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The High Cost of Invention: Patent Law and the Consumer Interest

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In the fall of 2001, an outbreak of the virulent disease called "inhalation anthrax" spread around the country through the mails, prompting widespread concern about the availability of antibiotics to treat it. A.G. Bayer Pharmaceuticals manufactured the principal drug of choice—the patented antibiotic CIPRO (ciprofloxacin). The company faced intense pressure to let other drug manufacturers produce generic versions of CIPRO to minimize hoarding, alleviate anticipated shortages of the medication, and to reduce its escalating cost. In Canada, the government met the public health challenge by exercising an emergency provision of its patent law rules, which brought the company's Canadian patent monopoly to an end. Bayer strenuously opposed the Canadian action however. In the United States, the company, with two years remaining on its seventeen-year patent monopoly, stood upon its legal right to leave prices high and supplies less than abundant. Substitute medications were available, a spokesman said, and patent protection existed as a necessary reward for having invested in the development of a superior product.

These different approaches in the U.S. and Canada illustrate the different political balance that has been struck between consumer and patent rights in the two nations. The difference has seldom been more apparent; but the problem of determining an effective and appropriate inducement for innovation is centuries old. The Venetian Senate, in fact, granted a ten-year blanket of protection for "new and ingenious devices" as early as the sixteenth century. During the Renaissance, monarchs used the award of patents to try to hasten the improvement of agricultural methods and military technology. Concepts related to the copyright, which permitted the
authors of literary works to benefit from their authorship through a limited monopoly on rights of publication, emerged during the Enlightenment.

Patenting inventions and protecting creative works was accordingly well-known to the American colonial legislatures. They established a diversity of patent rules that both confused and hindered inventors (Merges, 1992). When the Framers addressed the subject of patents in the United States Constitution, they consolidated the power to create and regulate patents in the hands of the federal government. The Constitution provides in Article I, section eight, that that “The Congress shall have the power ... to promote the progress of useful arts, by securing for limited times ... to inventors, the exclusive rights to their discoveries.” The basic principle guiding the development of patent law has in succeeding years been that, to qualify for a patent, an invention must be novel, useful, and not obvious. The volume of patents granted continues to rise, with the number of patents issued by the Patent Office coming to 157,497 in 1999.

Patent law in the United States changed significantly in 1994 when the United States decided to adhere to the General Agreement on Tariffs and Trade (“GATT”). This agreement mandated several changes to American law to bring it into harmony with the new global standard. Up to this point, the patent laws of the United States provided seventeen years for protection, ordinarily running from the day the patent was issued. Under the GATT agreement, however, the new time allowed by patent protection is a variable period that can run up to twenty years, counting from when the application is first filed with the Patent and Trademark Office (“PTO”) (Lemley, 1995).

Specialists have conducted theoretical and empirical studies of the patent system and its legal regime—industry by industry and doctrine by doctrine—to see whether inventors’ rights have been overprotected. They have often inquired, that is, whether patents foster anti-competitive monopolies and raise prices without generating sufficient compensatory benefits. The tests applied by patent officers and courts, and the studies by scholars, however, often assess whether the rules, or the patents granted under them, are economically efficient rather than whether they are deleterious to particular groups of consumers or to consumers as a general class. To claim, as its defenders do, that the “public interest” is generally served in the long run by patent law may or may not be correct; but this is not the same as asserting that consumer interests are generally well-served.

Whether consumer interests have been given their due regard by the patent law regime is a different inquiry from the ones that are usually undertaken by scholars who are not consumer professionals, and, unsurprisingly, it is an inquiry to which further attention should be paid. Do consumers benefit, overall, from American patent laws? Are the economic rewards from innovation sufficient to outweigh the damage done by officially sanctioned monopoly power? Will consumers profit from the new rules that have been crafted, in the interest of globalization, for extended patents? The topic is a broad and complicated one, and only a beginning can be attempted here.

RATIONALIZING PATENT PROTECTION

There is a consumer interest served by granting patents of limited duration. Patents have the capacity to stimulate free market competition by increasing the consumer options through various new inventions and ideas. Because patentees must publicly disclose their inventions to obtain patents, the system encourages other inventors to design around or develop their own improvements. Consumers then are presented with an array of new and improved inventions, as has happened recently in such fields as pharmaceuticals, computer science, and biotechnology. Without the patent right, inventors would likely be induced by self-interest to rely on trade secret protection that would typically keep new information permanently from the public.

Two general reasons have been offered for the existing government system of patents, which protects and nurtures investment in
inventions for such a long period. First, inventiveness promotes economic well being, but it does not thrive without inventors who can reasonably anticipate the prospect of monetary gain (and investors who can reasonably anticipate gain) as the result of their success. Without protective rules and penalties for violating those rules, anyone could copy any commercially successful new idea or item before the recoupment of the costs of invention, including a reasonable bounty for the successful act of creation. Rational competitors would seize the opportunity to capitalize on the investments made by others, discouraging the inclination to sponsor invention.

Second, governmental macroeconomic policy objectives are said to be served by the patent law. One specific policy claim, for example, is that lengthy patent protection protects small businesses from predation by larger businesses. A new idea, product or process is the often only way that the smaller business can compete with the larger, more dominate, businesses. Our patent laws are said to protect and foster the growth of small businesses by allowing them to compete against the larger businesses without fear that their sole advantage will be prematurely upended.

More generally, the American patent system, it is said, creates a positive incentive for investment in research, which sustains international economic competitiveness over extended time periods. Patent law, like monetary or fiscal policy, is said to be a public policy tool that either promotes or restricts national economic growth according to the economic incentives it generates. (Symposium, 1990).

**CALCULATING THE COSTS OF ANTI-COMPETITIVENESS**

Notwithstanding the benefits of a system of long-term patent protection, the costs of that protection may be borne disproportionately by consumers. The biggest costs will result from the officially sanctioned monopoly power that is generated by the grant of a patent. Evidence of an aggregate anti-competitive impact of patents is difficult to come by. It is not difficult, however, to locate individual allegations of the detrimental impact of monopoly power by consulting court decisions in the area of patent antitrust law.

Unless more aggressive antitrust enforcement becomes the norm, it appears that the impact of the intellectual property and patent laws on innovation, price structures and the availability of products will continue to be damaging. Robert Pitofsky, the Chairman of the Federal Trade Commission, recently suggested that an imbalance between anemic antitrust enforcement and strong intellectual property protection may be producing a significant anti-consumer impact. “It is clear that both intellectual property protection and reasonable antitrust enforcement will encourage innovation,” Pitofsky wrote.

“Intellectual property rights subsidize investments in innovation [while] Antitrust . . . prevents dominant firms from harming or retarding innovation. Serious problems arise when either regime—intellectual property protection or antitrust—is accorded disproportionate weight.” Examining the history of antitrust enforcement, Pitofsky observed that it had “often if not always been [excessively] sensitive to the value of innovation.” (Pitofsky, 2001).

A striking example of over-sensitivity to the possibility of discouraging innovation is the Federal Circuit decision in CSU v. Xerox Corporation, where the court concluded that a patent holder could refuse to license anyone, regardless of the intent of the patent holder or the effect of the refusal on competition. The court ruled that the refusal was exempt from the antitrust laws in all but extreme circumstances. In doing so, the court “leaped from the undeniable premise that an intellectual property holder does not have to license anyone in the first instance to the unjustifiable conclusion that it can select among licensees to achieve an anti-competitive purpose or can condition a license . . . to achieve an anti-competitive effect.” (Pitofsky, 2001).
QUESTIONING THE LENGTH OF PATENT PROTECTION

Are inventors being protected for unnecessarily long periods of time at the expense of consumers? In the United States rights have been lengthened to exclude others from making, using, or selling the claimed invention for twenty years after the filing date of the patent application. Extensions to compensate for litigation subsequent to filing are also possible, particularly in biomedical fields.

Faced with a choice between the conferring monopoly power for a longer period of time or opening previously monopolized lines of manufacture to the competitive marketplace, it would seem appropriate to place a strong burden on the advocates for longer periods to demonstrate that returns are otherwise insufficient to induce investment. In the fields of electronic technology, computer science, and biomedical research, the evidence suggests that the value of investments is great enough to generate, if anything, over-investment.1

Representatives of several industries have claimed that their protections have been adversely affected by the WTO Trade Related Aspects of International Property Rights, or “TRIPS” agreements, which they claim have effectively reduced patent protection. In the biomedical field, lobbyists have complained that developing nations are being permitted to copy patented medicines under public health exceptions. They also claim that since they spend more time on average litigating for their patents, and since the date of application rather than the date of the grant may trigger the patent clock, they have less protection under the new system notwithstanding the change from a seventeen to a twenty-year grant.

At least one study suggests that there is less to the argument about shortening than meets the eye. Overall, empirical analysis by Professor Mark Lemley found that the average patentee obtained an extra 253 days of protection under the new law when compared to the older system of 17 years. Part of the reason is the new law’s permissive filing of “provisional” applications. These allow inventors to file such applications with the Patents and Trademarks Office (PTO) in order to have the date of the provisional application count as the invention’s priority date in disputes with other inventors but to avoid running clock on the patent protection period for another year. In essence, inventors can obtain extra time for their patents at minimal cost. (Lemley, 1995)

CURBING ABUSE OF PATENT RIGHTS

Once patent rights are commercialized they are subject to misuse by patentees to further unlawful monopolies to impede competition. One method consists of illegally tying a patented product to a second, non-patented product. Another method is to retard competition by pursuing the right to claim infringement against a competitor who makes “insubstantial” changes to an invention. Sometimes patentees enter into ostensibly “cooperative” agreements, negotiated under threat of patent litigation, which have the effect of extending the duration of their patents and maintaining an artificially high price level for a product line.

Patentees also have refused to share information about unpatented aspects of their products in order to limit competition, which might otherwise produce further innovation that could benefit the public while diminishing the value of the original grant. In a widely noted antitrust enforcement action, for example, the Federal Trade Commission in 1998 charged the Intel Corporation with denying essential technical information and product samples of new microprocessors to companies that, because of intellectual property disputes, had initiated or threatened to initiate litigation against Intel or Intel’s customers. Intel’s goal, the FTC asserted, was to coerce other companies not to resort to the courts, but instead to license their intellectual property on terms favorable to Intel. The Commission alleged that anti-competitive
effects included discouraging innovation efforts by potential challengers in microprocessor technology. (Pitofsky, 2001).

CONSTRAINTS ON THE ARTICULATION OF CONSUMER INTERESTS

As stated earlier, there is a burden on the applicant for a patent to establish several elements, including originality and usefulness, to receive a patent. For good reasons, there is no requirement for the applicant to prove that an invention will advance the consumer interest. And yet is hard for the authors to see why the process cannot be designed systematically to incorporate greater consideration of consumer concerns:

- Consider a hypothetical decision to grant a patent for the successful invention of a sterile, disease-resistant plant. Foreseeable gains in utility for some agricultural producers and suppliers would result from patenting such an invention, and these will be highlighted by the party seeking the patent in the course of demonstrating suitability for an award—but matters of great concern such as the likelihood of higher prices, or of reduced quantities available for consumption, may be detrimental and yet in the current process are likely to remain undisclosed or underdisclosed. While patent examiners have considerable authority to request information regarding a patent, the proceeding is typically a non-adversarial administrative procedure, where the opportunity for consumer participation in the process is absent. (Oczek).

- Consider a hypothetical decision to grant a patent to a pharmaceutical company for a new drug, which predominantly is the result of a governmental research program, in which the company cooperated but did not participate in actively. The grant of the patent to the company would further the government's interest in promoting the future partnering with the drug industry; but the resulting monopoly on production would dramatically increase the cost of the drug and the value to consumers will be attenuated at best. Consumers generally do not have standing to challenge the award of a patent. (Naik, Davis).

- Consider the fact that there is no doctrine of “fair use” in patent law comparable to the doctrine in copyright law, which allows limited use of material to further the development of new ideas which make unsubstantial use of patented processes. (O’Rourke).

- Finally, consider the potential value of allowing consumers or agencies representing them to challenge patent holders for failing to develop or license their patents at reasonable cost—a right which has been narrowed by case law and is nonexistent for consumers. (Naik, Davis).

CONCLUSION

The old saying that war is too important to be left to generals can be applied to patent law, which has too profound an impact on consumers to be only the domain of patent law specialists. Redrawing some of the rules, notably the basic protection period which has been set to harmonize with global standards, now appears to be “off the table.” If consumer groups and consumer educators will more systematically address the specific problems involved, however, the current lines between patent monopoly power and competition may be redrawn.

The authors hope that this discussion
stimulates further research by consumer affairs professionals into methods for improving the responsiveness of the system of patent and intellectual property protection to consumer interests.

ENDNOTE
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