

# “Make Patents, not War”

## Branding Intellectual Property: The Next Step

By Roya Ghafele

### The Author’s Background:

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Perceptions of Intellectual Property are, to say the least, controversial, as I sought to illustrate in depth in the recently released book on “Perceptions of Intellectual Property. A Literature Review.”<sup>1</sup>

The TRIPS Agreement marks the cornerstone in the public view on intellectual property. While prior to TRIPS, IP passed more or less as a technical non-issue primarily of interest to a few experts, the creation of an international treaty on Intellectual Property under the umbrella of the World Trade Organization caused the most heterogeneous group of people to contest the concept of intellectual property rights. The sharp contrast of “pre-WTO” speak on intellectual property, compared to “post-WTO” IP talk can be best illustrated at the difference in international perceptions of the “WIPO” – the World Intellectual Property Organization and the “WTO” – the World Trade Organization. The WTO is a very recent international body that, which at the time of WIPO’s Director General Dr. Arpad Bogsch, was not even international organization, but nothing than a forum (the “GATT”). Clearly, Dr. Bogsch underestimated

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<sup>1</sup> Roya Ghafele: Perceptions of Intellectual Property: A Literature Review. IPI. London 2008, free for download at <http://www.ip-institute.org.uk/pdfs/Perceptions%20of%20IP.pdf>

the impact of the TRIPS agreement at the time when he said, no doubt with a feeling of superiority that certain countries are proposing to accommodate Intellectual Property Rights in a forum that does not even have the status of an international organization.<sup>2</sup>

Why eventually intellectual property found its space in international trade, is not yet researched. While some say that intellectual property has intrinsic features that link it to trade<sup>3</sup>, others contest this view and argue that the mere reason why the concept of “strong” intellectual property rights was established on the agenda of trade ministers was that it was probably easier to establish a new international perspective on IP within a forum that was created from scratch, proving in this sense Schumpeter’s ideas of creative destruction as a crucial element of innovation.<sup>4</sup> Be it as it is, when the U.S. trade representative suggested in the Uruguay round negotiations to establish intellectual property on the trade agenda most negotiators had no idea what they were actually committing themselves to. Dr. Bogsch and WIPO were more or less bypassed and even though the TRIPS agreement at many instances refers to treaties administered by the international bureau of the WIPO, it still constitutes a piece of work on its own. The TRIPS agreement not only reflects the full architecture of the WTO system, but also allows signatories to the treaty to actually go into litigation.

From the perspective of international business the TRIPS agreement had strongly contributed to resolve major business challenges, yet from a mere legal perspective. The physical infrastructure of doing international business was more or less established through excellent means of transportation and the internet, which gave space and time a new meaning. Engaging with business partners in the most remote corners of the world became affordable at low cost, in an easy and uncomplicated manner. Opportunities to move from a traditional Fordist production chain to a network economy were established through means of new technology and transportation. No physical obstacles were in the way to leverage low labour and cheap production costs at the international level. Arbitrage or the leverage of different income levels turned out to be a rewarding business model. Operating as networks and abandoning linear value chains offered knowledge intensive companies previously unknown business opportunities. Yet, the legal infrastructure was and probably still is not at the same height as the technological infrastructure provided for international business.

What TRIPS did, was to resolve at least some of these shortcomings by providing a minimal legal international context for intellectual property. However and here lies the dilemma of any exercise of branding IP, what was perceived to provide enabling opportunities for international business, was equally perceived as strongly harming human development. Civil society’s outrage against the TRIPS agreement was unheard of before. Human rights advocates, feminists, peace activists, representatives of various churches, health advocates, in a word, the most various interest groups protested against intellectual property. While heterogeneous by background, the Globalization movement not only had

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<sup>2</sup> Michael P. Ryan: Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property. Brookings Institution Press, New York 1998

<sup>3</sup> Keith E. Maskus: Intellectual Property rights in the Global Economy. Institute for International Economics, Washington D.C. 2000

<sup>4</sup> Joseph Stiglitz: How to fix the IP imbalance: Too much IP Protection is Bad for the Economy.” Managing Intellectual Property October 28 2004, p. 35-39

the liberalization of international trade as its target, but also intellectual property rights. Best summarized in the slogan “IP kills”, the concept of proprietary knowledge got interwoven with issues such as “gender discrimination”, “famine”, “health gaps” and the further increase of gaps prevailing at the international level. To put it shortly and summarize the comprehensive report on “Perceptions of IP”, intellectual property rights were very much seen as yet another weapon and powerful tool protecting the wealth of those who “have” from those who don’t.<sup>5</sup> The debate reached a level of polarization and aggression that it justified Clausewitz view that “war is just politics by other means.”<sup>6</sup> It may however also justify, but no scientific prove of the argument is possible, that the debate was and still is strongly gendered and male dominated.

It is crucial to understand this historical context when seeking to “brand” intellectual property. Currently, the brand value of IP is somewhere between “patent kills” and a general lack of awareness what IP actually is, a left over from the Pre-TRIPS time.

With that in mind, one question arises: What can be done to calm the situation and to stop the international “IP war”? The crucial element in this exercise is to understand the concept of “incentives”. Both, business and civil society have an “incentive” to move from a stage of war to a constructive, solution driven approach. For business the increasingly negative publicity that IP is giving it, may actually translate into serious bottom line profit losses due to loss of reputation and image. For civil society again, the stage of continuous critique can not be maintained either. At some point in time donors do want to see solutions and constructive output. Thus, there are good chances to move from a “win” to a “win-win” situation.<sup>7</sup>

So far, IP has been largely looked upon from a legal perspective, which comes as no surprise since current educational systems worldwide only train lawyers in IP. Economists, political scientists, sociologists, historians or even engineers know most of the times very little about intellectual property. A pity, since it is exactly this multidisciplinary perspective that is needed to turn IP into a tool for economic, social and cultural prosperity and leverage it as a means for wealth and welfare creation. A different perspective on IP, one that looks at it as a strategic asset more than a legal framework gives way to new managerial perspectives on intellectual property.<sup>8</sup> While so far, the readjustment of the IP system has primarily been looked upon through the perspective of compulsory licensing (again a very legal approach to IP management), few have taken a more pragmatic approach and asked what types of management choices may work towards obtaining inclusion and an equitable distribution of research and development findings within the existing intellectual property framework.

Public interest IP management seeks to offer strategic choices on how to reconcile the existing contradiction between the exercise of exclusive rights and the universal right to equitable access. Innovation functions as a public private partnership; according to current research by Ashley Stevens at

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<sup>5</sup> Roya Ghafele: Perceptions of Intellectual Property: A Literature Review. IPI. London 2008

<sup>6</sup> Carl von Clausewitz: On War. Wordsworth. Hertfordshire 1997

<sup>7</sup> Caroline Kamerbeek. Director of Communication. Philips

Philips Intellectual Property & Standards.. Intervention at the IPI meeting on IP Branding, 2.12.2008

<sup>8</sup> Roya Ghafele and Alexander Wurzer: The Clash of Mindsets. Intellectual Asset Management Nr1/2006

Boston University the vast majority of FDA (Food and Drug Administration) approved pharmaceuticals were developed with public sector support. While the public sector is asked to thoroughly negotiate agreements in the public interest, business can explore opportunities to leverage IP for the wider public interest. Public interest IP management comprises different approaches to ownership and access of IP and makes use of market and non-market incentives. It includes defensive publication, the pre-emptive creation of a public domain (including waiving of IP rights) and a deliberate deployment of legal exclusions. The application of the right to exclude can further be used to safeguard the open quality of a shared innovative domain.<sup>9</sup> A good example is “humanitarian licensing” where IP is being licensed to market participants on the condition of several tied in arrangements. In this case the licensor tends to reserve the right to license the technology also out to developing country producers or allow for parallel trading. It is further common practice to assure in licensing agreements “public interest” clauses that aim not only to assure commercial, but also public welfare gains. In practice, “humanitarian licensing” works if regulatory frameworks are in place clarifying ownership over IP developed in the public domain as well as sufficient practice in managing IP. A comprehensive, strategic IP approach furthermore represents the public interest as early as the selection phase of a research topic and plays a decisive role in the interaction between the public and the private sector. An ex-ante IP strategy is different from an ex-post intervention. The latter are only public interest remedies treating IP as a commodity, where negotiation is only possible over price.<sup>10</sup>

Yet, public interest intellectual property management faces several limitations:

It can not refer to successful private sector IP management approaches, which are hampered by inadequate accounting and financial standards, as well as by a general lack of awareness of the *pro-active* IP management, as compared to the defensive focus on IP *protection*. In addition, it is limited by the wider constraints associated with public sector management, such as difficulties with the impact assessment of public policies or the provision of incentives within a public sector context.

While Sun Tzu says that one needs to understand who one is fighting, the greatest strategist in time, also says that the best war is the war that can be avoided.<sup>11</sup> In this sense, the management of intellectual property in the public interest, the illustration of the enabling opportunities that can be provided by intellectual property constitutes a clear way to move from the battle field to constructive solutions. Intellectual Property does have the potential to provide enabling opportunities for all the Peoples of the world. Yet, this will not happen by itself. It needs political will, business initiative and the concerted effort of both business and the public sector to foster inclusion and knowledge equity rather than further marginalization and discrimination.

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<sup>9</sup> Antony Taubman: Public–Private Management of Intellectual Property for Public Health Outcomes in the Developing World: The Lessons of Access Conditions in Research and Development Agreements. Initiative on Public Private Partnerships for Health. Global Forum Health. Geneva 2004

<sup>10</sup> Antony Taubman: Public–Private Management of Intellectual Property for Public Health Outcomes in the Developing World: The Lessons of Access Conditions in Research and Development Agreements. Initiative on Public Private Partnerships for Health. Global Forum Health. Geneva 2004

<sup>11</sup> Sun Tzu: The Art of War/ Die Kunst des Krieges. Knauer. Muenchen 2001