author has employed doctrinal

demonstrates-the-value-of-intellectual-property/?lid=c.

⁸ Saha, C. N., & Bhattacharya, S. (n.d.). Intellectual Property Rights: An Overview and Implications in Pharmaceutical Industry. National Center for Biotechnology Information. Retrieved April 18, 2022, from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3217699/#ref1>.

⁹ United States Constitution. (n.d.). Article I, Section 8, Clause 8.

¹⁰ Mersha, B., & Debesu, K. (n.d.). Theories of Intellectual Property. Abyssinia Law. Retrieved April 18, 2022, from <https://www.abysinialaw.com/study-online/item/468-theories-of-intellectual-property>.

research methodology that encompasses a systematic exploration of the intricate relationship between intellectual property (IP) protection, innovation incentives, and potential societal costs. While this study does not involve empirical analysis or case studies, it draws from a diverse array of scholarly sources and employs various methods to synthesize insights and arrive at informed conclusions.

Writing Approach: The author adopts an analytical and interpretive writing approach to dissect and synthesize the content from the cited sources. The goal is to critically analyze and evaluate the existing body of knowledge, discern patterns, and articulate the nuanced dynamics between IP protection and its socio-economic implications.

Research Materials: The primary research materials consist of academic literature, legal documents, and authoritative sources in the field of intellectual property. These sources include seminal works such as "The Economic Structure of Intellectual Property Law" by Landes and Posner, policy documents like the "TRIPS Agreement," and scholarly articles like "Utility Models and Innovation in Developing Countries" by Suthersanen.

Methods of Analysis: The author employs qualitative analysis techniques to scrutinize and synthesize the ideas presented in the

selected sources. This involves a systematic examination of key concepts, arguments, and perspectives put forth by various authors. The analysis seeks to identify common themes, divergent viewpoints, and potential implications for the relationship between IP protection and societal welfare.

Data Collection Techniques: The research methodology involves extensive literature review and document analysis. Data collection techniques include sourcing relevant texts from digital libraries, academic databases, and reputable online repositories. The author carefully selects, evaluates, and cites pertinent passages to substantiate arguments and enrich the discourse.

Research Focus: The central research focus is on elucidating the interplay between IP protection and its potential societal costs. The methodology is geared towards comprehending the broader implications of robust IP regimes on equitable access to knowledge, innovation dynamics, and socio-economic development.

In summation, this research methodology integrates a systematic approach to analyzing and synthesizing a diverse range of authoritative sources. Through a qualitative analysis of literature, legal texts, and expert viewpoints, the study aims to unravel the intricate tapestry of intellectual

property's role in shaping innovation, society, and equitable progress.

DISCUSSION AND RESULTS

The conversation about intellectual property (IP) unfolds as a puzzle, where the pieces are the balance between its security and the effects it might have on society. The paper's essence revolves around the idea of tipping this balance in favor of society's well-being. By digging into the layers of this complex matter, the paper sheds light on a way forward that aligns innovation, creators' interests, and the greater good.

The paper's main thought, as discussed in the conclusion, introduces IP as a fairly new creation, woven from various arguments that circle around a sensitive equilibrium. This balance, an intricate act of weighing creators' ambitions against what is best for society, becomes the heartbeat of intellectual property's existence. In this light, the paper expands on the crucial role that IP plays in our economy. The products of human intellect have come to be seen as public goods, which gain value because of the artificial scarcity arising out of strong IP protection. This shield acts as a driving force for innovation, thereby becoming the very foundation for progress.

However, the tale is not all bright. The paper points out a cloud of social costs that can be cast by the same protective cloak that nurtures innovation. It dives into these costs, unraveling their

aspects that include monopolization, seeking undue advantages, stifling future innovations, and the weight of administration. This leads us to a vital call for action - a need to find a new equilibrium, a balanced arrangement that tempers the level of protection to avoid unnecessary social burdens. The paper urges a balance where the scales tip towards the well-being of society.

The conversation moves towards exploring alternatives, paving ways to alleviate these social costs. Building on the arguments laid out in the paper, the exploration extends to alternatives for copyrights, trademarks, and patents. The embrace of copyleft principles and open-source approaches, signals a shift from the traditional copyright system, easing concerns about monopolies and nurturing collaborative innovation. For trademarks, the focus turns to industry norms and adapting swiftly to changing product cycles. Meanwhile, the world of patents broadens to include trade secrets and utility models, offering substitutes that safeguard effectively while bypassing unwanted social costs.

In conclusion, the discussion and results echo the paper's central theme i.e., a harmonious blend where innovation resonates alongside societal well-being. As we conclude this intellectual exploration, it leaves a trail of insights and opportunities, urging policy makers, creators, and stakeholders to create an environment where the rhythm of progress dances in harmony with the symphony of

collective social advancement.

Social Cost of IPR

Overshielding intellectual property can hinder its dissemination and thus, impede further innovation. Since knowledge has come to play a crucial role in economic activity and acts as a competitive advantage, these concerns have garnered greater significance now.¹¹ Broadly speaking the following social costs arise or may arise when intellectual property rights are granted:

1. Monopolisation costs

Intellectual property rights allow you to fetch a higher market price. In such a scenario, firms may act in an undesirable manner to maintain their market position. For example, they may not necessarily invest in innovation and instead choose to invest in lobbying the government to preserve their monopoly,¹² or they may engage in other unethical competing practices.

2. Rent-seeking Behaviour

A lot of time and money is spent on acquiring intellectual property rights, which could be put to better use in developing something more meaningful. Individuals try to generate economic rents i.e., gains in the

marketplace, which can be inefficient and ultimately harm the overall economy.

3. Restriction of Future Innovation and Creativity

Intellectual property rights holders may try to stifle others from undertaking research on similar goods or services. This can be seen as an extension of monopolistic behaviour.

4. Administrative Costs

The costs involved in the application process, screening process, etc. wherein thousands of people work for the government to see through such procedures for the registration of trademarks, copyrights, and patents are humungous. In furtherance whereof, the costs for the enforcement of such rights in court also mount on top of the already expensive process.

The Need to Strike a Balance

Intellectual Property Rights by restricting access to protected work impose social costs on the public, this can only be justified to the extent that, on balance, it incentivises enough creation and distribution of original works to offset those costs.¹³ The advancement of science and useful arts

¹¹ Qureshi, Z. (2018, July 11). Intellectual Property, Not Intellectual Monopoly. Project Syndicate. Retrieved April 30, 2023, from <https://www.project-syndicate.org/commentary/intellectual-property-regime-tends-toward-monopoly-by-zia-qureshi-2018-07>.

¹² Lindsey, B., & Teles, S. M. (2017). *The Captured Economy: How the Powerful Enrich*

Themselves, Slow Down Growth, and Increase Inequality. Oxford University Press.

¹³ DIPP. (2016). Legal and Legislative Framework of the National Intellectual Property Rights (IPR) Policy. Retrieved from http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/National_IPR_Policy_08.08.2016.pdf.

is ultimately achieved when such protected inventions and works of authorship are finally released into the public domain at the expiration of their term of protection for everyone to benefit from it. The balancing scale is thus not only a potent rhetorical trope of fairness¹⁴, but also an instrument that the law constantly invokes to question the extent of available IP protection.¹⁵ The key to economic efficiency is striking a balance between the societal benefits of creating economic incentives and the social costs of limiting information distribution.¹⁶

In the following graph, the vertical axis represents social benefits. The higher you go, the more social benefit you get. The horizontal axis represents the rights acquired, the strength of rights viz., the length of protection, the enforceability of rights, etc.

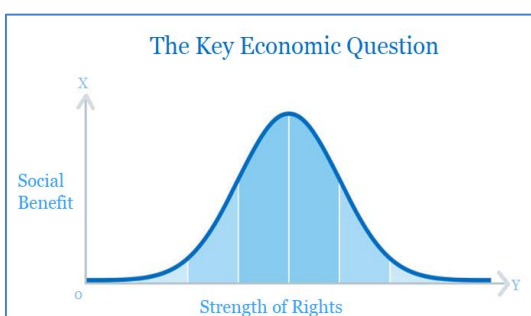


Figure 1: Social benefit and strengths of rights

The idea here is that as we increase the rights, we get more social

benefits at first. However, as we get more rights, we are also increasing the costs. Eventually, we fall down the other side of the cliff, where we are giving so many benefits to intellectual property owners that we, as a society, are not getting enough back.

For instance, to encourage research and development in the pharmaceutical industry, we could offer patent protection to incentivise researchers. Grant of such intellectual property rights would lead to societal benefit in the form of better medication and effective cures. However, as the strength of these IP rights grows, the holders of such rights can demand skyrocketing prices for their products knowing that they are the only manufacturers for it, which would inevitably hurt the public as they would not be able to afford such expensive medication. Consequently, a situation shall arise where the incentive provided to produce valuable goods, itself leads to a detrimental situation for the public. In this scenario, the research has been done and the product is available, but the public cannot access it, therefore, no public good emanates from it.

The most pertinent question here is where we are on this curve, as the answer would help us understand whether we still need to strengthen

¹⁴ *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966). “The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the

innovation, advancement or social benefit gained thereby”.

¹⁵ *Supra*, Note 4.

¹⁶ *Merges, R., Menell, P., & Lemley, M. (2012). Intellectual Property in the New Technological Age (6th ed.). Wolters Kluwer.*

intellectual property rights to reach the point of saturation or whether we have already crossed it and need to curtail such rights to prevent them from proving to be detrimental to society. Unfortunately, there is no definite answer to this question since we are at a different stage in the graph with respect to different goods and services. The level of innovation is different with respect to different fields and so the economy's position on the graph also varies accordingly.

Economists have been trying to study these factors for decades, however, we still don't know with any certainty as to how the net effect of social benefits and costs plays out in intellectual property rights. There is an ongoing debate with respect to this juxtaposition i.e., how many rights shall be granted in the name of protection and whether these rights are the most efficient way to bring about the innovation we want for society.

TRIPS Agreement

The WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)¹⁷ recognises that intellectual property systems shall find a balance between the long-term social objective of encouraging future inventions and creation, and the short-term objective of diffusion of information.¹⁸

¹⁷ TRIPS Agreement. (n.d.). World Trade Organization. Retrieved April 18, 2022, from https://www.wto.org/english/docs_e/legal_e/31bis_trips_03_e.htm.

1. **Article 7** postulates that IPR shall contribute to the progression of technological innovation and to the distribution and transference of technology, in a way that is advantageous to social and economic welfare, to the mutual benefit of producers and users of technological knowledge, and to a balance of rights and obligations.
2. **Article 8** postulates that formulation or amendment of laws and regulations shall be done using such measures that are necessary to protect the public's health and nutrition, and to promote the public interest to their socio-economic and technological development.

Alternatives to IPR

Intellectual property law has developed significantly over the last several decades since it is at the core of the economy. However, considering the social costs imposed by these intellectual property rights it is about time we started resorting to some alternatives to the traditional forms of intellectual property rights i.e., copyrights, trademarks, and patents. Some of these alternatives are mentioned as follows:

1. Copyright

¹⁸ Anurag, A. (2019). Pharmaceutical Patents and Healthcare: A Legal Conundrum. SCC OnLine Blog OpEd, 18.

Copyright grants protection over literary, artistic, and dramatic works. It is automatically acquired and thus the administrative costs are quite low, however, the caveat is that you can't sue anybody for copyright infringement unless you register your copyright. It is highly enforceable and has a very long term of protection.

Alternatives to Copyright

a. Open Source or Copyleft Principles

Copyleft is a general license agreement granted by the owner of the copyright thereby permitting anyone to freely use and reproduce the copyrighted work. As opposed to copyright, copyleft promotes social interest in respect of knowledge creation by vesting copyright control in a large general community. This is mostly used in software, digital art, and other creative content.¹⁹ But anything created with the aid of such copyrighted work shall also be open source and easily accessible to the public at large. Copyleft requires that whoever redistributes the software (or any other copylefted work) must pass along with the freedom to further reproduce or modify it.²⁰ This shifts the incentives from the creation itself to providing complimentary goods and services. It

also lowers the cost of follow-on development.

b. Private Subscription

Rather than seeking legal protection for creations, the goal here is to have individuals subscribe to your next creation. It can be argued that subscription-based businesses like Netflix or even traditional television networks use this strategy to spur innovation.

c. Encryption & Technological Protection

This entails enclosing your artistic or creative work with some form of protective software or hardware and/or employing technology to either restrict or limit the ability of others to use it without your permission.

d. Collective Compensation Systems

This entails an obligatory or semi-mandatory payment system wherein a minimal charge is paid into a compensation system, which is subsequently dispersed among various artists. This is prevalent in the case of musicians where recording artists and recording studios band together to create a collective system allowing radio stations to simply purchase a blanket licence for all types of works, such as lyrics, composition, singing, etc.

¹⁹ Friedman, K. (n.d.). Copyleft, Intellectual Property License. Encyclopaedia Britannica. Retrieved April 3, 2023, from <https://www.britannica.com/topic/copyleft>.

²⁰ GNU Operating System. (n.d.). What is Copyleft? GNU Project. Retrieved April 30, 2023, from <https://www.gnu.org/licenses/copyleft.html>.

e. Prizes or Awards

Prizes such as Pulitzer, Booker, Emmys, Oscars, etc. serve as strong motivation for literary, artistic, and dramatic works by rewarding original and creative expression. Such incentives do not create monopolisation costs.

2. Trademarks

It protects distinctive marks or product appearance. The length of a Trademark can be perpetual so long as the connection between the mark and the underlying source of goods is maintained. It is easy to obtain and widely enforceable.

Alternatives to Trademarks

a. Rapid Product Life Cycles

This can be seen in the fashion business, where there is not a lot of activity around trademark protection for fashion goods; instead, there are rapid life cycles of innovation. Whatever new is introduced in the market is immediately followed by competitors who essentially copy the innovations as quickly as they can providing them for lower costs, causing the innovators to simply move on to another type of good.

b. Traditions and Industry Norms

Here the incentives are generated by a tacit industry agreement. The industries may agree not to utilise each other's trademarks, which might create incentives to develop these marks and build goodwill. This can result in

market-based rewards which involve lower costs as compared to resorting to trademarks.

3. Patents

It is an exclusive right granted to the original inventor of a product which entitles the holder to make use of his inventions in any way he wishes for the permitted period. The owner thus has absolute liberty to utilize, sell, and even modify his original invention and to restrict others from the commercial use of such ideas without his consent.

Alternatives to Patents

a. Trade Secrets

Trade secrets offer exclusivity and confidentiality of vital information thereby providing the necessary legal protection for sensitive data. It is substantially less expensive since there is no application or screening process. The duration of such protection is effectively indefinite, as it will last as long as the knowledge claimed to be a trade secret remains secret.

b. Utility Models

A utility model confers on the holder an exclusive right to use his technical invention. This is granted for a limited period in exchange for public disclosure regarding the workings of the invention. These provide quick and relatively inexpensive protection for technical inventions as they do not entail a substantive examination.²¹

²¹ European Commission. (n.d.). Internal Market, Industry, Entrepreneurship and SMEs. Patent Protection in the EU - Utility Models. Retrieved

April 30, 2023, from <https://single-market-economy.ec.europa.eu/industry/strategy/intellectu>

Utility model law can protect inventions that do not fall under the purview of standard patent law or other intellectual property laws, this could thus curtail lobbying practices in industries for addition of minor inventions in the patent regime.²²

c. Government Contracts

Here the incentives are generated by the funds provided by the government which essentially awards either contracts for inventing things or a grant to explore a particular area of technology and invent things. This can majorly be seen in the field of defence and medicine.

CONCLUSION

Intellectual property is a rather recent legal creation, whose existence is vindicated by a set of arguments that ultimately hinge on the balance whose contents are dictated by specific goals and validation of the law: balancing the interests of creators with those of society.²³

Intellectual Property has come to play a crucial role at the core of the economy. The incorporeal goods that flow from such intellectual labour are termed as public goods, which would be largely underproduced and thus inevitably scarce without the adequate incentives provided by intellectual property rights. However, it is germane

to note that many social costs also flow from such protection, and there is a dire need to strike a balance between providing incentives to ensure that social benefits result from it, thereby limiting the amount of protection to curtail any unnecessary social costs involved. It is also essential that the net effect of protection granted by IPR must be in favour of the societal welfare.

Social costs can largely be avoided by resorting to the alternatives to the traditional forms of Intellectual Property, however, it must be kept in mind that these alternatives are not perfect substitutes for them. The incentives and protection provided by such alternatives are often weaker than those provided by the traditional forms. Nevertheless, adopting alternative forms of intellectual property would be advisable wherever possible, and they can sometimes prove to be the more lucrative option like in the case of Trade Secrets which involves no costs at all and offers effective and lasting protection.

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