The politics of intellectual property laws*

LTC HARMS**

Early in 2010, I had occasion to write an editorial for Max Planck's *International Review of Intellectual Property and Competition Law* on indigenous traditional knowledge and intellectual property law.[1] My argument was that indigenous traditional knowledge cannot be classified as intellectual property; instead it required its own niche for protection. I cited the history of the Hoodia plant. Subsequently I received this news snippet from Australia:[2]

> "The Western Australian Department of Agriculture and Food are growing a plant which can help those trying to lose weight. Hoodia is a cactus-style plant, on trial at the department's Gascoyne research site in Carnarvon.
>
> Manager Tony Kirwin says while it is only very early in the trial, he hopes researchers will eventually patent a product worth a lot of money for growers. 'Hoodia comes from Southern Africa, from the Kalahari, where the Bushmen chew on these cactuses to depress their appetite when they're hunting,' he says. 'We think that there's a huge market there for this if we can find out how it grows, distil the stuff and then market it, come up with a PBR [plant breeder's right] or some system that we can patent.'"

Mr Kirwin has much to learn. Hoodia is not a cactus; one does not refer to the San as Bushmen; the San, like the Aborigines, insist that their indigenous knowledge be respected; the active ingredient has already been isolated and patented; initial test results with Hoodia were so disappointing that development was terminated; and that one does not get a plant breeder's right for finding out how a plant grows.[3]

Reverting to my subject, I (and others) lost the argument because our intellectual property law have since been amended to accommodate indigenous traditional knowledge.[4] I should have known that for more than one reason the argument would not prevail.

The first is that there is no such thing as an intellectually sustainable concept of intellectual property law, because the principal areas of intellectual property law, namely patents, designs, copyright, trade marks and unfair competition, have surprisingly little in common with each other.[5]

Secondly, as explained by Boyle, we lack a politics, or perhaps a political economic theory, of intellectual property.[6] One could compare intellectual property law with the Kon-Tiki: A prehistoric vessel, drifting across the Pacific; rudderless; relying

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** Adams & Adams Professor in Intellectual Property Law, University of Pretoria. Former Deputy President of the Supreme Court of Appeal of South Africa.

1 "Indigenous traditional knowledge and intellectual property law" 2010 *IIC* 503.

2 http://www.abc.net.au/rural/news/content/201006/s2940866.htm brought to my attention by Prof Blakeney.

3 For the facts see Harms "A few negative trends in the field of intellectual property rights" 2009 *THRHR* 175 and 2009 *European Intellectual Property Review* 540.

4 The act is not yet in operation, and does not appear on the available databases.

5 As if authority is required: https://www.londoninternational.ac.uk/current_students/programme_resources/ laws/subject_guides/intellectual_property/intel_prop_chpt1.pdf (12-03-2012).

6 "*A politics of intellectual property: environmentalism for the net*" 1997 *Duke LJ* 87.

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on sea currents and on a theory, which might or might not be valid, to reach its destination.

Weber, writing a century ago, would have reminded me that law-making is of two kinds: rational or irrational.[7] In non-philosophical terms it amounts to this: irrational law-making is not controlled by the intellect and built around general norms but is determined by emotional, ethical or (especially) political factors. We are living in the age of irrational law-making – something Mr Kirwin proved: in the absence of international protection of indigenous traditional knowledge, local protection is of no value. It only inhibits local development and industry, another argument I had lost.

We are also not entirely honest about intellectual property law. In his usual provocative manner, Sir Robin Jacob said this:

> "The general area of law now called 'intellectual property' is in the main a law conferring private rights on one party to prevent competition from others. It is fundamentally about industry – an economic law – a law that controls or forms the base for industrial activities. To call it 'intellectual' is misleading. It takes one's eye off the ball. 'Intellectual' confers respectability on a monopoly which may well not be deserved. A squirrel is a rat with good PR. 'Intellectual Property' is perhaps a phrase coined by the same PR agent for monopolies?"[8]

The granting of and limitations on monopolies have always been political issues. We are all aware that the origin of patent law lies in the battle for sovereignty between king and parliament and that the Copyright Act of Anne limited the monopolies of printers and reduced censorship through the creation of the author's right. Nothing much has changed.

Two recent events illustrate the point graphically. The International Indigenous Forum decided on 22 February 2012, during the course of a meeting of the World Intellectual Property Organisation's committee on genetic resources, to withdraw from the discussions. And on 26 February, the Africa intellectual property law training programme on intellectual property organised by the United States, with several partners, for Cape Town at the beginning of April was postponed indefinitely under pressure to make the programme more transparent and representative of all stakeholders. I suppose that the buzzwords "representivity" and "transparency" will be with us for a long time.

The fact that the United States of America was the senior partner in the event may have had something to do with the opposition to it.[9] The United States of America, I believe, bears a burden similar to that borne by Rome. In the words of Virgil, it is this:[10] "Roman, remember to rule Earth's people through your empire –

[7] Rheinstein (ed) *Max Weber on Law in Economy and Society* (1967 reprint) 63.

[8] Jacob "The Stephen Stewart Memorial Lecture: Industrial Property – Industry's Enemy" 1997 *IPQ* 3.

[9] The ambiguous feeling in the Third World about the USA is well illustrated by Theroux's experience with a Sudanese guide in *Dark Star Africa* (London 2002) 83-84. After Mohammed had said that "Bush is Satan", that "Clinton is Satan", and that "American soldiers no good" because they kill people, he suddenly said that "I want to go to America" and asked "How I can go to America?"

[10] *Aeneid* Book 6: 753-756: "tu regere imperio populos, Romane, memento (hae tibi erunt artes), pacique imponere morem, parcere subiectis et debellare superbos."

for your abilities[11] are to be these: to pacify, to impose the rule of law, to spare the conquered, and to battle down the proud."

In an intellectual property law context it means that you will be spared if you accept our view of intellectual property law as the rule of law, enter into a Trade-Related Aspects of Intellectual Property Rights Plus Agreement and abide by the Anti-Counterfeiting Trade Agreement (ACTA). Otherwise we will battle you down with section 301 of the Trade Act, 1974. In this regard Lennard referred to a Latin proverb which reflected upon the dilemma of holding a wolf by the ears (*auribus teneo lupum*):[12] dangerous to hold it so, dangerous to let it go. United States protectionism is just such a wolf, he said, although to the United States of America a wolf is always foreign.[13]

De Tocqueville noted that "the Americans … are fond of explaining almost all the actions of their lives by the principle of self-interest rightly understood".[14] This, I believe, is still true but not only in relation to Americans. By the way, the America Invents Act (nearly as silly a name as the PATRIOT Act) was signed into law during September 2011.[15] It is not what one would call earth shattering but nevertheless the legislative process took six years and 607 groups spent some $790m on lobbying during the preceding year alone.[16] This may be another instance of ideology blended neatly with the interest of the industry funding the ideologues.[17]

Intellectual property law legislation is in consequence not based on principle but on political expediency and, more often than not, based on flawed ad hoc economic theories. And political expediency is fuelled by self-interest and emotion.

Our indigenous traditional knowledge legislation is a prime example of a similar political philosophy. It has been reported that government ignored the prescribed regulatory impact assessment, done by an independent research company, which established that there was insufficient evidence to conclude that the risks and costs associated with implementation would be justified by the achievement of social and economic benefits on a significant scale for indigenous communities.[18] The assessment did not suit government's preconceived ideas.

This is reminiscent of the history of section 15C of the Medicines and Related Substances Control Act 101 of 1965, another piece of irrational law-making. It allows the minister to prescribe conditions for the supply of more affordable medicines notwithstanding anything to the contrary contained in the Patents Act.

[11] Virgil used the plural of "ars", translated by historians as "arts". See Kelly *The End of Empire* (2009) 25. Since context is everything (pace Lord Steyn) and since "the meaning of a word is always another word" (Bloom *The Western Canon* (1995) 63) I prefer to translate "artes", not as "arts", but as "abilities" or "cunning", meanings the word "art" has in Latin (Engelbrecht *Latijnsch Woordenboek* (1884)) and in American English (*Encarta World English Dictionary* (1999)).

[12] Terence *Phormio* Act III Scene ii. It was already in his time (161 BC) considered to be an old saying.

[13] "Which is the wolf and which is the lamb? Australia confronts US before WTO" 2000 *Austr LJ* 217 220.

[14] II *Democracy in America* bk 2, ch VIII. Admittedly he may have used it in a different context, because the chapter is headed "How the Americans combat individualism by the principle of self-interest rightly understood."

[15] AIA, PubL No. 112–29; House Report No 112–98, 112TH Cong, 1ST Sess 2011 http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt98/pdf/CRPT-112hrpt98-pt1.pdf (12-03-2012).

[16] First Street Report "Lobbying the America Invents Act" http://firststreetresearch.files.wordpress.com/ 2011/11/first-street-report-lobbying-the-america-invents-act.pdf (20-03-2012).

[17] Cockburn "Drones, baby, drones" (34) 5 *LRB* 15 (8-03-2012).

[18] *Mail & Guardian Online* http://mg.co.za/article/2011-10-03-government-ignores-its-own-advice/ (20-03-2012).

The act was hailed as a step towards ending apartheid in medicines.[19] The litigation between the pharmaceutical industry and government concerning its validity was settled when the industry withdrew its application. It was seen as a big victory over the industry. What is seldom mentioned is the fact that government undertook to abide by the provisions of the Trade-Related Aspects of Intellectual Property Rights agreement.[20] We are more than ten years down the line and this provision has not been used – not even once – because no one has thus far even bothered to apply for a permit under the regulations.[21] In spite of this the legislation is still being hailed by the starry-eyed as a panacea to drug costs.

A problem is that intellectual property law principles that were developed to curtail monopolies are now used to extend them. And principles that were developed to cater for one technology (namely printing) are now used in a completely new technological environment – the digital era – for which they are hardly suitable. Where the grant of a patent was an indulgence, it is now a matter of right, and irrespective of the level of inventiveness or novelty one is entitled to the same monopoly. The same applies to copyright: irrespective of the quality of the work or the level of its originality you get the same protection.

Another problem is that the political economy of intellectual property rights differs from society to society and what is true in relation to an economy that depends on the creation of knowledge is not true in respect of one that depends on the production of raw material or labour.

Lee reported in an *IPKat* blog during January that the Missionary Church of Kopimism was founded in 2010 by a Swedish philosophy student and file sharer. The Swedish governmental agency responsible for such things registered the church as an official religious organisation. According to the church, information is holy and copying is a sacrament. Information holds a value, and the value multiplies through copying. The church organises "religious services where the kopimists share formation with each other through copying and remix". CTRL+C and CTRL+V are sacred symbols.

This is reminiscent of the history of Scientology. Hubbard, when he launched his idea of Dianetics, insisted that it had nothing to do with "any mumbo-jumbo of mysticism or spiritualism or religion" but when he ran into difficulties he transformed his organization into a church. This meant that his practices could no longer be subjected to scientific scrutiny and he became tax exempt in the United States of America and Australia. As Aviv explained, a religion "can turn self-help platitudes into a scarce and privileged resource; criticism can be dismissed as intolerance, or persecution".[22] The French and the English, at least, were not impressed.[23]

This may be amusing, but it is serious, as we know from the fact that political parties, with free copying as their only political credo, have been fairly successful in national elections in Sweden and Spain. I have always believed that politicians are not interested in intellectual property rights because people do not vote for their views about intellectual property law. But I know now that politicians are obliged to be interested in intellectual property law because they may lose votes if they are pro intellectual property law, at least in the developed world. The refusal or reticence of

[19] www.tac.org.za/Documents/Literacy/pmavsgov.doc (13-03-2012).
[20] Adams & Adams *Practitioner's Guide to Intellectual Property Law* (2011) 105.
[21] Fact verified on 13-03-2012.
[22] Rachel Aviv "Religion, grrrr" 34(2) *LRB* 14.
[23] *Church of Scientology of California* v *Kaufman* 1972 FSR 591.

some European countries to sign the Anti-Counterfeiting Trade Agreement, in spite of their rather secretive part in its development, proves the point.

We come from a legal background informed by Roman law concepts, the rights of the individual and the absolute right in property. These rights formed the basis of liberal capitalism. Intellectual property rights developed in the Western world and are seen as Western capitalist creations.

We know that much of the world does not accept these concepts. Our own constitution in some respects pays lip service to property rights. The move is from the rights of the individual back to the rights of communities; away from absolute rights to relative rights: rights have to yield to what is considered to be the general good – in itself a fluid concept.

It is not without significance that a cabinet member recently remarked that we do not have a liberal constitution but a socialist one.[24] What he meant by socialism he did not say: that of Mr Castro or that of Mr Strauss-Kahn? There is a difference, but that is not easy to perceive because, as Mr Strauss-Kahn's lawyer said, it is not possible to distinguish between a naked prostitute and any other naked woman.[25]

Another cabinet minister went to address a political meeting in Wesselsbron, a place in the country to which politicians are unable to fly and thus obliged to drive. Because of potholes, he had two flat tires. When asked about the poor state of our rural roads he responded by saying that infrastructure is a middle-class obsession. Sep Blatter, he of the Fédération Internationales de Football Association (FIFA), whether you like him or not, has since caused a mind-shift in some government circles, at least for some roads close to the centre of government.

Although the general view is that socialism has failed in the former Union of Soviet Socialist Republics, liberal capitalism has also been unable to satisfy the general socialist desires that one finds amongst the have-nots and most haves. As Judt said, "today neither Left nor Right can find their footing."[26] That is why the Greek economy failed. The Greek government professed to adopt a capitalist economy but ignored market forces and dished out largesse as if it were a socialist country. Tomorrow will pay, even if we do not work today. And now they are upset with those who lent them money.

That is the danger to our economy: we only have 4 million people who file tax returns (that is not 4 million who pay tax) and we have some 15,2 million who receive social benefits (which means that many more than 15,2 million live off social benefits).

Haunss, from the University of Konstanz, discussing the politicisation of intellectual property law, pointed out that during the last fifteen years or so a remarkable string of contentious mobilisations has emerged to challenge the normative and institutional frameworks that regulate how knowledge is produced,

[24] The view that the adoption of the Constitution of the Republic of South Africa, 1996, marked the enactment of one of the world's most liberal constitutions is generally held, even by Justice Ruth Bader-Ginsburg: Adam Liptak "'We the people' loses appeal with people around the world" http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html?_r=3&partner=MYWAY&ei=5065 (13-03-2012). To the extent that the term "liberal" still has a discernible meaning this view is nevertheless an over-simplification.

[25] Lear "Dominique Strauss-Kahn attends an event" *The New Yorker* (29-02-2012) http://www.newyorker.com/online/blogs/culture/2012/02/dominique-strauss-kahn-attends-an-event.html (13-03-2012).

[26] *Ill fares the Land* (2010) 3.

appropriated, and used.[27] They include access to medicine, software patents, pirate political parties, the Creative Commons project, bio-piracy, the protection of traditional knowledge, peer-to-peer file sharing, and the access to knowledge movement. [28]

Political protests in many European countries and the Occupy Wall Street movement in the United States of America are the result of a belief that something is wrong. The protesters have no answers, but they have anger. And they have to find a scapegoat. They have given up on their political leaders, whom they have chosen by default (since less than 50 per cent vote). In any event, they are used to political leaders who tend to lead from behind and refuse to take the risk of relying on their own convictions. In this age of boredom, which is the by-product of innovation,[29] they are addicted to information technology and easy access to money, and any related deprivation hurts deeply.

The reaction of many to the arrest of the hacker, Mr Assenge (who attracted wide popular support for his actions), and that of the founder of Megaupload in New Zealand, and to the adoption of the Anti-Counterfeiting Trade Agreement are clear indications that we are not talking about merit, legality or morality, but about emotion.

One gets the impression that the proletariat is dictating intellectual property law.

No wonder that intellectual property law has attracted the attention of dialectic-materialist philosophers. I cannot pronounce the name of the one I intend to refer to.[30] Explaining the wealth of Mr Bill Gates, he said that Microsoft has imposed itself as an almost universal standard by monopolising one embodiment of what Karl Marx referred to as the general intellect – *ie*, the collective knowledge in all its forms. This, the author said, is at the core of today's struggles over intellectual property law: as the role of the general intellect increases in post-industrial capitalism, so wealth accumulates in the hands of few and out of all proportion to the labour expended in its production. This leads to the privatization of knowledge and of workers becoming superfluous.

Goldsmith did not need an economic theory to say the same, namely that "ill fares the land … where wealth accumulates, and men decay".[31]

This brings me to the World Health Organisation. The following resolution is on the table for its meeting in May, namely to establish a new mechanism for international collaboration among member states, from a public health perspective, regarding substandard, spurious, falsely-labelled, falsified, and counterfeit medical products, but, importantly, "excluding trade and intellectual property considerations". What a counterfeit product without intellectual property is, we have not yet been told.

The reason for this new attack on the World Trade Organisation and Trade-Related Aspects of Intellectual Property Rights Agreement is that many countries believe that trade and intellectual property law considerations should be discounted in deciding whether or not a drug is counterfeit.[32] And this is based on the unexpressed

[27] "The politicisation of intellectual property: ip conflicts and social change" 2011 *WIPO J* 129 available at SSRN: http://ssrn.com/abstract=1965554 (12-03-2012).

[28] For a slightly older discussion of the general topic see the essays in Haunss and Shadlen (eds) *Politics of Intellectual Property* (2009).

[29] Brodsky "In praise of boredom" in *On Grief and Reason* (1995) 104.

[30] Zizek "The revolt of the salaried bourgeoisie" 34(2) *LRB* 9.

[31] *The Deserted Village* (1770). The quotation is the source of the title of Judt's quoted work.

[32] http://apps.who.int/gb/ebwha/pdf_files/EB130/B130_R13-en.pdf (13-03-2012).

premise that medical products are not the result of trade and intellectual property law considerations.

One can have sympathy for the uninformed, but if the informed act irrationally, there is much reason for concern.

While on the Trade-Related Aspects of Intellectual Property Rights Agreement, it ought to be common knowledge by now that it was added to the General Agreement on Tariffs and Trade (GATT) because of the unenforceability of the Berne and Paris Conventions and the realization by the United States of America during the 1970s of the value of copyright and patents as export commodities.[33] They, who had shunned Berne for a century, saw the light and were converted – and the converted tend to become fanatics. However, since then,

> "policy-making at the WTO seems to have ground to a halt after the 2001 Doha Ministerial Conference … . The BRIC countries have also been gaining more expertise in the area of IP, so governance at WIPO has become an issue. WIPO is more balanced, but strangely, it is also a more dysfunctional institution as a result. It is precisely the growing balance between countries that has prompted some countries interested in international maximalist agendas to try to implement their agendas through international trade treaties."[34]

That is enough for one day. I have referred to the Kon-Tiki but there is an alternative vision of intellectual property law, this time in the shape of the Costa Concordia: a luxury vessel, representing intellectual property law. Passengers are intellectual property holders – they can afford the cruise. The captain is fooling around in his cabin, busy with more exciting things than steering the ship. The ship is close to the rocks. The pilot does not realize it because the captain did not supply him with proper navigation maps and, in any event, has told him to sail as close to the rocks as possible. The ship hits the rocks and sinks. The captain could not care because he knows that, like a good marine rat, he will be able to jump ship at the first signs of danger.

Choose your own boat.[35] As Kriwaczek noted, "once people stop believing in the system, the end is near; no amount of coercion can keep it going indefinitely".[36]

[33] *Golan v Holder, Attorney General* No 10–545. 18-01-2012: US supreme court.

[34] Guadamuz "TPP: The shape of the new international IP regime" iposgoode@osgoode.yorku.ca (20-02-2012).

[35] The comparison between shipping and intellectual property law, I have since preparing this paper discovered, is not novel and my rendition is therefore original. The multi-talented Barlow has used the simile more than once. This is one rendition ("The economy of ideas" http://www.wired.com/wired/archive/ 2.03/economy.ideas_pr.html) (12-03-2012):

> "Since we don't have a solution to what is a profoundly new kind of challenge, and are apparently unable to delay the galloping digitization of everything not obstinately physical, we are sailing into the future on a sinking ship. This vessel, the accumulated canon of copyright and patent law, was developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry. It is leaking as much from within as from without. Legal efforts to keep the old boat floating are taking three forms: a frenzy of deck chair rearrangement, stern warnings to the passengers that if she goes down, they will face harsh criminal penalties, and serene, glassy-eyed denial. Intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum (which, in fact, rather resembles what is being attempted here). We will need to develop an entirely new set of methods as befits this entirely new set of circumstances."

[36] *Babylon* (2010) 75.

SAMEVATTING

IMMATERIEEL GOEDEREREGTE EN POLITIEK

Die gebied van die immateriële goedereregte gaan onder 'n aantal beperkings gebuk wat die uitbreiding daarvan op teoreties gefundeerde gronde kniehalter. In besonder kan na die volgende faktore verwys word: die kerngebiede het weinig gemeen; daar is 'n gebrek aan 'n aanvaarbare ekonomiese teorie wat die gebied onderlê; die wettereg is irrasioneel; en die begrip "intellektuele goedere" is opgeblase.

Daarbenewens word die gebied deur politieke oorwegings en gedienstigheid oorheers – nie alleen histories nie, maar ook in die huidige tydsgewrig. Op internasionale gebied word sake beïnvloed deur die feit dat die Verenigde State van Amerika so 'n belangrike maar onaanvaarbare rol op die gebied speel.

'n Probleem is dat beginsels wat geskep is om monopolieë aan bande te lê, tans aangewend word om nuwe monopolieë te skep. Daarbenewens word beginsels wat in 'n ander tegnologiese tydvak ontwikkel is, op ander nie-gelyksoortige, tegnologieë toegepas waar hulle nie hoort nie.

Die grondslag van algemene regsbeginsels wat hulle oorsprong in die Romeinse reg vind, is ook in die algemeen in die spervuur. Regte word in alle opsigte gerelativeer. Die vraag ontstaan of die Suid-Afrikaanse grondwet sosialisties of "liberaal" is, wat die begrippe ook al mag beteken.

Die aanval op die immaterieel goedereregword van alle kante geloods en op talle aspekte daarvan. Voorbeelde uit die onlangse verlede sluit in die aanval op farmaseutiese patente en op regte ten aansien van rekenaar-sagteware. Daar is 'n duidelike verband tussen die protes teen die huidige ekonomiese bedeling en die protes teen immateriële goedere.

Met verwysing na talle onlangse insidente kan 'n mens tot die gevolgtrekking geraak dat die proletariaat die agenda dryf en dat politici nie die durf het om standpunt in te neem en leiding op beginselgrondslag te gee nie.

Aan die anderkant is daar gronde om te aanvaar dat die akkumulasie van rykdom in die hande van enkelinge as gevolg van die digitale rewolusie daartoe aanleiding gee dat ander krepeer.

Ten besluite kan verwys word na Kriwaczek wat opgemerk het dat as mense hulle geloof in 'n sisteem verloor, is die einde naby en dat dwang nie die einde kan uitstel nie.