Intellectual property, traditional resources rights and natural law: A clash of cultures

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Western nations, through international treaties and bodies such as the World Trade Organisation, the World Intellectual Property Organisation, and economic and political pressures on many governments, are to a large degree succeeding in strengthening protection of intellectual property rights as they are understood mainly within the Western context. Framing the debate within Locke's theory of natural law, this chapter discusses the extent to which this strengthening of intellectual property rights is appropriate for developing countries, especially in the African context.

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Introduction

The legal history of the US in intellectual property (IP) demonstrates considerable effort in detaching IP from natural law and the notion of labour, especially in the idea/expression dichotomy, which basically expresses the legal doctrine that ideas are not protected but the expression of those ideas is, and that the "sweat of the brow" is not translated to IP. However, recent trends in Europe, and even the US itself, demonstrate a return to the Lockean natural law theory of property as labour attached to resources.

In this chapter, we will address the conflict arising from the labourer's claims (whether an individual or a multinational company) and the fundamental entitlements of the public, both indigenous and as mainstream economic players, within the context of Locke's "no harm" principle.

We will also explore the nature and scope of traditional resources rights and the extent to which they are affected by notions of Western IP, and how natural law, from both a universalist and an African perspective, would help untangle the mess. We will especially address the question of "individual" versus collective ownership of resources and how IP plays into that debate, examining how the Lockean proviso of "enough and as good" plays in the theatre of the extraction and propertisation of indigenous knowledge and resources from developing countries by multinational countries, especially by the pharmaceutical industry. In effect, we will discuss the question whether there is a net harm to other persons in the acquisition of IP through labour, and whether this acquisition is "legitimate" in more than the legalistic sense as, for example, from an ethics perspective.

Natural law and the Lockean genesis of Western IP law

In his *Two Treatises of Government*, John Locke (1690) essentially viewed natural resources as available for all to partake in, and that what one was able to retrieve from its natural state by one's labour belonged to the labourer. Gordon (1993: 1544–1545) summarises the logic:

> *Labor is mine and when I appropriate objects from the common I join my labor to them. If you take the objects I have gathered you have also taken my labor, since I have attached my labor to the objects in question. This harms me, and you should not harm me. You therefore have a duty to leave these objects alone. Therefore I have property in the objects.*

Locke thus viewed labour as the foundation for property. A person has the same duties that others owe to him. If one has laboured to acquire property, therefore, one would be obliged to respect others' rights to their property. But these rights come with a modifier: persons have a duty not to cause harm to others, absent extreme need. There is also the moral claim: in times of extreme need and provided it does not threaten one's own survival, one "has a duty to let others share in her resources (other than her body)" (Gordon, 1993:1541–1543).

The genesis of the Western concept of IP has its origin in this Lockean view of labour-based property. Although not tangible, the resulting product was a result of one's intellectual labours. Because of its special characteristics, however, it was difficult for the creator to retain ownership of the IP once he or she had shared it with society, which had an interest in the creation. To ensure that the "creator" would keep creating, therefore, society made a pact that would give the creator certain privileges in exchange for the creation, thus hopefully providing an incentive for continued creation.

The view of the Western IP system, which covers such disparate areas as patents, copyrights, trademarks, trade secrets and related rights, is therefore bifurcated into two schools: one that views IP as an element of public policy making and one that views it as a system of economic rights (WIPO, 2005:2). According to the World Intellectual Property Organisation (WIPO, 2005: 3), IP should not be seen as a monolithic entity, but rather as a "complex composite network of international treaties and national laws, together with the business and social practices that have developed around each distinct area of IP".

IP law within the US context

IP is territorial, and generally IP legislation is effective only within the legislating country's borders. The IP system in the US traces its origin

to at least as far back as the US Constitution which, in Article I Section 8, gives Congress the power to encourage creativity and innovation by providing limited incentives to authors and inventors. It is thus clear that the US Congress was trying to create that elusive balance between the incentive to create and the public's right to access the creations.

Recent developments in US IP law, such as the extension of the term of copyright protection and the enlarging of the scope of patentability, have brought the following into focus (Gordon, 1993: 1544):

> *... the basic question at the heart of Lockean natural law: what happens when a conflict arises between fundamental entitlements of the public, and the moral claims that a creative laborer possesses by virtue of having created an intellectual product?*

This has been complicated further by the fact that individual creators have been supplanted by corporate interests (e.g. the individual author versus Walt Disney Corporation), to the extent that it is no longer clear for whose benefit the current IP system is. In the words of WIPO (2005:7), there seems to be "a separation between genuine creativity and the business models that have developed to produce, publish and distribute creative products". Notwithstanding these concerns, the US, in concert with much of the Western world, has lately been engaged in aggressive marketing of strong IP protection regimes around the world, shoring up the IP expansion that has already occurred in many countries over the years.

IP law projected to the African context

For the majority of African countries, IP systems are generally a legacy from the colonial era, and used as legislative bases of the laws of the former colonising powers. With independence, these countries incorporated the existing IP legislation into post-colonial legislation, initially with few changes, but eventually with significant revisions.

As well as being members of the African Union, most African countries are also members of the United Nations (UN). As such, they were in accord with the 1974 Agreement between the UN and WIPO that recognised WIPO's role as:

> *... the promotion of creative intellectual activity and the facilitation of the transfer of technology related to intellectual property to the developing countries in order to accelerate economic, social and cultural development.*

Though still steeped in the Western concept of IP, private rights nevertheless seemed favourable to these countries.

The IP landscape was considerably altered by the negotiations coming out of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), which created the World Trade Organisation (WTO) and resulted in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). According to Gathii (2001:753), TRIPS was the result of a successful effort by:

> *... a coalition of private, American high-technology firms in linking intellectual property protection to trade and to the GATT/WTO framework. This coalition, known as the Intellectual Property Committee (IPC), was formed in the early 1990s with two major aims. The first was to make IPR protection a central part of United States foreign trade policy. The second was to use this new prominence of IPR protection in the domestic foreign trade policy context to improve international IPR protection, primarily through new internationally binding minimum standards that would be adopted in the course of the Uruguay Round and enforced by the WTO.*

This agreement at once moved IP issues into world trade negotiations and seemed to supplant much of WIPO's authority in this area. TRIPS essentially obliged countries to have strong patent protection schemes and specifically provided for the protection of plant variety rights, with a proviso in Article 27.3(b) that allows countries to elect patent protection or develop *sui generis* legislation for such protection. For the majority of the African countries (with Kenya and South Africa being examples of a few exceptions), plant variety protection was a deviation from the then prevailing paradigm of widespread knowledge sharing (Cullet, 2001: 122). The situation was exacerbated by the time pressure African countries were put in by TRIPS implementation deadlines.

The requirement for plant variety protection should not be confused with the protection of biological diversity. A 1992 instrument, the

Convention on Biological Diversity (CBD), was already evidence of concern about the depletion of biological diversity as a result of human activity. The preamble of the CBD takes the view that the conservation of biological diversity is a common concern of humankind, but that states have sovereign rights over their own biological resources (UN, 1992) and that there should be (CBD, Article 1):

> *... fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies.*

Concern with biodiversity is of special significance here within the context of IP rights, as pharmaceuticals from developed countries have been accused of engaging in bio-piracy – essentially removing large amounts of unique plant material from developing countries for use in drug research. In this regard, it is significant that the forests in the developing countries hold the vast majority of the world's biodiversity (AgBioWorld, n.d.), most of it in Africa (UNFPA, n.d.).

Traditional resources rights and Western IP law

Over the years, indigenous peoples – including those in Africa – have developed and built detailed information and knowledge bases on various aspects of their cultures and their natural environment, including detailed knowledge of plant and animal species, soils, seasons and weather patterns. This knowledge is the result of an accumulation of experimentation and experiences over a long period of time to determine, for instance, whether a certain plant has curative or preventive properties over certain diseases. As Bastida-Muñoz & Patrick (2006:281) describe it: "The universe of knowledge held by indigenous peoples is a result of a diachronic, intergenerational, communal and holistic collection of 'incorporated' information about their local environment." Traditional resources rights, therefore, refer to systems for the conservation and protection of, and compensation to, communities holding this knowledge.

That indigenous knowledge is valuable can be illustrated by the fact that "indigenous knowledge of medicinal plants and food decreases research and production costs by 40% or by $200 million a year" (Bastida-Muñoz & Patrick, 2006: 260). This value attracts Western economic sectors, such as the pharmaceutical industry. A clash of cultures is immediately apparent, however, when the industry seeks to appropriate this knowledge as property.

In the Anglo-American system, property is characterised by the ability of the owner to use the property, to alienate (or transfer) the property to someone else, and the right to exclude others from using the property (Gordon, 1993:1550). Two problems emerge in the attempts of the Western pharmaceutical industry (and other industries) to appropriate traditional knowledge. The first is that the indigenous notion of property is different from the Western notion of property. For the former, property, especially in traditional resources, is collective while for the latter, property rights are private. The other problem is corollary and comes from the convenient appeal by the pharmaceutical industry to Lockean philosophy that, since there are no private rights in traditional knowledge, then this knowledge must be treated as a commons, and the pharmaceutical company having mixed its research labour into the resources identified by this knowledge is now entitled to the labourer's reward of property of the product. This, of course, runs smack against the notion of national sovereignty.

Enmeshing public policy within international trade

As we have noted above, one of the major results of the TRIPS Agreement was to introduce IP into the ambit of world trade negotiations. TRIPS itself was predated by the International Convention for the Protection of New Varieties of Plants, which established the International Union for the Protection of New Varieties of Plants (UPOV) and provided for private property rights in plant varieties. These rights were not patents, but under the 1991 UPOV version, plant breeders have rights analogous to weakened patents, with only a nebulous distinction between the two concepts (Cullet, 2001:100).

Given that the TRIPS Agreement provides for plant variety protection, and Article 27.3(b) of the Agreement allows members who do not want to give this protection by way of patents, to

formulate substitute property rights systems through *sui generis* laws to effect their obligations under the Agreement, developing countries have recently been under tremendous pressure to adopt the Convention as a compliance tool for such a protection scheme (Cullet, 2001:100). TRIPS is in marked contrast to the Model Law of the Organisation of African Unity (now the African Union) dealing with access to biological resources and rejecting patents of life or exclusive appropriation of life forms. The OAU Model Law recognises:

> *... the rights of local communities over their biological resources, knowledge and technologies that represent the very nature of their livelihood systems and that have evolved over generations of human history, are of a collective nature and, therefore, are a priori rights which take precedence over rights based on private interests.*

More specifically, it refers to these rights as "inalienable". The problem is that, unlike other international law treaties, TRIPS is non-derogable, such that without the consent of all parties, countries cannot make reservations. Furthermore, under the Generalised System of Preferences, preferential access to the US market for developing country imports was made subject to signing on to TRIPS (Gathii, 2001:762–763). This makes efforts by African countries to buck the private property system, such as in the OAU Model Law, effectively toothless. Gathii puts it succinctly:

> *The sovereignty that countries had in the pre-TRIPS era to determine how far to extend IPR protection was lost. (For example, in the pre-TRIPS era, a variety of developing countries had decided not to extend patent protection to pharmaceuticals. The reason was to ensure the availability of medicines to their citizens at affordable prices.) In other words, some countries had chosen not to extend monopoly protection to certain products in the public interest. The post-TRIPS international environment narrowed the sovereignty of countries bound by TRIPS to determine appropriate levels of IPR protection.*

This narrowing of sovereignty is especially evidenced by the fact that the US singled out for unilateral punitive sanction countries that were opposed to TRIPS, prompting many to sign on both under this threat and the promise of access to the US market (Gathii, 2001:755–756).

TRIPS and its strong IP protection regime bring into sharp focus such ethical issues as the balance between the needs of low-income pharmaceutical consumers facing a life-threatening disease like AIDS, and the pharmaceutical producers' interests. Both Gathii (2001:735) and Gellman (2000) report, for example, that:

> *... the pharmaceutical industry has quietly argued that selling AIDS drugs at discounts in sub-Saharan Africa portends doom with respect to the ability to finance further research and development. In effect, it argues that the AIDS crisis in Africa is intractable because providing AIDS drugs, which still enjoy patent protection in Western markets, conflicts with its commercial objectives.*

This attitude has even been projected to actions occurring pre-TRIPS. Brazil, for example, has long had a policy of free access to AIDS drugs, which has resulted in a tremendous reduction in deaths from opportunistic infections, by as much as 60–80% between 1996 and 1999 (Gathii, 2001: 734–735). The country has done this by investing heavily in generic drug production projects. The initial response of the US was to ask the WTO to investigate the legality of Brazil's compulsory licensing legislation. Subsequently, however, in another similar dispute, former US President Bill Clinton would sign an Executive Order for Sub-Saharan African countries, as well as an understanding with South Africa on the relationship between public health and pharmaceuticals, following that country's efforts at fighting AIDS (Myers, 1999).

Relying on the concept of Boyle's "romantic author", the insistence of TRIPS on strong IP protection tools such as patents devalues sources like the traditional knowledge and plant specimens that go into developing drugs (Boyle, 1992). This leads to no compensation, as only the scientific research is deemed worthy of compensation (Gathii, 2001:758) – a decidedly Western orientation of IP. It does, however, attempt to balance public policy concerns against private interests, as in TRIPS' recognition in Article 8 of members' rights to adopt measures for public health and for prevention of IP rights abuse.

Back to Locke: Dealing with the "no harm" principle

We have seen that the Western notion of IP rights

is antithetical to the African philosophy of common ownership and sharing, especially in the area of traditional resources and knowledge, and certainly in agriculture which, even in modern African governments, was kept out of the patent zone based on elements of public morality (Cullet, 2001:109; Gathii, 2001:761).

Western IP, instead, turns to Locke for inspiration, even though, especially in the case of the US, some aspects of IP law such as copyright have made an express effort in divorcing IP protection from results of labour. The case of Feist v. Rural Telephone in the US drew the line between "originality" and mere labour, with the Supreme Court ruling that the white pages of a telephone directory could not be protected by copyright, as it did not have the requisite originality (US, 1991). Since then, however, legislation protecting databases in Europe (the EU Directive) and legislation outlawing the circumvention of electronic fences in information content (the Digital Millennium Copyright Act) have brought IP full circle back to Locke. However, even while appealing to Lockean notions in IP protection, there are significant departures from some of the central tenets of the natural law philosophy. Laying aside for the moment the argument that natural resources found in a country belong to that country and cannot be considered by other countries as their "commons" (CBD, Article 15), and assuming that it is possible, for example, for pharmaceutical companies to claim property interests in the parts of the commons to which they have attached their labour, there is still the conundrum that one's liberties in the use of one's property have limitations under natural law.

One such limitation is the duty to refrain from harm. Also, "even if a laborer is ordinarily at liberty to keep the benefits she can draw from her product, the natural law imposes on her an obligation to share her plenty with those in extreme need" (Gordon, 1993:1550–1551). Such extreme needs would presumably include the prevention of deaths from AIDS, as not sharing a beneficial product would harm those in need.

The ethics of strengthening IP law in the African context

For Locke, the labourer was justified in property rights from the results of his labour in appropriating from the commons of nature, provided that after such appropriation, there was "enough, and as good left in common for others" (Gordon, 1993:1562). When a pharmaceutical company leverages traditional knowledge and traditional resources to patent a drug, however, it is unclear whether there is enough and as good left in common for others. The resource country, for example, cannot produce the same drug from the same resources.

A cynic might say that as long as the extraction does not deplete the particular plant resource, there is still enough and as good left for the community members and they can continue utilising the plant for medicinal purposes as they always have. A glaring problem, however, is that should the community later find itself with scientific sophistication, it will have to contend with issued patents. As Gordon (1993:1563–1564) notes:

> *Creators should have property in their original works, only provided that such grant of property does no harm to other persons' equal abilities to create or to draw upon the preexisting cultural matrix and scientific heritage.*

What is left after extraction may be enough, but not as good, a result based on a reliance argument. Once a new drug has been developed, those who used the plant for medicinal purposes cannot be confined to their original resource. Gordon (1993:1570) points out that they should be equally entitled to the new invention:

> *Intellectual products, once they are made public in an interdependent world, change that world. To deal with those changes, users may have need of a freedom inconsistent with the first creators' property rights. If they are forbidden to use the creation that was the agent of the change, all they will have to work from will be the now devalued common.*

Developed countries' patenting of drugs derived from traditional knowledge and plant sources imposes a duty on community members in their use of the common, especially if these communities should want to develop the drug themselves. This, then, begs the question of the moral validity of bestowing exclusive property rights in the labourer (the pharmaceutical company) at the expense of devaluing the common. As Gordon (1993:1560–1561) argues, where there is a conflict

between bequeathing property rights to the labourer and causing harm to the commons, Locke dictates that the common should prevail.

The global pharmaceutical industry is estimated to have made billions of dollars in annual revenues partly due to "the illegal seizure of traditionally used medicinal plants and the uncompensated taking of the associated knowledge regarding their preparation for specific ailments" in what has come to be known as "the green gold" of multinational business (Bastida-Muñoz & Patrick, 2006:260, 273–274). These authors point out that IP rights resulting from this green gold come at a cost, including:

- Destruction of biodiversity, communal rights, innovations, and traditional ways of life
- Usurpation of indigenous knowledge
- A new technological protectionism logic
- Denied access to indigenous medical knowledge

This cost appears high enough to warrant a re-examination of the underlying ethics.

Conclusion

The Convention on Biological Diversity was formulated to facilitate the fair and equitable sharing of research results arising from the utilisation of genetic resources. This sharing is supposed to be on "mutually agreed terms" (CBD, Article 15). Developing countries, however, and African countries in particular, are hardly in a position to negotiate on such sharing, and the mutual agreement is for the most part an illusion, especially since the concept of informed consent is equally empty. With respect to obligations imposed by TRIPS, for example, these countries have neither the fiscal nor the institutional assets to take any advantage of TRIPS there may be (Gathii, 2001:765), especially its Article 27.3(b) *sui generis* provision.

It is interesting, however, to see flashes of conscience from some of the pharmaceutical companies, with some giving drugs free or at reduced cost to some developing countries, or allowing the production of generics while the patent is still in force. This social conscience, however, invariably runs against the companies' fiscal obligations to their investors. The question starkly becomes: What is the optimal point between maximum profit and unnecessary deaths?

Strengthening IP protection in Africa will, while arguably benefiting some sectors in the modern economy, nevertheless result in net harm for the majority of the communities in those countries. It is imperative that this realisation should be factored into any IP regime's adjusting discussions, including TRIPS-like negotiations.

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