

THE INDIAN JOURNAL OF LAW AND TECHNOLOGY

Volume 5, 2009

THE MELTING OF PATENT LAW

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ABSTRACT

In this special comment, the author posits that the patent system as it stands is archaic and oppressive, and has neither intellectual nor moral support. Having veered away from its original goals, by virtue of the change in the technological and functional basis of government, it instead serves as a justification for inequalities of wealth distribution. The author argues that substantial reform is required that would shift the balance in patent law from monopolistic greed to public interest, paving the way for access to knowledge.

Legal thought is not mostly about creating better rules. Lawyers spend much less of their time transforming the rules than they spend inventing new explanations to justify the current effects of rules invented so long ago that their original purposes are lost to memory. Changes in rules occur, mostly over the objections of “respectable” legal thinkers, when the distance between current conditions and obsolete rules becomes too great to bridge by explanatory rhetoric, no matter how fictive or absurd.

At present, respectable legal opinion is reluctantly going through such a process, coming to grips with the deterioration of intellectual and moral support for the patent system. Late twentieth century patent apologetics took the unprecedented and appalling position that human ingenuity would cease unless all technical ideas, whether abstract or immediate, were turned into an absolute monopoly through the metaphor of “intellectual property ownership”. The claim that only ownership could stimulate creativity was obviously untrue, but on the meretricious basis that “innovation” depended on the availability of long-

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term statutory monopolies on ideas, the domain of the patent system extended - first in the United States and then everywhere else American influence could make itself felt - to software, business methods, pharmaceutical molecules, and the genetic material embodied in natural objects.

This approach to justifying a current misdistribution of wealth bears no relationship to the original goals of the patent system. Empowering its Congress in the Constitution of 1787 to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”,¹ the early United States understood very differently the advantage of limited exclusivity for inventors. That early American Republic had much empty land and few educated and skilled inhabitants. Its economic future as a free, rather than slave, society depended on skills drawn from the European population. Encouraging skilled immigration was the only workable form of technology transfer for an eighteenth century society. The United States Congress created patent law to help Americans live by importing skilled brains - Scotland in the late eighteenth century, for example, lived by exporting them.

So the original purpose lying behind American patent law was, in return for brief periods of commercial exclusivity, to encourage skilled immigration and ensure publicly-accessible documentation of the skills and inventions of those immigrants. The method employed administratively in determining whether to grant statutory monopolies, though widely copied by patent offices around the world, is equally obsolete, representing the best of nineteenth century bureaucratisation. The managerial technology of the nineteenth century had little ability to make quantitative determinations about large-scale social processes. With no ability to capture data about the market, no statistical sciences with which to evaluate that data, and a shortage of trained staff that would make the complaints of the contemporary Patent and Trademark Office seem ridiculous, the patent system operated at the bleeding edge of administrative complexity. Monopolies distributed for fixed terms, on a mere showing of eligibility under loose criteria, were as much complexity an administrative system could then possibly handle.

¹ U.S. CONST. art. I, § 8, cl. 8.

In the course of the twentieth century, however, the technological and functional basis of government changed. Administrative law came to assume a governmental agency much more adept, capable, and accordingly accountable for the effective attainment of public purposes. Although conservative thinkers in the United States have tended to observe the expansion of the state's regulatory control at the expense of private aggregations of power, it would be equally accurate to say that the terms on which administration was conducted rendered the state radically more accountable, and therefore far more limited, than it had been before.

The grant of a twenty-year statutory monopoly potentially involving hundreds of billions of dollars in economic rents is a very substantial interference with the free market. Until the recent partial nationalisations of financial institutions, the largest single subsidies for the private aggregation of wealth in the United States - far larger than any single military contract, resource lease, or infrastructure project - were certain pharmaceutical patents, for example. In every other context in which the federal administrative state in the US operates to intervene massively in the private market, it does so under rules that require some combination of open information collection, formal assessment of impact and cost-benefit analysis, and immediate judicial review of the agency's basis of determination. But in patent law, these procedural fundamentals of twentieth century administrative law are absent, replaced by the much more insensitive, rudimentary, and therefore unrestrained processes of nineteenth century vested rights creation.

This nineteenth century approach to administration correlates poorly with the new-found justification for patent law: that it is the regulatory engine of innovation. If patent law's grant of statutory monopoly is actually the *source* of innovation in the contemporary economy, one would expect government to employ the expertise-based system for policy formation and protection of the public interest that it finds necessary in relation to such other foundational issues in industrial policy as environmental regulation, occupational safety, drug and medical device regulation, etc. Instead, we approach this supposedly all-sufficient engine of intellectual creativity with stunning unconcern for the details: handing out monopolies of unvarying term without public comment or fact-finding, without consideration of likely effect or impact on the public interest and without any consideration of cost or its relation to benefit.

The cost-benefit calculus of traditional patent law, in fact, assumes that any patentable innovation is of *infinite* benefit - such that no formal consideration of the cost involved in granting a monopoly need be undertaken at all. This is a breathtakingly counter-factual assumption, one which the modern administrative law makes in no other context.

Patent law thus presents, to the eye of the historian, characteristics of a legal regime in senescence. Its original purposes having sunk, it is presently supported by a justificatory narrative constructed after the fact, inconsistently cobbled together with outmoded procedural institutions at odds with the current state of administrative practice and contemporary political economy. For government to hand out generation-long market monopolies in key industries without cost-benefit analysis or an opportunity for public comment would ordinarily be stigmatised as industrial policy run amok, if it weren't assumed to be the result of "crony capitalism" or outright corruption. Those who are enabled to acquire vested rights on an immense scale at comparatively insignificant cost can be expected to praise the system highly and resist every form of fundamental change, but only a biased eye could fail to observe the radical distance between rhetoric and reality.

Nor is the moral case for patent law any more robust. Patent disclosures were a crucial form of technological literature in the eighteenth century, when even the most advanced societies lacked comprehensive detailed documentation of almost all their basic industrial processes, and learning by any means other than direct contact with skilled artisans was impossible. The development of an industry like contemporary pharmaceutical manufacturing - dependent on an immense socialised research system in the United States National Institutes of Health but claiming monopoly property rights in technical outcomes based on that research - was not an imaginable outcome under traditional patent law, because such a socialised research infrastructure was unimaginable. Instead, patent law was assumed to be a mechanism *substituting*, in default of better choices in an immeasurably poorer society, for direct governmental subsidisation of research. Yet modern pharma not only exists by monopolising the benefits of socialised research, but grows fat on profits earned by charging more for the products of that research than the richest society in the world can afford to pay for access to those products for all its citizens. The industry goes further under

conditions of globalisation, by charging more than *other* societies can afford to pay as well, for drugs resulting from basic biomedical research done by the socialised U.S. research system, and whose further development was then fully funded by profitable sale back to U.S. citizens and their insurers. Everywhere, in order to pay the rents demanded by “property”, societies are forced to reduce other aspects of health care delivery, and vulnerable human beings die.

The United States in its industrial period of development, since roughly 1815, has been particularly inclined in its legal theory towards theories of *property*. Innovation in technology, creativity in art, business reputation, algorithms, musical phrases, rights to receive speculative future profits of businesses, personal fame, the medical employment of particular molecules, methods of conducting businesses, and the location in human chromosomes of genes with occasional medically-significant adverse mutations have all been conceived of as property, without any apparent awareness of artifice. With the conception of these intangibles as property comes a presumption of the right to exclude. But exclusion when applied to knowledge is enforced ignorance, which is the immediate precursor of hereditary social injustice. The right to exclude from knowledge is never conceived of by adherents as the *purpose* of the “intellectual property system.” But it is, in the long run, the system’s most deplorable ingredient.

All societies, since the beginning of human civilization, have wasted almost all the human brains they possessed. We must recognise, whenever we trouble ourselves to consider, that nearly none of the Einsteins who ever existed were permitted to learn physics, that but few of all our Ramanujans were allowed access to mathematics. The human race has never succeeded in freeing every brain to learn. All its other difficulties - technical, social and spiritual - are made profoundly worse by this consistent failure. But within the next two generations it will become possible to allow all human beings, everywhere, access to all the combined intellectual and cultural attainments of humankind. Our network of networks contains digital representations of everything we know and know how to do. Every book, film, instructional video, text, or record of recent experience can be searched for and delivered to instruments that cost very little and fit in a child’s pocket. A society in which today even the poorest of the urban poor can possess a mobile phone can become tomorrow a society in which anyone can learn anything. The primary obstacles are the institutions

which render knowledge “property”, and create therewith an artificial entitlement to exclude.

So the law of the past must soon come to the end of senescence, and experience both death and transfiguration. Despite the inevitable continuance to the end of “respectable” opinion, the distance between explanatory rhetoric and reality has grown too wide, and the immediate power of social need is much too great to permit the endurance of the system we have known. This historical process, history shows, will remain invisible to the established oracles and their students until the very last moment, because training in the reigning justification narrative tends to bias the lawyer’s cognitive awareness of the deeply conflicting reality.

What is presently talked of as “reform” is merely the rearrangement of furniture. Substantive reform, that would strengthen the system’s social benefits without entirely reworking the existing distribution of rights, is still possible. Rather than nineteenth century patent process, we need a flexible system that establishes the economic value of innovation and provides for the realisation of fair commercial returns while protecting the rights of researchers, students and non-profit innovators. Monopolies should be granted only within commercial fields of use and for terms limited to the necessary period of cost recouPMENT. Systems of sharing knowledge to enhance innovation through commons rather than exclusive ownership, such as free software licensing and Creative Commons culture, should be equally protected and fostered by legal rules and governmental administrative practice as proprietary production. Principles of public access, cost-benefit analysis, and judicial review to protect the public interest should be scrupulously honoured in every legal setting.

Failure of reform will not leave the patent system undisturbed. It will merely continue the process of detaching existing practice from surrounding reality. The parties who grow rich through the existing system will grow richer, and they will continue to deny respectability to any theoretical position unfavourable to their interests. But the demand for equal access to learning is a demand founded in the most basic principles of human justice. It will not be ultimately denied. And what has stood as a barrier in its path will most likely be swept away.