

## RESPONSE

# Intellectual capital as property

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The global HIV/AIDS crisis and issues related to access to drugs for its treatment, on which Omar Schwartz's paper (1) focuses, also raise key questions about the notion of property and property rights. It would be useful in this context to discuss how intellectual property rights (IPRs) have developed in modern times, and the contradictions inherent in the system today.

While property rights have long been recognised, 'intellectual' property is a modern notion that comprises information, ideas and knowledge. Unlike other property rights, IPRs are essentially state-mandated monopolies. Discoverers and inventors are thought to deserve special reward or privilege because of the benefit of their discoveries or inventions to society. Public good is not considered a reward in itself and certain incentives are needed to encourage invention or innovation.

### **Contradiction in the philosophy of IPRs**

The philosophy behind IPRs is built on the contradiction that to promote the development of ideas, one must reduce the freedom with which people can use them. Liberal philosophy has reflected this contradiction during the genesis of the concept of IPRs—a tension between an individual's claim to the product of his labour and undeserved monopoly privilege granted by the State.

The industrial revolution and capitalist mode of production led to the necessity of redefining 'property'. Tools acquired a new economic value and it became possible to duplicate and distribute them in quantity. To encourage their invention, copyright and patent laws were developed. The earliest patent laws were an expression of the need to ensure that innovations did not die with the original inventor; they were designed to promote disclosure and dissemination of knowledge (2).

We are entering an era where major parts of the world economy are based on ideas and knowledge—goods that take no material form. Unlike physical goods, there are no physical obstacles in providing an abundance of ideas. IPRs are, thus, an attempt to create an artificial scarcity to give rewards to a few at the expense of many.

Let us examine what is sought to be protected through IPRs. The central distinction between intellectual property and physical property is that the former can be transferred without it leaving the possession of the original owner. Information is acquiring intrinsic value, not as a means to acquisition but as the object to be acquired. Laws to protect property rights were developed to protect, in the first instance, land. Later, when manufacturing became the dominant mode of economic activity, laws grew around the centralised institutions that needed protection for their reserves of capital labour, and hardware. Today, to a large extent, information has replaced land, capital and hardware as a commodity that needs to be protected to protect control over the means of production.

Alongside this, has developed a new contradiction—information or ideas are sought to be commodified at the same time when technology has made it possible to exchange ideas in a radically free environment. Exchange and control cannot coexist—the more tightly we protect one, the less there will be of the other. If ideas are to be exchanged in the marketplace, the basic assumption of a marketplace with regard to physical objects, that value is based on scarcity, should hold good. But this is contrary to the nature of information, which may, in many cases, increase in value with dissemination.

### **Monopoly as a facilitator of creativity?**

Central to the projected utility of IPRs is the notion that creation is facilitated by providing a temporary monopoly which ensures the author of a work will be the sole beneficiary of any profits. The earliest patent and copyright laws were geared, to an extent, to benefit the individual artisan, or the author of a literary piece or a musical score. But with the institutionalisation of the concept of IPRs, individual creators ceased to be the beneficiaries, and were replaced by large corporate interests. In practice, today, most creators do not actually gain much benefit from intellectual property. Independent inventors are frequently ignored or exploited. When employees of corporations and governments have an idea worth protecting, it is usually copyrighted or patented by the organisation, not the employee. Since intellectual property can be sold, it is usually large corporate entities that benefit.

The value of intellectual products is not due to the work of an individual, or any small group. Intellectual products are social products. Even in the US and Japan, an enormous part of research is funded by the State. The line, therefore, is blurred between what constitutes 'basic research' by a company and what it draws from public-funded research. In fact, half of the US\$ 70 billion invested in drug research each year comes from the public sector, chiefly as funding for basic research, which is the highest risk part of the drug development pipeline. Ten AIDS drugs were fully developed or supported by publicly funded research, and the US government supported the clinical research for 34 of the 37 new cancer drugs marketed in the US since 1955 (3).

### Knowledge in the market place

Open ideas can be examined, challenged, modified and improved. To turn scientific knowledge into a commodity arguably inhibits the development of science. Innumerable examples show that IPRs have been used to suppress innovation. Companies may take out a patent, or buy someone else's patent to inhibit others from applying the ideas.

The pharmaceutical sector is a classic pointer to the dangers of a strong IPR regime. The huge inequity in the IPR system today is exemplified by the fact that while millions die due to HIV/AIDS and national economies are being devastated, the prices of drugs to treat the disease can be 40 times or more than the costs warranted by the actual production and distribution costs. Large pharmaceutical companies have generated super profits through the patenting of top-selling drugs. But drugs which sell in the market may have little to do with the actual health needs of the global population. Often, there is nobody to pay for the drugs required to treat diseases in the poorest countries. Research and patenting in pharmaceuticals are driven not so much by therapeutic needs as by the need of companies to maintain their super profits. Today, transnational corporations (TNCs) with global tentacles, wishing to retain the huge growth rates of the 1970s and 1980s, are trying to pool resources for research and development. As a consequence, we will see 10–12 large TNCs survive as 'research-based' companies in the business of drug development and patenting. The bulk of drug manufacturing will be done by smaller companies. Today, in the US, this trend is already discernible. While the volume of sales of large

multinational corporations (MNCs) has stagnated in the past decade, sales of small companies producing generic drugs show a double-digit growth. Still, the profitability of large MNCs has actually increased. Clearly, these companies can thrive on 'rent incomes' made possible by strong IPR protection without enhancing their manufacturing activities (4).

Given their monopoly over knowledge, these companies will decide which drugs to develop—those that can be sold to people with the money to buy them. Thus, we have the development of 'life-style' drugs such as Viagra, which target illusory ailments of the rich. On the other hand, we have 'orphan' drugs that can cure life-threatening diseases in Asia and Africa, but are not produced because the poor cannot afford to pay for them. Today's medical research is highly skewed in favour of heart diseases and cancer rather than diseases such as malaria, cholera, dengue fever and AIDS, which kill many more, especially in developing countries. Less than 10% of the US\$ 56 billion spent each year globally on medical research is aimed at the health problems affecting 90% of the world's population (5). On the other hand, some drugs developed in the 1950s and 1960s to treat tropical diseases have begun to disappear from the market because they are seldom or never used in the developed world.

Clearly, the imbalance between the rights and obligations of a patentee have become grossly skewed in the course of the development and expansion of IPRs. It is time to reflect how 'ideas' that are clearly 'public goods' can be protected—not for monopoly control by TNCs but for their rapid dissemination for the alleviation of human suffering.

### References

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