

INTELLECTUAL PROPERTY RIGHTS VS. SOCIAL JUSTICE: A CRITICAL ANALYSIS OF CONTRADICTION BETWEEN INTELLECTUAL PROPERTY RIGHTS AND SOCIAL JUSTICE

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1. INTRODUCTION

The debate between Intellectual Property Rights and Social Justice has arisen today more than the past. Intellectual property theorists seek to balance the moral and economic rights of creators and inventors with the wider interests and needs of the society.²²³ According to liberal

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²²³ Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, And Access to The Benefits of science*, (1999).

legal scholars, intellectual property law should focus on protecting exclusive rights and the right to monopoly exploitation of any intellectual property. But they do not focus on social rights. The main reason for making a Conflict between Intellectual Property Rights and Social Rights is the discrepancy of private interest and social interest. According to *Hans Kelsen*, the law must be a social engineering instrument which is balancing the intern conflicting social rights. But the question is, does the contemporary Intellectual Property law able to protect the social rights from economic rights? Another question is, how do the IP rights impact the public interest and social justice by challenging human rights, environment, and culture?

There are three main classical approaches which focus on rational of Intellectual Property Rights. Those theories are, ‘Economic Theory’, ‘Natural Right Theory’, and ‘Utilitarian Theory’. The economic approach mainly focuses on the good function of the market economy. The economic justification for Intellectual Property concentrates on the incentive to produce or make available certain types of goods.²²⁴ In order to justify Intellectual Property, the ‘Natural Rights Theory’ considers that everyone has a natural property right on his idea. By definition the ‘Utilitarian Theory’ based on the fact that the industrial progress and cultural goods have a beneficial effect on society. However, none of the justifications has enough consistency to justify the contradiction between IP rights and Social Justice.

2. WHAT IS INTELLECTUAL PROPERTY?

A Property could be a tangible or intangible thing which belongs to someone. Therefore, Intellectual property is also a property which

²²⁴ Ana Ramalho, *Intellectual Property and Social Justice*, p.274, University of Amsterdam, (2013).

has been owned by someone. **Intellectual property refers to creations of the mind: inventions; literary and artistic works; and symbols, names, and images used in commerce.**²²⁵ Intellectual property could be a tangible object or an intangible work. According to the World Intellectual Property Organization,²²⁶ there are two types of Intellectual properties. They are **Industrial Properties** and **Copyright**. Industrial Property includes patents for inventions, trademarks, industrial designs and geographical indications. Copyright covers literary works such as novels, dramas, films, etc. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and broadcasters. Intellectual Property rights are the legal rights of human intellect.²²⁷ According to the Article 27 (2) of the United Nations Declaration on Human Rights and Article 15 (c) of International Covenant on Economic, Social and Cultural Rights, **Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.**²²⁸ Thus, any intellectual property right holder has the ability to utilize, modify, or transfer his intellectual property rights.²²⁹

According to *John Locke*, "A person who has put his labour for productive work is entitled to the products of his own labour." Lock's theory of natural law and justice is tightly linked to private

²²⁵ What is Intellectual Property? World Intellectual Property Organization.

²²⁶ World Intellectual Property Organization (WIPO).

²²⁷ Jeremy Phillips & Alison Firth, *Introduction to Intellectual Property Law*, para:1, p.04 (4thed, Butterworth's LexisNexis).

²²⁸ UDHR -Article 27(2) & ICESCR – Article 15. C.

²²⁹ Copyright, Designs & Patents Act 1988 UK/Intellectual property Act, Sri Lanka - No 36 of 2003, Sec: 84.

property.²³⁰This calls ‘*Mixed Labour Theory*’.²³¹ Marxist writers who present an alternative view on property rights show that intellectual property is the product of creative labour that will develop the productivity of the capital.²³² According to Marx, Intellectual Property is creative labour.²³³ *Karl Marx* and *Frederick Engels* argue in the *Communist Manifesto* that Intellectual Property also is always a product of society.²³⁴ Therefore, according to the Marxist theory, An Intellectual Property could not be a mere private property which is gaining private interests.

3. INTELLECTUAL PROPERTY RIGHTS & HUMAN RIGHTS

At a fundamental level, human rights are thought of as rights inherent to all human beings, whatever their nationality, place of residence, gender, national or ethnic origin, colour, religion, language, or another status.²³⁵ They are, quite simply, "*timeless expressions of fundamental entitlements of the human person.*"²³⁶

²³⁰ John M. Kraft and Robert Hoveden, *Natural Rights, Scarcity & Intellectual Property*, New York University Journal.

²³¹ John Locke, *Second Treatise of Government*, para:1, p.04, ed.1980.

²³² Peter Drahos, *A Philosophy of Intellectual Property*, Australia National University Press, Chap; 05.

²³³K. Marx, *Economic and Philosophic Manuscripts of 1844*p.274, (*Collected Works*, volume 3).

²³⁴C.S Stanford, *Communism: Public Goods and Intellectual Property*.

²³⁵ Megan M. Carpenter, Trademarks and Human Rights: Oil and Water - Or Chocolate and Peanut Butter, 99*Trademark Rep.*892 (2009).

²³⁶ U.N. Comm. on Economic, Social & Cultural Rights, General Comment No. 17.

There is an unbreakable bond between Human Rights & Intellectual Property Rights. These two regimes are in two parallel directions.²³⁷ In the Human Rights approach to Intellectual Property, there is a discussion on the rights of inventors and the interests of the wider society.²³⁸ According to the Article 27 (2) of the United Nations Declaration on Human Rights and Article 15 (c) of International Covenant on Economic, Social and Cultural Rights, **Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.**²³⁹ Prof, *Karl Rustian* says that Human Right concepts should be integrated with Intellectual Property Right to make it stronger and justified.²⁴⁰ But there is a clear conflict between Human Rights and Intellectual Property Rights.

In article 25 (1) of UDHR, *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.*²⁴¹ Granting patents for pharmaceutical products limits the right to free access to health care. The patent license makes a monopolistic approach for the manufacturer.

²³⁷ Anupam Chander, Madhavi Sunde, *Is Nozick Kicking Rawls's Ass - Intellectual Property and Social Justice*. (2007).

²³⁸ Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, And Access to The Benefits of Science*, (1999).

²³⁹ UDHR -Article 27(2) & ICESCR – Article 15. C.

²⁴⁰ Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, University of California at Davis Law Review.

²⁴¹ *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

Therefore, multinational pharmaceutical companies are able to create a monopoly in the market. Most drugs are sold under the manufacturers' brand name, not under the pharmaceutical name of the medicine.²⁴² A registered brand name is an Intellectual Property. Selling under the brand name is more profitable than selling under the pharmaceutical name. Some drugs that do not have any other substitute products are more expensive. For example, the market value of *Atripla tablet* for the HIV / AIDS virus is \$ 99.76.²⁴³ Underdeveloped and low-income countries in Africa, Asia and Latin American region have no viable ability to buy or distribute such expensive drugs.

There is a real contradiction between trademark rights and human rights. In 2014, the famous Tobacco Company case²⁴⁴ which has been decided by the Court of Appeal in Sri Lanka has reviewed the clash between the trademark and public interests. In this case, the Ceylon Tobacco Company has filed an application to the Court of Appeal against an order by the Health Minister to include 80% pictorial warning in a cigarette packet. The main argument of the company is if the cigarette packet includes 80% pictorial warning, there is no space for the exhibit their trademark. Accordingly, the Court of Appeal decided to allocate 60% for pictorial warnings and granted the remaining 40% for branding. Intellectual property rights which have belonged to multinational companies made an opportunity to gain their capital interest and on the other form, breaching the right to health of the public. Nowadays, genetically modified foods have become popular worldwide. This further exacerbates the problem of

²⁴² Silvia Salazar - Intellectual Property and The Right to Health.

²⁴³ Price Guide, (October/10/2019 10.00 a.m.),
<https://www.drugs.com/price-guide/atripla>.

²⁴⁴ *Ceylon Tobacco Company PLC Vs. Minister of Health* C.A 336/ (Writ) (2012).

incomplete information about ‘Genetically Modified Foods’ and ultimately threatens the public health and safety.²⁴⁵

Copyright, Right to Education and Freedom of Expression are three inter-conflicting regimes. In article 26 (1) of UDHR, *everyone has the right to education.*²⁴⁶ And in article 19, *Everyone has the right to freedom of opinion and expression.*²⁴⁷ According to Intellectual Property Rights, an original work of an author cannot be used without his permission. Therefore, the right to education could be prized by copyright. For example, some printed textbooks are more expensive and some internet sources are not to free access. In 2017 Canadian Federal Court has interpreted section 29 of the Canadian Copyright Act²⁴⁸ and ignored the principle of fair dealing and accepted the rights of the publisher.²⁴⁹ There is a mismatch between the right to education and copyright. In the other hand, the authors’ rights have restricted the freedom of expression to another person who has the same idea. This reflects that the inter-conflict between intellectual property rights and human rights.

²⁴⁵ E.A Rowe, *Patents, Genetically Modified foods and IP Overreaching.*

²⁴⁶*Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*

²⁴⁷ *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

²⁴⁸ *Copyright Act, RSC 1985.*

²⁴⁹*Canadian Copyright Licensing Agency v York University FC 669 (2017).*

4. INTELLECTUAL PROPERTY RIGHTS & SOCIAL JUSTICE

Social justice is a part of the broader concept of justice.²⁵⁰ Social justice includes not only the social aspects but economic, political, environmental and cultural aspects. Therefore, social justice is a wider phenomenon. Social justice in intellectual property has recently gained special urgency because of three developments, the first two are technological, and the third is legal: (a) the emergence of the Internet and information technology; (b) the development of biotechnology; and (c) the entry into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").²⁵¹

IP rights mainly protect the rights of the inventors. But the inventions such as nuclear weapons, bio-chemical weapons, atomic weapons, replication of human genes will badly impact on the environment, public interest, and social justice.²⁵²

The growing importance of biotechnology to advances in agriculture and medicine is increasing. New scientific researches are accreting in these fields more than the past. As a result of this revolutionary technological evolution, many patentable innovations are invented. Bio-piracy is a novel consequence which has been popped-up with technological advancement in the field of biotechnology. Bio-piracy means *unauthorized access of biological material and using them for commercial purposes and gaining of exclusive monopoly rights against institution regarding certain biological material or indigenous*

²⁵⁰ Ana Ramalho, *supra*.

²⁵¹ Anupam Chander, Madhavi Sunde, *Is Nozick Kicking Rawls's Ass - Intellectual Property and Social Justice*. (2007).

²⁵² Aparajitha Ariyadasa, *Invention vs Public Interest & Social Justice*, *Hulftsdrop Law Journal*, Vol 1, p.257, 2014.

knowledge, while those resources belong to a community, region or another country.²⁵³ Exploiting bio & genetic resources is a huge environmental and social-economic issue in modern days.²⁵⁴ The biological patents are granted by most of the industrially developed countries such as the United States. Granting patents for biomaterials is making a legal coverage for bio-piracy. Patenting of products derived from indigenous and endemic resources by foreign countries is a serious threat and issue in the native cultures and environmental aspects.²⁵⁵

Today, chronic kidney disease (CKD)²⁵⁶ has become the worst non-communicable disease which is spreading in agricultural areas. The main reason for chronic kidney disease is the vast usage of agrochemical products. Sri Lanka is a country that has faced this disaster.²⁵⁷ Most of the agro-chemical products are manufactured by patented multinational companies. However, these products are virtually not environment-friendly. Therefore, biodiversity and sustainable environmental health have been seriously damaged in the agricultural lands.

The most common environmental issue in the world is 'Global Warming'. This has endangered ecosystem causing atmospheric and climatic changes resulting in devastation globally; drought, floods,

²⁵³ Noel Castree, And Others, *A Dictionary of Human Geography* (3rd Ed; Oxford University Press), (2013).

²⁵⁴ Kusal Amarasinghe, *Bio-piracy and its impact on Biodiversity: A special review on Sri Lankan context*. Journal of Environmental Protection (2018).

²⁵⁵ Aparajitha Ariyadasa, *supra* note, 256.

²⁵⁶ **Chronic Kidney Disease** is a condition characterized by a gradual loss of kidney function over time.

²⁵⁷ Senaka Rajapakse, Mitrakrishnan, Chrishan Shivanthan, Mathu Selvarajah, *Chronic kidney disease of unknown etiology in Sri Lanka*, Int J Occup Environ Health. 22(3): 259–264. 2016.

melting glaciers, disease, and death.²⁵⁸The greenhouse gas producing industries badly impact on the air, soil, and water.²⁵⁹ Burning fossil fuel is the main issue to increase the greenhouse effect in the global atmosphere. *CFC*, *Propane* and *Butane* producing products are using all around the world. All of these products and innovations are patented creations of mankind. Unfortunately, at the moment of the patent is granted the due process does not really consider whether the innovation is environment-friendly or not.

According to the principles of the market economy which aims to gain ‘Capital’, the doctrine of social justice becomes vulnerable. Today every intellectual property has its own price tag. However, in some industries such as computer software development industry, are functioning paradoxical to the general phenomenon. In the software development industry, most of the software can be bought for an affordable price or can be freely downloaded. Professor, *Slavoj Zizek* mentioned that it is sort of a communist way which is functioning alternatively to the market economy. But it is functioning in a limited circumstance.

Social justice is primarily concerned with fairness and equality between individuals.²⁶⁰But core concepts of Intellectual Property law focus on individuals’ rights. Without saving human rights, public interest, environment, and culture we could not seek social justice. Therefore, contemporary IP law must not only aim for protecting the inventors and authors’ rights but also protect social justice. The 21st century is the era of Knowledge and Participation. Therefore,

²⁵⁸ J. Moreland, *The Greenhouse Effect and Geo-Engineering*.

²⁵⁹ A.W Torrance, *Patent Law, Hippo and the biodiversity crisis*, University of Kansas, School of Law.

²⁶⁰ Ana Ramalho, *supra*.

Intellectual property law should help to define the possibilities and human capabilities of this Age.²⁶¹

5. LIMITS TO INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights are always regulated by the elements of property law. According to property law, there are mechanisms for providing property rights as well as restricting property rights. Establishing the limits of the creators' or the inventors' control in order to meet the goals of the whole system of intellectual property is an almost impossible task to accomplish.²⁶² Nevertheless, intellectual property rights are limited in a number of ways. These mechanisms have frequently varied from country to country.

The first and foremost limitation of an IP right is the limited time duration. A patent license is granted for a limited period, generally 20 years.²⁶³ The term of copyright protection is limited to the lifetime of the author and 70 years after his or her death.²⁶⁴ After expiry of the patent license or copyright term, the work falls into a public domain. In other words, after the expiry of the copyright term, any person can use the copyrighted work without any authorization or permission and without paying any fee or royalty.²⁶⁵

²⁶¹ Anupam Chander, Madhavi Sunde, *supra*.

²⁶² Haring this view in what copyright is concerned, p. 286 Breyer 1970.

²⁶³ World Intellectual Property Organization /Sec:)1(83 of Intellectual Property Act, Sri Lanka No 36 of 2003.

²⁶⁴ Sec:)1(13 of Intellectual Property Act, Sri Lanka No 36 of 2003.

²⁶⁵ Dr, V.K Ahuja, Law of Copyright and Neighboring Rights, p.07, Lexis Nexis.

Under copyright law, some uses of protected works are free. These are usually referred to in the general term as ‘fair use’ or ‘fair dealing’. The fair uses can be made for non-commercial uses, such as; for private study and research, teaching, criticism, reporting events etc.²⁶⁶

Under Patents law, a compulsory license is a statutorily created license allows to use an invention without getting the consent of the patentee.²⁶⁷ Non-exclusive licenses (compulsory licenses) are granted on a national emergency.²⁶⁸ “A compulsory license is an involuntary contract between a willing buyer and an unwilling seller imposed and enforced by the state.”²⁶⁹

Intellectual property and equality are fundamentally intertwined. Intellectual property, like property law, structures social relations and has profound social effects.²⁷⁰ Intellectual property law will help to define the possibilities and human capabilities of this era. Therefore, IP law is playing a major role in the law of property. The core duty of the IP Law is to balance the inner conflict between IP rights and social rights.

6. CONCLUSION

According to Professor *Peter S. Mendell*, within each mode of intellectual property protection, we need to use bi-focal perspectives. In addition to the conventional issues involved in assessing the internal validity of intellectual property regimes (for example, does

²⁶⁶ In Sri Lanka Sec:11 of IP Act 2003/in India Sec: 52 of copyright Act 1957.

²⁶⁷ <https://definitions.uslegal.com/c/compulsory-license>.

²⁶⁸ Sec:86(2) of Intellectual Property Act, Sri Lanka No 36 of 2003.

²⁶⁹ Gianna Julian-Arnold, *International Compulsory Licensing: The Rationales and The Reality* (1993).

²⁷⁰ Anupam Chander, Madhavi Sunde, *supra*.

patent law, trade secret law, and copyright promote progress as judged by the conventional utilitarian lens? Does trademark law effectively safeguard the integrity of the consumer marketplace?), scholars must also explore the broader range of social justice concerns bearing on the particular intellectual property modality: human rights, moral rights, cultural and group interests, indigenous people's rights, distributive concerns, and other externalities, such as environmental degradation and climate change.

“Anything under the sun made by man could be patentable.”²⁷¹ Is this a true interpretation? The question has been answered throughout this essay. Social Justice & Human Rights principles prevent patenting of anything made by man. In this ‘Neo-Liberal’ social and economic system, anything could be exchangeable for the price. Even social and human relations. Right to Health, Right to Education & Environmental Rights have been commoditized in today. This is the *de facto* situation in modern society. But according to the social justice principles, basic human & social validities could not be pricing in any kind of status. No human domain should be immune from the claims of social justice.²⁷² Therefore, Protecting and balancing social justice must be the core liability of the Intellectual Property law regime.

²⁷¹*Diamond v, Chakrabharathy* 447 U.S. 303 (1980).

²⁷² Anupam Chander, Madhavi Sunde, *supra*.