Contemporary IP Paradoxes

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The present time is challenging for law since it involves different paradoxes that need to be considered. Two of them are especially troubling: the issue of disincentives, and the friction between global problems and local solutions. Both deeply influence patent law and make the system much less functional than it should be. Let us assess each of them separately.

The first one – disincentives – is based on a longstanding law and economics belief stemming from outdated neoclassical concepts. It can be stated as follows: a central problem regarding the functioning of markets would be the diffuse presence of free-riding. One of the main functions of law, including industrial property and antitrust law, would be to create barriers for such behavior. Accordingly, for example, patents would be justified to avoid the risk of an individual or enterprise extracting the benefits of someone else's investment in research and development for new inventions.

This statement might have been true for the world of the 19th or the 20th centuries – but it is no longer true.¹ The world of abundance of the previous centuries justified this kind of assertion. Resources and inventions being abundant, the general trend is for producers to attempt to wrest for themselves the economic byproducts and benefits of others' inventions. In other words, there was a dispute between producers to accrue the economic benefits of inventions and patents, who tried to prevent the use by those who had not invested.

The world of the 21st century is completely different. Firstly, abundance is gone. We live – and will increasingly live – in a world of scarcity of natural resources and of the goods needed to combat it. Moreover, in the world of the 21st century,

¹ It is not as a rule true for the current world, even if it might be true in some very specific cases.

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inventions are a result of a complex mix of public investments, pure science progress at big universities, and investments by enterprises to help in achieving practical uses for some of the great ideas of pure science. Therefore, it is much more difficult to identify a single private entrepreneur who is being free-ridden. Consequently, it becomes harder to state that protection of the patent owner against competitors should be the primary focus of IP law.

In fact, the opposite seems to be true. Instead of competitors, the dispute deals with access of consumers and potential users to scarce resources and inventions, which leads to new significant challenges for the law. In sum, the question is how to provide access in a world of scarcity? For this reason, in such a world, the law's focus on free-riding turns out to be a disincentive that might lead to the opposite effect: free-driving.

Free-driving, a concept originally developed for environmental economics and introduced by Martin Weitzman,² is very useful in a world of scarcity. It argues that if incentives are misplaced, they can lead to excessive production concentrated among a few producers and regions, while others are left with nothing. Therefore, while some regions are oversupplied with goods and inventions, others are completely deprived of them. This question is much more relevant in a world in which law has to arbitrate mainly disputes on the demand side and not on the supply side. This is exactly what is happening in the world of scarcity that we all live in. For IP law, this means that if patents are overprotected, some groups and regions of the world will be oversupplied with goods while others are deeply underprovided. In this scenario, the international IP system structured around the TRIPS Agreement becomes unmanageable and inefficient.

This last statement leads me to the second paradox I referred to: the mismatch between global problems and local solutions. This is a problem that has haunted the IP system for decades. The TRIPS Agreement tried to introduce flexibilities at the local level (through, for example, local compulsory licensing provisions), but local solutions are insufficient in light of the needs and new technologies which are increasingly global. The problem of disincentives then comes back in full force. Regions that are rich in terms of state and university support of technological development free-drive and overproduce (for their own needs and more), while other regions remain embedded in scarcity. This is exactly what we have been witnessing with respect to the recent Covid-19 vaccine crisis, as developed countries hoard vaccines and control know-how, rendering a local solution (e.g. a compulsory license in a single country) ineffective.³

Markets' negative externalities can only be controlled if the law chooses the right regulation and the right incentives. It is no longer justified that the central objective of regulation is the protection against free-riding. Competition itself is the best protection against free-riding. On the contrary, protection against the unequal

² See "A voting architecture for the governance of free driver externalities with application to Geoen지니어ing" https://scholar.harvard.edu/files/weitzman/files/weitzman-2015-the_scandinavian_journal_of_economics.pdf.

³ Law and Poverty Research Group, University of São Paulo. "Research Report on Access to Covid-19 Vaccines" May 2021. Available at: https://www.direitopobreza.org.br/_files/ugd/81c13c_4a64de6a52bf4008a956b785e2b671ba.pdf.

distribution of production and access to technology should be sought, i.e. protection against forms of free-driving. To that aim, only a global law or regulation that unifies IP principles with competition law principles and allows for the existence of global public goods, exempt of patents and open to all competitors – public or private – that are ready to produce, will be useful.

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