Dwyer Lawyers

Principal

Terence M. Dwyer FTIA
B.A. (Hons), B.Ec. (Hons) (Sydney)
M.A., Ph.D. (Harvard), Dip. Law (Sydney)

Senior Associate

Deborah R. Dwyer FTIA
B.A. (cum laude), M.A. (Smith)
LL.B. (ANU), LLMCL (NTU)

17 July 2012

Compulsory Licensing of Patents
Productivity Commission
LB2 Collins Street East
Melbourne Vic 8003

Att: Delwyn Lanning

Dear Sirs

PATENTS: AN IMMORAL AND INEFFICIENT ANACHRONISM

Patents are immoral, contrary to the principles of natural liberty, natural law, to the common law and detrimental to the progress, prosperity, safety and health of all peoples. The patent system should be destroyed for same reason that slavery was destroyed – as an offence against natural justice and natural liberty.

Patents are immoral

John Stuart Mill observed that the laws of private property have never conformed to the principles upon which private property is justified.

What is the justification of private property? The right to property can only rationally be found in the act of creation. The word "property" comes from the Latin "proprium" – that which is of us. As John Locke observed, it is only by impressing our labour into objects that we can claim to have created them. But ideas and knowledge are like the air, they belong to all and to none. No one can claim to have made an idea anymore than any man can claim to have created the Earth, which belongs to all as the common inheritance of mankind.

Invention cannot found a just claim to property. The Latin root "invenio" means to come across. There is no real difference between discovery and invention – and neither is creation. The tortured efforts of harassed judges to make sense of the distinction between an "inventive step" and mere discovery has polluted the law books and led to conflicts between nation states, as each set of higher courts reaches different conclusions. Are genomes patentable? Are seeds patentable? Can we find

Suite 4, Level 2, CPA Australia Building,161 London Circuit
GPO Box 2529,CANBERRA CITY ACT 2601, Australia

Phone: *+ 61 (0)2 6247 8184* ***Fax:*** *+ 61 (0)2 6169 3032* ***Email:*** *office@dwyerlawyers.com.au*

and patent a new quinine for the millions suffering across the world from malaria? Pick your Court and take your chances.

No, discovery is not creation. Nor is discovery a good root of title in morality. If it were otherwise, the heirs of Eric the Red or Christopher Columbus would be vying in the Courts for ownership of the North American continent and demanding rent from several hundred million people (leaving aside the heir of him who first crossed the Bering Strait).

Nor should it be thought that any single human being ever invents anything alone, as though born full-formed like Aphrodite. All men enter the world as babes and learn and copy from others as they grow. Isaac Newton wisely and truly declared that he would not have seen so far had he not stood on the shoulders of giants. We are all heirs of those who went before us. Why should the direct and indirect result of the discoveries of many over the ages be appropriated by the first person to reach a patent office?

Slavery is now widely seen as immoral. But is there such a vast difference between telling a man he does not own himself and must labour for his master or telling him that he may not work except on condition he pay rent to a monopoly patent holder?

Patents contrary to natural liberty

Imitation, so we are told from an early age, is the highest form of flattery. No man injures another by copying what he has done, on the contrary he acts as a publicist.

Adam Smith had a well-justified distaste for monopoly and would have regarded as objectionable and obnoxious to the "simple and obvious system of natural liberty" a legal system which leaves men in terror of lawsuits from the holders of patent of monopoly.

Patents contrary to natural law

The fact that "industrial property" as the first patent laws were called only arose in the second half of the 19th century should give us pause for thought as to whether patents can be justified in natural law. If they could, we would doubtless be paying the heirs of he who first invented the wheel.

The very fact that patents are time-limited and that that time has been arbitrarily increased from 10 to 20 years in our legal system demonstrates that patents have no basis in natural law and are not entitled to the same respect from the legislature as obligations so arising.

Patents contrary to common law

Patents are a creature of statute not of common law. Queen Elizabeth I in her Golden Speech had to apologize to the Commons of England for the oppressions which her ill-considered grants of patents of monopoly had wreaked upon her subjects. Before and after, the policy of the common law was set against such instruments of monopoly, so much so that Blackstone and others took it that Acts creating monopolies could be void as against the law.

The common law presumes and defends liberty of action for the subject. Patents are an infringement of this common law freedom and were ever therefore regarded with just hostility by the common law.

Patents detrimental to progress and prosperity

It is well known that the patent system is used to discourage competition. Who will dare research or explore new ways of manufacturing anything in an area where the road to new products is well sprinkled with upturned nails in the form of patents, actual or pending, waiting to explode his tyres and send his commercial enterprise off the road into financial ruin in the Law Courts? Patents suppress innovation; they force the creation of artificial differences and incompatibilities between products so that instead of getting the efficiencies of common architecture and standards arising by consensus for products, each producer must labour to differentiate his product lest he be sued for patent violation.

A large number of fundamentally mis-educated economists seem to consider externality as an aberration in a market economy. They are wrong. Beneficial external economies are everywhere around us and they need *not* be charged for. Fame is the spur for many; for others, the mere knowledge that they have benefited their fellow man. As Henry George remarked, Nature laughs at a miser and no man can keep the good he does to himself (even if he were so disposed) than it can shelter others from his evil. No man is an island, we are made for each other – as John Donne and Marcus Aurelius understood.

As for the argument that patents reward invention and innovation, this is a venerable and hoary lie.

It is not necessary that the "inventor" (and to identify that person is an exercise in itself) be rewarded with a rent from millions across generations that he do what gives him pleasure. No, the natural reward to invention and innovation is that he brings his discovery to the notice of men – to be first in the field and have the accolades of all. Goodwill is the reward to invention and innovation, nothing more is required.

The man who first enters the field with a new product is entitled to be recognized as such, no more no less. He is entitled to prevent people passing off their works as his, he is entitled to stop others lying as to themselves having discovered what he did, but he is not entitled to lay humanity under a burden to pay for what anyone else may have discovered sooner or later.

The proper and natural reward for invention is the premium for being the first in the market place. Patents reward laziness and tardiness, they discourage emulation and competition.

It is noteworthy that most of the great inventors of the Industrial Revolution, which brought such blessings to hundreds of millions of human beings, opposed the introduction of patent laws in the nineteenth century. They admitted and acknowledged they had all learnt freely of each other, as they strove to uncover the mysteries of natural philosophy and harness the latent powers of Nature for the good of Man. The little boy who first tied the string to the Newcomen engine to regulate the valve so he could go and play with his friends had his natural reward. He required no patent right or patent attorney to make him a lord of commerce before he revealed his idea to the world and revolutionized the design of the steam engine.

Those so-called economists who may yet argue that patents are necessary to encourage innovation and bring benefits to humanity may care to ask themselves how it was that the incandescent light globe was made less efficient and turned into a regularly disposable product and whether such a scheme would have been possible without the protection of patents.

Patents detrimental to safety and health

Nowhere is the evil and immoral effect of patent monopoly more apparent than in the operations of the legal drug cartels.

Patents force innovation and research away from natural cures towards patented proprietary drugs. Chemotherapy drugs are a notorious example of how research has been corrupted into third rate remedies by the vested interest of drug companies. Vast vested interests stand in the way of new and better cancer treatments such as photodynamic or sonodynamic therapy or enzyme therapy.

Australia has suffered directly from patent licensing and the suppression of innovation. The Opal Clinic which was in Melbourne and cured cancer through new therapies had to close and move to China because it could not afford to compete with licensed yet inferior chemotherapy drug therapies protected by the patent system and subsidized by the Pharmaceutical Benefits Scheme. It is a curiosity of the patent system that it forces taxpayers to protect the market for, and pay for, useless drugs which kill them. Such are the benefits of monopoly and regulation – the two ugly sisters ever eager to blot out the fair face of genuine competition.

Indeed, the patent system has created the absurd situation where it is actually economically rational for a drug company to create a super-disease for which it alone has the patented cure and then release that disease into the population. Such an illustration is not fanciful, as one sees companies (as is alleged of Monsanto) working to pollute their natural competitors' fields with artificial seeds – and then sue the victims of their pollution for patent infringement.

The mere existence of such perverse incentives should be enough to illustrate both immorality and the economic absurdity of the patent system.

What is to be done?

Diplomacy, as M de Talleyrand understood, lies in honouring one's undertakings while securing the national interest.

The international patent system is in no country's national interest. Even the United States, a nation magnificently founded upon the ideal of natural liberty but too often afflicted with the best legislators money can buy, has started to recognize the costs the patent system imposes through inflated costs of medicines paid for by its depleted treasury. The patent system serves only the supra-national or non-national patent holders and the bankers who finance their monopolies.

We have already advised overseas governments to think upon these lines and Australia should do likewise. Competition lies in not doing what others do but in learning from their mistakes and acting differently.

Faute de mieux, if outright abolition is deemed impossible at this time, a system of compulsory and easy licensing should be introduced. It is not necessary that Australia renounce the WTO treaties or dishonour any international obligation. Compulsory licensing can be the means of bypassing their nefarious and evil effects while retaining what is valuable.

If the Attorney-General's Department and the Parliamentary draftsman can regularly invent means of avoiding Constitutional restrictions on Commonwealth legislative power, it would be child's play to design a WTO-complaint compulsory licensing system which leaves a naked title in the hands of patent holders while restoring liberty and freedom of enterprise to those who would use knowledge rather than seek to "own" it.

For example, one could legislate that any person should be able to serve a statutory demand on a registered patent holder for a licence which shall be deemed granted if served 6 months after the patent has been granted. The statutory fee payable could be, say, 1% of the sale price of the good or service supplied by use of the patent. If there is more than one patent holder, they should share the 1% royalty equally. If a patent holder has not sought payment of his share of the 1% royalty within 30 days of the end of a calendar year, he should be deemed to have waived his right to any royalty.

There are many possible permutations on this theme and we would be happy to assist the Federal Government or the government of any other country design legislation to loosen or undo the shackles of the patent system and gain a competitive advantage for its own industries. Imperial Germany and Meiji Japan understood the importance of access to technology for their industrial progress as does modern China. There is no reason why any country should subordinate the interests of its people to the dictates of foreign patent rent collectors.

Conclusion

The spirit of monopoly is, alas, the spirit of the age. National "competition policy" has been perverted into an instrument for the protection of vested interest under the guise of assuring proper returns to "investors" in monopoly, much as the fugitive slave laws of the United States protected the investments of slaveholders.

The Productivity Commission should take a principled stand in this matter and declare itself, like Adam Smith, in favour of the public interest in the freest and most productive use of human talent, unshackled from vexation by those vested interests who, armed by misconceived statutes, claim to stand in the way of the advancement of their fellow men until they pay a toll-charge for the privilege of producing.

Yours sincerely

Terence Dwyer