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Southeast Asia Legal Education

Preparing Lawyers for Tomorrow's Society and Profession

Joint collaboration between School of Law University of Washington
and Faculty of Law Universitas Airlangga, Indonesia

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Integrating Sense of Social Justice Into The Teaching of Intellectual Property Rights

Nurul Barizah¹

Abstract

This paper argues that it is important for the lecturers to introduce a sense of social justice as part of intellectual property rights (IPR) subject in their teaching method and material. This paper argues that teaching IPR should not only provide explanation about national law, but to provide a professional jurist with a sense of social justice, it is important for student to have an explanation on IPR from different perspectives so that students have a comprehensive understanding on the subject. In this context, this paper emphasizes that teaching IPR should not only seen IPR as a main vehicle for transfer technology, investment and economic development of a nation, but also it in certain aspects lead to inhibit the development objectives of nations, particularly developing nations. Secondly, this paper also analyses that TRIPs adopted a protection paradigm with the objective to seek a balance the interests of innovators and users of technology. And in this context, it is fundamental to provide knowledge to students on how national laws of member nations should to take into account this perspective to achieve the TRIPs objective. Lastly, this paper explores several social justice and unfairness issues resulted from the protection of IPR, particularly in field of patent and copyright which have been a concern of a number of international organizations and forum.

Key Words: Intellectual Property, Social Justice, Patent and Copyright

1. Introduction

Human genius is the source of all works of art and invention. These works are the guarantee of a life worthy of men. It is the duty of the state to ensure with dilligence the protection of the arts and inventions.

(Gerald J. Mossinghoff and Ralph Oman, *The WIPO; A United Nations Success Story*, 160 World Affairs 104 (1997))

The Introduction of Intellectual Property Rights (IPR) law as a new subject or course in a majority of law schools or faculties in developing countries like Indonesia can not be separated from the conclusion of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement on 1994.² Prior to 1994 there was no subject matter or course on IPR whether in the Faculty of Laws or other faculties in Indonesia. However, since Indonesian become a Member of the World Trade of Organization (WTO) by ratifying the Agreement of the Establishing WTO, including Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement)

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2 Agreement on Trade Related Aspects of Intellectual Property Rights, Agreement Establishing the World Trade Organization, Annex IC, Legal Instruments. Result of Uruguay Round, vol 31, 33 I.L.M.81 (Marrakesh; April 15, 1994)

1994³, a new subject matter have been introduced in the Faculty of Laws in Indonesia.

Subsequently, there was a need to increase the human resources capacity in Indonesia particularly for lecturer and legal enforcer bodies about IPR subject matters and to facilitate it, there have been in-house or overseas trainings of IPR for university lecturers, legal enforcers bodies promoted and supported by World Intellectual Organization (WIPO) in cooperation with other international agencies or overseas fundings, such as JICA, IASTP-AuSAID, USAID, etc.

One of the main program was to send the lecturers and legal enforcers bodies to have in-house or overseas training about IPR in different countries such as Australia, Japan, Europe, etc. Accordingly, the perspective has been thought to the lecturer was the western IPR concept and perspectives, which seen IPR as one ways to promote technological innovation, economic progress and development of modern society. This perspective is in line with the objective enshrined under the TRIPs Agreement.⁴ Accordingly, there have been a prevalent thinking that protection of IPR enhance the economic and cultural development of Indonesia if this country provides IPR protection in accordance with TRIPs Agreement.

2. Current Content of Intellectual Property Subjects

Based on the knowledge and experience received from in-house and overseas training, lecturers sets up teaching material for the IPR subject matter, in which, traditionally it consists of all area of IPR subject matters, such as, copyright and related rights, patent, trademark, industrial designs, geographical indications, undisclosed information, layout-design of integrated circuit, and plant varieties protection. Such subjects are as provided under several international conventions and treaties related to the protection of IPR from Paris Convention on Industrial Property,⁵ Bern Convention on the Protection of Literary Works,⁶ TRIPs Agreement, UPOV Convention on the Protection of Plant Varieties⁷ and other international systems and instruments.

While the content of the IPR syllabus of has adopted mostly from the content of the IPR syllabus of the law schools or faculty of laws in developed countries because teachers have overseas training experience from developed country's law school. Eventhough there have been a number of concerns from developing countries's perspective about the protection of IPR and the potential impact for such countries in several sectors of development, such perspective have not yet been taken into consideration to be part of discussion or context of IPR subject matter or teaching material. The basis of this is because the majority of the academics in Indonesia from 1995s until 2005s have a similar thoughts as the Government who believe that the protection of IPR is very important for protecting intellectual creativity effort, promoting technological innovation and transfer of technology, supporting investment

³ *Ibid.*

⁴ See the objective of TRIPs Agreement in Article 7

⁵ *Paris Convention for the Protection of Industrial Property*, 21 U.S.T.1583, 828 U.N.T.S. 305, 20 March 1883 (entered into force 26 April or 19 May 1970)

⁶ The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, 828 U.N.T.S. 221

⁷ *International Convention for the Protection of New Varieties of Plants*, December 2, 1961, as Revised at Geneva on November 10, 1972 on October 23, 1978, and on March 19, 1991

climate, promoting the development of seed industries and in turn leads to support the development objective, including economic development.

The above believe is in line with the objective of the protection of IPR as provided under Article 7 of the TRIPs Agreement as follows:

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligation.”

3. Social Justice Issues in the Protection of IPR

According to Sun, IPR laws, has progressed without taken into account its effects on social justice, where reducing inequality is seen as essential for humanity and civilization.⁸ Otherwise, IP law has long been shaped by the perceived need to promote efficiency and protect individual interests in personhood and human labor.⁹ This social justice issue in the area of IPR have become a subject of intense discussion in a number of international forum between developed and developing countries. This issue rooted from the thought to harmonise IPR laws among the WTO –TRIPs Member countries without taken into consideration level of economic and technological development of each country. Many scholars argued that this thought is regarded as unfair and unjust particularly if it seen from John Rawl principle of justice.¹⁰ Sun also strongly states that “However, it would be sheer arrogance to presume that a one size fits all approach toward intellectual provision will and should work for developing countries.”¹¹ Sir Hugh Laddie argues as follows:

“[f]or too long intellectual property rights have been regarded as food for the rich countries and poison for poor countries...Poor countries may find them useful provided they are accommodated to suit local palates. The ...appropriate diet for each developing country needs to be decided on the basis of what is best for its development, and that the international community and governments in all countries should take decision with that in mind.”¹²

The above argument clearly states that it is unjust to implement the protection of IPR based on one size fit all principles and there is a need to be taken into consideration when providing IPR protection for developing countries that is “what is best for its development”

Accordingly, it is very important in IP laws to have a sense of social justice since it was found that the protection of IPR causes serious inequality problem. The following discusses social

8 Haochen Sun, “Can Louis Vuitton Dance with Hiphop? Rethinking the Idea of Social Justice in Intellectual Property Law,” *15 Pa. J. L. & Soc. Change* 389, 390

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 Hugh Laddie, Commission on Intellectual Property Rights Foreword, <http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf> (accessed at December 21, 2008)

justice issues in different field of IPR.

3.1. Social Justice Issues in the Field of Patent and Plant Varieties

In the field of patent, social justice issues partly derived from the existence of the Article 27 (1) of the TRIPs Agreement, which states that:

“...Patents shall be available for any inventions, whether products or processes, in all field of technology, provided that they are new, involve an inventive step and are capable of industrial application...patents shall be available and patents rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.”

From the above Article it can be interpreted that any inventions in the field of technology can be patented as long as they are fulfill the requirement of patentability, that are newness, inventive step and industrial application. This technology includes modern biotechnology industry and “life science industry”, such as biotechnological inventions, DNA sequences technology, etc. As Article 27 (3) further provides that:

“Member may also exclude from patentability:

- (a) diagnostic, therapeutic and surgical methods for the treatment of human and animals;
- (b) plant and animal other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes. However, Member shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.”

The wide coverage of the Article 27 (1) is to ensure that no material will be excluded from a patent law,¹³ including biological resources. This article also subject to different interpretation particularly about the definition of “invention” from one jurisdiction to another depends on the level of technological development. In interpreting the term ‘invention’ proponents of biotechnology patents usually take a broader approach to include isolated and purified genetic resources and materials even though they are identical to their natural counterparts, including human genes, DNA sequences, and protein. they follow a liberal notion of patent law and policy that ‘everything under the sun made by man is patentable’.¹⁴ In contrast, opponents of biotechnology patents claims that the meaning of word ‘invention’ should exclude genetic resources found in nature.¹⁵

In practice, there are two types of patents involving genetic resources. Firstly, direct patenting of source material, in which a patent directly claims genetic resources obtained from separate source as an invention. Secondly, patenting of an invention which is derived from source material or somehow uses genetic resources.¹⁶ Such practices have extended the patentable subject matter and opened possibilities to grant patents on inventions which do

13 Maria Kruger, ‘Harmonising TRIPs and the CBD; A Proposal from India’, (2001) 10 *Minn.F.Global Trade* 169, 184-5

14 The US PTO applies this principle

15 Graham Dutfield, ‘Intellectual Property and Basic Research; Discovery vs Invention’, October 2001, *Scidev. Net*, 2001, revised December 2002), available from <<http://www.scidev.net/en/science-communication/>>, p. 1;

16 WIPO, ‘Intellectual Property Questions in Relation to Genetic Resources’ Information Meeting on Intellectual Property and Genetic Resources, Geneva, September 15, 2004

not meet the patentability thresholds. Such practices are of concern because it opens uses of genetic resources that amount to improper or unfair misappropriation of the resources. This is potentially serious and, particularly unfair, where a patent permits a misappropriation of genetic resources related to traditional knowledge by biotechnology industries or other commercial entities.¹⁷ McCall argues that: "patenting biological substances is a mistake both morally and economically for any system of intellectual property and should be reanalysed at all levels, particularly as it affects developing nations."¹⁸

Similarly, Mgbeoji explicitly claims that patent policy facilitates global biopiracy.¹⁹ Scholars like Drahos,²⁰ Blakeney,²¹ Dutfied,²² Andrews,²³ Maskus and Reichman,²⁴ Ullrich,²⁵ Aoki²⁶ and many others also express similar concerns. In general, they argue that the expansion of the subject matters of the IPR particularly to include biological resources, including life forms, might facilitate biopiracy of developing countries' resources. Such condition has a potential to undermine the availability of public goods on the basis that those important resources can be privatised under a global IPR framework by biotechnology industrialised countries.²⁷ Martin Khor, also argues that the large scale granting patent for genes and other biological materials is leading to an even greater concentration of control over the world's food crop by a few corporations.²⁸

According to Khor, these patents pose a threat to a global food security, including farmer's livelihoods. He states that that such patents may decrease farmer's access to affordable seed, reduce effort in public plant breeding, increase the lost of genetic diversity and prevent traditional forms of seeds and plant sharing. Khor also found that the companies

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- 17 Charles R. Mcmanis, 'Fitting Traditional Knowledge Protection and Biopiracy Claims into the Existing Intellectual Property and Unfair Competition Framework', in Burton Ong (ed), *Intellectual Property and Biological Resources*, (Marshall Cavendish Academic, Singapore, 2004) 425-510
 - 18 Diana D. McCall, 'Stating the Obvious; Patents and Biological Material', 2003 *U. Ill. J. L. Tech. & Pol'y* 239- 257, 241
 - 19 Ikechi Mcbeoji, *Global Biopiracy, Patent, Plants and Indigenous Knowledge*, (UBC Press, Vancouver, Toronto, 2006) 119-200
 - 20 Peter Drahos, 'The Regulation of Public Goods', in Keith E. Maskus and Jerome H. Reichman *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, 2005) 46-68
 - 21 Michael Blakeney, "Bioprospecting and Biopiracy", in Burton Ong (ed), above n 16, 393-425
 - 22 Graham Dutfield, 'Sharing Benefits of Biodiversity Is there a Role for Patent System?', in Keith E. Maskus, *The WTO, Intellectual Property Rights and the Knowledge Economy, Critical Perspectives on the Global Trading System and the WTO* (E. Elgar Pub., Northampton, MA 2004) 292-324, 301
 - 23 Lori B. Andrews, 'Genes and Patent Policy; Rethinking Intellectual Property Rights', (2002) 3 (10) *Nature Reviews Genetics*, 803-8, available from <http://www.nature.com/reviews/genetics> in David Vaver III (ed) *Intellectual Property Rights; Critical Concepts in Law*, (Routledge, London, 2006) 261-273
 - 24 Keith E. Maskus and Jerome H. Reichman, *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, 2005)
 - 25 Hanns Ullrich, 'Expansionist Intellectual Property Protection and Reductionist Competition Rules; A TRIPS Perspectives', in Keith E. Maskus and Jerome H. Reichman, *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime*, (Cambridge University Press, Cambridge, 2005) 709-725
 - 26 Keith Aoki, 'Traditional Knowledge, Intellectual Property, and Indigenous Culture; Article: Weeds, Seeds & Deeds; Recent Skirmishes in the Seed Wars', (2003) 11 *Cardozo J. Int'l & Comp. L.* 247
 - 27 See for example, Michael Blakeney, 'Intellectual Property Rights and Global Food Security', in David Vaver III (ed), *Intellectual Property Rights; Critical Concept in Law* (Routledge, London, 2006) 315-338
 - 28 Khor also notes that top five corporations involves in agricultural biotechnology (AstraZeneca, DuPont, Monsanto, Novartis and Aventis) account 60 percent of global pesticide market, 23 percent of the commercial seed market and virtually 100 percent of the transgenic seeds market, see in Martin Khor, *Intellectual Property, Biodiversity and Sustainable Development, Resolving the Difficult Issues* (Zed Books, Third World Network, 2002) 22

were seeking patent protection on genes sequences, proteins, plants and seeds. Three-quarters of patents on plants genes were by the private sector and almost 601 patents on plants DNA were filed by just 14 multinational corporations. This includes main staples like rice, Maize, Potato, Wheat, Soybean, as well as patent related to medicinal plants.²⁹

Furthermore, Jeffery states that:

Opponents to the pro-patent view assert that by creating patents over living organisms we are encouraging the destruction of biodiversity and creating monopolies that are unfair and immoral. This view says that such patents also support 'biopiracy', which is the unauthorized use of biological resources or the traditional knowledge held by indigenous communities or developing countries.³⁰

Moreover, the patent system is also used as a means to transfer the benefit of genetic resources from the BRDC to the BDC. Mgbeoji illustrates that:

Today's pirates don't come with eyes patches and daggers clenched in their teeth, but with sharp suits and claiming intellectual property rights. So those rich countries which take seeds away from their poorer neighbours and then try to patent them are guilty of theft – plain and simple; biopirates by an-other name.³¹

If intellectual property holders can commercialise the patented inventions and earn revenue on the basis of exclusive rights, the local communities or the countries that developed or used the knowledge or resources would not receive any revenue or benefit arising from patent.³² This condition is ironic if the patented inventions are relatively expensive to developing countries from where the patented process and products originated.³³

This perspective lies at the basis of widespread criticism of the patent system as being one of the roots of unfairness of in the global wealth distribution. Patent law only protects inventions that satisfy the collective requirement of patentability, and such requirements in practice operate to eliminate the opportunity for traditional technological innovations to be protected under this system.³⁴ Patent law provides protection for modern laboratory products and processes in pharmaceutical companies' inventions even though such inventions are derived from traditional medicinal knowledge of certain local communities. The Prime Minister of Malaysia expressed this concern as follows:

[T]he poor countries have been told to preserve their...genetic resources on the off-chance that at some future date something is discovered which might prove useful to humanity...We are also told that the rich will not agree to compensate the poor for their sacrifices. The poor are not asking for charity. When the rich

29 *Ibid* 24-29

30 Michael I. Jeffery, "Intellectual property Rights and Biodiversity Conservation; Reconciling the Incompatibilities of the TRIPs Agreement and the Convention on Biological Diversity", in Burton Ong (ed.) above n 16, 200

31 Ikechi Mgbeoji, above n 18, 121, as quoted from *New Scientist*, <<http://www.newscientist.com/ns/980214/editorial.html>>;

32 Martin Khor, above n 27, 21

33 *Ibid*.

34 Biswajit Dhar, Sachin Chaturvedi, and R.V. Anuradha, *Regime of Intellectual Property Protection for Biodiversity; A Developing Country Perspective* (RIS and IUCN, 2001) 74

chopped down their forests ... and scoured the world for cheap resources, the poor said nothing. Indeed, they paid for development of the rich. Now the rich claim a right to regulate the development of the poor countries. And yet any suggestion that the rich compensate the poor adequately is regarded as outrageous. As colonies, we were exploited. Now, as independent nations, we are to be equally exploited.³⁵

President Ali Hassan Mwinyi of Tanzania at the United Nations Conference on Environment and Development also expressed similar concerns:

[M]ost of us in developing countries find it difficult to accept the notion that biodiversity should [flow freely to industrial countries] while the flow of biological products from the industrial countries is patented, expensive and considered the private property of the firms that produce them. This asymmetry reflects the inequalities of opportunity and is unjust.³⁶

Those statements indicate the great concern of developing countries on the issue of IPR and biological resources. They also indicate that developing countries consider that they have been left out of the benefit of the IP system, and that the system may be inconsistent with their social and cultural values, as well as their national and technological interests. However, the IPR system has been implemented and forced upon them through multilateral³⁷ and perhaps bilateral trade agreements.³⁸

This unfairness seems more blatant when the technological element said to establish novelty or inventive step for the purpose of patent law is only a very thin veneer covering the traditional knowledge which was considered to be incapable of patent protection.³⁹ For example, the case of a patent granted on the ailment 'dry eyes'. In the Indian literature, 'dry eyes' control has been spelled out through the use of leaves of aloe vera (leaves of Kumari plant in Indian Language). The process of the remedy is to take few leaves of aloe vera, wash these in clean water and then crush the leaves. Put some drops of solution that is extracted from the leaves into the eyes and the 'dry eyes' problem is cured. The patent application has been granted to the USPTO follow the same principle or similar process, the only different is that the clean water has been replaced with chlorinated water. And of course, the technical terms and languages also used to make it look like a new product.⁴⁰

For the above example it can said that in simple words, patent system facilitate the interests of technological innovations which take place in modern technological societies

35 As quoted in William Fisher, III, "Managing Genetic Resources", available from <<http://law.harvard.edu/faculty/tfisher/bioprospecting.html>> p. 9

36 Ibid.

37 Susan K. Sell, 'Life After TRIPs - Aggression and Opposition', in *Private Power, Public Law; The Globalisation of Intellectual Property Rights* (Cambridge University Press, Cambridge, 2003)121-62; See also, Susan K. Sell 'Intellectual Property Protection and Antitrust in the Developing World; Crisis, Coercion, and Choice', in *Power and Ideas, North-South Politics of Intellectual Property and Antitrust*, (State University of New York Press, New York, 1998)175-21

38 Carlos Correa, 'Bilateral Investment Agreements; Agents of New Global Standards for the Protection of Intellectual Property Rights?' A study commissioned by GRAIN, 2004, available from <<http://grain.org/briefings/?id186>>(last visited 13 February 2006); See also, Peter Drahos, 'Bits and BIPs, Bilateralism in Intellectual Property', (2001) (4) *Journal of World Intellectual Property* 791, 791- 808

39 See, 'TK Digital Library; Another Tool For Biopiracy', *South Bulletin-39*, A South Centre Publication, 15 July 2002, p 9;

40 Ibid.

and fails to acknowledge the traditional systems of knowledge that have evolved over time in traditional society.

Furthermore, strengthening IPR protection for pharmaceutical can lead to problem of public health. For example, people who are HIV-positive in some developing countries like Africa may not have the means to afford patent-protected HIV treatment drugs that could sustain their survival.⁴¹ Because of that, the Doha Declaration on the TRIPs Agreement and Public Health has concluded, in which this Declaration emphasises the fact that "concern had been growing that patent rules might restrict access to affordable medicines for populations in developing countries in their efforts to control diseases of public health importance, including HIV, tuberculosis and malaria."⁴²

In Indonesia, for example, it might be argued that the introduction of a patent system on pharmaceuticals will have a beneficial effect by allowing access to proper patented pharmaceuticals and its overall capacity for Indonesian investment in R & D in the health system. However at this time, the introduction of a patent system to some extent contributes to greater unaffordability and lack of access to medicines. The Department of Health has acknowledged that the TRIPs Agreement has created a wider dependency on developed countries for the stock and availability of medicines, which in turn has a negative impact on the affordability and price of medicines in Indonesia.⁴³ Siahaan from the Centre for Services and Technology R & D also found that the prices of medicines in Indonesia are high as compared to international reference prices, and there are significant differences between innovator brand (patented) & generic equivalent products.⁴⁴ Furthermore, there is a little evidence that the patent system increases Indonesia's R& D capacity in health sector. This causes great concern.⁴⁵

Although the Indonesian Patent Act contains provisions intended to secure benefits for public health. Three legal mechanisms can be used to further the public interest in health problems. These are: Parallel Imports,⁴⁶ Compulsory Licenses,⁴⁷ and Government Use.⁴⁸ However, the 'Government Use' is the only option that has been used by Indonesia to deal with the spreading of HIV, while the first two has not been utilized.

The use of compulsory licensing was also recommended by the WHO in the case of the 'abuse of patent rights or a national emergency' with the aims to ensure that the price of drugs is affordable for local purchasing power. Similarly, UNAIDS has also suggested the use of such a licence, particularly in countries where HIV/AIDS is spreading rapidly.⁴⁹ Contrary

41 Sun, above n 7

42 Ibid. See in <http://www.who.int/medicines/areas/policy/doha_declaration/en/index.html (Last visited Maret 21, 2013)

43 Departemen Kesehatan RI 2005, *Kebijakan Obat Nasional (The Department of Health of the Republic Indonesia)* 23 September

44 Selma Siahaan, 'Medicines Prices in Indonesia' (Centre for Health Services and Technology Research and Development, National Institute for Health R & D Indonesia, 14 June 2006) 1, available from <<http://haiweb.org/medicinesprices/surveys/200408ID/sdocs/MEDICINESPRICESININDONESIA.ppt#256>>

45 Departemen Kesehatan RI 2005, above n 42,9

46 See Article 135 of the Indonesian Patent Act

47 Ibid, Articles 87-74 of the Indonesian Patent Act

48 Ibid, Articles 99-103 of the Indonesian Patent Act

49 UNAIDS, 'Statement of UNAIDS at the Third WTO Ministerial Conference, Seattle' 30 November- 3 December 1999, 2,

to general expectations, developed nations like Canada which have well established public health systems, still use the opportunity to give a compulsory licence, while few compulsory licences have been granted in developing countries. This may be due to a number of reasons such as; the lack of adequate technology and manufacturing capacity of these nations, the lack of availability of full and reliable information on patents granted in developing countries, the complicated procedure and these mechanisms may also be viewed by the companies as threatening their interests.

Moreover, there is growing concern about the likely implication of patents hindering downstream research.⁵⁰ For example in the case of Myriad Genetic in which advocates have questioned whether the broad coverage that Utah-based Myriad Genetic enjoys on its breast cancer gene patents is slowing down research in curing this disease. This is because Myriad received two patents on diagnostic tests and treatments involving these genes. Myriad then entered into licences with several medical schools, universities, and hospitals, and through this licences those institutions has the rights to research breast cancer and its related issues. However, the scope of these licences is very limited. One of examples is that the licences are confined only to laboratory research and do not extend to clinical settings. According to Jaffe and Lerner, many medical school researchers have been forced to throw away their research program due to the licensing terms and this condition has been happening since the first patent was granted in December 1997.⁵¹

This concern is derived from the analysis of Michael A. Heller and Rebecca S. Eisenberg, who argue that the recent rush in patenting will harm innovation by creating 'anticommons' that threaten innovation by raising the transaction costs of R & D.⁵² By using the anticommons theory, Eisenberg argues that 'too many patent rights on 'upstream' discoveries can stifle 'downstream' research and product development by increasing transaction costs and magnifying the risk of bargaining failures.'⁵³ Earlier, Eisenberg argues that 'patent rights in some government-sponsored discoveries may actually be undermining, rather than supporting, incentives to develop new products and bring them to market.'⁵⁴ Furthermore, Eisenberg maintains that:

The patent system aims to promote scientific and technological progress by granting exclusive rights ... But the enforcement of these exclusive rights against subsequent researchers can sometimes interfere with further progress in the field of inventions... That free access to prior discovery by subsequent researchers might be a more effective means of promoting progress... But as the line between basic and applied research becomes blurred in certain fields, patent protection increasingly threatens

access at <<http://www.southcentre.org/publications/publichealth-14.htm>>

50 Adam B. Jaffe and Josh Lerner, *Innovation and its Discontents; How Our Broken Patent System Is Endangering Innovation and Progress and What To Do About It* (Princeton University Press, New Jersey, 2004) 17

51 Ibid.

52 Michael A. Heller and Rebecca Eisenberg, 'Can Patents Deter Innovation? The Anticommons in Biomedical Research' (1998) 280 *Science* 689, 689

53 R.S. Eisenberg, 'Bargaining over the Transfer of Proprietary Research Tools; Is This Market Failing or Emerging?' in R.C. Dreyfuss, (et.al) (eds) *Expanding the Boundaries of Intellectual Property, Innovation Policy for the Knowledge Society* (Oxford University Press, Oxford, England, New York, 2001) 223-250, 226-29

54 Rebecca S. Eisenberg, 'A Technology Policy Perspective on the NIH Gene Patenting Controversy' (1994) 55 *U. Pitt. L. Rev.* 633, 640

to encroach on the domain of research science.⁵⁵

To address this problem, Eisenberg suggests formulating carefully the experimental use exceptions from patent infringement liability.⁵⁶ The use of experimentation or research exceptions is permitted under Article 30 of TRIPs. Most countries provide this exception, but, the appropriate scope of this exception has been subject to intense debate among legal scholars. In the US, there is a statutory basis for the 'experimental use exception',⁵⁷ but it has been established based on case law using a very narrow term, only for 'philosophical experiments'.⁵⁸

In the case of *Madey v. Duke University*, Madey is a physicist who moved from Stamford University to Duke University. Madey had received two patents on 'free electron lasers' (FEL) while at Stanford. When Madey moved to Duke, this University built an FEL lab for Madey, including equipment protected by Madey's Patents. Madey headed this lab for almost ten years, but after than Madey was removed as head of the lab and left Duke University. But, Duke continued to operate the FEL lab, and on this basis Madey sued the University and claiming infringement of the patent that he held from his work during at Stanford. On the basis that Duke's established a patent policy that states that Duke is 'dedicated to teaching, research, and the expansion of knowledge ... [and] does not undertake research or development work principally for the purpose of developing patents and commercial applications' the District Court found that the Duke FEL was covered by the experimental use exception, and granted Duke's request for a ruling for its favour. But Madey appealed, and in this appeal the Court of Appeal for the Federal Circuit held differently, this Court decided that the universities, by their very nature, are not eligible for the experimental use exception. The Court also concluded that the exception use should continue but 'albeit in [a] very narrow form'⁵⁹

*Madey v Duke*⁶⁰ reaffirmed the extremely narrow approach proposed by the Court of Appeals for the Federal Circuit.⁶¹ In which the Court of Appeal for the Federal Circuit held that:

'... major research universities, such as Duke, often sanction and fund research projects with arguably no commercial application whatsoever. However, these projects unmistakably further the institution's legitimate business objectives, including educating and enlightening students and faculty participating in these

55 Rebecca S. Eisenberg, in David Vaver III (ed), *Intellectual property Rights; Critical Concepts in Law* (Routledge, London, 2006), 121

56 *Ibid.*

57 See Advisory Council on Intellectual Property (ACIP), above n 348, 2. See also Carlos M. Correa, above n 90, 122.

58 The opinion of the Supreme Court Justice Story in *Whittemore v. Cutter* (1813) stated that:

'[I]t could never been the intention of the legislature to punish a man who constructed such a machine merely for philosophical experiments, or for the purpose of ascertaining the sufficiency of the machine to produce its described effects". And by 1861 it was generally accepted that 'an experiment with a patented article for the sole purpose of gratifying a philosophical taste, or curiosity, or for mere amusement is not an infringement of the rights of the patentee'

See Advisory Council on Intellectual Property (ACIP), *ibid.*

59 *J. Madey v. Duke University* No. 1: 97CV1170, slip on (M.D.N.C. June 15, 2001); 307 F.3d 1351 (Fed. Cir. 2002).

60 *Ibid.*

61 Adam B. Jaffe and Josh Lerner

projects... In short, regardless of whether a particular institution or entity is engaged in an endeavour for commercial gain, so long as the act is in furtherance of the alleged infringer's legitimate business and is not solely for amusement, to satisfy idle curiosity, or for strictly philosophical inquiry, the act does not qualify for the very narrow and strictly limited experimental use of defence. Moreover, the profit or non-profit status of the user is not determinative.⁶²

The *Madey* decision has not been well received by those concerned to promote research. Some have predicted the decision will have devastating consequences for academic scientific research, particularly in the fields of biotechnology and biomedicines.⁶³ Moreover, without an experimental use exception, research institutions will be highly dependant on the mercy of the patent's holders, consequently, blocking further innovative research.⁶⁴ For example, if this strict approach is applied in the context of a patent on seeds, it has the potential to prevent third party from using patented seeds to produce improved varieties even for non commercial purposes, like experimentation.⁶⁵

Lastly, in the context of access to patented material can be critical to the success of further research, but there is no uniform rule regarding the time of access.⁶⁶ The US law strictly stipulates that access only can take place after patent granting and only permissible for experimental use, while commercial use of the sample material constitutes patent infringement, While the European patent law follows the Budapest rule, and only for experimental purpose.⁶⁷

In the era of economic pragmatism, this access is even more complicated. As noted by a researcher:

'Even after the patent is filed and granted, access to the material can be denied by failure to answer requests. Such access as may be granted may not be meaningful since profitable use of the materials may be prohibit and, even if allowed, is subject to restrictions. The result is that the laws sometimes limit, or even prevent, beneficial applications.'⁶⁸

Access becomes more complicated since academics and university institutions are often engaged in a significant amount of commercial activity.⁶⁹ Eisenberg argues that "The greater commercial activity of academic scientists, and a greater awareness among

62 *Ibid.*

63 See the Brief for Association American Medical Colleges (et.al), as *Amici Curiae* in Support of Petitioner at 14, *Duke Univ. v. Madey*, 123 S. Ct.2639 (2003) (No. 02-1007)

64 Jennifer Miller, 'Duke University Sealing the Coffin on the Experimental Use Exception', available from <<http://www.law.duke.edu/journals/dltr/articles/PDF/2003DLTR0012.pdf>>

65 Mark D Janis, 'Experimental Use and the Shape of Patent Rights for Plant Innovation', Paper for Economics of Innovation and Science Policy Lecturers, Centre for Agriculture and Rural Development, Iowa State University, September 15, 2003, 1, available from <<http://www.card.iastate.edu/research/stp/lectures.aspx>> (last visited 1 August 2008)

66 See in Carlos M. Correa, "Access to Plant Genetic Resources and Intellectual Property Rights", in Petrr Drahos and Michael Blakeney (eds), *IP in Biodiversity and Agriculture, regulating the Biosphere* (Sweet & Maxwell, London, 2001), 121

67 *Ibid.*

68 *Ibid.*

69 John P. Walsh, Charlene Cho and Wesley M. Cohen, *Patent, Material Transfers and Access to research Inputs in Biomedicine Research*, Final Report to the National Academy of Sciences, Committee Intellectual Right in Genomic and Protein-Related Inventions, September 2005, 37

commercial scientists of the potential value of IP associated with research, has raised concern of the slow down of the flow of research material.”⁷⁰

Therefore, patents protection may contribute to the unavailability of access to samples of protected and patented materials, and research inputs without any commercially based licence agreement.⁷¹ There increasing numbers of researchers who did not receive materials in response to their last request. The reason for academic s not sharing materials is the time and cost of providing those materials and scientific competition, while for industrial researchers, the reason is for commercial interest (patents).

3.2. Social Justice Issues in the Field of Copyright

In the area of copyright and trademark, IP has a potential to inhibit an individual's ability to express her/his views in the public sphere because what people want to communicate, such as a passage from copyrighted work or a trademarked logo, is often subject to proprietary control by an IP owner. Although the fair use doctrin eases the speech-censoring function of copyright protection, this capacity has been substantially reduced with the vast expansion of copyright protection over the past few decades, thus it have an impact on protecting public interest in copyright law.⁷² Because of that there has emergenced an urgent need for reshaping IP law in favor of the “long –neglected concerns of the poor, the sick, the visually impaired and others” to response the backdrop of “a global crisis in the governance of knowledge, technology and culture.”⁷³

International intellectual property laws affect the flow of knowledge between countries. They influence trade, licensing agreements and information shared about products and new technologies. They award exclusive rights to produce and sell products for a minimum period of time. In an international context, IP obligations impose a set of rules on countries that they may or may not have the capacity to implement, much less enforce.⁷⁴

Copyrights some times also regarded as impediment to the fulfilment human right to enjoy the benefit of scientific progress as enshrined under the Universal Declaration of Human Rights⁷⁵ and the International Covenant on Economic, Social and Cultural Rights,⁷⁶ particularly access to knowledge and education material. Although human rights treaties have recognised the redistributive needs related to IP law for nearly sixty years, there have been a little progress in realizing in this human rights.

70 R.S. Eisenberg, in R.C. Dreyfuss, (et.al) (eds) above n 52,223-250

71 See the study conducted by John P Walsh, Charlene Cho and Wesley M. Cohen, above n 68, 27-28

72 Haochen Sun, “fair Use as a Collective User Right, 90 N.C.L. Rev.12, 159-63 (20011) in Haochen Sun above n 7, 391

73 Geneva Declaration of the Future of the World Intellectual Property Organization 1 (2005) available at <<http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf>>

74 Pedro Roffe and Gina Vea, “The WIPO Development Agenda in an Historical and Political Context”, in Neil Weinstock Netanel (ed.), in Haochen Sun, above n 7

75 Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217 (III), December 10, 1948)

76 International Covenant on Economic, Social, and Cultural Rights, adopted Dec.16, 1966, 993 U.N.T.S .3 (entered into force January 3, 1976)

4. Conclusion

There are a number of social justice issues in the protection of IPR, particularly from the perspective of developing countries. These issues is not only in the field of patent, but also in the field of plant varieties protection and copyright. Patent is regarded as legal instrument to facilitate biopiracy of the natural resouces of developing countries rich in biodiversity, patent is also considered as inhibit further research since some research materials have been patented and accordingly, uneasy to get access to such material. Patent is also regarded as a potential threat to public health and right to health because drugs and medical equipment and tool can be patented. While, in the area of plant varieties protection, the strong protection on plant varieties has a potential to affect food security on the basis that most seeds have been protected under IPR regime. And copy right protectionon education material may contribute to the difficulties to implement other human rights norms and standard, such as right to education.

Accordingly, it is important to redesign the context and the substance of IPR subject matter, particularly for developing countries' faculty to take into consideration a balance perspective of the protection of IPR by inclusion of social justice issues as consequences of providing IPR protection. This may help the student to have a better undertanding and sufficient knowledge on IPR not only merely adopting the perspective of developed nation, but also developing countries.