

Intellectual property rules suit the wealthy.

Glenn Ashton

Recent media focus on intellectual property rules has led many to believe that the entire debate centers around the issues of piracy of films, videos and DVDs. There is a constant refrain that a watertight regime of intellectual property rules is essential to protect the rights of those who devised, developed and produced innovative goods, be it art or health cures.

When we go to the movies we are shown powerful industry statements that portray clearly that theft of movie images is a piratical anathema to both our viewing pleasure and a threat to the very structures that uphold our system. Piracy, it is implied, is closer to anarchy than it is to theft, closer to the gunpowder plot than to the mere abuse of technology for personal gain.

A whole set of corollaries are posited by this implication. Is piracy or appropriation of intellectual property always bad? Do the same rules apply across the board to such piracy? Is protection of intellectual property a level playing field? Are stringent intellectual property rules essential to nurture growth, welfare and the general public interest? And how do intellectual property rules affect us individually, collectively, nationally, regionally and continentally? Most importantly, perhaps we must consider whether intellectual property rights were ever intended to be or were devised to be tools to provide almost limitless monopoly rights to the originators of any claims.

None of these are easy questions to answer but they are essential questions to ask in order to inform ourselves how we are affected by this debate as well as how it plays out on national and international stages.

Is there any moral high ground?

Anyone who has invented, written or produced anything unique is familiar with the frustrations of attempting to protect their idea, concept or item from appropriation by others who wish to gain, either through the accumulation of academic

kudos, through usurping potentially profitable concepts or simply through appropriating concepts by legal and financial subterfuge.

Humans are altruistic; this is known through observation and has been confirmed by scientific analysis. Recently the Max Planck Institute for Evolutionary Anthropology found altruism exhibited by both sub 18-month-old humans and chimpanzees. Most of us, in devising ideas and concepts want to see them shared for the good of all. It can be strongly argued that the altruistic incentive, if I may call it that, is a stronger driver for progress than the right to harness intellectual property by creating legal frameworks to protect such concepts.

However, as soon as our world-view shifts from a humanistic to an economic perspective, altruism, morals and ethics are sidelined by the profit motive. A legal regime to own and protect intellectual property is an essential part of our inherited market economy upon which our supposed security depends.

The accumulation of capital - as in the practices of capitalism or neo-liberalism - coupled to the need to protect and thus enclose ideas and concepts that have monetary value, or even those which have potential monetary value, has been the driving force behind the creation of an increasingly rigid system of intellectual property protection.

Global Rights Hegemony

Patents and intellectual property have long been protected by United Nations supported treaties such as those which gave rise to the World Intellectual Property Organisation (WIPO). International harmonisation of these rules remains elusive despite increasing attention in the past two decades, spurred on by two major evolutions in the euphemistically titled "free market" which in reality has marked the evolution of corporatism as a modern economic driver.

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The first of these evolutions was that of a united world trade body. This has taken shape as the World Trade Organisation that arose out of a lengthy series of conferences lasting decades, called GATT or the Global Agreements on Tariffs and Trade, created by the victors of World War Two, in concert with the World Bank and International Monetary Fund. These together create three pillars of what is effectively the Bretton Woods triumvirate, enhancing the power of the Organisation of Economic Co-Operation and Development, comprised of the so-called developed nations, also known as the Global North.

Under GATT and the WTO, the latter created in 1995, the rules protecting and harmonising intellectual property have been enhanced to principally benefit corporate and neo-colonial interests. The primary harmonisation instrument is the WTO Trade Related Intellectual Property regime, known as TRIPS. TRIPS is extremely controversial in its failure to recognise traditional and communal knowledge systems and rights while at the same time insisting on strong protection, enforcement and regulation of corporate aligned intellectual property rules.

WIPO has sought to broaden the debate after pressure was applied from several member countries, mainly from the global South and now aligned around the so-called megabiodiverse nations, which include Brazil, India, China and South Africa. They forced the initiation of a round of discussion around the validity and applicability of intellectual property rights for traditional and communal knowledge systems.

This flood of acronymic instruments supposed to regulate intellectual property does not stop here. They extend to, and interrelate with, other agreements such as the United Nations Convention on Biological Diversity and UPOV, the International Union for the Protection of New Varieties of Plants. Each component is relevant to a complex international interrelationship of agreements that apply to the protection of intellectual property, be it related to patents or traditional knowledge systems.

Within all this detail lies the Devil and for the developing world the Devil is the threat of the intensification of wealth in the developed world

while the Global South remains exploited and poor.

Patented humans

The second evolution in human progress that has influenced the entire intellectual property debate is the genetic revolution. Certainly a revolution is somewhat more extreme than an evolution but this hints at the importance of what has occurred as part of the genetic revolution, particularly within the health industry. Since the secrets of the double helix began to be revealed in 1953, humans have developed the ability and means to control the very processes of life through technical advances and through applying intellectual property rights to living organisms.

The first patent on a living organism was granted to a genetically altered bacteria by the US Supreme Court in 1980 launched a new speculative gene rush, with over 1, 300 patents granted on full-length human genes and many thousands more on other living organisms, from marine life to plants and enzymes. Better known examples such as genetically modified food crops have been widely discussed but the implications of this gene rush on health, gender and economic status remains poorly understood by most people.

For instance Myriad Genetics was granted a broad patent on the gene BRCA-2 gene that has been linked to a predisposition to breast cancer. This controversial patent was overturned by the European Patent Office but was later upheld after its wording was altered. This patent grants a virtual monopoly to Myriad Genetics for testing for this predisposition to breast cancer. Previously tests could be done by public service medical facilities at a cost of around US\$100. Now the price has in some cases risen to more than five times that amount, not only placing already vulnerable women at further risk – particularly in nations where this procedure is not covered by health insurance or social support services - but also placing a completely unnecessary burden on public and private health systems. This clearly runs counter to the public interest.

And this is just the tip of the iceberg. Genetic testing and possibly genetic therapies will become a speculative branch of investigation, driven, as is the entire pharmaceutical industry toward profit driven solutions to health care for

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Northern markets. Less profitable markets and far more serious medical problems such as malaria and sleeping sickness remain marginalised.

It is notable that Big Pharma has moved sharply toward adoption of genetic technologies in their search for profit. Genetic therapies are terribly attractive to corporations as they can theoretically be tailored towards the individual. This ignores the fact that the entire scientific foundation of our present understanding of genetic engineering and its ramifications is poorly founded. This is brought into focus by the recent nightmarish experience by six drugs test volunteers in the UK who were given a genetically engineered medicine, with the most horrific results - four almost died and two remain in serious condition as of this writing. All we hear from the manufacturers is that this should not have happened. Too right.

But whether this line of research pays off or not, the important point is that the benefits will mainly accrue to those that can afford them and more importantly, those that are prepared to pay. Perhaps it is not just the intellectual property system we should be questioning but our entire system, but I have alluded to that already!

Rights now and forever, Amen.

Patents grant monopoly rights for a limited time, theoretically in order to repay the Research & Development costs. Yet monopolies on genetic data are largely speculative and can through small alterations, be reclaimed when the monopoly term approaches closure. This can tend to an endless monopoly on various genetic data that may be essential to global biological functions.

In South Africa we had a lengthy – but not necessarily profound – debate around the role of Big Pharma in testing and promoting anti-retrovirals and related HIV and AIDS medicines. International intellectual property regimes do grant governments the right to apply for a waiver of property protection in case of national emergencies, as our HIV and AIDS pandemic so clearly is. However nations are reluctant to do so in order to placate investor sentiment.

India and Brazil have both insisted on compulsory licensing - as this waiver is termed - yet South Africa, after all of its earlier legal bluster in taking

Big Pharma to court in a move supported by a morally outraged world, has really failed to follow up on forcing the hand on matters of intellectual property as they apply to genetics, pharmaceuticals or even traditional knowledge systems. Yet South Africa has indeed sided with the developing world position, the so called G21, in calling for more transparency and fairness in positions taken by the WTO Doha round while remaining cautious to not be seen rocking the economic stability boat.

Rights in the service of society

Below the radar of international monoliths like the WTO and the so-called multilateral agenda, lies a series of bilateral agreements between developed nations and blocs that present different threats. Included amongst these are EU-SA bilaterals, the US driven African Growth and Opportunities Act, as well as numerous other treaties between single or multiple parties. These treaties often insert clauses relating to intellectual property protection that weaken positions taken at multilateral fora, often without due reference to national democratic structures or public input.

The matter of intellectual property rights and how they relate to life and knowledge, be it indigenous or corporate, is one that must be engaged with by civil society at all levels. At stake is the last frontier of ownership: The ownership of living organisms and life and metabolic processes. Once this frontier is crossed, and when corporate interest trumps personal or communal rights, not only health care but also our entire existence will become a far more tenuous and risky proposition than has ever previously been the case. We cannot permit the usurpation of life and knowledge through arcane legal structures. This is an issue that demands urgent attention from the widest possible cross-section of society, from traditional leaders and healers to medical experts, from academia to the man in the street. It is an issue that touches us all and one we ignore at our collective peril.

Glenn Ashton is a widely published scientific and environmental writer. He co-edited the recently released book, "A Patented World? Privatisation of Life and Knowledge," a series of essays by global experts on issues related to intellectual property and the new enclosure movement, and how this stands to affect society as a whole. It is published by Jacana Press.