

## Intellectual Property and Equal Opportunities for All

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“He who receives an idea from me receives it without lessening me, as he who lights his candle at mine receives light without darkening me”<sup>1</sup>, said Thomas Jefferson. This prominent quote reflects that knowledge provides benefits to mankind; therefore, how it distributes should be taken into consideration.

The notion above precisely captured a description of an intellectual product as a non-excludable good,<sup>2</sup> which will lay, when disseminated in society, a groundwork for others to create further intellectual products. In fear that the non-excludable effects will discourage people from creating new inventions, Intellectual Property (IP) regimes are, in all respect, established to provide the creators the monopoly power of an exclusive right<sup>3</sup>. The creators will therefore gain profits in return for their efforts. This is because the design of IP protection aims to spur innovation in society. And in my opinion, IP enhances the distribution of knowledge to expand innovative societies, where the creator will legally be protected and the people shall enjoy the benefits thereof.

Exclusive right, in itself, is able to encourage social welfare. To illustrate, when new efficacious medicines were not brought to the market, consumers were able to take whatever drugs that the market offered. Then, when the drugs became available no matter what the price was, consumers were not injured by this situation since the earlier alternatives were still available. This, in the end, will lower the cost of drugs. In contrast, if there are no exclusive rights, there will be lack of incentives and thus no new drugs manufactured.<sup>4</sup>

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<sup>1</sup> THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 1790–1826: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 180–81 (H. A. Washington ed., Volume VI 1859) (1853).

<sup>2</sup> “Non-excludable means that it is impossible to prevent an individual who does not pay for that thing from enjoying the benefits of it” from p.5 intellectual property and human rights

<sup>3</sup> trademark art.16, copyright art.13, patent art.28 in TRIPS

<sup>4</sup> Herbert J. Hovenkamp, “Consumer Welfare in Competition and Intellectual Property Law”, U Iowa Legal Studies Research Paper No. 13-39(November 2013)< [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2329150](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2329150)>

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), in order to serve its purposes, encourages equal opportunities in various types of manners. For example, within the meaning of the principle of equality, TRIPS binds the signatory Members to provide protection to non-nationals as equally as its nationals through the process of National Treatment (NT).<sup>5</sup> This similar type of practice is characterised in the process of Most-Favoured-Nation Treatment.<sup>6</sup>

The IP system furthermore creates a substantive equality principle by measuring human well-being by distributional effects to various other global public goods, such as communicable disease control, as mentioned in TRIPS Article 8. This article states that each member state has the ability to “[a]dopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development”, and the countries’ ability to use the flexibilities permitted by the TRIPS Agreement to reduce the cost of medicines. This includes compulsory licenses for the manufacture of generic medicines or parallel importations of patented medicines, which are sold more cheaply in other countries as like an accession of patented antiretroviral drugs in the AIDS crisis.<sup>7</sup>

In term of equal opportunities for education, IP regimes stimulate acquisition and dissemination of new information. For instance, rival firms could use patent data to develop new invention once patent applications are published. Moreover, member states can ameliorate education opportunities and accessibility by legislating "fair use" cause which allows reproduction for an educational purpose; as long as it is not in conflict with a normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the rights holder pursuant to TRIPS article 13. States can also use flexibilities such as compulsory licensing, which are licenses without the consent of the IP owner, to reduce the cost of educational materials pursuant to TRIPS article 31.

In order to enhance people to equally enjoy the benefits from such inventions, such as the three basic principles in human rights, namely the indivisibility, the universality, and the inalienability of human rights, ensure that human rights are,

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<sup>5</sup> ART. 3 TRIPS

<sup>6</sup> ART. 4 TRIPS

<sup>7</sup> Keith E. Maskus, “PARALLEL IMPORTS IN PHARMACEUTICALS: IMPLICATIONS FOR COMPETITION AND PRICES IN DEVELOPING COUNTRIES”, Final Report to World Intellectual Property Organization

without discrimination, accorded to each individual. Referring to Article 8(1)<sup>8</sup> of TRIPS, it implicitly recognises that States must theoretically and practically respect their human-rights obligations when implementing TRIPS.<sup>9</sup>

In addition, with regard to international bills of human rights i.e. the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the 1948 United Nations Declaration of Human Rights (UDHR), the obligations therein are capable of providing the framework for all member States, including Thailand, to respect, to protect as well as to fulfil the rights of each individual.<sup>10</sup>

For equal access to IP protection, Article 27(2) of the UDHR<sup>11</sup> and Article 15(1)(c) of the ICESCR<sup>12</sup> both recognise that rights on inventions and creations are human rights. The human rights framework recognise such rights; nevertheless, it does not define which measures should be taken other than IP, nor what standard IP protection should be given, in order to achieve the purpose of such rights. It follows that if the State chooses IP legal regimes as a means of protecting the inventions and creations of individual, it also must be applied in accordance with other human rights.

For instance, with regards to patents and the right to health, the basic elements of right to health are availability, accessibility, acceptability and quality.<sup>13</sup> Should the IP protection limit the right to health because of the high cost of patented medicines,

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<sup>8</sup> Art.8 (1) of TRIPS : ‘Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.’

<sup>9</sup> Paul L.C. Torremans, “Intellectual Property and Human Rights”, Kluwer Law International, (Netherlands2008)

<sup>10</sup> General comment No. 3: The nature of States parties obligations (Art. 2, par.1) (Annex III) E/1991/23(SUPP) 01 Jan 1991

<sup>11</sup> Article 27(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

<sup>12</sup> Article 15(1)(c) The States Parties to the present Covenant recognize the right of everyone:  
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(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.  
...

<sup>13</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (Art. 12 of the Covenant), Twenty Second Session, 25 April-12 May 2000, E/C. 12/2000/4.

the member State could use a safeguard provided in Article 8(1) and Article 31 of TRIPS and in Article 9 and Article 46 of the Thai Patent Act<sup>14</sup> to ensure that Member States could respect this right, while also giving adequate protection to IP.

After IP protection was employed with human rights regimes, it might be noticed that some IP categories would strengthen the enforcement of some human rights; for example, patents and the right to freedom of speech, since according to patent law, it is compulsory for patentees to disclose their invention through an open publication of a patent application. And for that matter, freedom of speech and the right of the public to receive information are mutually supported.

In conclusion, the IP regime is a compromise on the sliding scale between individual exclusive right, and the benefits society may receive from the invention. As one of the tools used to encourage innovation, IP must provide an equal protection to the creators and, in another way, provide equal benefits towards society at large. If it is not employed in such manner, it may hinder the innovation development rather than progress.

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<sup>14</sup> Thailand Patent Act B.E. 2522 (1979)