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# US PATENT POLICY AS A BEGGAR-THY-NEIGHBOUR POLICY

HELEN DOLLING

Bachelor of Laws and Bachelor of Commerce

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## US PATENT POLICY AS A BEGGAR-THY-NEIGHBOUR POLICY

### ABSTRACT

The United States of America (US) has founded its patent policy on the basis that stronger patent protection engenders more innovation (US Patent Principle). The US Patent Principle overemphasises private rights at the expense of social benefit. Patent systems are intended to promote innovation and the public interest. However, the expansion of the US Patent Principle and US patent policy has had a negative effect on global innovation and development.

The US Patent Principle contradicts the principles of trade liberalisation. Trade liberalisation has been a central feature of international trade and law since the end of World War Two (WWII), largely due to the influence of the US, which has been the main advocate of trade liberalisation principles. The trade liberalisation doctrines condemn policies that encompass “beggar-thy-neighbour” protectionist policies, because of the detrimental effects such policies had on the global economy between the end of World War I (WWI) and WWII. A beggar-thy-neighbour policy is an economic strategy adopted by one country to enhance domestic welfare which can only be realised at the expense of other countries.

This article discusses the beggar-thy-neighbour effect of US patent policy domestically and international. In general the US domestic patent regime is effectively a beggar-thy-neighbour policy, because it benefits domestic inventors and large US multinational corporations at the expense of other foreign inventors. The US-led harmonisation of global patent law is also a beggar-thy-neighbour policy, in that at the expense of the developing nations it principally enhances the

welfare of the profits of large multinational corporations, most of which are headquartered in the US.

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Author's Note: The terms 'developing' and 'developed' have been used throughout This thesis for convenience only. The author acknowledges that these phrases are misnomers and does not intend any offence or generalisation by their use.

## INTRODUCTION

Innovation and imitation are predictable competitive behaviours in market economies.<sup>1</sup> Innovation involves uncertainty and risk, whereas imitation takes advantage of an established market.<sup>2</sup> In the absence of regulation, imitation occurs because it circumvents the inherent uncertainty and risk of innovation. Innovation requires the diversion of scarce resources from other activities.<sup>3</sup> The essential value of an innovation lies in its know-how or the information it contains. Once the information has been disclosed, through writing or creating the invention, it becomes a public good which is both non-excludable,<sup>4</sup> and non-rivalrous.<sup>5</sup> Innovation, as a 'public good', carries with it a risk of immediate exploitation by competitive imitation.<sup>6</sup> Patent law prohibits competitive imitation in 'patentable circumstances'. Patentable circumstances require an inventor to demonstrate that their invention is new, involves an inventive step and is capable of industrial application.<sup>7</sup> Once successfully demonstrated, a patent is granted by the State. A patent provides the inventor with monopoly rights to exclude others from making, using, selling or importing that invention.<sup>8</sup> The justification for the state

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<sup>1</sup> William van Caenegem, *Intellectual Property Law and Innovation*, (Cambridge University Press, 2007), vii.

<sup>2</sup> Philipp Koellinger, 'Why are some entrepreneurs more innovative than others?' (2008) 31(1) *Small business economics* 21, 23.

<sup>3</sup> van Caenegem, above n 1, vii.

<sup>4</sup> Non-excludable because it is impossible, or prohibitively costly, to exclude someone from receiving the benefit of the invention's information after it has been disclosed. Roger A Arnold, *Microeconomics* (Cengage Learning, 2010), 378-378.

<sup>5</sup> Non-rivalrous because the consumption of the information by one person does not reduce the consumption of another. *Ibid.*

<sup>6</sup> Van Caenegem, above n 1, vii.

<sup>7</sup> *Agreement On Trade-Related Aspects Of Intellectual Property Rights*, signed Apr 15 1994, 1869 UNTS 299 (entered into force 1 Jan 1995), art 27. (TRIPS)

<sup>8</sup> Patent Act of 1952, 35 USC § 271(a) (2006); TRIPS, above n 7, art. 28.



interference in the free market, by the granting of patents, is that social welfare is improved when the 'natural' balance between imitation and innovation is pushed to favour innovation.<sup>9</sup>

Patent law is supposed to be the principal policy tool of governments for promoting innovation, fostering the development of new technologies and increasing the fund of human knowledge.<sup>10</sup> The exchange bargain of patent law involves the state granting an inventor with a patent for a limited time, in return for the disclosure of that invention.<sup>11</sup> In theory the ultimate beneficiary of a patent is not the patentee but the public, to whom the invention is disclosed.<sup>12</sup>

Traditionally, patent policymaking was a national affair. States could make policy judgements about what would best promote innovation and the dissemination of new information in their country.<sup>13</sup> These judgements would mould patent laws into a tailored national patent system. The systems were tailored to the nation's level of wealth, economic structure, technological capability, political system and cultural tradition.<sup>14</sup> Globalisation and the growing internationalisation of life have blurred the lines between foreign and domestic affairs.<sup>15</sup>

The US is the world's largest economy. The 'robust economic competitiveness' demonstrated by the US during the last century has been attributed to its capacity

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<sup>9</sup> van Caenegem, above n 1, 1.

<sup>10</sup> Dan Burk and Mark A Lemley, 'Policy Levers In Patent Law' (2003) 89(7) *Virginia Law Review* 1575, 1577.

<sup>11</sup> Timothy R Holbrook, 'Possession in Patent Law' 2006 59 *SMU Law Review* 123,125.

<sup>12</sup> *Ibid* 126-7.

<sup>13</sup> Peter K Yu, 'An Symposium: World Trade Intellectual Property and the Global Elites: International Lawmaking in the New Millennium: Introduction' (2002) 10 *Cardozo Journal of International and Comparative Law* 1, 1.

<sup>14</sup> *Ibid*

<sup>15</sup> John C Yoo, 'Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution' (1999) 99 *Columbia Law Review* 2218, 2219.

for innovation.<sup>16</sup> Leading economists predict enduring world dominance by the US with respect to volume and quality of new inventions.<sup>17</sup>

However, the US patent policy has been widely criticised as intentionally and blatantly discriminating against foreigners in order to foster domestic innovation and promote national economic growth.<sup>18</sup> Critics of the US system believe that the US patent policy is not only 'unfair' - which, in the context of a free-market, is largely irrelevant - but also substantially detrimental to the expansion of knowledge and the advancement of modern technology. Keith Maskus, a 2006 representative of the US Council on Foreign Relations, advocates rejecting the modern notion of intellectual property rights as being private rights. Maskus promotes returning to the tradition of limiting the scope of patents in order to encourage innovation and the development of new technologies.<sup>19</sup>

Proponents of the US system, such as large businesses and multinational corporations (MNCs), advocate the preservation of the modern version of Lockean principles. Historically, Lockean natural rights shaped both the way in which the US Constitutional Framers understood patent law,<sup>20</sup> and the judicial reasoning of the US courts in patent cases.<sup>21</sup> Modern US patent policy has diminished the

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<sup>16</sup> Keith E Maskus, *Reforming U.S. Patent Policy: Getting the Incentives Right* (Council on Foreign Relations, 2006), 3.

<sup>17</sup> Economist Intelligence Unit, *A New Ranking of the World's Most Innovative Countries*, (April 2009) Economist Intelligence Unit website  
<[http://graphics.eiu.com/PDF/Cisco\\_Innovation\\_Complete.pdf](http://graphics.eiu.com/PDF/Cisco_Innovation_Complete.pdf)>.

<sup>18</sup> Christopher May and Susan Sell, 'Forgetting History is Not an Option! Intellectual Property, Public Policy and Economic Development in Context' (Paper presented at Intellectual Property Rights for Business and Society Birkbeck College, University of London, 15 September 2006) 1  
<<http://www.dime-eu.org/files/active/0/MaySell.pdf>>

<sup>19</sup> Maskus, above n 16, 6.

<sup>20</sup> Benjamin G Damstedt, 'Limiting Locke: A Natural Law Justification for the Fair Use Doctrine' (2003) 112 *Yale Law Journal* 1179, 1179.

<sup>21</sup> *Ibid*, Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, (1992) 33 *William and Mary Law Review* 665, 690-703

natural law basis and focus on the notion of patents as a form of private property. In recent decades, the Lockean notion of patents as private property has been used to validate the unreasonable expansion of patent rights and stronger patent protection.

The current US system protects and favours large corporations by allowing them to profit through exploiting what are effectively private monopoly rights.<sup>22</sup> As a result, they have had strong incentives to manipulate the patent regime to protect their own interests.<sup>23</sup> Their success in doing so is evident: since the early 1980s, US legislators and judges have adopted and operated on the US Patent Principle; that is, the fundamental principle that stronger patent protection engenders more innovation.<sup>24</sup> In practice there is little probative evidence that the US Patent Principle actually succeeds in promoting more innovation.<sup>25</sup> In fact, patents may even be counterproductive to innovation because they impose additional R&D costs, and promote litigation and wasteful attempts of cumulative innovation, through attempts to invent around patents.<sup>26</sup>

Internationally the US has pushed for the harmonisation of national patent laws. The most recent harmonisation treaty to be introduced by the US is contrary US international trade policy. Trade liberalisation is the avoidance of protectionist domestic policies which lead other states to reinstate trade barriers in a competitive

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(discussing the strong Lockean influences on early intellectual property law in the United States and England).

<sup>22</sup> Peter Drahos and John Braithwaite, 'Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context' (2001) 20 *Wisconsin International Law Journal* 451,452

<sup>23</sup> *Ibid.*

<sup>24</sup> Maskus, above n 16, 3.

<sup>25</sup> Burkt and Lemley, above n 10, 1580.

<sup>26</sup> Yi Qian, 'Do National Patent Laws Stimulate Domestic Innovation In A Global Patenting Environment? A Cross-Country Analysis Of Pharmaceutical Patent Protection, 1978–2002' (2007) *Review Of Economics And Statistics* 436, 436

reaction which impairs the global economy and global development (trade liberalisation principle).<sup>27</sup> Post WWII, the US was convinced that beggar-thy-neighbour policies had been a cause of both the Depression and the War.<sup>28</sup> As a result the US took initiative and showed international leadership in creating international trade agreements which promoted a stable world economy and global development.<sup>29</sup>

International trade agreements since WWII have focused on the trade liberalisation principle and ‘negative integration’, or the liberalising of trade by reducing tariffs and stripping away regulatory barriers.<sup>30</sup> In the 1980s, the US and MNCs, led the campaign to link patent protection and intellectual property rights to the General Agreement of Trade and Tariffs (GATT).<sup>31</sup> The Agreement on Trade Related Aspect of Intellectual Property (TRIPS)<sup>32</sup> signalled a controversial shift for the GATT to a ‘positive integration’ approach. This contradicts the US Trade Liberalisation Principle. TRIPS goes beyond de-regulation to affirmatively re-regulate, by imposing global patent standards in place of national ones.<sup>33</sup> Attaching TRIPS to the GATT had created a dichotomy in US international trade and patent policies.

The US, since the 1970s, had adopted a beggar-thy-neighbour patent policy. The US domestic patent regime benefits domestic inventors and delivers US national

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<sup>27</sup> Robert Howse ‘From Politics to Technocracy – And Back Again: The Fate of the Multilateral Trading Regime’ (2002) 96 *American Journal of International Law* 94, 94-95.

<sup>28</sup> John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 177.

<sup>29</sup> Riad A Ajami and G Jason Goddard, *International business: Theory and Practice* (M E Sharpe, 2006) 73.

<sup>30</sup> Sean Pager, ‘TRIPS: A Link Too Far? A Proposal for Procedural Restraints On Regulatory Linkage In The WTO’ (2006) 10(2) *Marquette Intellectual Property Law Review* 216, 217.

<sup>31</sup> Sell, above n xx.

<sup>32</sup> TRIPS, above 7.

<sup>33</sup> Pager, above n 30, 217.

economic and competition objectives, at the detriment of foreign inventors. The US has also aggressively pursued an international patent law harmonisation campaign. TRIPS, the most recent agreement governing international patent law protects the economic interests and welfare of developed nations and the profits of large MNCs at the expense of the developing nations.

The US system ensures that developed countries such as the US continue to develop and exploit new technologies which provide a better standard of living and improve economic growth. Developing nations remain in a position of disadvantage. They are denied access to advancements in medical, communications and other technologies because they cannot afford patent monopoly prices. They are also unable to exploit new inventions by imitation or 'piracy'. The US has removed the ability of States to regulate their patent policies. Due to the inclusion of TRIPS in GATT agreements, States must agree to be bound by US patent policy, or cease to have trade agreements with the US. Many countries are net importers of US commodities, so are effectively forced to adopt the US patent policy. These countries must endure the interference in the free market, and the effective interference with the exercise of sovereignty, but do not enjoy any social benefits. Stuart MacDonald addresses this fundamental problem by stating: "The real pirates are not those who steal innovation from patent owners, but those who steal the system of encouraging innovation from the public."<sup>34</sup>

This thesis examines the role of the US patent policy. Part 1 discusses how US domestic patent policy is effectively a beggar-thy-neighbour policy. It will compare

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<sup>34</sup> Stuart MacDonald, 'When Means Become Ends: Considering the Impact of Patent Strategy On Innovation' (2004) 16 *Information Economics and Policy* 135, 153.

the US 'first-to-invent' patent priority system to other systems and examines why the US has resisted changing its unique priority system. Having established the inherent bias of the US domestic regime towards large businesses and domestic inventors, Part 1 moves to explore the era of expanding the US Patent Principle and the counterbalancing reforms which have removed some of the inherent bias and reduced the strength of US patentee rights.

Parts 2 and 3 consider the globalising of US patent policy and how TRIPS provides benefits to MNCs and developed nations at the expense of the developing countries. Part 2 starts by considering patent law harmonisation and US patentee right protectionism. It then discusses how the US created a dichotomy between its international trade policy and patent policy.

Part 3 explores the effect of US the beggar-thy-neighbour policy on developing nations. Part 3 begins by introducing the patent protection requirements of TRIPS and the how the agreement ensures compliance with its patent provisions. It then elaborates on how TRIPS protects the interests of developed nations and MNCs while it fails to provide developing nations with promised economic benefits and implementation flexibilities. The subsequent discussion considers how TRIPS reduces the access of developing nations to public health and how after TRIPS was implemented developed nations have continued to raise the standard of patent protection through other agreements.

Finally, Part 4 presents two key ideas for reforming the US patent system and explains how they would effectively reduce the application of the beggar-thy-neighbour policy and bring patent law into conformity with trade liberalisation.

These ideas centre on increasing patent disclosure and system transparency, and amending international patent treaties to focus on a new model of development for a more wholesome global development essential for global welfare.