

CHAPTER V: CASE STUDIES

The 2010 IPRI presents six case studies exploring various aspects of physical and intellectual property rights. The case studies also highlight the efforts by IPRI's partner organizations to improve the situation with property rights in their respective countries. We thank the contributors for their invaluable insights that have greatly enhanced the IPRI report.

PHYSICAL PROPERTY RIGHTS

CASE STUDY: LAND TITLING IN SOUTH AFRICA

By Leon Louw, The Free Market Foundation (South Africa)

Introduction

South Africa's Land Acts are often regarded as the cornerstone of apartheid, which was the aspect of South Africa's 'crime against humanity' that made the biggest single contribution to psychological, political and material dispossession of black South Africans. The land question remains one of the most problematic and conflict-provoking aspects of post-apartheid South Africa. The land debate consists primarily of an acrimonious discourse about land redistribution from whites to blacks, which is so overpowering that scant attention is paid to other aspects that have greater potential for black economic empowerment.

The Land Situation in South Africa

Black South Africans constitute 80 percent of the population and live primarily on urban 'plots' that they hold under a range of limited forms of tenure. The balance (about 35 percent) live on plots or farms in rural 'tribal' areas (formerly 'homelands'), which are also under a range of forms of tribal tenure. A small but growing number of blacks live in historically 'white' areas.

Hard as it may be to believe, 15 years after the transition to predominantly black rule, most black South Africans still live under the legislative progeny of the Land Acts. In other words, most black South Africans still live under apartheid legislation and land tenure now imposed by a democratic government instead of a white racist regime. Additionally, the present regime inherited the massive loot of the apartheid government in the form of gigantic 'parastatals' created primarily for white regime patronage and extensive government-owned land. This land is unused or underused, and, therefore, is readily available for redistribution to landless blacks. Given the dire situation with respect to property rights, why has the post-apartheid government not converted black-held land to full ownership indistinguishable from historically white land? Why has it not used superfluous land and parastatals to empower its constituency?

The Free Market Foundation, Africa's oldest and most influential economic policy think tank, is the only organisation that has worked for conversion of all black-held land to full ownership ('freehold') and for the redistribution of superfluous government land to the victims of apartheid as a substantial once-off compensation for the crime of apartheid. Virtually everyone to whom these ideas are put endorses them regardless of ideology, yet, with few exceptions, neither has occurred. As Hernando de Soto has so eloquently explained, the poor are locked by tenacious land laws into a world of "dead capital." The theory is straightforward: unleash dead capital into the hands of the poor and the economy by giving them full title that is freely tradable and mortgageable. The reality is there are always powerful vested interests in preserving whatever the status quo happens to be – what Milton Friedman aptly called the "tyranny of the status quo" – compounded by prohibitively costly and complex laws governing fundamental change.

The South African Experience

This matter can be understood in the context of three South African experiences.

Mathanjana tribal area

Mathanjana is a remote tribal area northeast of Pretoria. After protracted interaction with the chiefs and communities, the government and all stakeholders agreed that Mathanjana should become the first tribal area in South Africa where village plots would be converted to freehold. That was eight years ago. Despite the fact that most plots had existed for generations, laws governing town planning, land survey, property registration, tribalism, local government tax, and the like have meant that the cost to the government to process reforms has exceeded the value of the raw land. Communities promised land title long ago have become frustrated and pessimistic. The conclusion to be drawn is that the introduction of full property rights in traditional communities in South Africa and probably throughout the developing world requires a fundamental and radical revision of law and procedure. Existing forms of tenure registration can be converted to full ownership without any expenses or formalities *for all preexisting plots*. Newly established plots on superfluous government land can be the subject of streamlined town planning and related formalities.

Ngwathe urban area

Ngwathe is a municipal area covering various towns in the north of the Free State Province of South Africa. It prides itself on the extent to which it has implemented land 'transformation' for black South Africans. Virtually all black-occupied land has been properly surveyed, included in town planning schemes, and proclaimed and registered in the deeds registry. Thousands of title deeds were issued. Curiously, most were not given to the intended beneficiaries and some that were given were either not freely tradable or subject to endorsement. If titles of the latter type fail to obtain an endorsement, their validity would lapse.

In consultation with the Free Market Foundation, Ngwathe municipality has resolved to become the first urban area in South Africa where all land is held under full freehold on the basis of complete equality between whites and blacks. Because most formalities have already been complied with, conversion to ownership is relatively easy, at least conceptually. Even so, there are substantial obstacles of the kind that bedevil land ownership in the Third World. First, substantial sums in arrear rents, rates and taxes are owed to the municipality, sometimes far in excess of the value of the land. Although these sums are unlikely ever to be paid, they are reflected in the municipal accounts as assets. If they are written off to allow for a tenure upgrade, the municipality will be technically insolvent and in breach of local government management legislation. Second, there are a host of professions wanting a slice of the cake including town planners, property lawyers, land surveyors, and development consultants.

Armed with its Mathanjana experience, the Free Market Foundation confronted these challenges with Ngwathe and said that normalization could be achieved only if the council broke with convention in fundamental ways. It would have to be willing to grant full title without the prohibitively costly intervention of the professions. To solve its accounting problem it was suggested that land-related debts be severed from the land and converted in the council's accounts to civil debts so that 'clearance certificates' could be issued on all land regardless of debt to the council. The government is considering exempting land converted from apartheid title from the deeds registry fees. Property lawyers in the area have agreed to a substantial reduction of their fees. South Africa's leading financial company is considering covering the costs of essential consultants as a marketing rather than philanthropic expense with a view to offering mortgage finance to Ngwathe's new land owners.

As a result, over 25,000 plots will be converted. At an average value of, say, \$13,500 and five or more people per plot, Ngwathe residents will be empowered directly to the tune of \$338 million converted from dead capital to market value, i.e., \$2,700 per person. With an estimated five to 10 million plots to follow countrywide, blacks and the economy will get a direct injection of tradable land worth at least \$68 billion.

Langa urban area

The standard objection to giving the poor full, unambiguously tradable ownership of their land is that 'they' cannot be trusted with it – that is, they will sell the land and spend the money frivolously, leaving them again landless. Apart from this being offensively patronising, it is contradicted by experience. The problem in South Africa and probably worldwide in comparable circumstances is the opposite; namely, the poor have been conditioned into not regarding land as tradable. They hold on to it tenaciously, passing it from one generation to another, fearful of losing it and mindful of their inability to acquire land in the free

market. The predominantly black area of South Africa where most of the plots are held under relatively free title is the Langa 'township' falling under the Cape Town municipality. Although these titles are freely tradable and mortgageable, no property market to speak of has emerged. Local newspapers do not have properties for sale classified advertisements of the kind that characterize mature property markets, and there are no estate agents (realtors). For sale signs are uncommon. A small but growing number of mortgages have been registered.

The problem turns out not to be purely technical. Difficult though it is to get full title, this further challenge is cultural and psychological. Dead capital does not become living capital as a matter of law. The solution proposed for Ngwathe is for a tenure upgrade to be accompanied by public information on the implications by way of pamphlets and workshops, preferably run by banks marketing their services.

Conclusion

Hernando de Soto is certainly right about the tragedy of dead capital inflicted on the poor in most countries by virtue of them being denied unambiguous and fully tradable title to their most substantial physical asset: their land. South Africa's experience, like that of many other countries, is that conversion of restricted tenure to full title is, in the real world, extremely difficult and costly. The Free Market Foundation's experience in South Africa has exposed many of the practical challenges and resulted in creative solutions that could convert dead capital into living capital expeditiously and affordably.

What Hernando de Soto's vision seems to need is a basic set of implementation strategies tailored to context-specific circumstances. It is hard to imagine anything more effective that the world's 'development' agencies such as the UN, World Bank and IMF could do in the pursuit of their mandates than a global program along the lines of South Africa's experience.

CASE STUDY: EXPROPRIATION FOR ECONOMIC DEVELOPMENT IN CANADA

By Joseph Quesnel, *Frontier Centre for Public Policy (Canada)*

Introduction

This case study involves a family that owned a large piece of land for generations in rural Canada, a section of which was almost expropriated by a local government for its own vague business purposes that have yet to be defined to the original owners. After years of court battles and offers and counter-offers, the municipality involved abandoned the expropriation in early October 2009.

Traditionally, expropriation is thought of as a last resort where land is taken for clear public interests and purposes, such as the construction of a publicly-accessible road, highway, or a bridge. In Canada, some provinces allow local powers the ability to expropriate private land on the grounds of economic development. Unfortunately, the precise definition of 'economic development' is never fully specified and this power often allows local governments, who possess massive legal and financial resources compared to individual landowners, to deny individuals their rights.

The process of expropriation for economic development allows local governments to take over property because they feel they can do a 'better job' on development than that which would occur between private, consenting parties – especially if, of course, some parties do not wish to develop their land. This is an improper role for governments. They should encourage business growth, not become directly involved in it.

History of the Issue

The Fouillard family owns a large piece of land near Fort Ellice in the province of Manitoba. On a portion of it, there is a historic Hudson's Bay trading post. Although the structure of the post has since been lost, there are cairns and a historic cemetery. Despite a history of generosity from the Fouillards where they allowed the public to explore the historic site free of charge for decades, the provincial government of Manitoba, the Rural Municipality of Ellice, and the nearby Town of St-Lazare tried to expropriate a large portion of their property. Their intention was to develop it as a more high-profile tourist site as part of their tourism strategy for the region.

In 2005, the Fouillards were given a notice of expropriation. Since that time, the family has sought to prevent the expropriation through legal channels. However, they exhausted their appeals to Manitoba courts, and recently the Supreme Court of Canada declined to hear their case. The problem, before the recent government reversal, was that Manitoba's Municipal Act provides a clear power to municipal governments to expropriate this land. The law was changed in 1997 to allow local governments the power to expropriate land to aid community job creation and economic development. Little did legislators realize at the time what sort of abuse this legal change could unleash on individual landowners.

Property Rights Abuses in the Case of the Fouillards

Size of Land

Originally, the Rural Municipality of Ellice sought 288 acres of the Fouillard's property. Under Manitoba's legislation, however, the Fouillards were entitled to an independent inquiry into the expropriation. Although this seems like a safeguard, in fact it was not because the municipality was only required to consider the report issued by the independent inquiry officer. Indeed, the independent inquiry found the municipality did not require the amount of land they were seeking. The officer determined they only needed 90 acres. However, because the recommendations are not binding in whole or even in part, the municipality ignored the report and proceeded with the full expropriation.

Business Plans

Although the municipality involved indicated it wanted to develop the land into a more high-profile tourist-oriented historic site and the reeve ('mayor') of the community made vague references to "walking trails," the Fouillard family never received any concrete business plan from the municipality. The family would like to view the plans to determine their viability, but municipal officials have been very reticent about providing such details. There was no evidence the plan was even viable.

Third Party involvement

The Fouillards were informed in court by municipal officials that the plan was to develop the land locally and that they were not to involve any third parties. However, provincial Freedom of Information requests later indicated Ellice officials sought audiences with various third parties and invited organizations such as the Manitoba Metis Federation to consider development of the land. In securing records of town council meetings, the Fouillards discovered the town sought business partners to help them develop the proposal.

Implications

The Fouillard's case serves as a warning to citizens and legislators who should realize that the expropriation process is prone to abuse. Governments should not be in the business of starting and engaging in business; they should create the environment where business can grow. They should also not act as a third party for land developers. To allow expropriation for economic development provides too much temptation for local governments to confiscate the property of private citizens merely for tax revenue purposes.

This process is also prone to abuse because individual landowners are not privy to backroom discussions between politically-connected business firms and organizations and municipal officials. Allowing this broad power to municipalities invites secret relationships and the possibility of corrupt arrangements. In this environment, local governments can expropriate solely for the benefit of another party, and they do not have to reveal their true intentions to the landowners who face expropriation. In the case of the Fouillards, they never received straight answers about the parameters of the project envisioned or which third parties the municipality had intended to work with.

Individual landowners also do not possess the deep pockets and organizational muscle to continue these battles indefinitely, whereas governments can obtain teams of lawyers and can draw upon taxpayer-based resources to fight expropriation efforts until they succeed.

Recommendations

The ultimate aim should be not to allow any governments to expropriate for economic development. This power should not be provided to them in the first place, and Canadian provinces need to amend their laws. If expropriation for economic development is allowed, it should include tight restrictions. For example, clauses in relevant legislation should clearly spell out what may and what may not be expropriated for economic development. This broad category should not be left up to governments to define because they will seek to maximize their gains at the expense of individual landowners.

Legislation should provide clear procedural safeguards for landowners caught in this situation. They should have clear rights to all relevant information pertaining to their case and they should have the possibility of third party panel review to the expropriation. Legislators should explore the idea of an individual landowner's bill of rights, which spells out rights for the landowner and binding obligations on the expropriating government.

In other countries, policy makers should avoid allowing regional or local level governments to enter into expropriation for economic development purposes. This practice should be restricted to public interest expropriation, most notably infrastructure such as roads, bridges, and canals, which will benefit all citizens and advance common interests.

Even the United States, which has an enviable level of property protection, has discovered the abuses present in allowing expropriation for economic development purposes. After the *Kelo v. City of New London* (2005) Supreme Court judgment, legislators at all levels have taken note of how corrosive this practice is on individual property rights. As of 2007, 42 states have enacted legislation that either limits or bans this practice altogether. Many have adopted measures to prevent expropriation that aims to benefit specific third parties.

Conclusion

The Fouillard case study demonstrates how easy our private property rights can be taken away when those rights are not given due protection or when governments decide that their economic development needs should supersede the rights of individuals.

Rather than give up 288 acres of their pasture land to a local government for its plans to develop a historic site, the Fouillards chose to fight the expropriation. Although their judicial attempts were unsuccessful given that the law is clearly written to provide local governments with broad powers of expropriation, the municipality eventually abandoned their expropriation efforts. However, not all landowners may be as lucky as the Fouillards. Presently, the Canadian provinces of Manitoba, Alberta, Saskatchewan, Ontario, and New Brunswick allow expropriation for economic development purposes. Most of these laws are vaguely worded and broadly defined and give governments powers to enter into the competitive marketplace when their proper role is only to encourage business.

Although some provinces, such as Manitoba, have attempted reforms, these have not been met with success. In Manitoba, a private members' bill (legislation with little chance of success under Canadian parliamentary procedure) was introduced that sought to limit expropriation powers. Some organizations such as the Alberta Property Rights Initiative and some agricultural associations have begun to take notice of the abuses inherent in the process, but the groundswell of opposition has not yet emerged. Perhaps Canadians need to be better informed about events south of their own border or have their own dramatic *Kelo* case to awaken them to the dangers of expropriation for 'economic development' reasons.

CASE STUDY: PRIVATE PROPERTY ABOLITION IN VENEZUELA

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Introduction

Commencing in 2001 with a set of decree-laws (i.e., executive orders with value and rank of laws) such as the one on Agrarian Reform (*Decreto-Ley de Tierras Urbanas y Desarrollo Agrario*), a new trend began in Venezuela to ignore private property rights protected by article 115 of the 1999 Constitution. Moreover, with the takeover of a significant number of private agrarian lands starting in 2005, such a trend has become a State policy. The government's strategy of systematically denying the existence of private property in different areas reached its highest manifestation with the enactment of new decree-laws in 2008 and recent legislation passed in 2009 by the National Assembly.

This policy has been developed by the Venezuelan state powers through laws, decree-laws, regulations, decrees, orders, and administrative acts, and it has been executed through procedures and decisions of the Public Administration and the Courts. These actions violating property rights have been intensifying as of 2008 after a majority of Venezuela's voters rejected the constitutional reform proposed by President Hugo Chávez. Chávez acknowledged private property rights only over "goods intended for use and consumption and over production means, legitimately acquired."

Assault on Property Rights by All Branches of Government

The most emblematic cases in which this policy has been applied and executed jointly by the Executive, Legislative, and Judicial branches are the following:

- Open disregard of the existence of private property rights over agrarian lands.
- Application of regulations violating the essential contents of property rights and economic freedom over real estate, construction activities, and production means.
- Enactment of laws that violate the constitutional guarantees concerning property takings and expropriation.
- Administrative measures that deprive owners from using and exercising their power to dispose of their assets.
- Court rulings affirming that private property and economic freedom are not limited to State action because the content of such rights is determined by the National Assembly in law, not by the Constitution.

Moreover, the Executive and Judicial branches have censured and criminalized information campaigns to promote private property rights.

Violations of Property Rights in Major Sectors of the Economy

In the case of agrarian lands, between 2006 and 2008 alone, private property rights over 590 farms were disregarded according to FEDENAGA – *Federación Nacional de Ganaderos de Venezuela* (the Venezuelan organization representing cattle dealers and breeders for over 60 years). By mid-2009, the Executive had already exercised its dominion over more than 2,500,000 hectares that were previously privately owned. This was done through the so-called *procedimiento de rescate de tierras agrarias* (an administrative procedure intended to recover agrarian lands supposedly idle), which does not involve the courts and takes place only when no one claims ownership over the land to be recovered. To accomplish the application of this procedure, the Executive ignores the current ownership documents unless accompanied by an "ownership chain documentation" as far back as 1848 (Rosito, 2007).

In the case of private companies and production means in general, the violation of private property rights has occurred by executing so-called "administrative expropriations." In reality, they fail to observe the guarantees given to private property under these legal instruments; therefore, they are arbitrary executive actions (*voie de fait/ vías de hecho*) similar to battery and assault. Additionally, such administrative expropriations have taken place by applying regulations and measures that deny the existence of basic features of free enterprise. For example, missing are the right to manage a company, to obtain a reasonable profit, and, in connection with private property, the ability to make use of produced goods (Canova, Anzola, & Herrera Orellana, 2009).

In the case of iron, steel, and cement industries, as well as activities related to primary hydrocarbons and the transportation and sale of liquid fuels, "special expropriations" have been created for the following purposes. First, to allow the takeover of goods to be expropriated before a payment of fair market value is made. Second, to enable the arbitrary setting of prices to be paid by the State. Third, to impede or to deny intervention of the courts.

In the case of foods and a large number of goods and services that the Government has declared essential, the Organic Decree-Law on Agro-Food Safety and Sovereignty (*Decreto-Ley Orgánica de Seguridad y Soberanía Alimentaria*) and the Consumer Protection Law (*Ley de Defensa de las Personas en el Acceso a los Bienes y Servicios*) impose limitations on producers and service providers to manage their companies and to make use of their goods freely. Moreover, they enable the Executive to set additional limitations and to adopt administrative measures for controlling the nationwide production and distribution of food, as well as for intervening, closing, managing, and disposing of plants, factories, goods, and machinery without any indemnification or time limitations. Although unusual, these measures led to a formal expropriation procedure of coffee-growing and processing companies (Ecarri, 2009).

In the case of urban lands and housing, whether already built or under construction, the situation has only worsened after the Caracas Metropolitan District ordered the expropriation and took over by force a significant number of homes in the city of Caracas in 2006 and 2007. Several regulations have been issued recently that set the criteria for calculating the value of the land. But the regulations do not reflect market prices and prohibit, in the case of construction in progress, collection of the real value of the property once completely built, accounting for inflation occurring during the construction period.

In September 2009, more than 2,000 properties in Caracas were declared of "cultural interest"; most of these properties are privately owned. From now on, such property may not be modified, sold, or liened by the owners thereof, according to the Law for the Protection and Defense of Cultural Estate (*Ley de Protección y Defensa del Patrimonio Cultural*) without the prior consent of the Executive. Additionally, in October 2009 the Law of Urban Lands (*Ley de Tierras Urbanas*) was enacted, thereby creating a procedure for the forced acquisition of urban lands in favor of the Executive without the guarantees against expropriation. Because of its ambiguity, this law effectively created a preferential right for the acquisition of such land and diminished the market value of urban lands in general and that of the buildings constructed on them.¹²

Complicity of the Judiciary

Instead of putting a halt to the actions violating private property rights and economic security conducted by the Legislative and Executive branches, the Judicial branch has been tolerating and supporting them. The Constitutional and Political-Administrative Chambers of the Supreme Court of Justice, the Contentious-Administrative Courts, and the Agrarian-Contentious Courts continue to uphold the following judicial criteria. First, they do not allow property owners to resort to the constitutional protection claim as a way to demand the protection of such rights. Second, they do not allow the issuance of precautionary measures intended to cause the suspension of these proceedings or regulations to avoid further damages. Third, they strongly affirm that because these rights are not absolute and Venezuela is not a *Bourgeois State* but a *Global State*, private property rights and economic security can actually be restricted and even eliminated in the manner already conducted by the Executive and Legislative branches (Arias, Herrera Orellana, & Rondón García, 2009).

Not surprisingly, the initiatives of NGOs such as CEDICE and ASOESFUERZO to conduct information campaigns in connection with this systematic policy of violation of private property rights as well as the consequences thereof in other countries have been rejected and penalized by the State through CONATEL (the Venezuelan Telecommunications Agency) and the criminal courts. The latter, in addition to banning such campaigns, has initiated criminal trials against some members or participants of these NGOs.¹³

Conclusion

The above mentioned facts constitute clear evidence of the manner in which the Venezuelan government is systematically eliminating rights such as private property and economic freedom as acknowledged in the 1999 Constitution. These actions are intended to eliminate all economic independence of citizens from the State and to implement a centralized planning system. They are contrary to the Constitution but in agreement with the 2007 constitutional reform and the 2007-2013 Socialist Plan, which is currently under development by the Government.

Unfortunately, this scenario will result in a less favorable ranking than the one obtained by Venezuela in the IPRI 2009 Report. In 2009, the country ranked 109 out of 115 countries assessed.

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INTELLECTUAL PROPERTY RIGHTS

CASE STUDY: IPRS IN MEXICO: CHALLENGES AND OPPORTUNITIES

By Carlos Ignacio Gutiérrez and Alberto Saracho, Fundación IDEA (Mexico)

Introduction

In recent decades, knowledge has become the most valued commodity in the global economy. Today, to compete is to invent, to produce, and to offer the most innovative and knowledge-intensive products and services. In other words, countries have to innovate continuously to compete.

The process of innovation entails two important risks. On one hand, a successful innovation in a product or service might lead to it being copied and commercialized illegally by a third-party. On the other, failure to succeed generates sunk costs in the form of time, money, and effort.

Intellectual Property Rights (IPRs) can address these risks. These rights promote efforts to create and to offer knowledge-intensive goods and services. In the world of patents, they do this by protecting the ideas of those who wish to profit from them through an exclusivity agreement with society in which an inventor is the only entity authorized to exploit his or her idea. In exchange for this protection, society is able to use the knowledge in the future freely. The existence of IPRs creates incentives that increase the likelihood that society will invest accordingly in the activities and knowledge required to increase a country's wealth.

Within Mexico, there exist challenges that stifle innovation and opportunities that promote it. The following is an analysis of situations where IPRs have an impact on various aspects of the country.

Commerce and FDI

Mexico's IPRs are one of the strongest in Latin America. Legislation that is currently in place is the result of the country's need to expand its commercial horizons through free trade agreements.

In essence, the need to foster commercial ties is a complex process in which both parties have to appease the needs of their local industries. For developed nations, an important base of their economic activity depends on the export of innovative products and services that need the protection of IPRs to avoid illegal copying. Henceforth, beginning with the North American Free Trade Agreement (NAFTA), the country has moved towards providing greater protection of IPRs. Since NAFTA was signed, Mexico has continued on this path and has created permanent commercial ties by means of 12 free trade agreements that cover 44 nations.

As a consequence, foreign direct investment (FDI) has poured into the country. Three benefits arise from this activity. The first is related to an increase in the resources invested in Mexico. From 1999 to 2008, investments in FDI totaled US\$217 billion dollars (Secretaría de Economía, 2009a). In comparison, Latin American and the Caribbean received approximately US\$650 billion in FDI from 1999 to 2007 (World Bank, 2009). The majority of the FDI that Mexico receives comes from developed countries. In fact, 95.2 percent came from countries that are part of the Organization for Economic Co-operation and Development (OECD) (55.2 percent from the United States and 33.7 percent from the EU) (Secretaría de Economía, 2009b).

The second benefit of FDI is that it provides a valuable opportunity for technology transfers. Through these investments, local workers and enterprises may assimilate foreign skills and technology. In addition to being trained, locals may decide either to license or to purchase knowledge that would be unavailable without proper IPRs protection.

The third and last benefit is for consumers. New investments in the country increase the number of firms competing for revenue. This, in turn, forces local corporations to raise their standards to maintain or to increase their market share against new entrants. Hence, consumers will more often than not be able to obtain higher quality products that are either produced locally or imported.

National Competitiveness Strategy

Specialized literature on the subject has identified four reasons why Mexico's ability to innovate may be hampered (Lederman & Maloney, 2003):

- The difficulties faced by innovators in avoiding the unauthorized use of their creation.
- The existence of free riders that use knowledge generated by a third party.
- The absence of public research institutions that distribute new knowledge to society through intellectual property rights.
- The lack of public and private sector partnerships devoted to research and development.

Besides these factors, Mexico has been slow to acknowledge the importance of innovation in its competitive strategy. Because of this, activities that promote innovation, such as Research and Development (R&D), have been relegated mostly to the public sector. Evidence of this is observable in the 81 percent of the R&D personnel of the country that is concentrated within the government and education sectors; hence, only 19 percent of R&D is performed by the private sector (Zubieta, 2003). Unlike Mexico, the majority of R&D personnel in the U.S. (81 percent), Korea (68 percent) and Canada (56 percent) is concentrated in the private sector (Ibid.).

In terms of investment on innovation, the OECD has estimated that Mexico currently devotes 0.5 percent of its GDP on R&D (OECD, 2008). This amount is less than that invested in similar emerging economies, such as Chile (0.67 percent), Brazil (1.02 percent), China (1.42 percent), and Korea (3.23 percent) (OECD, 2008).

Prevalence of the Informal Economy

Currently, the informal economy employs more than half of all Mexican workers and produces at least 30 percent of the nation's GDP (Perry, Maloney, Arias, Fajnzylber, & Mason, 2007). A number of these businesses infringe IPRs. In Mexico, it is possible to buy illegal copies of movies, music, software, medicines, and other products without consequences.

These activities are harmful to society in three ways. First, they indicate that the government is unwilling to devote resources into eliminating these illegal activities. Hence, the incentive to copy is greater than the one to innovate. Second, the health and safety of consumers is put at risk because substandard copies of some products, such as medicines, may, in some cases, cause life-threatening situations. Lastly, the proliferation of these markets ensures that the government loses a source of revenue. A recent study by the American Chamber of Commerce on the issue estimated that in 2008 the government did not receive approximately \$2.6 billion pesos (about US\$190 million) in lost revenue (American Chamber of Commerce–Mexico, 2008). This amount represents more than the \$2.2 billion pesos (about US\$160 million) 2009 budget for the Sistema Nacional de Investigadores (Presupuesto de Egresos de la Federación, 2009), a national system that provides funding for research in several fields.

Innovation within Mexico

Because of factors related to education level, public policies on innovation, and economic opportunities, Mexico's population is still learning to use IPRs as a tool for development. An indicator of this is the percentage of patents registered by Mexicans in Mexico, which in 2007 was 3.9 percent and in 2008 was 4.1 percent (Instituto Mexicano de la Propiedad Industrial, 2009). In fact, the nation that leads patents in the country is the United States with about 50 percent of all patents (Ibid.).

Though Mexicans remain a minority in the patenting of ideas in their country, they dominate the registration of utility model applications. The latest statistics show that out of the 434 applications in 2008, 387 were submitted by Mexicans (Ibid.). Efforts by locals to improve products or services are a positive sign that the population is willing to use official channels to register their innovations.

Conclusion

To become what the World Economic Forum calls an innovation-driven country, such as South Korea, Mexico requires significant cultural and governmental changes that will enhance its use of IPRs and incent innovative activities. One of the country's main

barriers towards reaching this point is its inability to change its dependence on business models that use unskilled and inexpensive labor as the foundation for economic and social development.

Though many solutions can be proposed to change the course of Mexico's future, developed economies have shown that to reach development goals it is fundamental for the country to realize that its most important assets are the ideas of its population.

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CASE STUDY: COMPULSORY LICENSING AND MITIGATION TECHNOLOGIES

By *Tim Wilson, Institute of Public Affairs (Australia)*

Introduction

In pursuit of securing an agreement to cut global greenhouse gas emissions, some countries want to replicate the undermining of intellectual property rights on pharmaceuticals onto mitigation and adaptation technologies.

With the Kyoto Protocol set to expire in 2012, governments are attempting to secure a successor agreement at the December 2009 Copenhagen meeting of the United Nations Framework Convention on Climate Change (UNFCCC). Proposals for a post-Kyoto pact are broad, but the central focus is to secure an agreement between developing and developed countries to cut, or at least to curb, the growth of emissions and to agree on the policy instruments they will need to do so.

Article 4.5 of the UNFCCC agreement requires developed countries to “take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties” (United Nations, 1992). The spirit of this provision is not unique, but as developing countries focus on how they will achieve proposed emissions targets, some are seeking to interpret this Article widely to undermine intellectual property on technologies. Their hope is watering down patents will make them cheaper.

In doing so, they are attempting to replicate the campaign against patents on innovative pharmaceuticals. This campaign saw amendments to the World Trade Organisation’s Trade Related Aspects of Intellectual Property Rights Agreement allow developing countries to waive the patents on innovative pharmaceuticals through compulsory licensing.

The Campaign to Undermine IP for Mitigation Technologies¹⁴

The current campaign originated around the 2007 G8 meeting with press reports calling for “an agreement on ... IPRS on technological efforts in developing countries paralleling the successful agreement on compulsory licensing of pharmaceuticals” (Government of India, Press Information Bureau, 2007).

So far their campaign has been successful with the September 2009 negotiating text including four different proposals for mitigation and adaptation technologies. The first proposal calls for the promotion of technology transfer by “operating the intellectual property regime in a balanced manner ... [by] deploy[ing] patent sharing and/or intellectual property[,] free renewable energy and energy efficiency technologies” with financial support.

The second proposal calls for governments not to interpret or to implement any international IP agreement in a way that “limits or prevents any Party from taking any measures to address adaptation or mitigation of climate change,” including the establishment of “a Global Technology Pool for Climate Change” and “the full flexibilities contained in the TRIPS agreement, including compulsory licensing” as well as many other measures.

The third option is for governments “to exclude patents and revoke existing patents...” The fourth proposal is for the establishment of a “committee, an advisory panel, or designate some other body, to proactively address patents and related intellectual property issues...”

But before governments agree to undermine patents on mitigation and adaptation technologies, they should assess whether patents actually have any impact on their final price and how to improve access.

The Role of Patents in the Cost of Mitigation Technologies

There is little doubt that mitigation and adaptation technologies are expensive. But in replicating the campaign against pharmaceutical patents, developing countries are misunderstanding why these technologies are expensive and that the contribution of patents to their overall price is limited.

First, unlike many innovative pharmaceuticals, mitigation and adaptation technologies are not single patent technologies. Instead, they are built on multiple licensed patented technologies many of which are used for non-mitigation and adaptation purposes. Many of these technologies are off-patent or face competition in the marketplace and do not attract a significant patent premium.

Second, while patents afford a 20 year exclusive right to exploit a technology, the extent that a patent premium can be charged is relative to the amount of competition that product faces in the marketplace. Many pharmaceuticals face limited competition because they are the only product that can deliver a particular health outcome. But Patent Cooperation Treaty applications with the World Intellectual Property Organization show that hundreds of different mitigation and adaptation technologies are being patented, and hundreds of patent applications are being made within technology families, demonstrating significant inter- and intra-product competition (Dechezleprêtre, Glachant, Hascic, Johnstone, & Ménière, 2008; Love, 2008).

Third, the patent premium as a contribution of the final cost of a technology is small. For example, the wind turbines that make up a wind farm are made up of costs associated with the physical product (reinforced concrete stands, the turbine, and the propellers), land ownership or rental for its placement, and the technical know-how for its installation, connection to the electricity grid (engineers and labourers), and placement (location identification for maximum wind activity).

Fourth, even if patents were scrapped, many developing countries would still lack the technical skills to produce and to install these technologies. This was the experience of developing countries after they secured agreement from WTO members to allow near carte blanche compulsory licensing on pharmaceuticals. But they promptly discovered that they did not have the technical or physical production capacity to manufacture them.

IP Promotes Technology Transfer

Instead of promoting technology transfer to developing countries, undermining patents is likely to have the reverse impact by harming innovation and removing the market-based incentives for technology innovators to license their technologies. A United Nations Development Program study found that “regulations governing ... [IPRs] help in some cases to build confidence amongst international firms and encourage them to engage in practices such as licensing and joint ventures” (Watson, MacKerron, Ockwell, & Wang, 2007, p. 51). Further, the Stern Review found that “there are a number of measures that governments can take to create a suitable investment climate for energy investment and the adoption of new technologies, such as ... strengthening intellectual property rights” (Stern, 2006, p. 6).

But the worst impact will be on innovation in the industry itself because it is an infant industry that requires long-term, significant, upfront investment (Israel, 2008, p. 1). These significant financial commitments will only come with a guarantee of property rights to assist in commercialisation, and their absence would send a worrying signal to investors and “may have implications in terms of the level of private investment already made in a technology and the level of returns that IPR owners need to derive before they are happy to release the IPR” (Watson et al., 2007, p. 8).

Other Ways to Decrease Technology Costs

Irrespective of patents, countries can act to decrease the cost of mitigation and adaptation technologies by removing trade barriers. A study by the World Bank supports this conclusion, which found that the diffusion of “green technologies would increase by between 7 percent and 14 percent per year based on different models of liberalisation” (World Bank, 2007, p. 53).

Trade barrier data demonstrate the enormity of the problem. Table 1 identifies barriers imposed by the top 18 greenhouse gas (GHG) emitting developing countries on select mitigation technologies with the combined contribution of tariff and non-tariff barriers (NTBs) being as high as 165 percent.

The World Bank report also found that weak IP regimes were another form of NTB undermining the transfer of climate friendly technologies (World Bank, 2007, p. 59). Similar conclusions were developed by Professor Barton of Stanford Law School who argued that IP regimes are not “significant” barriers to technology transfer, but weak IP barriers were a disincentive for foreign investors (Barton, 2008). This point has not been missed by the European Parliament, which called for “the need to reduce barriers to ‘green’ trade by, for example, removing tariffs on ‘green’ goods at the WTO level” (European Parliament, 2007).

Instead of being a concrete proposal to promote technology transfer to mitigation and adaptation technologies, undermining patents will not assist developing country governments in meeting emissions targets. But it will harm the capacity of developed and developing countries alike to innovate the next generation of technologies, and with it any chance of using technology as part of a solution to cut global emissions.

Table 1: Applied Average Tariff and NTBs for Climate Friendly Technologies in the 18 High GHG-emitting Developing Countries

Countries	Clean coal		Wind		Solar		Fluorescent lamps	
	Tariff	NTBs	Tariff	NTBs	Tariff	NTBs	Tariff	NTBs
China	15	25	8	0	10	0	8	0
Colombia	15	0	10	32	15	0	20	0
India	15	0	15	0	15	0	15	102
Venezuela	15	0	10	0	15	0	20	0
Brazil	14	145	14	87	18	53	18	96
Mexico	12	0	15	0	13	62	15	0
Bangladesh	6	0	8	0	25	0	19	0
Chile	6	0	6	0	6	0	6	0
Zambia	5	0	15	60	30	0	30	83
Egypt	5	149	6	70	32	0	18	87
Nigeria	5	160	0	89	20	70	20	91
Philippines	3	119	6	88	15	70	11	93
Thailand	1	0	10	0	10	0	20	0
Argentina	0	0	14	0	18	57	18	0
Indonesia	0	0	10	0	15	0	5	0
Kazakhstan	0	0	0	0	0	0	0	0
Malaysia	0	93	5	59	18	0	30	85
South Africa	0	125	0	0	12	0	17	0
High Income OECD	1	0	3	0	3	0	4	0

Source: WITS Database, Adapted from World Bank (2007).

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CASE STUDY: THE PIRATE CODE ON TRIAL IN SWEDEN – WHAT FUTURE FOR INTELLECTUAL PROPERTY?¹⁵

By Waldemar Ingdahl, Eudoxa (Sweden)

Introduction

The conditions for creating and consuming music, film, literature, journalism, computer software, and other intellectual products have changed dramatically in less than a decade. It is within the creative industries that the impact of technology to copy and to share content on the Internet has been most keenly felt. Facilitated by the simplicity of copying and sharing content on the Internet, the public is consuming ever more culture.

The paradox is that the willingness to pay for this consumption is decreasing. This paradox has ultimately resulted in the Swedish trial against the owners of the file sharing hub, The Pirate Bay. The purpose of the trial is to determine if The Pirate Bay promoted copyright infringement with its actions as a torrent tracking website. In the first instance, The Pirate Bay was found guilty.

The attention of the Swedish public to intellectual property is demonstrated by the election of two representatives of The Pirate Party to the European Parliament. Hence, the conflict surrounding Internet piracy has entered a political dimension regarding the status of intellectual property and the survival of content producing industries.

File Sharing in Sweden

File sharing refers to the providing and receiving of digital files over a computer network where the files are stored on and served by the personal computers of users. Much of the debate before the trial has been about the legal grounds for prosecuting the operators of The Pirate Bay. They argue on their web site that "only torrent files are saved at the server. That means no copyrighted and/or illegal materials are stored by us."

Are the people behind The Pirate Bay not responsible for the material that is being spread using the tracker? Prosecutor Håkan Roswall disputed this. In an interview with *Reuters* in January 2008, he said: "It's not merely a search engine. It's an active part of an action that aims at, and also leads to, making copyright protected material available."

The file sharing conflict is becoming important in the lives of regular people. File sharing is a central function of the Internet. In itself it is not illegal, and is used for the sale of digital content. File sharing becomes illegal when sharing materials protected by copyright without the permission of the proprietor occurs. A survey, recently carried out by the International Federation of the Phonographic Industry (IFPI), reveals that 40 percent of Swedes between 15 and 74 years old actively share music files illegally over the Internet on a daily basis, or with less frequency. The figure is equivalent to 2.8 million people, or nearly one third of Sweden's population of 9 million people – a figure much higher than suggested by previous studies.

Illegal Downloading and The Pirate Bay Trial

In 1960, the social democratic government instituted a private copying levy, which was an extra charge on the purchases of recordable media allocated to content developers. This created a culture of home recording and home taped music. In the 1990s, Sweden excelled as an early adopter of information technology and developed an infrastructure with powerful broadband connections. The dot-com crash significantly impacted the innovative Swedish IT industry. What was left were not companies and institutions but an extended, powerful broadband waiting to be filled with content. That content happened to be uploaded music, films, and books shared through programs like Napster and Kazaa.

On 31 May 2006, a third of Europe's Internet traffic suddenly halted. Swedish police had raided the server hall of the company PRQ and confiscated the server running the notorious Bit Torrent tracker, The Pirate Bay. With more than 20 million users and more than one million torrent files, it was seen by the U.S. State Department as the most prominent source of pirated films, music, computer games, software, and media.

On 16 February 2009, the main hearing started in the Stockholm District Court against the four young men behind The Pirate Bay. On 17 April 2009, Peter Sunde, Fredrik Neij, Gottfrid Svartholm, and Carl Lundström were found guilty of assistance to copyright infringement and sentenced to one year in prison and payment of a fine of \$3,620,000, after a trial of nine days. The defendants have appealed the verdict and the judge has been accused of bias. The case may take up to five years to be resolved through the Swedish legal system.

The Pirate Bay is actually becoming obsolete as the trial progresses. It requires special software; the distribution is centralized on the torrent site instead of using search engines like Google, as file-hosting sites do. Globally, The Pirate Bay ranks below many file-hosting sites. According to Alexa Internet, RapidShare is currently the 17th most visited site in the world, while The Pirate Bay is the 108th.

Previously, the closure of Napster, Kazaa, DC++, and many other torrent sites has only lead to an accelerated development of new sites and new technologies. The recent and controversial EU directive IPRED (International Property Rights Enforcement Directive) does not seem to have particularly influenced the average file-sharer.

Political Significance of The Pirate Bay Trial

The trial's importance is linked to its political significance. In his book *Code and Other Laws of Cyberspace*, Lawrence Lessig made the comparison between East Coast Code (law in Washington) and West Coast Code (programming in Silicon Valley), suggesting they are fundamentally the same, i.e., "the code is law." In other words, if you have the power to write code, you can shape the world.

In the legal arena, there have been relatively few problems instituting new laws to protect copyright. On the technical level, the easy dissemination of content and the complexity of the Internet made it very difficult to uphold and to enforce the law. The result of these two parallel debates was the forming of a huge rift and an unfortunate imbalance between the law and actual practice.

In reality, legal and technical issues are intimately connected. The key to successful policies is to use the expertise of both sides, considering that it is relatively easy to have technically inexperienced lawyers and legally inexperienced technicians agree on issues they would never have considered if they had not collaborated.

From Anti-IP Sentiments to a Political Party

The problem for the content industry was that the general population in Sweden held anti-IP sentiments. The file-sharers started to argue against intellectual property, disputing that copying is theft, and sparking the creation of a network of a file-sharing supporter NGO named the Pirate Bureau. The Pirate Bureau functions as a think tank providing ideas for a more intellectual criticism of copyright. The Pirate Bay was in its early stages connected to the Pirate Bureau. Finally a formal political party, the Pirate Party, was formed in 2006 and aimed for the Swedish and European parliament.

The party promises to strengthen privacy protection, to weaken copyright laws, to abolish the EU Data Retention Directive, and to roll back government surveillance legislation. The party was vitalized by the demonstrations following the police raid on The Pirate Bay and the government passing of an unpopular anti-terrorist eavesdropping legislative package in 2008. Its membership has risen to almost 10,000 (outnumbering some of the traditional parties). In the Swedish election to the European Parliament, the party received 7.13 percent of the total vote. The Pirate movement has reached out internationally, establishing branches in Europe. The party closest mimicking the Swedish success has been the German Pirate Party that gained 2 percent of the vote in the latest parliamentary election.

The Pirate Party is increasingly becoming aware of how extensive the ramifications of intellectual property are in our present society, putting political pressure on the issues of pharmaceutical patents, patent protection limits, and international organizations like the WTO and WIPO. As intellectual property is further becoming ever more important in the regular production of devices in which computers and their programs play a key role, The Pirate Party's influence on the debate is significantly increasing.

Conclusion

The organized pirate movement is making use of the sympathy gained from many illegal downloaders and developing an argument against property that is perceived to resonate with the workings of the Internet. The core of the pirate ideology is to elaborate how a future culture would appear by making use of the Internet's collaborative qualities and pointing out conflicts

between individual creators and copyright holders. In this aspect, the pirate movement is similar to socialism's challenge to private physical property.

In the long run, the Swedish example shows that trials and crackdowns will become less effective in protecting copyright from technical and political pirates. The debate is turning from legislation into a discussion of the ethical value of property in the digital age and the provision of legal alternatives, such as the services Spotify and Voddler.

The trial of the Pirate Bay has become the symbol of one of the most powerful challenges against the concept of the ownership of ideas.

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