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## Reflections on the IP System: A Development Perspective

By Carlos M. Correa

**The South Centre held a side event during the 50th WIPO General Assemblies on the theme of "Reflections on the IP System: A Development Perspective" on 5 October 2012 at the WIPO headquarters in Geneva. Professor Carlos Correa, Special Advisor on Trade and Intellectual Property of the Centre, was the speaker of the event. Below is a summary of his presentation.**

By Carlos M. Correa

I will focus on three areas during this presentation. Firstly, I am going to talk about the relationship between intellectual property (IP) and innovation, mainly based on the views of economists from developed countries. Secondly, I will discuss some trends in legislation, jurisprudence and policies in developed countries that limit IP protection in some respects. And thirdly, I will refer to law-making in IP.

Let me start with a quote from the Austrian-American economist Fritz Machlup who, in a study for the US Senate made half a century ago, said that "If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one". Machlup was saying basically that for smaller economies - not necessarily economies like the United States of America - it would have been better to abolish the patent system.

### IP and Innovation

Of course, a lot has changed in the world since Machlup produced his report, with increased globalization, new technologies, etc. However, the view that IP does not necessarily have a positive effect on economic development is still predominant among economists. For instance, based on an analysis of historical studies, Bessen and Meurer (2008) concluded that "...nations with patent systems were no more innovative than nations without patent systems. Similarly, nations with longer patent terms were no more innovative than nations with shorter patent terms". In accordance with Boldrin and Levine, "[I]ndeed, historical evidence provides little or no support that innovative monopoly is an effective method of increasing innovation".

On the cost-benefit of patents, Bessen and Meurer also said that "Note that patents *do* provide profits for their owners, so it makes sense for firms to get them. But taking the effect of *other* owners' patents into account, including the risk of litigation, the average public firm outside the chemical and pharmaceutical industries would be better off if patents did not exist." The Nobel Prize laureate Joseph Stiglitz (2007) said "...are the incentives provided by the patent system appropriate...? Sadly, the answer is a resounding "no". Richard Posner (2012), judge of US federal appeals court and Chicago University professor said "In most [industries], the cost of invention is low; or just being first confers a durable competitive advantage...so there's no point to a patent monopoly that will last 20 years... Most industries could get along fine without patent protection".

In addressing the importance of non-IP incentives for innovation, Torrance and Tomlinson (2009) concluded that “[A] growing body of empirical research appears to support the view that patent systems do not necessarily ‘promote the Progress of...useful Arts’”.

Not only economists have this view; it is shared by a growing sector of business actors. For instance, the Computers and Communications Industry Association (CCIA) whose members include Google and Microsoft said that “We do not think it is an accident that innovation has flourished in a society that values an open, competitive economic marketplace, nor where original independent and free speech are enshrined in law... Therefore, our commitment to vigorous competition, freedom of expression, and openness is a natural product of the understanding of what has helped our industry thrive, and what it needs to continue to do so”.

The WHO/CEWG (The Consultative Expert Working Group on Research and Development: Financing and Coordination) also recommended open approaches to research and development (R&D) and innovation. It found that there is insufficient R&D for diseases that prevail in developing countries and endorsed the adoption of a binding convention that guarantees the results of R&D will be public goods i.e. not subject to appropriation but free for use, to generate medicines needed particularly in developing countries. They also recommended prizes as incentives to innovation, in particular milestone prizes.

In summary, there is no conclusive evidence on IP and innovation. IP may promote innovation but it is not a ‘magic tool’. It may also deter it. A large number of factors (such as the R&D infrastructure, the availability of risk capital, the qualification of personnel) can influence the nature and rate of innovation in developing countries. It is crucial, hence, to consider non-IP mechanisms to effectively promote innovation in those countries.

## **Trends in Legislation, Jurisprudence and Policies in Developed Countries**

The last twenty years has shown a trend towards more and more IP protection. IP has expanded and been strengthened. Are there limits to this protectionist trend? I will explore four areas to answer this question: gene patents, inventive step, permanent injunctions and counterfeiting.

Regarding gene patents, when a gene is found to perform a certain function, if an absolute protection is granted, further research can be discouraged. The patent holder will be able to appropriate any possible use, including those he had never discovered. In order to address this problem, France limited the scope of patents to the specific use of the gene. Article L613-2-1 of the French Industrial Property Code, as amended in 2004, says

“The rights created by a patent grant that includes a gene sequence can not be invoked against a later claim on the same sequence if this claim complies itself with the [patentability] requirements... and it discloses another specific application of this sequence.”

Similar limitations to gene patents have been made in other developed countries’ laws such as in Swiss and German laws.

In the case *Association For Molecular Pathology, et al., vs. United States Patent and Trademark Office, et al.*, the plaintiffs challenged patents held by Myriads over genes and diagnostic methods relating to BRCA1 and BRCA2 (breast cancer type 1 and 2 susceptibility protein). The U.S. District Court for the Southern District of New York held that the patents were invalid on the grounds that the isolated genes are not patentable products of nature and that the diagnostic method claims were mere thought processes. The court went even further and stated that claims of ‘isolated’ genes were just “a lawyer’s trick”. The US Department of Justice’s Amicus Curiae indicated that “The chemical structure of native human genes is a product of nature, and it is no less a product of nature when that structure is ‘isolated’ from its natural environment than are cotton fibers that have been separated from cotton seeds or coal that has been extracted from the earth”. (Pollack, 2010)

How much skilled PHOSITA (person having ordinary skill in the art) is, in the US practice? Burk and Lemley (2002) have concluded that “The courts have endowed the PHOSITA with mediocre personality traits; she is conceived of as an entity that adopts conventional approaches to problem solving, and is not inclined to innovate, either via exceptional insight or painstaking labor”. In fact, patents are too easy to obtain on any subject matter, and the low PHOSITA standard is partly to blame. An example of this is the Animal Hat Apparatus and Method. A redefinition of the inventive step standard in favor of the public domain was suggested in the US Supreme Court decision in *KSR v. Teleflex* which indicated that “A person of ordinary

skill is also a person of ordinary creativity, not an automaton". However, a substantial change in the policy of the US Patent and Trademark Office is not apparent so far.

Regarding permanent injunctions, an interesting case is *eBAY Inc. v. MercExchange, L.L.C.* MercExchange had sought a permanent injunction to prevent eBAY from continuing use of patented subject matter. Despite the fact that it was found that eBAY had infringed the patent rights, the District Court denied the request. The United States Court of Appeals for the Federal Circuit reversed this. The US Supreme Court then overturned the Federal Circuit's approval of the injunction. It indicated that "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts."

In *Amado v. Microsoft* (February 26, 2008), Carlos Amado had sued Microsoft for patent infringement of U.S. Patent 5,293,615 – a "point and shoot interface for linking database records to spreadsheets". Microsoft requested the Federal Court of California a compulsory license which was granted against a royalty of US\$ 0.12 per copy; Amado had requested US\$ 2 per copy.

These examples show the use of flexibilities in the implementation of the patent system in the United States, which illustrate well the policy space available under the TRIPS Agreement, and the significant use of legislation and case law in such circumstances.

Developed countries are actively pursuing a crackdown on counterfeiting and piracy, focusing on its allegedly negative effects. If broadly understood, this may also affect the commercialization of legitimate products, such as in the case of the Anti-counterfeiting Act that Kenya was induced to adopt. The Anti-counterfeiting Trade Agreement (ACTA) is another example of a broad approach. It is often argued (based on an OECD estimate) that annual losses due to counterfeiting and piracy amount to around \$200 billion. However, more nuanced views than the unqualified anti-counterfeiting approach, generally articulated by developed countries and their business associations, can be found in a study published by the US Government Accountability Office (*INTELLECTUAL PROPERTY: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, April 2010). The study concludes that current estimates of losses due to counterfeiting are not reliable, and considers both the negative and positive effects of counterfeiting. It found, for instance, that there are potential positive effects of counterfeiting and piracy:

- Some consumers may knowingly purchase a counterfeit or pirated product because it is less expensive than the genuine good or because the genuine good is unavailable, and they may experience positive effects from such purchases. For example, consumers in the United States and other countries purchase counterfeit copies of high-priced luxury-branded fashion goods at low prices, although the products' packaging and sales venues make it apparent they are not genuine. Consumers may purchase movies that have yet to be released in theaters and are unavailable in legitimate form.
- Lower-priced counterfeit goods may exert competitive pressure to lower prices for legitimate goods, which may benefit consumers.
- ...companies that experience revenue losses in one line of business—such as movies—may also increase revenues in related or complementary businesses due to increased brand awareness. For instance, companies may experience increased revenues due to the sales of merchandise that are based on movie characters whose popularity is enhanced by sales of pirated movies.
- ....consumers may use pirated goods to "sample" music, movies, software, or electronic games before purchasing legitimate copies, which may lead to increased sales of legitimate goods. In addition, industries with products that are characterized by large "switching costs," may also benefit from piracy due to lock-in effects.

This analysis confirms that the right balance regarding this issue should be found in implementing national policies.

Another example of a more critical view of intellectual property than that generally articulated by developed country representatives is provided by a study undertaken by Professor Hargreaves at the request of the UK Prime Minister. The Hargreaves Report (2010) found, inter alia, that:

- Copyright, once the exclusive concern of authors and their publishers, is today preventing medical researchers studying data and text in pursuit of new treatments. Copying has become basic to numerous industrial processes, as well as to a burgeoning service economy based upon the

internet. The UK cannot afford to let a legal framework designed around artists impede vigorous participation in these emerging business sectors.

- Government should firmly resist over-regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level...The Government should also legislate to ensure that these and other copyright exceptions are protected from override by contract.
- Government should ensure that development of the IP System is driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights.

Some of these recommendations are in tune with the positions held by developing countries in dealing with the WIPO Development Agenda and in other exercises and fora.

In view of some of the case law and reports mentioned above, it is pertinent to question whether the positions in international fora of some developed countries are consistent with changes in internal policies and perceptions on IP. Flexibilities on IP should not only be implemented at the national level, but preserved and developed at the international level, such as in normative activities in WIPO.

## **Law-making in IP**

ACTA, a plurilateral agreement negotiated in a secretive manner, has been developed to set a standard to be followed not only by its contracting parties but by other countries. ACTA is functional to the interest of big companies, but overlooked the interests of small and medium enterprises and the general public. Despite the efforts of the small club of countries who are the proponents of ACTA, it did not turn out to be a successful story. There was strong resistance to it in civil societies. For instance, during the Valentine's Weekend in 2012, there were mass protests all across cities in Europe. In Poland, the prime minister suspended the ratification process of ACTA after widespread protests and attacks on government websites. In the Polish Parliament, several members disguised as 'Anonymous' as a sign of protest. The European Parliament voted by 478 to 39 to reject ACTA on 4 July 2012. It is a question now whether this initiative is still alive.

There were also important protests regarding the Stop Online Piracy Act (SOPA) and Protect Intellectual Property Act (PIPA), two bills submitted to the US Congress that would give authority to the U.S. government to block access to foreign websites on the grounds of copyright infringement. In one single day, on 18 January 2012, 10 million petitions against those bills were signed through different sites, 8 million calls were made to US Congressmen, 4 million mails were sent to the Congress and 115 thousand sites participated in a blackout, including Google, Yahoo and Wikipedia. On the same day thousands of people mobilized against these Bills in different cities of the United States. In the US Congress, the number of those in favour of SOPA dramatically decreased and those against dramatically increased after these protests. The number of Senators who publicly opposed PIPA went from only one Senator on 16 November 2011, to 32 on January 18. The bills were not passed.

These examples show the potential direct influence that civil society may have in IP law-making. With the widespread use of Internet and social networks, civil society can play an important role in shaping or opposing new IP initiatives. This may help consumers and users of technology to be heard, and developing countries' interests and concerns to be taken into account, ultimately leading to more balance in IP rules nationally and internationally.

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