The Intellectual Property Debate

Perspectives from Law, Economics and Political Economy

Edited by

Meir Perez Pugatch

New Horizons in Intellectual Property

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NEW HORIZONS IN INTELLECTUAL PROPERTY

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In an increasingly virtual world, where information is more freely accessible, protection of intellectual property rights is facing a new set of challenges and raising new issues. This exciting new series is designed to provide a unique interdisciplinary forum for high quality works of scholarship on all aspects of intellectual property, drawing from the fields of economics, management and law.

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The Intellectual Property Debate
Edited by Meir Perez Pugatch

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Contents

Introduction: debating IPRs

Meir Perez Pugatch

Aliusque et idem
Carmen Saeculare, 10
Horace

1. THE LESSONS OF HISTORY: WAVES OF IP DEBATES

If a Martian (or any kind of extraterrestrial for that matter) were to visit earth for the first time and be exposed to some of the debates that are currently taking place in the IP domain, he would undoubtedly think that there is something very peculiar with the system. After all, if something as 'technical' and 'legalistic' as IPRs draws so much attention, then surely there is either more to the system than meets the eye, or the system is relatively new and therefore requires modifications. If the same Martian were to visit earth sooner – say in the 17th century (1623 to be exact) – when section 6 of the *Statute of Monopolies* was passed in Britain, then he would have probably understood that the system is far from new and would thus have eliminated the second explanation.

After all, the Statute of Monopolies – which at the time revoked all rights to private monopolies under the British dominium and established that the British Crown has the sole authority to grant such monopolies, has made an exception with regard to patented inventions.

> Any declaration before- mentioned shall not extend to any letters patents (*b*) and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm (*c*) to the true and first inventor (*d*) and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use (*e*), so as also they be not contrary to the law nor mischievous to the state by raising prices of commodities at home, or hurt of trade, or generally inconvenient (*f*): the same fourteen years to be acccounted from the date of the first letters patents or grant of such privilege hereafter to be made, but that the same shall be of such force as they should be if this act had never been made, and of none other.[1]

But if the system of IPRs is more than five centuries old, what makes it so fraught with emotion that every generation occupies itself with new debates on IPRs, which are often as emotional as they are rational?

Indeed, the current debates on IPRs are vast and diverse, as will hopefully be demonstrated in this book. However, before outlining some of the themes that will be discussed in the ensuing chapters, it may be useful to remember that such debates have been on the agenda for at least two centuries.

In a paper entitled *The Patent Controversy in the Nineteenth Century*,[2] Fritz Machlup and Edith Penrose, two of the most prominent scholars of IPRs in the early 1950s, have described some of the most intense debates over patent protection in the 19th century. It is worth noting what Machlup and Penrose said about the great patent debates of the 19th century when referring to the debates that took place in the US Congress during the 1940s and 1950s:

> In recent publications [in the 1950s – author's note] commenting on these discussions it has been suggested that opposition to the patent system is a new development. A writer of a 'history' of the patent monopoly asserted that 'there never has been, until the present time, any criticism of this type of "exclusive privilege". . . '.
>
> In actual fact, the controversy about the patent of invention is very old, and the chief opponents of the system have been among the chief proponents of free enterprise. Measured by the number of publications and by its political repercussions – chiefly in England, France and Germany, Holland and Switzerland – the controversy was at its height between 1850 and 1875. The opposition demanded not merely reform but abolition of the patent system. And for a few years it looked as if the abolitionist movement was going to be victorious.[3]

The great patent debate of the 19th century sowed the seeds of the debates that followed in the 1950s, 1970s and up to the present. The patent debate of the 19th century covered it all – philosophical, ethical and legal aspects. It was also the time when economic arguments were put to use and from which a whole new specialization in the economics of IPRs emerged. Machlup and Penrose talk about four dimensions in which the patent debates took place: 1. the natural property right in ideas; 2. the just reward to the inventor; 3. the best incentive to invent, and 4. the best inventive to disclose secrets. Each of these dimensions saw argument for and against the patent system.

To note two dimensions: the notion *natural property right in ideas* and the *incentive to disclose secrets*.

The notion of *natural property right in ideas* was probably first manifested in 1791 France, in which patent rights were linked explicitly to the notion of property. Right number 17 of the *Declaration of the Rights of Man and of Citizens*, as adopted by the French Constitutional Assembly, states: 'the