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INCENTIVE THEORY JUSTIFICATION FOR INTELLECTUAL PROPERTY RIGHTS IN USA: JUDICIAL TREND

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Introduction

The dominant philosophical foundation of the intellectual property (hereinafter IP) rights system in United States of America (hereinafter US) is the incentive theory. The said theory justifies IP as a mechanism of incentivizing the creator or author with market exclusivity so as to protect the invention or work from free riding and potential copiers in the market, thereby encouraging further innovation and creativity (Fromer 2012:1-2). They understand the system as a reward scheme, designed to induce creativity within the labour in effort to benefit the society as a 'freestanding asset' (Merges 2011). The underlying presumption, here, is that an external incentive, such as a patent or copyright, is required to encourage innovators or authors to create or invent further.

My attempt in this article would be to analyze US courts' decision(s) and understand how far they are able to adhere to the cardinal principles of incentive theory for the grant of IP rights. The paper would also enquire into the fundamental questions whether IP incentives are necessary to encourage further innovations and creations. Is incentive theory successful in benefitting the society through development of Science and Arts? The final question is, has the time come for US to change from the incentive based intellectual property regime and search for other alternatives?[2]

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[2] For the purpose of this article I would confine my discussion to Patents and Copyrights

Evolution of Incentive Based Intellectual Property Regime

Looking into the pedigree of the IP rights regime one finds that, it emerged under the Elizabethan era in the form of royal grants by the king, a royal prerogative. It existed in the nature of a privilege than right and was often misused by the crown to grant selective monopolies. Primarily Patent was aimed at promoting new trade (Texas Univ. 2016) while Copyright for the facilitation of censorship (Bracha 2010: 1427- 1433). In either of the case the initial objective was not for spurring newer innovations or encouraging creativity. IP rights was also in reality utilised to control the growing threat against the royal power by controlling the dissemination of information (Bracha 2010: 1427-1433) and was part of the political struggle between the monarch and various power bases in the mid-millennium society and not so much based on economic rationale.

However, the Statute of Monopolies was enacted in 1623, aimed at preventing such abuses and formed the basis of the modern patent law. While in Copyright, the Licensing Act 1662 established a register to regulate book trade and protect printers. Later the Statute of Anne, 1710 brought protection to the author as the owner of copyright (WIPO 2016). It was only after the enactment of Statute of Monopolies (1623) and Statute of Ann (1710) that the economic basis for granting of IP was made popular. The first Copyright Act of US was a mimic of the Statute of Anne in respect of its basic concepts, text and structure (Johnson 2011: 623) and the same was adopted by US. So we could see that the evolution of the incentive theory as a justification for grant of IP is itself not based much on sound economic basis.

Incentive Theory Justification of Intellectual Property

The basic question to be asked at the outset, upon an intellectual property framework based on the incentive theory such as that of US, is who is to be incentivized? And why is he being incentivized? The traditional view of incentive theory is that the author or inventor of a creative or innovative work or invention is to be incentivized so as to encourage him for more creations or innovations. It further advocates the disclosure or dissemination of information which would encourage others to make more innovations or work ultimately benefitting the society by the development and progress of science and art. It is upon this touchstone principle to analyse how far the incentive theory justification for grant of intellectual property rights is working successfully in the US.

Fallacy of the Incentive Based IP Regime

The prevailing judicial trend in US shows that incentive based justification for IP regime is a fallacy. Though the US Supreme Court was earlier less inclined to entertaining IP related matters, some landmark decisions have been pronounced by the Court in recent years. These decisions clarify the problems and ambiguities in the IP regime prevailing in the US and also justify the need for interference by the Apex Court. However, whether this enabled the court to directly or indirectly substantiate the incentive based justification for IP is an interesting enquiry. The following decisions do not present themselves very supportive of that fact. In the landmark judgment of Association for Molecular Pathology Case (2013), the Supreme Court held that synthesized cDNA (Complementary DNA) strand is patent eligible as it is artificially synthesized and not naturally occurring. It is very relevant to note that many doctors had raised criticism against the said judgment conferring monopoly rights on the cDNA. The practical effect of the judgment is that, for conducting the diagnostic test for detection of breast cancer, permission will have to be sought from the respondent Myriad Genetics Inc. (hereinafter Myriad). The diagnostic test which is very crucial in detection of cancer is offered by Myriad at a very high price and further other scientists will not be able to use the particular cDNA for further research. Who is the court trying to incentivize here and at what cost? The interest of the investor (Myriad) is being protected at the expense of thousands of cancer patients and by blocking future innovations on the same DNA location. The basis of incentive theory is to incentivize the author and not the investor and definitely not at the cost of the society. One might argue here that after 20 years the diagnostic method would become available freely in the public domain? The answer to the said rhetoric be the death of millions of victims of the disease for whom the test is unaffordable and the transformed nature and extensive impact of the diseases would render the diagnosis and cure useless after the patent period expires.

Further, the Golan Case (2012) concerned the constitutionality of section 514 of Uruguay Round Agreements Act passed by the US Congress. The Act restored copyright status to foreign works which were earlier in public domain. It was challenged and the Supreme Court upheld the US Congressional decision to recognize the validity of copyright of foreign works on the ground that public domain is not indisputable and Congress can grant protection to previously unprotected work. The judgment resulted in the copyright protection being extended to millions of works which were earlier in the public domain and were copyright free. The basis of incentive theory is to encourage future innovations and creative works and not to hurdle them, unlike the said case.

Hence the pertinent question is how the action of the US Congress and of the Courts justified? Here again, the fundamentals of the incentive based IP system is being questioned. If the basis of the incentivizing theory is to encourage innovators for further creativity or creation of more works in the future, questioning the Apex Court's justification in granting copyright protection to millions of foreign work which were earlier in the public domain becomes inevitable. Further the larger question stands, how is the US society being benefitted by the said judgements? As a result of this judgment the US society will have to pay for millions of foreign works which they had been enjoying for free till now and further the administrative cost involved in identification of the works, authors and devising a mechanism for paying royalty to them. Had US been denying protection to foreign works for many decades? Has US changed its IP philosophy now or is it as a result of inherent ambiguity and impracticability in the incentive based system?

In *Capitol Records, LLC Case (2013)*, the District Court of Southern District of New York held that the online sale of second hand music records amounts to violation of the reproduction right of the sound recording company. As the owner of certain music files, Capitol Records have filed suit on second hand sale of their music records online by Redigi that amounts to infringement. Redigi gives 20% share to the artist of the music. But the case has been filed alleging violation of reproduction right of the sound recording company who practically does no creative contribution in the creation of music. The judgment of the court has been to the effect of blocking second hand online sale of legally acquired music file. Court here advances the argument that since the Congress intent is not to extend exhaustion doctrine to digital medium, exhaustion or first sale doctrine applies only to tangible goods and does not apply to online second hand sale of music. The author having been already paid a portion of profit by Redigi, the fundamental argument of incentivising the author is weakened. Further, incentive theory is to enable incentive to be received by author or owner for his innovation. Once he gets his reward then he cannot further control the subsequent sale of the same product. This is the economic rationale for exhaustion doctrine. It is evident from the fact that the author or investor gets his reward once for sale of online music. Hence the Court argument that subsequent sale cannot be done by the lawful buyer and inapplicability of exhaustion doctrine in digital medium and applicable only in case of tangible goods is erroneous. This case, again strikes at the root of the incentive theory, that a person is to be incentivized once for a single product produced. What economic rationale does the incentive theory provide for subsequent incentivizing of the author for the same product again and again merely because of the fact that the content is digital. It is pertinent to note the position that European Court of Justice in UsedSoft Case (2012)

has come regarding the same issue and held that since the owner of software had received his reward once, the sale of used software is valid and exhaustion doctrine applies.

From the above cases it can be observed that the US Courts face serious objections in adhering to the basics of the incentive theory justification for grant of intellectual property since deviation from the fundamental principles is becoming the need of the hour.

Alternatives to Granting of IPR

Researches of prominent academicians such as Belleflamme (2006), Gallini and Scotchmer (2002), and Shavell and Ypersele (2001) have revealed that, often, factors other than external incentives, patent or copyright, act as strong motivators. Many people make advances in their research because of the personal satisfaction and urge to complete their creation rather than aiming at other incentives. In the academics, more altruistic concerns such as norms, curiosity and user's need to understand and learn act as strong motivational factors. Open source projects such as Wikipedia, Firefox and Linux are substantial examples disapproving the underlying presumption that incentivizing through copyright or patent is necessary to encourage an innovator to contribute to the society (Dreyfuss 2014).

Increasing volume of digital contents created by people without expectations of compensation is a backlash to the incentive theory. Many capital intensive ventures are being funded by group of strangers only connected by a website and a common vision (Johnson 2011: 623). Thus we could see that it is not always the external incentive or a patent or copyright that motivates an artist or inventor for further creations but rather, internal motivations.

The vital question to be asked is if people were not motivated to innovate during the pre-copyright and pre-patent era? Further, in present time, who is really being incentivised - the innovator or the investor or industry? Thus it is not always the grant of IP which encourages more and more innovations but rather is dependent on other factors[3]. Therefore on the said context, the following questions become pertinent: What

[3] These other factors can be passion to innovate, desire for earning reputation and acceptance in the society, to make contribution for betterment of the society etc.

is the real objective behind incentive theory? Is theory in application fulfilling its altruistic agenda of creativity encouragement and dissemination of knowledge or is it an investment protection scheme?

Conclusion

The basic purpose of incentive theory justification for grant of intellectual property rights is to incentivize the author so that more and more innovations or creations come and the society is finally benefitted by it. The incentive theory today is proving to be a failure as instead of incentive being provided to the author, the IP is acting as an investment protection scheme.

The time has come for newer philosophical theories to take the place of incentive theory and provide for a more conducive environment whereby the rights of society and the authors are balanced and the society isn't taxed so high so as to satisfy the investor. Further the underlying assumption of the incentive theory that external incentive is required for creativity and innovation is being tested especially in the internet era (Johnson 2011: 623). The present trend is that in the name of incentivizing the creator/innovator, monopolization is taking place and there is a tendency to encroach into public domain. Alternative models to IP are thus necessitated by the emerging lacunas and problems which renders the present IP regime a failure, as illustrated by the cases discussed in this paper.

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