Political Economy of Intellectual Property Policy-Making

An Observation from a Realistic (and Slightly Cynical) Perspective

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"O cives, cives, quaerenda pecunia primum est; Virtus post nummos!"

Horatius, Epistolae, I, 1, 53–54

I. INTRODUCTION

Two separate and unrelated phenomena mark the end of a high-profile and extremely politicized debate in the intellectual property (IP) field. Two separate phenomena that emphasize the complexity of the political and economic context in which the process of IP policy-making is taking place. Two separate phenomena that highlight the interests, the forces, the lobby, and the power games characterizing this field. Two separate phenomena, the outcome of each amounting to nothing but a rather superficial, politically correct consensus with no substantial results one way or the other.

But after such a bleak introduction, surely one needs to attach some titles to these phenomena. In fact, we will do more than that, as, for the sake of convenience, it would be useful to attach two titles to each phenomenon—the formal title and the actual title of what it is really all about.

The first phenomenon may be formally referred to as the Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions—CIIID in the popular jargon.1 Its actual caption, however, should be “the rise and fall of the Directive that focused on the rather pointless contribution of the term ‘technical contribution’”.


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Trade Organization deal on patented medicines (or drugs) in the popular jargon. Here, the title “the much ado about nothing decision” springs to mind.

Later in this article I shall describe the two issues in brief. The reason why it is not important to delve into the “nuts and bolts“ of each case is that this article seeks to flesh out some of the political-economy insights associated with these cases rather than analyzing their content and history in detail. Suffice it to say that the C1D case relates to the extent to which software-based inventions (or inventions dealing with the interface between software and hardware) may be patentable under EU law and the WTO case deals with the extent to which patented pharmaceutical products may be overridden by WTO Members in so far as to allow the exportation of generic drugs to least developed countries with insufficient manufacturing capabilities.

At first glance, the two issues have nothing in common. They relate to different fields of technology (software and pharmaceuticals), they were debated in different forums (the European Commission/Parliament and the WTO), and they achieved opposite results (the former was scrapped while the latter was formalized). But a more informed reflection suggests strong political and economic similarities in the manner in which they were manifested.

This article does the following. At the outset, it provides a theoretical overview of both the complexity and problematic nature of the economics of intellectual property rights (IPRs). Secondly, the article suggests an alternative political-economy interest-based approach to the analysis of systemic IP outcomes. Thirdly, the article outlines the chronological development of the C1D and the WTO deal on patented medicines. Finally, the article outlines the political-economy themes and insights to which these cases can expose us.

II. A BRIEF DISCUSSION OF IPRS AND THEIR COMPLEX ECONOMIC NATURE

Economists explore ways of efficiently allocating scarce resources to unlimited wants and find that private property rights are a plausible way of dealing with scarcity in an efficient manner. Knowledge, however, is a unique resource given that it is not inherently scarce. Theoretically speaking, the potential use of existing knowledge is unlimited and may be diminished only when such knowledge becomes obsolete. Thus,