In Search of a Suitable Theoretical Justification for Patent Rights

By:

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Patent law has, for centuries, been shaped by vigorous legal, philosophical and policy debate and by the development and refinement of the law through legislative interventions and contentious proceedings in court. In his book, *Patents Human Rights and Access to Medicines*, Oke comprehensively and thoughtfully examines the theoretical justification for patent rights by determining 'the most appropriate explanation for the development of inventions between the creator-centric (heroic) theory of invention and the socio-centric theory of invention'(p. 32). In distinguishing between the heroic theory of invention and the socio-centric theory of invention, Oke argues that while the former gives a single person all the credit for a particular invention, the latter regards inventions as a product of both individual and the society (p. 33). This distinction is particularly instructive in today's world given the counter intuitiveness of patent law's normative logic – using exclusive private rights to produce inclusive public goods.

The book achieves its objective of finding the fitting justification for patent rights by critically appraising four popular theories of intellectual property law namely, the Lockean theory, the Hegelian theory, the utilitarian theory, and the regulatory theory. One interesting finding of the book, which is very relevant, is that of all the theoretical justifications examined, the regulatory theory is the only one that adopts a broad socio-centric approach (p.68). At first glance one would have thought the utilitarian theory perfectly matches the socio-centric perspective, however, Oke's brilliant analysis reveals that the utilitarian framework's emphasis is largely focused on how to provide incentives while the issue of access (public interest) is typically treated as a secondary. In light of this, the author expresses doubts as to whether relying on the utilitarian framework to justify patent rights really serves the health needs of developing countries (p. 51). Interestingly, Oke's analysis raises curiosity given that the utilitarian justification for patent law majorly dominates the modern patent law system. The patent law regime in most jurisdictions is conceived as a system crafted and refined as a utilitarian mechanism for producing public knowledge goods, in the form of usable and transmissible new technologies. Conversely, Oke argues that the utilitarian theory is constructed on a faulty assumption that the production of innovative products is dependent on the existence of patent rights or that the grant of patent rights is the best way to stimulate the production of inventions' (p. 49). Simply put, the utilitarian theory provides a rather narrow view of the role of intellectual property (including patents) in society by tilting the balance towards incentivising creative production.

Criticizing the Lockean theory from a socio-centric perspective, Oke argues that 'the value of an invention cannot be attributed solely to the labours of any particular inventor (or group of inventors) given that an invention does not 'operate in a vacuum', and 'intellectual activity is not creation ex nihilo'(p. 43). Oke posits that 'inventions (and other intellectual products) are social products that depend on the ideas of those who came before the inventor and as such, it will be impossible, to separate the labour of an inventor from that of his precursors (p. 44).

In criticising Hegel's personality theory, Oke noted that although Hegel situates his comments on intellectual property within a socio-centric framework, other aspects of his work relating to the relationship between the state and property can potentially lead to negative consequences in terms of human and economic

development (p. 45). Oke argues that a developing country that is interested in fostering human development in general and facilitating access to affordable medicines, in particular, may not find the Hegelian framework to be a suitable framework on which to base its policy on patent rights (p. 48).

Consequently, Oke proposes an alternative normative framework, acknowledging and arguing that:

> the best explanation for the development of inventions is the socio-centric theory of invention. If inventions are socio-centric, it follows that the patent law system (which is designed to regulate the exclusive rights granted to inventors) should also be socio-centric and not creator-centric (p. 66).

At its simplest, Oke finds that a 'socio-centric approach to the design of patent law and policy is essential for any developing country that seeks to ensure that its national patent law does not impede access to medicines' (p. 67).

Drawing lessons from India, the author referenced Section 3(d) of the Indian Patent Act which restricts grant of patent for 'incremental innovations' in many drugs unless it provides significant therapeutic advantages to existing molecules. This example of a socio-centric approach is purposely designed to prevent the grant of patents on trivial inventions and to also facilitate access to cheaper generic drugs for poor and vulnerable patients.

On the whole, the author makes a strong and convincing case for the need for developing countries to always consciously seek to preserve their patent policy space and secure access to medicines for their citizens by treating intellectual property as an instrument that regulates the exclusive rights granted to creators and incorporates (at least) the model of human rights into the design, implementation, interpretation, and enforcement of its national patent law (p. 68).

No doubt, Oke's past scholarly work has contributed extensively to the literature on intellectual property law in its international legal and policy context, and especially as it is framed by the TRIPS Agreement and investment agreements. This book helpfully distils and builds upon this work to yield a

monograph that is focused, systematic and closely informed on the central choices that confront policymakers today as they seek to adapt the patent system to the demands of today in the pharmaceutical sector and public need. In doing so, Oke, through a comprehensive analysis of court decisions from three key developing countries (India, Kenya, and South Africa), by assessing the effectiveness of national courts in resolving conflicts between patent rights and the right to health and demonstrates how a model of human rights can be incorporated into the adjudication of patent rights. This work can therefore be abstracted from the individual jurisdiction it discusses and can serve as a practical taxonomy of policy choices faced by many countries – and can serve, also, as a selective guide to the background literature in this inherently complex and necessarily difficult domain of policymaking.

While the present writer would differ – respectfully, collegially and productively – with some of the lines of analysis, policy assumptions and conclusions presented in this volume, he has benefited from the privilege of reading through the manuscript, an illuminating reading which has precipitated new insights in response, and will continue to refer to the book to assist in understanding the evolving context, and content, of law and policy in relation to patents and public health.

In conclusion, the book is a must-read for policymakers, governments, regional communities, students, researchers, health practitioners and anyone that may be interested in 'the access to medicine for all' campaign. The depth of analysis and critical thinking renders the author's arguments very persuasive and practical. It will stimulate the readers to view patent law and policy as a ‘work in progress’ rather than being ‘cast in stone’ and get them thinking about how it can be further improved. The book is highly recommended.

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