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Of War and Peace

Analyzing the Policy Discourse on Intellectual Property

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Abstract

This study analyzes underlying themes of the international policy discourse on Intellectual Property (IP) and in this sense raises awareness on common pitfalls currently associated with international policy making in the area of innovation. Methodologically it is situated within the domain of discourse analysis, which considers policy making as strongly embedded by a specific representative order that paves the way for framing policies in one specific way, while systematically silencing alternative positions. The baseline of the analysis forms a literature review of approximately five hundred texts that were identified through random key word search, including academic journal articles, newspaper articles, statements from international organizations and national administrations as well as statements on ‘you tube’. We found that the current policy discourse on IP is driven by two different camps. On one side are those who associate IP with the negative side effects of Globalization and see in IP a mechanism to erode important social and cultural values. On the other side, those wanting to advance the IP agenda hardly address how IP may promote equitable innovation, but instead repeatedly refer to counterfeiting and piracy as a major threat to industry. Overall the discourse derives much vocabulary from the domain of war, fights and battlefields. We did not find any solution driven approaches seeking to explore how IP may be used as a means to advance the knowledge economy worldwide or bridge current divides prevailing in international systems of innovation.

Introduction

Intellectual Property (IP) is at the same time an intangible asset and a political scapegoat. The TRIPS agreement and subsequent amendments to the treaty have turned a previously perceived “technical non-issue” into a concept that generates controversial debates. Primarily understood as

a legal concept, it appears as a negatively connotated word in the international discourse on globalization, innovation and developing country challenges.⁽¹⁾

Within the current Globalization discourse, the role and tools appear clearly defined and IP is positioned as yet another tool to protect the wealth of those who have from those who don't. Increasingly, the concept of IP is interwoven with much broader issues of global concern and more and more positioned as a means to help multinational companies build up monopolies to the detriment of the poor, patients in need or the preservation of our climate. (Marlin-Bennett, 1995) IP is furthermore perceived to drive small and medium-sized enterprises (SMEs) and local business in developing countries out of business and increase prices for consumer products, be they pharmaceuticals or software and increasingly so, means of "green" energy creation. (The Economist, 2001)

The opportunity of examining IP as a tool to advance the knowledge economy, or as an unlimited resource available to leverage indigenous knowledge resources worldwide or build new bridges for a common environmentally friendly technology scheme are systematically missed because of the structure of the discourse. The damage is worsened by the reality that proponents in favor of the IP system, such as patent offices or industry associations, do not address the issues and concerns of the Globalization movement. Instead, the ever reiterating call for "strong IP rights", the "fight against counterfeiting", "the punishment of pirates" polarizes the debate even further and increases the gap between those who fear the loss of fundamental social, human and environmental rights and those wanting to advance the IP agenda. The concerns of civil society that IP prevents the maintenance of global public goods are clearly not met by this type of language and unsurprisingly culminate in civil society's call for a fundamental shift of the global IP regime and significant changes of current IP governance structures.

Intellectual Property and Globalization: Sketching the discursive field

Innovation, along with trade, capital flows and the activities of multinational enterprises (MNEs), is widely recognized as a force driving 'globalization', a phenomenon often described as 'Globalization' or less polemically described as international economic integration. Firms moved increasingly away from a Fordist production model with reliance on economies of scale and towards a flexible model of networks or clusters that come together in various ways and for varying lengths of time to focus on a particular market niche. Such clusters may exist across geographical areas, or firms may collaborate virtually, as in an ICT driven environment. Often, established firms and start-ups or young firms are partners in this process. New firms may be created as spin-offs from established large firms or be linked to research institutions /universities. The proliferation of international business networks and their increasing importance to the

1 This paper draws upon a draft literature review, entitled 'Perceptions of Intellectual Property. A Literature Review' that was prepared for the Intellectual Property Institute, London in 2008. A selected inventory of the texts reviewed for this article is annexed to this preliminary draft review. My particular thanks to my research assistant Janine Kischl, who provided excellent support in creating an inventory of current texts related to intellectual property. Further thanks for most helpful comments, ideas and suggestions to Ian Harvey, Jeremy Philips and Paul Leonard of the IPI, Kevin Rivette from the USPTO, as well as to the UKIPO, Caroline Kamerbeek of Philipps IP & Standards, Oswald Schroeder of the EPO and Shamnad Basheer, who runs the blog Spicy IP.

international economy mean that the management and development of such clusters of enterprises are critical to promote growth.

Innovation policy and institutional support to leverage innovation have been lacking at both international and regional levels, and the existing Intellectual Property system often appeared insufficient to provide an adequate regulatory framework for innovation based multi-national production and distribution. Intellectual property rights are by nature territorial rights and therefore offered insufficient protection to do business across countries. The legal architecture that had evolved over centuries in Europe and North America to protect and possibly also promote innovation was slow to adapt to the new economic environment. The systematic use of ICT and new means of transportation meant less physical obstacles were in the way to leverage low labour, production costs and other forms of arbitrage at the international level. The physical infrastructure of doing international business was more or less established and gave space and time a new meaning. Trade related innovation may have become global, but was still forced to operate within a regulatory framework designed primarily for national or at most regional business activities. IP was still strongly rooted at the national level.

The TRIPS Agreement in many ways overcame the gap between the territorial limitation of intellectual property and the internationalization of business operation. Yet in doing so, it transferred many of the challenges and shortcomings of the overall WTO architecture for international trade to intellectual property. While TRIPS resolved from a legal point of view some crucial questions associated with enforcement and prosecution outside a firm's home country, it did not address important non-legal questions. Therefore, while it provided a more appropriate infrastructure for cross border innovation, it opened up a whole new universe of unresolved questions associated with sustainable development and the equitable distribution of global innovation. A borderless world became a reality for some; however the majority of the world's population experienced further fragmentation and marginalization; the regulatory context provided for innovation through the TRIPS agreement formed no exception to that.

(Hirst/Thompson, 1996; Friedman 1998) The maintenance in the global innovation gap may perhaps be understood in light of the discrepancy between international economic diplomacy and international economic theory. Trade diplomacy never aimed for a perfectly integrated global economy, but for some sort of mercantilist reinterpretation of a free trade paradigm. Intellectual property-related trade diplomacy formed no exception. While international economic theory assumes a perfectly integrated global economy in which transaction costs are strongly reduced, current regulatory settings provide for a free-ER trade compromise rather than free trade.

Clearly, larger markets liberated from entry barriers against foreigners have offered new business opportunities and forced incumbents to reconsider their position. The positive, dynamic effects of economies of scale and scope, the increase in product and service efficiency and competition are telling. However, there is an inherent dilemma in a half realized open-economy paradigm: growth rates are unequally distributed and income disparities, both within and between societies, tend to be widened rather than resolved.

Assessing the dynamics of the Uruguay round negotiations leading to the creation of the TRIPS agreement illuminates the built-in asymmetries of this new international framework for innovation. Developing countries very likely signed away their rights for a handful of concessions related to textiles and agriculture, while very likely not grasping the impacts of the treaty on global innovation. Although the treaty ordered global innovation in a specific way; the power of IP was implicit not explicit, since many countries had yet to realize the decisive factor

intellectual property plays in building and advancing knowledge based economies. (Stiglitz, 2004) Or, as Ryan puts it, “when the U.S. trade representatives suggested to put intellectual property on the trade agenda, very few grasped what the U.S. was in fact aiming for.”(Ryan, 1998)

The dynamics provoked by the further internationalization of intellectual property not only boosted certain economies, but also exacerbated ongoing processes of marginalization. Cross-border innovation thus produced integration and disintegration, interconnection and exclusion, growth and stagnation. Paradoxically, this dynamic hampers the innovation process itself, which is nourished by a diversity of ideas and perspectives from people all over the world. The TRIPS agreement put a further distance between the center and the periphery. Unsurprisingly given these consequences, the concept of intellectual property gained a previously unknown claim to fame. Diverse groups ranging from feminists to churches to environmentalists protested against intellectual property and labeled it as a major threat to humanity. In a word, the concept of intellectual property was “globalized,” not only in the sense that it provided a more solid legal basis for international business, but also in the sense that it became a core target of the Globalization movement, which associated IP with global capitalism and a threat to decent living conditions worldwide.

Intellectual Property or Intellectual Property Rights?

The mainstream argument in favor of intellectual property is that it provides an incentive for innovation. The TRIPS agreement defines intellectual property rights as negative rights, as rights “to exclude”, allowing thus the owner to prevent third parties from “from making, selling or importing articles bearing or embodying copies …, provided that such acts are undertaken for commercial purposes.” (Trips Article 26.2 and 26.3)

The rationale for proprietary innovation is that publicly available innovation satisfies the criteria of non-excludability and non-rivalry in consumption, key features of public goods. Public goods may thus cause a market failure, meaning that the market does not provide socially optimal amounts of the good because market participants do not have sufficient incentives to produce the good. For the purpose of this article we call this approach towards proprietary knowledge the “intellectual property rights” paradigm, which, as we shall further illustrate, provides a reductionist view on the wide range of opportunities provided by “intellectual property” or intellectual property “assets;” understood as proprietary knowledge or property rights in an abstract object. (Mouritsen & Thrane, 2006)

Common wisdom further argues that intellectual property rewards the individual inventor/creator – but in many cases this is just not true. Take patents as an example: If anything, patents reward patent offices and patent attorneys. Patents are costly to the inventor and they provide no guarantee for the product’s success in the market. Also, the “inventor” is in most cases a company. The romantic image of the individual inventor experimenting in his/her laboratory and eventually developing a new technology is misleading and does not reflect the cumulative nature of innovation processes. Rather, patents like other forms of intellectual property provide an entry ticket to the market based economy. Intellectual property allows the creation of surplus value. They allow the selling, buying, trading or licensing of knowledge, made explicit and codified

through the legal system. This is the fundamental and at the same time most contested function of the intellectual property system.

Intellectual property makes knowledge economically functional and managerially controllable. Viewed as property over immaterial assets, it allows market participants to associate innovation with entrepreneurship. Because IP allows tacit knowledge to be made explicit and be parceled into limited bits and pieces of clearly decoded knowledge, IP can resolve issues related to appropriability in the sense of Teece (1987) of a firm's innovation capacity. Eventually, intellectual property allows the inventor to hedge against risk and provides an opportunity to turn a new idea or invention into an innovation and engage in some sort of commercial interaction. While we do not want to delve further into the history of thought on entrepreneurship and innovation, nor into the comprehensive question on how entrepreneurship and innovation promote growth, we would like to stress the point that intellectual property provides only an opportunity for innovation based business, but by no means does it in and by itself guarantee entrepreneurial success. Current research does not clearly indicate the extent to which the existence of intellectual property, which may be owned by a number of different players, may even *hamper* innovation, as addressed in the open source community. The issue of patents on research tools, for example, or of patent thickets, patent pools and patents essential to technical standards are dimensions that need to be studied in greater depth. In addition, research is needed into the emerging, more comprehensive understanding of IP as the currency of the knowledge based economy, rather than as a mere defensive right.

With Rivette & Kline (2000) we argue that research into a pro-active, value driven attitude towards IP has so far been limited in scope, perhaps because the non-legal literature dealing with IP can draw upon more than a decade of academic work in the field. Hanl (2006) reports that the number of publications dealing with patents indexed in ECONLIT rose to (only) 251 between 1999 to 2002, compared to 39 between 1981 and 1984. We argue that the wide range of strategies available to manage intellectual property at the level of the individual firm offers some parallels for the governance of intellectual property at the international level. While compulsory licensing is clearly a legitimate means to assure global equity, particularly health equity, it is only one means to assure the public interest. A more differentiated understanding of IP and its role in global innovation processes gives way to a whole range of policy measures, treating IP not as a final product, but as an element in an evolving innovation process. To what extent one or more IP items, jointly or severally, successfully contribute to maintain or enhance global equity depends on the context in which the IP is used, the supplementary assets (including human resources) to which the IP is related to, and its fit to other overarching strategic goals set by a certain policy. A new paradigm for intellectual property, an understanding of intellectual property as an "enabling mechanism", an "offensive right" rather than a mere prohibitive legal mechanism gives way to new questions on the role of IP in current globalization dynamics. These approaches are however not reflected in the current discourse on IP and Globalization, meaning that a reductionist and simplified understanding of intellectual property through a mere legal lens ("the intellectual property rights" paradigm) translates into a very narrow understanding of public policy choices available to manage intellectual property in the public interest.

Theory of Discourse

The current discourse on IP and Globalization, and in particular the systematic reference to IP as IP rights rather than as IP opportunities is a good illustration of how power dynamics determine the direction of a discourse. A discourse, which represents social reality in a certain way, offers specific perspectives on a given subject, while systematically silencing other attributes or features of a given subject matter. Once a certain perspective is widely recognized and woven into the overarching discursive parameters of its time, it is hard to break with established social constructions. Foucault points out that the discourse of Mendel was correct from a scientific point of view, yet it did not fit the prevailing parameters of 19th century genetics:

“Le discours de Mendel était juste, mais il n’était pas dans le vrai du discours contemporain.” (Foucault, 1971) (The discourse of Mendel was correct, but it was not in the « truth » of the discourse of his time)

Foucault’s differentiation between “juste” in the sense of scientifically correct and “vrai” – “right”, a term that sketches out the overarching socially accepted truth, is the best conceptualization one can think of to describe the underlying tensions between a notion of IP as a form of an intangible asset and IP as a legally constructed defensive right. In a way it is ironic that the very concept designed to foster innovation does not escape the preserving and conservative approaches of established discursive patterns towards innovation.

Discourse analysis allows reflection on social systems, on commonly accepted “truths”, the “vrai” in the sense of Foucault, and unmasking of what seem at first sight to be objective facts as socially constructed realities. The notion of a “socially represented reality” replaces the belief of an objective reality that exists independently from language, which can be seen as the collective work of a given community or society. (Lafont, 1992) Discourse analysis argues that the object/subject dualism is nonexistent. It challenges the notion of an empirically verifiable reality or truth and instead assumes a linguistically constructed representation that serves to legitimize existing practices and cements the status quo. (Mueller, 2006) A helpful notion to differentiate between the inherent reality of the world of objects and the social world is provided by Bakshar. (1986) It is not questioned that some sort of “natural reality” exists of which society has no or limited or mistaken knowledge of. However, this reality must not be confused with society’s knowledge of reality. The ‘real’ is different from the ‘empirical.’ The ‘empirical’ does not in any simple way mirror the “real”, but represents it in a very specific way, deciphered by Foucault as the “order of the discourse.” The “objective world” can exist independently of society’s reflection on it. However, if it is to be part of society’s overall effort to grasp meaning of the world that surrounds it, it is bound to undergo the process of linguistic representation, resulting in a specific social creation and conceptualization of the objective world. (Fairclough, 2005; Bakshar, 1986)

A discourse is not simply a reaction on a specific situation, does not simply express a given context, a discourse allows the categorization of the social world and in this sense determines what is allowed and what is not. A discourse provides categories of orders, which help to establish and maintain the coherency necessary for maintaining political power. A discourse can

only be recognized as “right” if previous discursive work has resulted in a primary authorization to do so. International policy making may be considered successful (from the point of view of a specific actor) if the existence of the one, the only, the legitimate and right discourse has as consequence the alienation of an opposing discursive arrangement. In practice, these strategies often make other positions look ridiculous, censor them or redefine them through subsequent social discursive work so that in the end they fit the established order, sanctioned by power. The result of the “discursive work” is to present the sanctioned discursive system as a coherent and legitimate system of absolute, discursive truth.

Thus, the existence of a discourse describes the regularity of a social existence, primarily maintained through the very discursive arrangement itself. A discourse as a social practice is therefore not just another practice among various social practices. It is a fundamental formation of social existence. By entering into interaction, humans constitute contexts and realities which change over time and adept to new social realities. However, discourse changes over time; i.e. witch burning is nowadays considered unethical, so is colonialism or slavery, yet in the context of their times, these practices were considered legal and sanctioned by the discourse setting authorities of their times. The modification of discursive practice may therefore be compared to a hermeneutical spiral. Power, according to Foucault, is an overarching principle of various discursive arrangements. Yet, it is irrelevant to ask who has power and who does not, rather, power is created and maintained through a complex system and the interplay of various discourses. In this sense, power is not a tangible object, but is the structural relationship that exists between various discursive orders. By imposing an ‘order’, the discourse classifies, judges, explains and limits social behavior. Discourse provides the architecture and framework through which the world can be understood. The repetition of specific discursive arrangements through the most various discursive practices characterizes the typology of a specific discursive field. Thus, even if a discursive order is realized in the most various ways, all of these discourses remain an expression of the one, specific ultimate discourse. Discourse is never free from a specific set of values. The discourse creates the basic condition to control a given set of values and offers various means to structure human perception and in this way introduces a specific set of ethical considerations and guidelines. (Foucault, 1966; 1969, Bourdieu 1982)

In any given societal context any given object is processed through the prevailing discourse order of its time. Discourse analysis seeks to go the opposite way and make the underlying meta narratives visible, so to expose differences beneath the discourse and illustrate that objectively presented truths (“*the vrai*”) are in fact manufactured artifacts. (Mueller, 2006)

Collective meaning, the joint understanding of a given object in a societal context, is primarily created, maintained and guarded through language. Societal interaction can not exist independently from language. Language is the primary means to create a specific meaning, a certain connotation associated with a given object. The production of sense, the choice of what makes sense and what does not, can be seen as a constant linguistic puzzle. “Meaning” is never definitive, but the product of an assembly of various narratives interwoven and arranged in a specific manner. What makes sense and what does not is the result of a certain social practice, rather than a reflection of any intrinsic truth deriving from the object itself. (Halliday, 1994) In its most radical sense, discourse analysis argues that there is no pre-defined objective reality, not

an object + language, but that any object that takes some sort of meaning within society can not escape the linguistic practice. It is bound to language, created through language and can not move out of the linguistic domain if it is to form a societal element. Single efforts to produce sense outside the social order are forced to fail already for the mere reason of a lack of understanding with other members of society. The individual remains socially reproduced, which in many ways collapses the distinction between the individual and the society s/he lives in. (Fairclough, 2005 & Chiapello & Fairclough 2002) The production of sense has to be a collective undertaking and the freedom of the individual speaker is significantly reduced by the need for being able to communicate with others and be understood by others. The discourse censors individual freedom through isolation.

Discourse analysis shows certain parallels to political process theory (McFarland, 2004), which conceptualizes organizational change as the outcome of conflict between competing groups, interests or value systems, yet differs from more technical theories of change in that more existential notions of what constitutes a social reality and how this reality is determined by power relationships are a core element of analysis. (Hellstrom, 2004.). Because of the strong emphasis on language, discourse analysis also reflects certain elements of actor-network theory (Law, 1994), which argues that communication is the substance of organizing in the sense that through discursive practices, members of an organization construct a complex and diverse system of meanings (Mumby & Stohl 1996) If one analyzes the creation of a specific discursive arrangement and order, one takes the opposite view: first one can separate the representative arrangement from the object and then find in the various discourses of the current international system not the uniqueness of their character, but a systematic expression of an overarching discursive reality established at the international level and aimed to maintain that specific arrangement. Within the current discourse on Intellectual Property this discursive order is that of Globalization.

Assessing the Current IP Discourse

To understand what these overarching paradigms of the global IP discourse were, a wide text corpus was created by reviewing relevant databases (such as Lexis Nexis, Wall Street Journal etc), online databases of academic journals (such as Sage Journals Online, Science Direct etc) as well as websites of a set of institutions involved with IP (such as WHO, WIPO, Doctors without borders etc.), NGOs, policy makers and national patent offices. Additional texts were identified through random key word searches, such as “patents & compulsory licensing” or “technology transfer”.² Subsequently, we created an inventory of relevant texts and ordered them according to

2 The review was conducted in the following working steps:

The text corpus was created by reviewing relevant databases, such as LexisNexis, Business and Industry Database, Business and Industry Report, Wall Street Journal, Business Source Premier, EconLit, CompuStat, GallupBrain, Global Market Information Database, Mintel Reports, Market Research Academic.

A keyword search included the following terms: patent & compulsory licensing, globalization, IP assets, IP and access to health, technology transfer, strong IP rights, IP litigation, IP—China, Russia, counterfeiting, innovation, have and have nots, winners and losers, TRIPS.

An author search specifically evaluated the work of authors such as James Love, Oxfam, Stiglitz, WHO, WIPO, IFPMA, Médecins sans Frontières, IIPI, IPI, Trilateral Offices or METI Japan.

recurrent themes that seemed to systematically emerge in various publicly available documents. We were not intending to create any word statistics, but chose a qualitative approach, as typical for discourse analysis, looking to identify overarching patterns, recurring themes, underlying assumptions and inherent presumptions that can be found in a text corpus. Thus, this paper may by no means be read as a return to a “dégré zéro de l‘écriture” (a zero degree of writing) in the sense of Roland Barthes (1953), a decontextualized paper, freed from any underlying myths and social context, but probably a contribution to yet another set of social constructions, which, however have by far not yet gained the same level of widespread recognition as those currently prevailing the discourse.

The Forgotten IP dimension

When looking at the “said” as well as at the “unsaid”, the explicit as well as the implicit, silent notions with which IP remains associated within the international discourse on Globalization, it is striking to note that the term “intellectual property” remains primarily associated with “patents”. Other forms of intellectual property, such as trademarks, design rights, copyrights, trade secrets or protection against unfair competition are systematically eclipsed from the discourse. The overarching emphasis on patents occurs at the detriment of the examination of other forms of proprietary knowledge. By consequence, questions asking how collective trademarks for example can be conducive towards rural development in emerging economies are systematically eliminated. (Ghafel, 2008) IP remains furthermore associated with science and technology. Other forms of innovation, such as design or brand innovation are usually not addressed when exploring the role IP plays in current globalization dynamics.

Most people don't really know what IP is

The silence surrounding IP is further reinforced by a general lack of awareness on IP. Surveys conducted by Gallup Group as well as by Olswang Group found that average citizens would not know how to define intellectual property or would at best associate it as “something arrogant.”(Gallup, 2005, Stewart, 2007, Olswang Group, 2007)³ A survey conducted by the U.K.IPO found that 86% of SMEs in the U.K. could not answer to the most basic questions related to IP ownership (UKIPO, 2006). When it comes to counterfeiting and piracy, consumers on average do not associate it with theft or crime. (You Gov, 2006; Mori Social Research Institute, 2007) To the contrary, buying a fake handbag, particularly when abroad, is not seen as a major wrong. The same sample of interviewees indicated however that they would consider

The review of relevant academic publications included the Berkeley electronic press, Cambridge electronic press, Oxford University Press, Science Direct, Scirus, Proquest Direct, Wiley, Chicago University Press, Emerald, Springer, Sage Journals Online,

Furthermore relevant websites of a set of institutions, policymakers, corporations, business and consumer associations were reviewed so to identify themes associated with the term IP. Subsequently the collected material was analyzed and it was sought to understand the presentation, documentation, analysis and interpretations of the various themes, perceptions, views and connotations related to IP.

3 Based on 65,000 interviews in 51 countries conducted over a period of 18 months, Gallup found that one fourth of consumers purchase counterfeit goods. These goods may be branded apparel, bags, footwear, music or movies. In another survey, conducted in the US among 1,300 adults in 2005, Gallup found that 13% of Americans bought or sold counterfeit products, but only 7% did so knowingly. In the same survey Gallup found that 60% are not familiar with the term ‘IPR.’ Olswang Group found that consumers are confused about the legality downloading and are scarcely concerned about getting caught. Only 34% of interviewees of this study believe it is wrong.

other forms of theft, i.e. stealing a car, a crime. (PWC, 2007)⁴ Participants of various consumer surveys even found that consumers do not feel comfortable with the thought of having ‘pirates’ punished. (Mori Social Research Institute, 2007) The true power of IP remains thus largely ignored, with only a very few aware of the potential of IP.

IP acts as a gatekeeper

Another theme that emerges in the current discourse on IP and Globalization is the strict separation between “insiders” and “outsiders.” (European Patent Forum, 2007) “Insiders” to the system are primarily situated within developed countries. (Su, 2000) “Outsiders” seem to have no choice other than to aspire for innovation through the transfer of technology. (Matthews, 2006) This line of argument seems very much derived from the mainstream international trade discourse, which argues that developing countries may aspire for technology transfer in exchange for a stronger enforcement of intellectual property. (Marshall, 1997) A significant part of academic literature has examined intellectual property within the context of foreign direct investment and an open market paradigm. (Yeates, 2002) While findings on the de facto impact of “stronger” IP regimes on increased trade and FDI provide various policy implications, it is striking that none of the authors looks at IP and asks to which extent IP has the potential to promote indigenous innovation in developing countries. (Javorcik, 2004; Lee & Mansfield, 1996, Maskus, 1998; Maskus & Penurbato, 1995; Braga & Fink, 1998) This almost appears patronizing since this line of thought relies on some sort of inherent assumption that developing countries do not dispose of the necessary resources to leverage their own knowledge capacities.

IP, yet another threat to humanity

Within the current discourse on Globalization, IP is used along the same lines as other concepts generally perceived as a threat to human welfare. (Lu, 2001): Downsizing jobs, outsourcing production to low income countries, the exploitation of the poor and their resources, increased pressure on labor markets in Europe and North America, the privatization of health care, the erosion of the social safety net, all of these concepts can be found to be intertwined with the term ‘intellectual property.’ Says Rikowski (2003): “TRIPs is not part of trade, but instead is primarily designed to help big business, as it engenders and encourages a protectionist environment through IP for the benefit of large corporations.” Beyond criticism of TRIPS, it is extremely difficult to find specific critiques of issues in intellectual property law. Within the context of Globalization IP is rather associated with a whole range of global ‘evils’, which at first sight do not have anything to do with the IP system as such. Within this discourse IP has no social function except to preserve the wealth of those who have from those who don’t:

“IP is a strategy that defends capitalists, who with the words of Marx, can no longer pretend that they are serving a social function... it allows modern capitalism to revert to a winner take all arrangement.” (Perlman, 2003)

IP is considered as yet another example of gender discrimination, neo colonialism or the erosion of Christian beliefs, to name a few: “IP is an example of how the poor are being exploited by big

⁴ Total sample size was 2,238 adults in the UK in 2007. Figures are weighted and are representative of all UK adults.

corporations". (Lu, 2001) Articles entitled "playing catch up" or discussing the impact of the IP system on developing countries from the perspective of colonialism, may be well intentioned, yet they implicitly prevent developing countries from taking ownership of the IP system and leverage it for the advancement of their national innovation agendas. (Hogge, 2007, Financial Times, 2005, International Herald Tribune, 2005)

While concepts such as gender discrimination, neo colonialism (May, 2004) or religious believers seem at first sight quite distinct and apart from each other, the way IP is addressed in the realm of these issues remains the same: IP is a threat. (The Toronto Star, 2005)

"TRIPs does not adequately reflect the fundamental nature and individuality of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self determination. There are apparent conflicts between the property rights regime embodied in the TRIPs agreement and international human rights law". (UNHCR Resolution Nr. 2000/7)

Authors like Badawi who seek to act as advocates of the poor, name IP along with other global shortcomings such as "commercial exploitation, the monopoly of health commodities, new food hazards and the marketing of tobacco". (Badawi, 2004)

The 'Christian Century' offers a critique typical of religious groups; that the IP system, along with issues, such as global warming, debt relief, trade policies and a lack of corporate governance that all erode Christian values. Gender studies again sees in IP a reflection of hyper masculine values. IP fails to recognize that the technological worlds of men and women differ fundamentally. Gender studies questions the IP system from the overall perspective of female access to education and chances for women to succeed in a male dominated world. Canadian Women Studies for example publishes articles exploring the link between the 'feminization of the third world' and the TRIPS agreement since TRIPS not only puts developing countries in a stereotypical passive female role, but also prevents female farmers in the developing world from feeding their children because the costs for IP protected seeds are too high. (Vandana, 2002; McMahon, 2002)

The Intellectual Property Genocide

The current discourse on IP and Globalization is aggressive and uses vocabulary from the domain of war, battles and fights. IP is positioned as a major means to exercise power against developing countries (Vandana, 2002)

Says for example Karen Coulter: "Other weapons in the globalization armory are agreements on IP. Incorporated in TRIPs, foreign corporations can easily appropriate biodiversity (in developing countries) for their private economic development."(Coulter, 1999)

IP remains a tool to maintain an imbalanced world order, dominated by wealthy countries and corporations. (May, 2004): 'IP allows big corporations to transform the fabric of life into private property... making the third world pay for cumulatively collected knowledge.' (Ostergard, Tubin, Altman, 2001)

The IP system is simply unfair: "fairness calls for fairer rules, which the IP regime does not." (The Toronto Star, 2005)

Again, IP is being merged into overarching critiques against Globalization and within that context manifests not only an ethically questionable way to appropriate intellectual wealth, but also prevents access to knowledge developed by a set of globally well known insider:

“The IP regime serves only the wealthy pharmaceutical companies... Patents are literally robbing AIDS victims of their lives.” (Piciotto, 2003)

“*Patents kill*”

Headlines such as “The profits that kill” or “at the mercy of drug giants” provide in a snapshot the way IP is being discussed in the mainstream literature on IP and public health. (Turner, 2001) “Patents kill”, a statement repeatedly found on T-Shirts of South African activists in their march for a compulsory license and thus for access to medication at low cost, brings the overall dichotomy between IP and public health to the point. (Shulman, 2006) The cartoon in the annex to this document further illustrates the debate. Sharks, vultures and hyenas represent the patent owners. They stand in strong contrast and on the other side of those wanting to advance the public health agenda. Their search for profits is yet again maintained by the patent system. (EPO, 2007) The severe gap established between IP and human welfare prevailing within the overall discourse on IP and Globalization culminates here. (WHO, 2006; World Health Assembly Resolution, 56.27 Correa, 2007) The “war” against “corporate greed” is used along the same lines as the war against terrorism. The IP system is considered an “unnatural act,” illustrating the supremacy of commercial interests in all spheres of life, leaving no scope for the greater public interest.

Within the public health discourse IP is addressed within the context of terms such as “fear” and “threat”: “IP condemns millions of the poor to premature, preventable death and shows a near to complete lack of “corporate social responsibility”. (IPS, 2007) In “The Profits that Kill” Osei Boateng sees in the debate a systematic campaign where the pharmaceutical industry was portrayed as an industry devoid of morality using “the patent system to squeeze low cost copies of branded medicines off the market”. According to Boateng newspapers such as *The Guardian* systematically made news with headlines such as “Millions of lives at risk—drug companies must temper their power. (Boateng, 2001) The ethical dimension of IP is also questioned in a series of papers asking whether it is acceptable to “view medicine as luxury”. (Goozner, 2002) Perhaps for reasons like these the European Patent Office saw its entry closed with masonry by Greenpeace in 1998, a search to protest against the patenting of the ‘oncomouse’, which triggered, yet another forceful, passionate and aggressive debate on the role of patents in biotechnology. (<http://www.boa-muenchen.org/boa-kuenstlerkooperative/diver17i.htm>)

“*Fight the Pirates*”

While the discourse on the social and ethical impact of IP is mainly driven by NGOs, consumer associations, human rights activists, as well as religious associations and feminists, the discourse on counterfeiting and piracy is primarily associated with business associations, patent offices, as well as academics wanting to be closely associated to business interests. At first sight it seems that the discourse on counterfeiting and piracy forms the anti thesis to the discourse on the social dimension of IP, yet it remains associated to the same discursive formation. Like the apparently

opposing discourse it borrows from the domain of war, fights, battles and weapons. (Chalker, 2007) The photograph annexed to this article (Annex, photo taken from the EPO, 2007) offers yet another illustration of how IP is being policed. Armed soldiers protect the interest of IP owners, the crowd, mainly poor people in some developing country watches with interest. It may be questioned to which extent operations like these help to foster an understanding of IP as an enabling tool for development.

In their global war against counterfeiters and prosecution of pirates traditionally ‘pro’ IP institutions have systematically missed out on addressing those issues raised by critiques of the IP system. It almost seems as if they existed in two parallel worlds bound by overarching order of war.

Those aiming to ‘fight piracy’ for the sake of the preservation of the ‘health’ of the economy, naturally consider counterfeiting a serious ‘threat;’ (CISCO, 2007) resulting in loss of jobs as well as revenues. Only if the ‘economic war’ against pirates can be won is there a chance to win this **war**. (The World Industry Overview, 2007; Capitol Hill Hearing Testimony, 2007; Federal Document Clearing House Congressional Testimony, 2004; Choate, 2005) Within that context TRIPS is repeatedly mentioned as an important tool to foster a ‘robust’ IP infrastructure, based on ‘strong’ intellectual property ‘rights’ (as compared to soft intellectual property?). To assure TRIPS compliance, certain countries have nominated enforcement agents all over the developing world. (China Morning Post, 2005; Stimson, 2006) Within this discourse IP is also being systematically linked to terrorism. (States News Service, 2006)

The discourse on IP and counterfeiting relies strongly on the intellectual property rights paradigm. It is repeatedly stressed that IP is to be protected and infringers are to be brought to court. The policing of intellectual property needs to position counterfeiting as a crime, so to assure the legitimacy of its doing. (Counterfeit Goods Pose Real Threat: Capitol Hill Hearing Testimony, 2007). To counter the risks, new initiatives such as software to detect counterfeits are needed in order to respond to the risks posed by counterfeits. (PR Newswire US, 2006)

The quantification of costs associated with piracy is used as an important element to legitimize the discourse on counterfeiting and piracy. Unsurprisingly, a great variety of business associations have provided a great diversity of estimates (!). Business Software Alliance for example estimates that in the U.S. piracy costs industry US\$ 11 billion in lost revenues and estimates that 35% of all software used worldwide is counterfeit.(Holder: 1998) The International Anti-Counterfeiting Coalition estimates that counterfeiting costs the US economy US\$ 200 million in lost revenues and US\$ 4 million in efforts to combat counterfeit goods. The IDC (International Data Corporation) Economic Impact Study found in 2007 that, if global software piracy was only lowered by 10% over the next four years, this change could contribute to 2.4 million new jobs and US\$ 400 billion in economic growth to the global economy. (Business Software Alliance, 2006) Even higher numbers can be found in the press: “the number of counterfeit items seized at EU borders increased by 1,000% from 10 million in 1998 to over 103 million in 2004” (U.S. Fed News, 2006) and The *Los Angeles Times* even finds that counterfeit goods cost US companies about US\$ 200 billion annually, four times the equivalent figure for a decade ago. 70% of these illegal products are from Asia and most of them are from

China. (Costello, 2007) While these are impressive numbers, they stand in strong contrast to estimates provided by the OECD, which found that counterfeit goods and services cost worldwide US\$ 176 billion annually, which is about 2.4 per cent of world trade in manufacturing. (Dryden, 2007)

Current research does not indicate that counterfeiting and piracy have necessarily negative effects on firm performance and the economy as a whole. It seems that the effects of counterfeiting on an economy are related to the purchasing power parity of consumers. De Castro/Balkin & Stepherd (2008), and also Katz & Saphiro (2001), even go a step further and argue that counterfeiting and piracy may actually benefit firms. Referring to the resource-based view of a firm, Castro et al. argue that reducing the value of one resource (through counterfeiting and piracy) can directly increase the value of another. The inimitability of an entrepreneurial firm's IP does not necessarily diminish performance since piracy can increase the value of this resource by stimulating networks and provoking signaling and standard-setting effects. Conner and Rumelt (1991) have challenged the argument that software piracy harms entrepreneurial firms, arguing that piracy could increase the customer utility of a software program. Using a diffusion modeling approach on a sample of two types of software in the UK Givon et al. (1995) found that six out of seven software users used pirated copies. However, the pirated software generated more than 80% of new software buyers.

Conclusion

The TRIPS Agreement marks the cornerstone of the current discourse on IP. The further internationalization of territorial rights, the further development of a legal infrastructure for innovation at the global level, not only gave way for increased flows of international trade in innovation, but associated at the same time the intellectual property system with Globalization and its perceived negative social side effects. In a way it seems paradoxical that the IP system, which disposes of no features what so ever for a true internationalization of economic activities (no worldwide valid patent or trademark exists, nor is there any appropriate supranational body responsible for the global enforcement of IP) became the focus of Globalization critique. The gap between its pre- and its post- TRIPS perception is best illustrated at the very different awareness the public at large has of WIPO and the WTO. While WIPO, the World Intellectual Property Organization, has as its sole mandate to promote IP at the global level and thus foster proprietary innovation, it is largely unknown beyond expert circles. This may be equated to the pre-TRIPS perception of IP. The WTO to the contrary, which really just administers one single international treaty on IP, has reached a claim to fame previously unheard of in the IP arena. Undoubtedly, had the WTO experienced the same allegations of corruptions as WIPO, those would have figured at the front-page of newspapers and possibly had an interesting twist in the way IP is perceived within the context of Globalization.

What comes as a surprise is the level of aggression of the international discourse on IP. IP is associated with war, fights and battles. In this sense we prove *the Economist* (2002) wrong when it depicts two driving forces behind the current discourse on IP. While *the Economist* (2002) makes the distinction between two camps, one which argues that IP is a cornerstone to promote innovation and another which sees in IP a major means to increase the wealth of multinational

companies at the detriment of the poor. Rather, we observe one big battlefield dominating the discourse. In the global “IP war”, issues such as the relationship of IP towards innovation seem rather remote. Rather, the two camps, the pro-IP group as well as those against IP, are equally seeking to fight their opponents. While the discourse of those in favor of IP is mainly marked on how to “fight the pirates,” in and by itself a strange terminology that enjoys no widely accepted definition, those criticizing the IP system equally wage a war for the preservation of social values. The bridging of global gaps, the discrimination of women, the erosion of Christian values, are concepts that are increasingly used interchangeably and carry one message: Fight IP.

There is no point in trying to determine who is right and who is wrong. Any exercise along these lines would contradict our understanding of social representations of reality. One may however argue that the strong emphasis on “winning and losing” on “combating”, “fighting” and “destroying” is in and by itself an illustration of how much the IP discourse is gendered and makes in this sense no exception to other business discourses. In “Lysistrata” the ancient Greek author Aristophanes (400 b.c.), who throughout his writing argues that wars are to be avoided because they harm an economy, lets the women in his play finish a long lasting war by collectively refusing physical intimacy to men. Perhaps similar drastic measures are needed to finish the ongoing metaphorical war in the context of IP. A language of war is not conducive towards solution driven approaches and clearly prevents to move from a win to win-win solution. Battles and fights only create more casualties. There has been enough metaphorical killing going on in IP. It is time to prove von Clausewitz (1812) wrong; war is not politics by other means. It is time to move from the battle field to the negotiation table and explore in a constructive way how IP may be managed in the public interest.

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