

Charter on Intellectual Property Research Brief (1)

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1. Introduction

This note summarises the main research topics that we want to consider.

We do not envisage a major research programme. But we do want to examine the nature of the *public interest in relation to intellectual property*, and have identified a number of issues, approaches and questions. The first question is, are the issues we've listed above, #4.1 - 4.8, the right ones. What have we missed?

We have been deliberately comprehensive at this stage. (Perhaps a note of warning is in order: the purpose of this brief is to stimulate ideas and raise questions, and it is not a draft, in form or content, of the final Charter).

We now need to focus on a few priorities and then decide how to proceed:

- Review existing work *and/or*
- Make existing work available through the IPC website
- Commission IPC papers (such as a review of existing research in a specific area)
- Invite submissions
- Hold seminars/meetings

Wherever possible we would like to work in partnership with other bodies.

2. Background: What's the Problem?

The main problem is the low priority given to the public interest as a factor in determining IP law; specifically, the absence of any public interest test of new legislation.

This is odd. Intellectual property touches most areas of contemporary life. It is central to individual expression, cultural aggregation and change, and economic activity.

The moral debates range from public healthcare access to the ownership of natural resources and of the gene sequences that determine human individuality. In the creative area, the public's cultural freedoms are increasingly shackled by property relations. Large tranches of culture which would once have been freely available in the 'public domain' are being held back in private hands as a result of changes to the law. The moves to maximise intellectual property means that access to the building blocks of common culture, be they ancient or contemporary, iconic or everyday, are increasingly limited.

IP is important because creativity is important. In fact, creativity is more important than IP. There are few statements in this field that we can make with absolute confidence. This is one of them.

Creativity – the process of invention, originality and innovation – relies on an open public domain, on the possibility of recombining commonly-held ideas. Humans are mimetic creatures. We learn by copying and imitating; yet the advance of private property law into areas that were once un-ownable, puts new restriction and levies new taxes on learning and personal development. In addition, traditionally un-ownable forms – folk cultures, traditional knowledge, even indigenous plants – are threatened by assimilation into systems of private ownership and control.

Expansions in the definition of intellectual properties create financial assets in one place while destroying public assets in another. The former may be beneficial; the latter is often harmful. For example, even small changes in patent law can have large effects on the production and pricing of drugs – for many, such changes are literally a matter of life and death.

Our concern throughout is the public interest: the management through law and regulation of creativity and innovation. (We believe common law rights also fit this schema). In analysing the public interest we will range beyond traditional IP matters into other areas – education, public utilities, competition policy, etc – to search for useful examples, case studies and models. We will also take account of contemporary trends in personal identity, ethnic diversity, ways of working, etc, as listed in the ‘Project Summary’.

At the same time, we will be careful to distinguish between IP issues and other issues. There’s a tendency to blame IP law for wrongs and mischiefs that are actually caused by something else. Copyright and patents, in particular, get blamed for things not their fault. Some of the corporate inefficiency and unfairness that is blamed on IP is actually the result of other factors; eg, private contract law, corporate governance, corporate inertia, weaknesses in competition law, the inherent instability of digital technology and the lack of new business models.

We will always come back to the twin themes of the public interest and intellectual property.

3. Public Perceptions

The Charter will succeed to the extent it resonates with people outside the core IP constituencies. There’s a tendency in many complicated specialist areas (of which IP is certainly one) to get caught up in insider debates. We therefore need to research what the public feel about IP, and what they feel the public interest is.

We have identified a few ‘headline’ issues:

Public Health and Drugs. Many people are outraged by the battle over whether countries suffering from major HIV epidemics (and TB and malaria) should be able to use cheap drugs. In developing countries the price of HIV treatment exceeds average incomes; but the drug companies argue that WTO rules restrict the import of cheap generic drugs. At issue is the availability of drugs at an affordable price to 80% of the world's population.

The Human Genome. The mapping of the human genome showed how corporations can 'privatise' this basic element of humanity. People are fearful they no longer own their bodies and nervous of the implications for the ethics, politics, law and economics of biotech research. Who owns the human gene pool?

Digital Culture. The potential availability of virtually all texts and most sounds and images on the Internet is an almost incredible opportunity for sharing knowledge and generating creativity. Some of these opportunities have been seized; others have been cut off by rights-holders unable to innovate imaginatively. Caught in the middle are teenagers convicted of theft. The possibility of infringing IP laws, which was once a remote possibility for average citizens, is now only too easy. It is vital IP does not smother the Internet, either directly or through excessive DRM.

Bio-Diversity and Traditional Knowledge. The West's focus on trade liberalisation threatens cultural and biological resources that local people have used and want to continue to use freely. There are many stories of people in developing countries being prevented from using their local resources because a Western company has 'privatised' them. WIPO is constructing legal protections for genetic resources, traditional knowledge and folklore. Is it taking the right approach? Some argue persuasively that this is not a 'developing country' issue but affects everyone in all countries.

Public Knowledge and Education. Digital media present vast opportunities for the wider, easier and cheaper distribution of publicly-owned information assets now held in trust by libraries, museums, public service broadcasters and public universities. In practice IP often seems to make this more expensive and difficult, not less.

Are these the right headline issues? Are there others? Do we have evidence – persuasive arguments, hard data - that significant damage is being done?

4. The Issues

4.1 Is 'Intellectual Property' a Useful Concept? Is a Single Approach to Intellectual Property (a) Possible (b) Desirable?

Although widely used, the collective phrase 'intellectual property' is often troublesome for two reasons.

One, people often use it when they actually mean only one of its constituents: copyright, patents, design rights, geographic indicators, trade secrets, etc. Most of these have some basic elements in common but each also has its own justification, history, purpose, practitioners and uses - and problems. The task of treating all forms of IP as a single class is daunting.

Second, some people dislike the concept of intangible 'property' (notably the proponents of free software). We therefore need to examine whether property is the right word. Many creative people (numerically, the largest group) don't think in terms of property at all. They simply want the widest possible distribution of their ideas, preferring recognition and publicity over the chances of economic gain. Even in the commercial world, the interests of creative individuals are often at odds with those of the companies (music publishers, drug companies, universities) that finance, buy and exploit their works. Laws (eg, copyright laws) and organisations (eg, WTO) that only take account of economic matters miss the point. The public interest demands a different approach.

A review of current thinking suggests IP has these commonalities and differences:

Common Elements

- 4.1.1 All IP originates from the idea that people have the right to own the fruits of their brain (strongly so in the case of copyright, much less so in the case of geographic indicators, etc)
- 4.1.2 All IP springs from assumptions about incentivising and rewarding creativity
- 4.1.3 All IP thus raises common issues of economic efficiency
- 4.1.4 All IP strikes a balance between public domain and private rights

- 4.1.5 The phrase 'IP' is universally used by the public, lawyers and academics; there is no alternative in common use; it may be perverse not to use it
- 4.1.6 All IP is formulated and regulated by the same institutions at national levels (eg, patent offices) and global levels (eg, WIPO, WTO/TRIPS)
- 4.1.7 All IP is treated as a property right, involving ownership and possession
- 4.1.8 All IP is increasingly treated identically in company (audit), contract and employment law
- 4.1.9 Unlike most other forms of property, most IP is limited for period of time. Such 'sunsets' ensure most materials return to the public domain
- 4.1.10 IPRs are intangible. The costs of reproduction is often negligible and the content vulnerable to leakage – the borders of intangibles are permeable
- 4.1.11 most forms of IP are 'public goods.' They owe their existence to society's recognition that, if left to free competition, the market will under-produce such goods.

Differences

- 4.1.12 The common law droit d'auteur is different from industrial/economic rights
- 4.1.13 The expressions that qualify for copyright and the subject-matter that qualifies for patent are very different
- 4.1.14 The systems of establishing rights are different; eg, copyright is automatic, patents are registered
- 4.1.15 The rights have different characteristics (eg, terms are very different)
- 4.1.16 The main concerns with patents are subject-matter and registration (ie, with whether or not a patent should be granted at all); whereas the main concern with copyright is the definition of each right and the licensing of rights (ie, with the nature and term of the right)
- 4.1.17 The 'property' label, although well-established for industrial property (eg, patents, trademarks), is quite recent for copyright
- 4.1.18 Some people dislike the term 'property' as indicating too high a level of possession
- 4.1.19 The different kinds of IP are used by different industries and have always reflected those industries' working practices. For example, the film industry and the pharmaceutical industry have very different ways of valuing and using IP rights

- 4.1.20 The main problem in the copyright arena is the Internet, which does not affect patents at all (except in terms of software patents)
- 4.1.21 The specific solutions proposed are different (eg, alternative licensing such as GPL and creative commons for copyright; and new definitions of patentability for patents)
- 4.1.22 Patents have the qualification of 'usefulness' or technical utility; and an obligation to disclose

In conclusion, it appears that five common points lie at the heart of all IP:

- There is the feeling, expressed most strongly in the droit d'auteur and moral rights, that a person has the right, if they want, to have some say over their expressions, inventions, etc (though this feeling is weak in the case of some systems).
- There is an assumption that all IP stimulates, rewards, protects and generally helps the creation and dissemination of more creative works; or, as WIPO says, 'promote the use and protection of works of the human spirit' (though it does not follow that IP is the best way to do so)
- The increasing internationalisation of IP governance brings an increasing convergence of approach
- The notion of the public interest is common to all
- The notion of the public domain is common to almost all

Against this, two counter points may be made. By using the phrase we unavoidably emphasise property as our starting point instead of the public interest. It is also true that each system has its own distinct characteristics, mainly because they reflect a specific industry's ways of working, economics and technology. So while there are commonalities at the level of principle and justification, there are wide differences in function and economic value.

We propose to use the phrase in our project title for the time being. The title of the final Charter is yet to be decided. In the Charter text, we propose to start with general concepts which are likely to include creativity, public interest and intellectual property but to make specific points about specific systems when appropriate.

Points and Questions

The two main questions about this issue therefore are:

- Do all IP systems have some things in common? If not all, do copyright and patents have things in common which do not extend to, say, trade secrets and geographical indicators?
- If so, what are these common factors? Does the phrase 'intellectual property' accurately describe them? If not, what other phrases should be used?

Other questions are:

- What is the history of the phrase? Has anyone researched its suitability for the job?
- Do older terms, such as 'government privilege', more accurately reflect the nature of IPRs? Would emphasising 'fair rewards' for 'creative labours' get the concept of IPRs over to the public more easily?
- What are the benefits and problems of a 'single approach'?
- There are trends to pick and choose between systems (eg, literary agents using trademarks and artists registering patents). Is integration beneficial?
- How far does a 'single approach' conflict with the recognition that the 'one-size-fits-all' approach has tended to ignore local contexts?
- Does the use of the phrase make things more difficult for developing states? How do we respect cultural diversity?

4.2 Creativity

Our theme is creativity, that mysterious process of conceiving, making and forming new ideas and new ways of doing things. Creativity is seldom completely original but almost always depends upon the recombination of prior ideas, objects or resources.

We want to use the word 'creativity' rather than 'invention' or 'innovation' because we want to emphasise the artistic and intellectual process over the legal systems for naming and 'protecting' the results, or the economic systems for trading them.

We don't anticipate doing much research in this area but we may need to clarify some issues.

Points and Questions

1. How do current IP systems support creativity? Where's the evidence?
2. Policy-makers are narrowing their definitions of creativity and innovation to suit the prescriptions of property law (eg, emphasising financial outputs). What are the dangers of this narrow, instrumental approach?
3. Are there are other ways (than through IP) to name, define and protect the creative process and creative outcomes?
4. Are the arts a special case, favouring the strengthening of moral rights and a corresponding weakening of economic rights?

4.3 The Public Interest

We emphasise the public interest for three reasons.

One, historically, the public interest has always been the ground for assigning IP. Two, it remains axiomatic that the privatisation of ideas, expressions and inventions is a matter of public interest. Three, by talking about the ‘public interest’ we increase the chance of being understood. The phrase is widely-used and has a positive ring (at least in English; we need to check other languages). Given the arcane, specialist and off-putting nature of IP jargon, this is a major benefit.

Of course, defining the ‘public interest’ is problematic. Historically, approaches have ranged from *political* discussions of citizenship and rights to the *economists’* discussion of the ‘general good’ as distinct from the self-interest of individuals.

We believe the concept implies that *individuals and groups should surrender their special private interests if they conflict with the public good*. We also hold that the public interest must not only be done but *must be seen to be done*.

It’s crucial the public interest is not conflated with either the public domain or the public commons; or felt to be hostile to private rights. The public interest is best served by *both* a strong and wide-ranging public domain and strong, robust systems of private property rights. It’s also important that the public interest is not confused with users’ or consumers’ interest.

There exists a substantial body of work about how the public interest should be defined, regulated and protected, ranging from the ‘public interest’ defence of free speech to the regulation of business monopolies, natural monopolies and public goods. Many governments and international bodies (eg, the CEC) have recently introduced ‘public interest’ tests for new legislation which typically include criteria for

- Cost (including cost/benefit analysis)
- Proportionality
- Transparency

All organisations carrying out such tests do so through full public consultation and independent research.

Points and Questions:

- Who is the public and how is it to be defined? What does the public understand by the 'public interest'?
- How is the public interest defined and promoted *in relation to IP*?
- How is the public interest defined and promoted *in other areas*?
- Does the public interest in IP only concern economic/reward issues? Put another way, is there a public interest justification for common law rights?
- Would it be helpful to collaborate with public interest groups in other fields?
- What can we learn from the success of treaties to keep, eg, the seas and outer space in the public domain?
- What, if any, has been the impact in the UK since 1988 of bringing back a common law defence of public interest against IP?
- What cultural, social, geographic, political and gender issues need to be addressed?
- Who are the champions of the public interest?

4.4 The Balance between Public and Private Spheres

IP is a social contract requiring a balance between public and private entities. From earliest times, the contract has been under endless negotiation. We suggest that while balance has always been a policy aim, it's probably true to say that *imbalance* is endemic. However, the current malaise is due to a feeling that the systems are *out of balance to an extreme degree and with profound implications*.

It is important to be clear about *what* should be in balance. There is the balance between the public domain and private rights; between creative people and rights-holders and investors (or, more precisely between those roles); between universities, government and industry; and between industrial countries and developing countries. IP law as a totality is not a neat binary system. The negotiations over a specific deal may be two-sided; but the system as whole is a web of overlapping bargains.

These competing demands bedevil analysis. The 'public interest' principle that IP policy should focus on encouraging creativity is not always commensurate with protecting property rights. The impetus to reform the law has most often come from rights-owners, rather than the public sector seeking to encourage innovation and learning in other, non-proprietary ways. In many countries, the public sector has been inattentive or ignorant of IP.

For example, governments increasingly require universities to seek commercial or project-based funding and to monetise their research output. The disclosure and spread of knowledge, once a central component of the universities' public interest, is now joined with generating and protecting property. In some subject areas, where the universities themselves are major users of research, the added costs of buying licences outweighs the extra revenue gained. In this respect, a small university having to pay licences finds itself in exactly the same position as a developing country asked to implement TRIPS; the costs outweigh the benefits.

We need to restore balance to serve the public interest. As James Boyle has recently observed, "it is not rights that generate progress, but the balance between rights and the public domain".

Points and Questions

- What are the costs/benefits of the maximalist approach to IP? What are the best examples of the current imbalance (dysfunction)? In terms of ethics (free speech), economics (innovation, consumer choice), and social policy (university research)?
- *What* do we want to be in balance? The two sides are normally classed as 'public' and 'private', but these can be tricky words. What do we envisage to be on each side?
- What are the *criteria* by which we judge 'balance'? Is the economists' classical concept of 'equilibrium' helpful?
- What is the role of governments, nationally and in WIPO, in mediating the balance between the needs of business and those of the public?
- What are the criteria for sensible IP terms?
- The thrust of IP law is to define rights and then to allow some subsidiary exceptions (eg, fair use). Would it be better to start with the public interest as the driver of both the public domain and private rights; as the guardian of the balance between them ? How should this be phrased?

4.5 The Nature of Rights

There are two main kinds of justification for IP rights: human rights (the ontological approach) and economic efficiency (the utilitarian approach).

The word 'right' has multiple meanings and is often ambiguous. It refers to human rights: such as the basic human rights to life, free speech and freedom from abuse and exploitation. Other human rights cover the right to property, privacy and personality. These concepts carry over to the right to ownership of one's own ideas, expressions and inventions (either strongly, as inherent in *droit d'auteur*, or weakly in other systems).

There is a view that IPRs are 'instrumental' rights that serve the needs of human rights proper. Any discussion of the nature of property and IP has to take account of this thinking on human rights (just as human rights thinkers increasingly refer to IP).

The right of people to have generic drugs if they cannot afford proprietary drugs is a related or instrumental right. Is it a special case or can we draw general conclusions?

Points and questions:

- To what extent is the right to own one's labour a basic human right? Does it extend to one's own ideas?
- For some human rights thinkers the right to own your body, your self, is the basis of all property. How can the intuitive and cultural notion that one owns oneself be built upon? What are its legitimate limits?
- To what extent is the *abrogation* or cancellation of an IP right (eg, a proprietary right in a medicine) a basic human right?
- Is the assumption of a right to one's labour a bulwark against protection in the labour market?
- Does rights legislation have any material relevance to current IP reform?

- The debate about exclusive and collective rights has come back into prominence in recent years. Some argue that exclusive rights are essential precisely because they recognise individual's rights; others that collective rights are more efficient. Again, where lies the public interest?

4.6 Economic Efficiency

The second and perhaps most powerful argument in favour of IP is that it incentivises and rewards creative endeavour. The Statute of Queen Anne is described as 'An Act for the Encouragement of Learning'; and the American Constitution gives powers to Congress to pass IP law in order 'to promote the progress of science and useful arts.

Economic IPRs are 'public goods'. Their purpose is reward areas of the economy, which, if left to market forces, would become underproductive: a classic case of market failure. In order to avoid this, society cedes a monopoly (always conditional and usually temporary) in exchange for the investment of the time, labour and capital necessary for the production of such public goods.

IP's power as an incentive for creative thinking is very dubious and to use the incentive argument as a justification for long copyright terms is risible. But IP is a highly effective way of rewarding commercial exploitation. It allows people to monetise their ideas, etc, on a large scale. Without IP, whole industries could hardly operate. It punishes theft. For these reasons, IP will always be essential.

But the dangers of monopolies and anti-competitive behaviour, cutting back on cultural and economic freedoms, are always present. There is a feeling that we may have reached the point of diminishing returns.

Of course, there is no agreement on this. There is no agreement on whether there is such a point, let alone whether we have reached it.

There is, indeed, very little evidence at all, either way. In the absence of evidence, the law often favours existing interests.

The test of economic efficiency should be one of the more feasible and objective parts of the puzzle. In fact, data is very scarce. There are a number of reasons. Astonishingly and probably uniquely in matters of industry regulation, governments very seldom ask for data about IP before passing legislation; so why bother to produce it? Second, it is difficult to measure economic efficiency in the creative economy. The transactions are numerous, variegated and usually confidential. And anyway what is meant by 'efficient'?

One topic that constantly recurs is the principle that One Size Fits All (OSFA). At one level, imposing a uniform legal system reduces costs and facilitates deals. Users benefit greatly from standard licences. But imposing the same concepts and rules regardless of context can be insensitive and not user-friendly. In fact, OSFA itself is neither good nor bad, and must fit the context.

Governments and regulatory bodies have to consider the costs and benefits of OSFA legislation in many fields. Before taking a decision, they normally have to show the public benefits. In IP, they should be required to demonstrate that the preference for a maximalist approach is in the public interest. If they cannot, they should favour public access. They should welcome alternatives such as free software licences and FS/OS-inspired developments such as the World Wide Web, the human genome project, and open access publishing.

The negative impacts of OSFA can be seen in the Internet. The aggrandisement of IP, for the benefit of those who want it, is increasingly damaging others who don't. In the past, people who didn't want to assert their rights were free not to do so. Nowadays, their freedom is curtailed. By making the system more internally efficient for a few, we are making it more *inefficient*, with huge externalities, for the many; especially for users. See #4.7, The Internet and Digital Culture.

There are several *specific tests of efficiency* that need to be looked at. Computer software continues to elude fair treatment. As a result, a massive counter movement has grown up around Free Software, Open Source (Linux), the GNU General Public Licence and Copyleft. Can we deduce a public interest that is applicable more widely?

Business Methods. The US gives patents to business methods. Initially, the effect had to be implemented by a computer-based process, but the computer requirement is becoming notional. This heralds a dramatic extension of patenting beyond its 200-year-old technology base into abstract ideas and processes. What is the public interest test?

Trade Marks. The growth of the creative economy has encouraged many organisations to trademark almost every word, symbol and design that is tradeable;

and people are following suit, trademarking their faces and names. Again, where does the public interest set a limit?

Patent Costs. The costs of the patent system are regularly cited as an impediment to innovation. Patent Offices say their registration charges are moderate. But the costs of contesting a patent can be enormous. Would the public interest be better served by lower application costs, and cheaper and simpler contest procedures?

Finally we must avoid the trap that property rights are inherently more efficient than the public domain; or the public domain more so than private rights. Both are capable of supporting creativity, innovation and economic growth. Before passing judgement we need to assess the relative economic efficiencies, rather as competition authorities assess markets and dominance.

Points and questions

- How do we measure the efficiency of the public domain and of IP?
- We need comparative studies of (1) market and (2) non-market economies that measure innovation and the use of IP. We need to look at alternative compensation systems.
- We need evidence of the effect of shorter, or longer terms, stricter protection, the use or absence of 'fair use'; and so on.
- We need research into where OSFA is appropriate and where not.
- Do we need to examine competition law and IP? Where lies the public interest in IP as a monopoly and as a spur to competition?
- Do we need to look at the role of industry standards; especially whether standards should ever contain patents? (A recent EU report suggests about 50% of standards do contain patents).

4.7 The Internet and Digital Culture

Digital media - software, the Internet - raise questions of creativity, ownership, property and theft in an acute form.

The digital world is highly wired, connected, open. It is instinctively collaborative. It has generated a dramatic and almost exponential spread of the act of copying. It has infiltrated itself into our ways of creating, discovering, inventing and sharing ideas and knowledge to an extraordinary extent. The story is familiar; as are the roadblocks being put in the way by out-dated and inappropriate IP laws.

Recent US and EU laws have cut back drastically on 'fair use'. Rights-holders increasingly use technical devices (DRM) to protect their rights. Many of these devices also diminish or stop legitimate 'fair use'.

Laws intended to regulate behaviour between a small number of people or firms who were expert in their trade (eg, between music publishers and music recording companies) now regulate how people behave in their own homes who have no commercial intent or legal expertise. The sharing of music (eg, between a home system and a car system) has moved in a matter of years from being a legitimate act to being a civil wrong to being a criminal violation. Until recently, it was difficult for the public to infringe an IP right. Now, it is trivially easy. Some people say in response, 'It's easy. Don't steal'. Obviously, rights-holders who want to restrict usage must be allowed to do so. But many people want their work to be seen and used. How to balance freedom where it is desired with restrictions where required?

The arts and digital media are enjoying fruitful, multi-disciplinary collaboration leading to emergent forms and experiences. But they are especially vulnerable to widespread confusion about which, and to what extent, IP rules should be enforced; with damaging effects on artistic freedom, funding, archiving and mutual sustainability.

Points and Questions

- What are the main public interest issues raised by the opportunities of the Internet and digital media? Where does IP help? Where does it hinder?

- Do the GPL, Creative Commons, Copyleft and other licences provide a new model outside the Internet?
- Digital Rights Management (DRM) has the power to undermine the balances traditionally enshrined in copyright law. How far is the unilateral behaviour of some corporations usurping the legitimate role of the state in balancing private and public rights?
- In undermining 'fair use' provisions, is DRM operating to the detriment of future innovation, education and competition?
- What are the social and cultural implications of seeking to criminalise everyday consumer behaviour? How far does bad law bring the law into disrepute?
- Historically, creative practice in the arts provided the theoretical architecture on which copyright laws have been predicated. What is the current relationship? Does copyright serve the arts community well, or is the law now at odds with the art community? Should the law be changed to represent changes in creative practice?

4.8 Development and Trade

The developing countries face special issues. They have massive cultural and biodiversity resources but relatively few financial resources. They are seeking to protect their own cultures, assets and creative industries and at the same time become more active in global trade. The WTO encourages the latter but only, it seems, at a cost which threatens the former.

There is little agreement about whether IP stimulates or restricts economic development. The controversy is usually seen in the context of the WTO's liberalisation of trade and globalisation; but it goes much deeper. It involves a country's determination to reduce poverty and achieve better health and education, as well as environmental, cultural and economic sustainability.

Some in the West believe strong IP facilitates development, mainly by enabling inward investment. Others, mostly in the South, respond by saying they do not have the resources to impose strong IP and cannot afford the costs; and resent being forced into the WTO's Western-based one-size-fits-all trading system. Developing countries have a special concern with the WIPO Treaties and TRIPS being based on a Western-centric view of creativity, the author and ownership. Recent research suggests that countries probably benefit from a relatively weak IP regime in the early stages of growth and from a stronger regime later on. The US and Europe had weak IP regimes when they were industrialising but now prefer strong regimes.

An Argentine/Brazil Proposal to the 2004 WIPO General Assembly said 'Action is needed to ensure, in all countries, that the costs do not outweigh the benefits of IP protection'.

The 40-year-old movements for appropriate (AT) and intermediate technology (IT) may provide models for supporting creativity. These schemes promote cheap, robust and appropriate technology in the South as an alternative to the more expensive and complicated tools made for Western markets and exported. The micro-lending Grameen bank systems may provide another model.

There is a particular controversy over the use of patents to incentivise and reward drug research. Undeniably it works, to a point. But it also results in drugs being

expensive, and some drugs, for which the demand in rich countries is low, not being researched at all. Is competition to secure a monopoly the best way to secure advance in the production of public knowledge? What other systems are possible? What are their advantages and disadvantages?

Another is traditional knowledge and bio-piracy. Over the past few decades Western pharmaceutical companies have patented many private uses of the genetic and chemical properties of hundreds of plants, herbs and spices. In most cases, the local people where these crops were growing either believed they were owned by the local community or were in the public domain (ie, belonged to nobody).

Points and questions

- What are the specific needs of developing countries at various stages of growth? Does the Group of 77 have a policy on IP?
- What evidence is available for the effect of IP (or its lack) on industrial countries' growth 1750-1950? Does the history of traditionally weak intellectual property in developed states hold any lessons for developing states?
- What evidence is available of the effect of IP on development processes?
- Do AT, IT and micro-finance provide models for 'appropriate' IP?
- Can knowledge transfer be achieved in ways that are not dependent on intellectual property?
- What would a 'Fair Trade' system of IP look like?
- What alternatives exist to the current patent-driven drug delivery system?
- How is the tension between bio-diversity and TRIPs best expressed? Where lies the public interest – locally, globally?
- What is the result of applying a 'public interest' to WIPO's work on traditional knowledge?

4.9 International Governance

IP law has been subject to international agreements ever since the Paris and Berne conventions of the 1880s. International coordination and standardisation is an essential element of IP, allowing rights to be easily licensed in different countries.

The main current agencies are WIPO and WTO, with WIPO providing subject expertise and WTO, through TRIPS, providing appeal and enforcement procedures. In addition, other UN agencies provide technical assistance (eg, WTC). Increasingly, as their own work involves IP, other agencies have become involved (eg, UNCTAD, UNESCO, UNDP). However, in all expert matters except enforcement the UN system defers to WIPO.

It is significant that, by attaching TRIPS to the 1994 WTO Final Acts, instead of to WIPO, IP became a trade issue. Given the UN's Millennium Goals, which put the priority on development, and the WSIS, are the WTO's priorities now out of step?

It is also notable that WIPO is seen increasingly as representing rights-owners over other interests, and has little incentive to consider the public interest or to operate 'public interest' tests of new IP rules.

Other UN agencies are taking an increasing interest in IP and often from a very different standpoint from WIPO. For example, UNESCO's draft convention on cultural diversity (to be submitted to General Conference in September 2005) has many references to 'the vital role of the creative act which nurtures and renovates cultural expressions' and to 'appropriate' IP. However, even more notable is the Convention's explicit exclusion of IP from its own scope.

The developing countries find it difficult to participate in UN meetings as effectively as do the EU and US, due to a lack of resources. Even if they were better resourced, they find it hard to maintain their policies in the face of G8 opposition. They are required to adopt high levels of IP protection either through WTO/TRIPS or FTAs. International funding agencies (World Bank, IMF, regional banks) seldom understand IP. The US and UK recently voted against UNCTAD providing assistance. So the developing countries have both special problems and a shortage of organisations they can obtain assistance from.

We have already discussed whether or not governments should favour one business model over another (see, #6, Economic Efficiency). The same comment can be made of international organisations. They should not have favourites among business models or technologies unless they can clearly demonstrate the public interest benefits.

Many of these issues were discussed at the meeting on 'The Future of WIPO' in Geneva in 12-14 September 2004, leading to the Geneva Declaration.

Points and Questions

- When is the UN system obliged to apply a public interest test to new IP rules? If the answer is never, should it be obliged? If so, how should the test be expressed, and how should it be applied?
- Is a trade agency dominated by the major Western trading countries the best-qualified body to regulate the ethical, development and public interest conundrums of intellectual property? Does it over-emphasise the protection of markets and assets rather than on encouraging learning and innovation? Over the years, WIPO has accumulated several 'mission statements', some of which conflict. What should WIPO's mission be?
- If the objective is to maintain a strong public domain and strong private rights, instead of chiefly the latter, how should the UN's powers be exercised?
- Currently, trade interests are very well represented at policy forums. The interests of the public (of all countries) are under-represented. Who should articulate their interests? How are they to get a seat at the negotiating table?