1. Frederick M. Abbott

Rethinking patents: From ‘intellectual property’ to ‘private taxation scheme’

Monopolies must be recognized for what they are and should not be allowed to shelter under the inaccurate description of ‘intellectual property’

Lord Sydney Templeman

I. PATENTS AS PRIVATE MONOPOLY TAXATION

Tracing back to the Venetian patent law of the 1400s the motivation underlying the grant of the patent was to encourage inventorship and contribution to society. Today patents have become a financial commodity treated much as any other asset of a business. Patents are judged by their capacity to generate financial returns, typically for a large industrial or post-industrial organization. The individual inventor or creator plays a role in the large organization, but from a macro-economic standpoint it is the exceptional case in which the individual inventor executes an idea that plays a material role in the marketplace. Despite the evolution of the social construct in which ideas become financial assets, the public narrative of intellectual property (IP) and patents remains focused on the concept of the individual inventor and the encouragement of creative activity. The narrative is a valuable one from the standpoint of large industrial and post-industrial organizations. If an individual expends his or her effort in generating a new idea, he or she should reap suitable rewards for the contribution to society.

2 Copyright largely evolved in the sixteenth and seventeenth centuries as a way to allow publishers to profit from the works of authors without interference from ‘pirates’. Trademarks were used in early days to prevent passing off imitations as goods from the original source.
From a macro-economic standpoint, today’s world of patents is not the province of the individual inventor. It is the world of Apple, Google, Microsoft, Pfizer, Gilead, Novartis, Disney, Comcast and Siemens. Experts involved in the field of patents understand that they work in an area dominated by mega-enterprises. Government regulators certainly understand that their efforts are not directed toward individual garage tinkerers. But, the intellectual discourse surrounding IP remains largely that of the nineteenth century. As the default principle, government should not interfere with the ‘right’ of the individual to exploit his or her own intellectual creation or invention.

A patent generally gives its owner the right to prevent third parties from exploiting that same invention or creation. As a reward or encouragement, it empowers the patent owner to secure a ‘producer surplus’ above that which would be provided in a purely competitive environment. The producer surplus in favor of the patent owner reduces the funds in the hands of consumers, and consumer expenditures in favor of other producers. The patent owner benefits from a government-mandated right to exclude. Patents are, in essence, a private right to tax, although a tax that is dependent (in most cases) on the willingness of consumers to pay it.3

There is a fundamental question regarding the allocation of a monopolistic private tax to large industrial and post-industrial organizations: that is, does the power to collect a monopoly tax entail public responsibilities? The underlying theme of public discourse is ‘no’. That is, the financial asset (i.e. patent) is regarded as freely alienable property that may be used as the owner deems fit, subject only to the general restrictions on uses of property. So, for example, there is no apparent limitation on the level of private tax that may be collected, and no concept of progressive taxation such as might ordinarily be adopted by a government taxing authority. Moreover, there is no restriction on what uses may be made of the tax. Unlike a government that is typically constrained concerning the areas in which it might make expenditure, the recipient of the private monopoly patent tax is free to make whatever use of it is deemed appropriate.

Property ownership more generally can be thought of as a government authorization to collect private rent or taxes. When the government establishes a system of enforceable land ownership rights (a ‘mini-monopoly’) it accords the landowner the right either to occupy or

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3 It is questionable whether a patient purchasing a unique drug for an otherwise untreatable disease is exercising ‘free will’.
rent-out the property, and the ownership right generally precludes third parties from trespass. Real property rental can be analogized to private taxation. Yet, real property ownership is typically layered with government regulation and taxation. Real property is subject to zoning restrictions; most land is typically designated for use for certain purposes. Real property is subject to easements or rights-of-way in favor of particular third-party uses, including rights of public utilities to occupy parts of the land. Real property is subject to government taking when needed for public purposes. Recognizing that real property ownership entails substantial government interventions and owner responsibilities, it is rather different than patent ownership. Real property is ‘finite’. While some parcels of land are more valuable than others, and may occupy more important potential rights-of-way, the ‘social effect’ of parcels of land tend to be localized and limited. Ownership of a parcel of land in New Jersey does not affect access to land in California. Analogies between real property and patents can be rather strained.

The idea that IP, including patents, should be treated from a legal standpoint in a manner similar to other forms of property was adopted as a controlling legal principle by the US Department of Justice and Federal Trade Commission when they issued their IP Licensing Antitrust Guidelines in 1995 at the height of influence of the Chicago School on US regulation.4

Patents are not real property, and the ‘private monopoly without responsibility’ model has inherent flaws. The model generates substantial concentrations of corporate wealth. Large industrial and post-industrial companies are aggregating portfolios of patents and other intellectual property rights (IPRs) that are making it exceedingly difficult for newcomers to break into markets. Apple, Google, Samsung, Microsoft and a few other large computer hardware and software manufacturers control the market for end-user equipment, and are increasingly seeking to dominate the evolving ‘cloud’. Pfizer, Novartis, Glaxo and a few other ultra-large pharmaceutical companies dominate the market for ‘originator products’ and extract huge rents from public health systems and consumers.

Beyond the ‘simple’ effect of market concentration, the wealth concentration effect is distorting the political market. Political discourse in

Brussels, Washington and New Delhi is dominated by the concerns of corporate and corporate interest group lobbies fueled by patent-generated rents.

The ‘genius’ of the industrialists that promoted the Paris Convention in the late 1800s was to bring the terminology of industrial ‘property’ into wide usage. The patent from a linguistic standpoint becomes the equivalent of a farm or home, the dwelling place into which the government should not intrude.\(^5\) The analogy between an intangible right to exclude for a limited time across a wide geography, on one hand, and the right to prevent trespass on a farm or dwelling, on the other, is deeply strained. Yet by calling a patent ‘property’ the industrialist conveys a sense of private entitlement that is intricately embedded in the human psyche.

The transition from ‘industrial property’ to ‘intellectual property’ is also significant from a linguistic standpoint. ‘Industrial’ conveys the sense of business orientation or commercial activity. ‘Intellectual’ conveys the sense of ideation or creativity. Whereas ‘industrial’ activity nearly begs for government regulation, ‘intellectual’ activity conveys freedom of mind best left to its own devices. ‘Industrial property’ lives in the world of the mundane. ‘Intellectual property’ comprises the stuff that dreams are made of.\(^6\)

Consider the difference in public discourse if patents were referred to as ‘private monopolies’ or ‘private taxes’ instead of ‘intellectual property’. The Chairman of PharmaCo would seem a much less sympathetic figure when stating ‘the government has no right to interfere with my “private monopoly” or “private taxation scheme”’ than when stating ‘the government has no right to interfere with my “intellectual property”’. Terminology does matter.

The intent here is not to oversimplify. Patents and other forms of IPRs do not alone account for the success of the mega-corporation. Some enterprises – even those grounded in new technologies – are not heavily reliant on IPRs. First-mover advantages and economies of scale play an important role for those companies successful enough to enter the ranks of the companies with global power and reach. There is still room for some new entrants that create their own new fields of endeavor. The US-based company Facebook is a recent example of a company that

\(^5\) In fact, at a meeting in Geneva regarding the use of pharmaceutical patents in developing countries, a junior representative from WIPO equated compulsory licensing of patents with forced third-party occupancy of private homes, putting the homeowners out onto the street.

\(^6\) From Prospero (Shakespeare’s ‘The Tempest’) to Sam Spade (John Huston’s ‘Maltese Falcon’).
created its own new field of business, and quickly came to dominate it through first-mover advantages and economies of scale. Facebook uses IP in many aspects of its business, but its market power seems largely to derive from a vast network effect.

Some industries, like the airline industry, are hardly influenced by patents at all and still become concentrated based on high capital requirements and government regulatory structures.

In 1996, I hosted a conference and co-edited a resulting book, ‘Public Policy and Global Technological Integration’, that sought to examine the consequences of the rapidly integrating global economy and evolution of the large-scale enterprise based on IPRs, asking whether there was some risk to social welfare from this changing environment and concentration of technological power.7 At that time, the WTO TRIPS Agreement had just entered into force, and policy experts were only beginning to assess its real-world effects. At that time, the risk of concentrations in the telecommunications, computer and software, and audio-visual industries loomed large. Although the question of pharmaceuticals played a substantial role in the WTO TRIPS Agreement negotiations, the consequences of strict enforcement of pharmaceutical patents in places like South Africa had not yet manifested themselves. But, during the ensuing decade issues concerning control over advanced pharmaceutical technologies, with good reason, dominated public discourse around patents.

It is exceedingly difficult to determine the ‘effects in fact’ of the TRIPS Agreement largely because we do not have a ‘counterfactual’ with which to determine the alternate TRIPS-free universe. It is unrealistic to assume that in the absence of the TRIPS Agreement countries would not have adopted new patent standards. The US and European Union (EU) would have continued to promote the interests of their IP-intensive industries abroad on a bilateral and plurilateral basis. WIPO might have remained the central forum for IP-related negotiations, a role that it has more prominently re-assumed in recent years. The current ‘IP battles’ between the pharmaceutical originators in the US and Europe, on one side, and India and its generics industry, on the other, would have taken place, but in some different form or context. Just as the US and EU have shifted from multilateral to bilateral and plurilateral forums to address perceived deficiencies in the WTO negotiating process, they would have pursued alternative negotiating forums in the absence of the TRIPS Agreement. We could step through each of the major international IP

‘events’ during the past 20 years and hypothesize some alternative version, but it would be unwise to postulate that some form of these events would not have occurred in the absence of the TRIPS Agreement. They would have occurred in different forms because the underlying issues would have manifested themselves in conflict. It is as easy to suggest that the TRIPS Agreement has played an ameliorating role as to suggest that it has exacerbated problems.

As an illustration, India might well have adopted pharmaceutical product patent protection without the TRIPS Agreement as its industry and researchers increasingly invested in new technologies, and as prospective foreign investors demanded patent protection. As Indian generic producers are major exporters to the US and European markets, there would have been demands for reciprocity on the patent side as a condition of trade and market access. India might well have adopted Section 3(d) of the 2005 Patents Act, or something quite like it, as a matter of domestic legal preference. Pfizer and the US Chamber of Commerce might have just as well have been unhappy with Section 3(d) in a TRIPS-free alternative universe. But, the TRIPS Agreement and its confirmation of flexibilities in the adoption and implementation of patent law is relied on by India to defend Section 3(d). In that regard, from the policy space standpoint, the TRIPS Agreement may be serving a positive role in ameliorating conflict.

The TRIPS Agreement has had an influence on global IP policy and rules, but its role is complex. It probably played a role in accelerating the adoption of more comprehensive IP rules in a number of developing countries, but the TRIPS Agreement was a response to growing demand for such rules by the major trading powers in the 1980s and 1990s.

This brings us around to looking at patents from a more fundamental standpoint, divorced from a particular multilateral or regional agreement, or a particular dispute.

II. THE CONSEQUENCES OF THE PRIVATE MONOPOLY TAX

We begin with a focus on patents and pharmaceutical products. This is where the issues of private taxation currently loom largest, though this is not to suggest that other fields of technology do not take increasing prominence, such as technologies to address climate change.
A. Pharmaceuticals

The most controversial area of patenting involves pharmaceutical products. We are reminded of Fritz Machlup’s seemingly rhetorical question in the 1950s whether society would tolerate a patent on a cure for cancer.8 Evidently, Machlup thought ‘no’ was the right answer. Today, Machlup’s rhetorical question appears naïve or quaint. Not only does society tolerate patents on treatments for cancer (though not so much a ‘cure’), but society appears prepared to tolerate the charging of astronomical prices for treatments based on the philosophical foundation that the patent allows its owner to charge ‘whatever price the market will bear’.

Let us assume for the sake of argument that it really does cost an originator company $1 billion to develop a ‘new’ drug, taking into account failures of non-performing candidates. Gilead has introduced an effective treatment for hepatitis C (Sovaldi) which is priced at $1,000 per pill, or $84,000 for a 12-week course of treatment. According to the US Center for Disease Control (CDC) 170 million people worldwide are affected by chronic hepatitis C infection, and there are approximately 350,000 deaths worldwide resulting from the virus.9 If treatment globally were limited to the individuals who would die each year, the annual cost of treatment would be $29,400,000,000. According to the US Department of Health and Human Services there are 3.5 million individuals in the US with hepatitis C infection.10 According to the CDC:

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9 Unfortunately there is no vaccine available to prevent hepatitis C, but research is being done to develop one. Most infections are associated with inadequate infection control and unsafe injection practices, which are estimated to account for as many as 4.7 million cases of hepatitis C annually. An estimated 500,000 cases of hepatitis C every year may also occur as a result of many countries not properly screening donated blood. CDC Data & Statistics Feature: World Hepatitis Day – July 28th, July 27, 2011.

10 ‘An estimated 3.2 million people in the US are living with chronic hepatitis C infection, and most do not feel ill or know they are infected, according to the CDC.

There are approximately 17,000 new hepatitis C cases each year in the US, many of which go unreported.’ Hepatitis C Fact Sheet, http://www.hhs.gov/opa/reproductive-health/stis/hepatitis-c, visited May 4, 2014.
Of every 100 persons infected with HCV, approximately
75–85 will go on to develop chronic infection
60–70 will go on to develop chronic liver disease
5–20 will go on to develop cirrhosis over a period of 20–30 years
1–5 will die from the consequences of chronic infection (liver cancer or cirrhosis)

If 85 percent of the 3.5 million individuals in the US with chronic hepatitis C, or 2,975,000 individuals, were treated at $84,000, the cost would be $249,900,000,000; yes, close to US$250 billion. Neither individuals nor the US government are going to spend $250 billion on hepatitis C treatment, yet the aggregate number might not be so far off worldwide. A $10 billion per year blockbuster drug with a remaining (theoretical) 12-year patent duration could return $120 billion to the originator. The production cost of Sovaldi is negligible, so the $120 billion is almost wholly a monopoly private tax, leaving aside the hypothetical $1 billion research and development (R&D) cost.

Of course, hepatitis C is but one of the myriad diseases affecting the population of the world, by no means the most prevalent or deadly. The originator pharmaceutical industry currently has revenues of about US$900 billion annually, a great portion of it a monopoly private tax. And yet the $900 billion is but the tip of a potential iceberg because a great part of the world’s population cannot afford to pay the private tax.

The originator pharmaceutical industry is able to persuade legislators that the private patent tax is justified because of Pharma’s contribution to society. R&D projects can be shelved and researchers terminated to meet Wall Street financial projections. Mergers can take the place of research. The originator can charge what the market will bear. The industry does not have an obligation to society to behave in a particular way. All of this is without empirical evidence that pharmaceutical products would not be developed just as effectively without the private tax.11

B. Computers and Electronics

Patents did not play a determinant role in the evolution of the computer and electronics industry, which has been more characterized by returns to

11 That is, for example, pharmaceutical researchers could simply be paid a good wage to keep on working on developing cures for disease based on some alternative model.
first-mover advantage. But, as the industry has matured and become
globalized, reliance on patents to protect market share has become more
significant. The major computer equipment suppliers have been spending
billions of dollars amassing patent portfolios for both offensive and
defensive reasons. Ultimately, these patent portfolios are used to extract
and protect vast revenue streams from consumers.

Because of intense competition among similar goods, computer and
electronic manufacturers are not able to secure the levels of profitability
or private tax available to originator pharmaceutical companies, but there
are some notable consequences to the accretion of vast quantities of
capital within the major corporations such as Apple, Google and Sams-

It is becoming increasingly likely that new entry into the smart phone,
tablet and other personal device market will be difficult because of patent
restrictions, and the control that is exercised by a small group of
companies over the patents embodied in these devices. Of course, the
amount of capital needed to become successful in these markets is large
in any case because of the need to supply large distributors such as
telecommunications service providers. But, it would seem that many of
the secondary actors (e.g. Nokia, HTC, Blackberry, etc.) are dropping out
of the game, leaving a few mega-enterprises with control of the space.
And, control of the devices seems increasingly to translate into control of
the content through application stores and the like.

To be sure, the social consequences of fewer choices among mobile
device producers is unlikely to have the type of social effect as
domination of the pharmaceutical market by a few large originator
companies. But there are concerns about data privacy, data mining and so
forth.

It is difficult to observe the comings and goings of the computer and
electronics industry and be particularly concerned that the market will
become calcified as a consequence of patents. Partly this is because of
the absence of ‘revolutionary’ technologies. Rather, most of the changes
are incremental and leave consumers with alternative purchasing choices.
Of course, this could change, but at the moment there does not appear
any great reason to suggest the need for placing additional public
responsibilities on the manufacturers. Yet, one could certainly imagine an
alternative universe in which a part of the revenues from sales of mobile
devices was mandatorily channeled to subsidize the provision of com-
puter equipment to schools and low-income individuals. There might be a
move towards equality of access to digital resources.
C. Energy and Climate Change

A substantial amount of attention has been paid at the international level to the potential impact of patent restrictions on technologies to prevent or mitigate the impact of climate change. The research done to date is inconclusive with respect to whether patent rights are having a material impact on access to technologies needed, particularly by developing countries, to transition from carbon-based fuels to alternative energy supplies.

As with the computer and electronics industries, there is some evidence that the technology market remains fairly competitive, and that there are few ‘blocking technologies’ having a material impact. One reason for this is that the product or service generated by the technologies (e.g. energy or electricity) is ‘fungible’ (i.e. electricity is electricity regardless of its generating source). Of course, different generating technologies or sources may have very different external (i.e. environmental) effects, yet the availability of alternative sources acts to constrain pricing.

Though predictive data is scarce at the moment, patents and other forms of IP may inhibit access to smart-grid technologies (in which the market may be more concentrated among large-scale actors). There are demands for technology transfer coming from developing countries to assist with preventing and mitigating climate change.

This is an area in which patents and other forms of IP that allow the application of a private tax could also be the basis for the imposition of obligations on their owners, either of purely financial or technology transfer assistance variety.

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D. Food, Agriculture and Water

A variety of IPRs affect food, agriculture and water. Considerable attention has been paid to the impact of patenting new seed varieties on developing country agriculture, in particular, also with effects on developed country farmers.\textsuperscript{15} Of notable interest today are issues concerning access to fresh water supplies, which may be increasingly affected by new technologies such as desalinization technologies.

Patents throughout this area are a private tax on consumers of food, agricultural products and water supplies. If we look at controversies surrounding companies like Monsanto and patent controls on new seed technologies, it is fair to ask whether a seed company that is earning substantial private rents from a government-sanctioned right to exclude does not also have a responsibility to the public, including farmers in developing countries and small farmers in developed countries.

This is not to suggest that patents do not perform a useful function in respect to food, agriculture and water, but it is to recognize that patents are creatures of government regulation and are exploited globally. Their ubiquity or intangibility enhances their value. They are not tied to a particular plot of land, and do not require new factories when a particular level of capacity has been reached. They confer a great deal of power on their owners. But public discourse largely regards this ownership as an authorization for unconstrained exploitation, within very loosely defined limits.

III. WHAT WOULD REGULATED MONOPOLY RESPONSIBILITIES LOOK LIKE?

Once the philosophical bridge of treating patents are as private monopoly taxation coupled with public responsibility is crossed, the major question is how to mandate public responsibility. This cannot be a program of voluntary guidelines or suggestions, as private industry does not respond to such cues. The question is made particularly complex because of the global nature of patents and industry.

\textsuperscript{15} Plant variety protection rights play a role in determining access to agricultural products, even if not as dramatically as patent rights. Geographical indications are used both to increase rents and block alternative suppliers. The food industry makes considerable use of branding and packaging as mechanisms to maintain pricing margins.
A. Progressive Taxation

We know that tax systems are constantly manipulated by income shifting to low taxation environments, so that a decision to impose incremental taxes on high patent-related income streams may prove problematic. For example, if the US was to progressively raise tax on originator pharmaceutical companies based on revenues generated by particular patents, the originator companies would try to work out a scheme whereby income was shifted to offshore locations. Even though the revenue-shifting device might be transparently manipulative, governments appear to tolerate this type of conduct as a matter of routine.

At least in respect of the pharmaceutical industry, there is probably a decent workaround of self-reporting of income by the private companies. There are private data suppliers such as IMS that generate both country-by-country and global-revenue data for individual medicines and could be used as a proxy for self-reporting by the industry actors. Moreover, there are some countries, such as Germany, where sales data is collected for government regulatory purposes, and which presumably is fairly robust. Other countries collect data on pharmaceutical sales for purposes of operating price control regulation systems. In principle, a company could act to challenge the sales and revenue data compiled by IMS or by/for a government source.

Assuming that the ‘progressive upward taxation’ of patent-based income, for example, were to be based on a country-by-country assessment, it might well be possible to allocate shares of revenue based on data from external sources.

Taxes based on particular subject-matter patent revenues could be used by governments to subsidize disadvantaged patient groups toward the purchase of the medicines, applied to R&D efforts, or otherwise reallocated into the health care system.

B. Private Rights of Use

A second method for imposing public responsibilities would be to provide third-party access to patent-protected technologies involving accelerating access to the underlying technologies after a threshold of revenues had been crossed.

The concept of ‘automatic compulsory licensing’ was embedded in a number of national patent systems, including that of Canada, prior to negotiation of the TRIPS Agreement. Requiring that a patent become ‘open’ after a period of some years, coupled with payment of a prescribed royalty, was a routine business. But, times have changed.
Using the pharmaceutical sector example, an alternative to using a period of years to determine when a patent would be laid open for licensing could be using a formula based on the aggregate revenues of the patent owner for sales of the particular patented product. Using the hypothetical $1 billion R&D cost for a new drug, one could pick a reasonable and even generous return, say $5 billion in revenue, as the threshold following which the patent would be open. An originator company could opt to maintain its control over the patent by pricing at a level at which its revenues would stay below the threshold for a longer period.

In the pharmaceutical sector, the advantage of a revenue-based threshold open-licensing system is that it would encourage the making available of generically produced products, as compared with a general progressive taxation system. For the originators, revenues would be maximized by continuous innovation.

By making aggregate revenue-based licensing an integral part of the national patent system, the legislature would avoid ideologically laden reference to ‘compulsion’. It would be an ordinary part of the regulatory structure. Patents would provide a suitable reward to the inventor, but they would not be the basis for long-term private monopoly taxation. They would provide a first-mover advantage, but not continuous extraction of rents from the public.

C. Pooling Obligations

An alternative form of mandating open access or rights of use would be the creation of patent pooling obligations based on defined criteria. Elements of climate change prevention and mitigation technology, for example, could be addressed through the establishment of global patent pooling mechanisms that would make such technology available among all potential relevant actors in the interests of addressing a common problem. Establishing such mechanisms would doubtless be a complex process, and would require providing adequate incentive for continued research. Nonetheless, addressing a challenge such as global climate change not only requires development of new technologies, but also mechanisms to assure their wide distribution and affordable access to the end-product (i.e. energy) for people in very different economic circumstances. Leaving this to the patent/private taxation market is a risky proposition.
D. Regulated Social Obligation

Another method of assuring that the public fairly benefited from the private patent-based taxation system would be to legislatively mandate obligations on the recipients of patents, i.e. affirmative duties. In this regard, patents would be treated as ‘regulated monopolies’.

Historically, governments have chartered and operated regulated monopolies to provide services that are essential to the public, such as energy utilities, public transport and telecommunication services. The regulated monopoly has fallen out of favor during the past several decades as ‘privatization’ has become the watchword of industry. Privatization, however, requires strong oversight by regulatory authorities, including competition authorities. In fact, governments are often overwhelmed in their capacity to regulate ‘private monopolies’ or ‘private oligopolies’. Once the monopolist or oligopolist has achieved a sufficient level of wealth, it becomes a power as great as the government. In some countries the link is relatively explicit, as in the link between autocratic government and oligarch in Russia. In some countries the link is less explicit, as in the link between the government, wealthy industrialist and lobbyist in the US.

If we take pharmaceuticals as an example, the patent office could work with Department of Health and national drug regulatory authority (DRA) in creating programs in respect to specific drugs or diseases. For example, the Department of Health could identify a portion of the population that should receive free or heavily subsidized medicines. The DRA could mandate that the manufacturer develop a pediatric formulation. The aforementioned duties could be based on a percentage of the revenues garnered from sales of the drug.

Governments have traditionally regulated monopolies by imposing limitations on the prices they may charge for their goods or services. So, for example, public energy utilities typically file a rate structure and must seek approval for rate changes from the regulatory authority. Prior to deregulation, airlines typically were limited in the prices that could be charged for tickets. Because these enterprises are providing services that the public cannot do without, and because the government is often responsible for paying a substantial portion of the infrastructure cost, the prices are or were regulated.

There are very sound arguments in favor of treating originator pharmaceutical companies as regulated utilities, and controlling the prices of their products. It is a financial markets’ fantasy that new drugs would not be developed if the industry was unable to reap tremendous profits. Most of the innovation comes from universities, teaching hospitals and smaller
private research enterprises, and not from the big Pharma companies that eventually place the drugs on the market. Clinical trials could easily be run without the big Pharma companies, and manufacturing already is undertaken by a host of successful generic actors.

None of the above are intended to appear as fully fleshed out prescriptions, but rather in the nature of illustrating that there are realistic alternatives to unregulated private taxation.

E. Changing the Terms of Discourse

This essay addresses a fundamental issue, that is, the basis on which public discourse concerning patents takes place. Powerful patent-owning groups such as the originator pharmaceutical industry sector spend enormous amounts of money and lobbying muscle to persuade legislators and executive authorities of their contribution to society. The discourse focuses on the mega-enterprise as innovator or inventor without whom life would be more difficult, and who operates most effectively unfettered from government intrusion. One can picture the solitary scientist in a white lab coat hovering over test tubes with different colored liquids mixing about. Who would want to disturb the work of such a dedicated individual? He or she may be one sleepless night away from curing cancer. Certainly this individual is entitled to the reward of ‘intellectual property’.

The reality of the patent system is vastly different. Scientists are feeding into a vast corporate and financial apparatus dedicated to maximizing financial returns, accompanied by gigantic payouts to corporate executives, and engaged in aggressive marketing campaigns. No level of patent-based rent extraction or private taxation is too high. There is no public or social responsibility other than that which may be imposed by class-action tort lawyers. We have watched the industry long enough to know that social responsibility must be legislated and enforced.

One way to begin to shift towards legislative responsibility is by changing the language of the discourse. Patents are not ‘intellectual property’. They are ‘private monopolies’ established by legislatures. As such, they should be subject to regulation in the nature of public utilities.

The fundamental point of this essay is not a new one. Lord Sydney Templeman, the distinguished English jurist, made similar observations in a brief essay entitled ‘Intellectual Property’ in 1998,16 saying:

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The term ‘intellectual property’ applied to patents conceals a monopoly created by Parliament. … ‘The term ‘intellectual property’ infers that there is some perpetual asset which belongs to an inventor or author. This theory is employed to obtain extensions of the protection afforded by statute and provokes cries of ‘theft’ and ‘piracy’ when the rights granted by parliament are infringed. From the point of view of the consumer and the general public, however, a patent right is a grant of a monopoly and copyright is a grant of a restriction on trade’. … ‘It is assumed that patent and copyright protection are necessary to ensure that an inventor continues to invent and that an author continues to publish. The validity of this assumption cannot now be tested. It may be that curiosity and the benefit of being first in the field would be sufficient to ensure that research and discovery would continue. Medical discoveries owe more to the experiences of war and the experiences of hospitals than they owe to the industry which deluges practitioners with marketing literature and inducements.

What then is to be done?

The first thing is for governments and courts to recognize that patents and copyright create monopolies which are injurious to free trade and impose exorbitant prices.

The second thing is for governments to take seriously the propaganda which assured the developing countries that they would benefit from TRIPS.

The third thing to be done is for governments and courts to be more liberal in granting and upholding compulsory licences and licences which are designed to ensure that patented products are available at reasonable prices and that domestic industry is allowed to compete.

The fourth thing to be done is for governments and courts to recognize the universality of the exhaustion of rights principle.

My point is not original, and doubtless similar observations were made before Lord Templeman, even if not so eloquently. But public discourse has not been much influenced so far, thus providing an opening for a reminder. The term ‘intellectual property’ is powerful industrialist propaganda designed to seize the high ground in any legislative debate on patents. We can at least be mindful of this, though we may lack the money and power to prevail against a deck stacked heavily against.