# Balancing benefits and downsides of Intellectual Property

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In current times of 'unipolarity' in the realm of properties and politics, given the opportunity to express or debate on "Intellectual Properties" and the balancing benefits and downsides thereof should be accepted as a boon, recognizing that WTO and TRIPs which form the backdrop has "multi polar landscapes".

From Americas and Amazon to Zimbabwe and Zambia, from US, UK, UN, WTO, WIPO, US and EU all the way through LDC / DC sovereign state leaders to NGO's, there has been total agreement on one basic aspect of Intellectual Property - the "balance in IP" and a need for it, though the perception of "balance" swings wildly, across the socio-economic spectrum.

Much has been spoken and written about Access to medicines vis a vis I.P. practices and abuses. The Doha Declaration, the GAAP Act in USA (Greater Affordability to Affordable Pharmaceuticals Act) and the UK Commission Report on IP has one thing in common. The need for balance is acknowledge by one and all. Starting from TRIPs up to the latest UK IP Commission Report it is evidently accepted that it is not possible to have a "one size fits all" regime. Each independent sovereign state jurisdiction must decide and provide an IP law that best fits the need of its people. TRIPs provide a minimum guideline with possible exemptions and flexibilities. If a nation fails to adopt the 'best mode' approach (due to fear of criticism or attack in a unipolar scenario) whom else to blame for the imbalance perceived or lack of concern and absence of a proactive policy approach.

**Benefits of IP**

IP can undoubtedly promote continued development of knowledge, technology and dissemination of information, so fundamentally essential to research leading to innovation. Investments in research have to lead to commercial returns in a sustainable manner for a reasonable and fair lifetime of the invention. This can only be assured if there is a fair competition. The return on the built-in value addition in the innovated product / process (+ profit) must be available to the inventor / licensee / assignee to plough back into research.

Often corporates opt for the other option of retaining technology and innovation as a trade secret (confidential information). Under this option there is no compulsion for disclosure, but there is no statutory protection against theft, pilferage, illegal transfer or even moving out of technology when the employee opts for a change of job. It is highly possible that a competitor may develop the same product or process by reverse -

engineering, and if it is an honest parallel technology there is nothing that the 'trade-secret' owner can do. The balance of benefit to the community is worse in this form of intellectual property as the novel and valuable technological information is denied to the community, who could otherwise have benefited from the knowledge to build further and add value and service to the community.

The expectation of the 'balance' tilts heavily and adversely when the economic backdrop moves from developed countries to underdeveloped or least developed countries and to developing countries. In a developed country, the citizens can mostly take care of themselves or the state takes care of them on areas of health & medical attention (or through health insurance). In least developed countries also the scenario is similar. They expect the developed countries (and some developing countries with vested interests) to take care of their problems. These LDCs have no manufacturing base and have therefore no real stake in IP or absence of research and innovation in the country. Therefore, it does not matter much to them whether they "sign on the dotted line" for adopting a strong IPR regime for themselves. They will live on aid or loans (which are invariably written off later.)

Where the "balance" is most important is for the developing countries who have good manufacturing base, technically qualified manpower, resources for research and development, however, have poor economic muscle-power to push through their own agenda of fair balance between monopoly, abuse of IP (Patents) and exploitation compared to working of the invention, fair use, availability and affordability and technology transfers / licensing. These countries have much more at stake and have to negotiate tough and bargain ferociously to get a fair deal. However, this group of Nations are heavily outnumbered and out-maneuvered, by the combination of the developed countries and the LDCs who are heavily dependent on the DCs.

Balance also moves through the IP spectrum. While copyright trademarks and designs are often licensed out to third parties and the per unit burden on these forms of IPs are relatively small, there is very little practice of licensing out in patent system and has a heavy per unit burden of IP built in to the product, igniting issues of access and affordability, even the complaint of abuse of the IP and the system itself.

'Balance has different significance to different groups. Even a vendor or a trader would want and will try (within legal limits or even beyond) to manipulate his "balance" to his commercial advantage, a "balance of trade".

The balance in developed countries' intellectual properties remains tilted in the eyes of rest of the world, in favour of the inventor/ inventor in innovations. However, the developed countries' interpretation of the 'balance' limits to the disclosure of technology (best mode) in return for IP rights with limited restrictions on absolute monopoly. Even though, compulsory licence provisions are built into IP laws of (even) almost all developed countries, the "balance" is more effectively maintained through judicious use of Anti-trust laws and Competitions Law.

'Balancing' when it comes to the 'third world' (it is almost like the 'nether world'), it is an altogether different story. This is when the Downsides of IPR erupts like a volcano from the ocean. The moratorium on disputes for LDCs up to 2016 is an acknowledgement of this phenomenon. High dependence in developed countries for 'Aid', ignorance of IPR laws, TRIPs and the flexibilities available under TRIPs to sovereign states, poor negotiation skills and pressures from global MNC corporations, have forced these countries to straggle to tackle human health problems like AIDS quietly and resigned to themselves.

**Downsides of IP**

Let us face it. There are no downsides to IP or Patents. Downsides are to the sovereign governments who are unable to understand and appreciate IP / Patents and draft the domestic laws and regulations to suit the National needs and priorities. It is like appealing for something when the very thing is in your own hands. To understand this better, let us look at the IP Laws some developed countries.

**USA. France, UK**

All the NGO and Indian Industry stalwarts have already highlighted that US PTO under USC has already the provision for compulsory licencing. However, this provision is sparingly used and are used only when the concerned 'industry lobby' is not powerful or when the Government has overwhelming reasons to use it. Similarly, France has built-in strong provision of compulsory licencing under section.

However, the downside of IPR / Patents being 'Monopoly', the governments in developed countries have legislated effectively to remedy absolute monopoly. The major difference between developed countries and other are they don't legislate unless they can enforce and they enforce what they legislate effectively.

**Anti Trust Laws**

Acknowledging that fostering innovation is the prime objective of Intellectual property / Patent protection, the Anti trust laws are enacted and enforced fully recognizing this common objective and they interfere only when there is abuse or likelihood of abuse of public interest. It has to be acknowledged that both intellectual property and competition promote innovation and public interest, through in different ways. While IP/Patents promote innovation by providing for an economic return on investment, the antitrust laws promote maintenance of competitive markets where the competition (often cut throat rivalry) between inventors and creative competitors provides an alternate incentive for competition.

For governments, it is a matter of great concern to provide for an equitable balance of these values, without hampering innovative spirit and enthusiasm and at the same time, providing for adequate and fair competition.

It is unfair to allege that governments are blind in providing this balance. The Federal-Trade Commission in US has involved itself into enforcing competition by involving antitrust laws. The best example (among many Microsoft is one another) is the merger of Marion Murrell Dow (MMD) with Hoechst. While MMD was selling extended release Diltiazem (cardizem), Hoechst was selling Tiazac, between them they would acquired monopoly in this therapeutic segment. Even though, Hoechst, prior to merger, transferred Tiazac to Bioavail, the US Trade Commission further intervened to remove residual anticompetitive side effects, by forcing Hoechst part with confidential Data (exclusivity related) on Tiazac for toxicology and regulatory approvals and forced the merging units to settle all infringement related litigation and actions related to the concerned drug prospectively or even retrospectively. All concerned parties were forced to disclose all confidential information involved between each other.

There are many more examples. What is important is, if there is a will there is a way. The concerns have to be genuine; the goals have to be positive.

There are innumerable domains where the "balance" in IP comes into play. Various forms of IP, like copyrights Trademarks, designs, Breeders & Planters vis a vis Farmers Rights in UPOV, Convention on Biodiversity (CBD), Licensing and contracts, confidential information, Date exclusivity etc. There are raging debates on conventional libraries and geo-libraries and growing use of Internet with related controversies and desire for a balance. New technologies bring in newer imbalances, so on & so forth.

In conclusion, IP/Patents is not just about freedom of exploitation, it is about limitations. The interests of the public are protected to the extent necessary to allow the flow of knowledge and benefits into the public domain. The interests of inventors are protected (in return for disclosure) to the extent necessary to reward and provide for returns on investment to generate surplus fresh investment in research and further development. The interests of creative competitors or third parties, including government, are protected by adequate provisions to prevent absolute monopoly and encourage competition. Here is the balance. The better the 'balance', better the benefits (to all concerned) and lesser perception and impact of the downsides. Benefits and downsides vary 'Nation to Nation' based on current status of economic development and a host of socio-economic parameters. The system of IP / Patents by itself is balanced and capable of retaining the balance in a wide cross section of economics. Acceptance of the fact that "one size doesn't fit all" and continuing to appreciate and accept the meet to allow flexibilities in the "balance" to operate in need based varying jurisdictions without sacrificing the basic goal to encourage and reward innovations will help ensuring progress and prosperity to mankind.

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