

Understanding intellectual property -

2. How business lobbying changed the world

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I'd like to just quickly relate the story of perhaps the best example of business lobbying in the 20th century. And that is the story of the Agreement On Trade-Related Aspects Of Intellectual Property Rights. That's quite a mouthful and so is the agreement. It's known by the acronym of TRIPS. Now this agreement is part of the World Trade Organisation. And the interesting question and the interesting history here, is how did it get there? If you look at the trade regime it really didn't have much to do with intellectual property rights. And why would it? These things are not intellectual property rights they are monopoly privileges. So if you are really serious about the free market and if you're really serious about free trade, you really shouldn't be in the business of globalising monopoly privileges. It's the very antithesis of free trade and free markets and as I've tried to explain it interferes in liberty. These things are not just economically problematic, they're politically dangerous.

Part 1. Changing the global rules

The TRIPS story basically starts with some Washington-based entrepreneurs who had a big idea. The companies that they worked for were companies that relied on intellectual property. So examples of these companies are Pfizer, for example, the pharmaceutical company, or DuPont another important company in the chemicals area, General Electric, or Warner. These are all companies that have high technology interests. IBM is another a company that is a player in this particular story. So these policy-based entrepreneurs working in Washington had the idea that they might get further in terms of globally enforcing intellectual property standards, if they could somehow get an agreement on intellectual property in what was then called the General agreement on tariffs and trade, the GATT for short. Now the GATT was a multilateral regime in which countries were trying to encourage each other to reduce tariffs so that trade could take place. The important thing about the GATT was that it had an enforcement mechanism, a dispute resolution process that worked - unlike many other international agreements that were really paper tigers, that really didn't have good enforcement procedures. That was the reason that these particular entrepreneurs were very interested in getting an agreement on intellectual property into the GATT.

Well, there's a long history but essentially what they did was to begin working their business networks. So, for example, the CEO of Pfizer, at that time Edmund Pratt, he began delivering speeches about this big idea to various fora such as the business Council. And other CEOs also began sending government the same message. More importantly, Pratt became a member of a particular advisory committee that advises the US government on trade matters - the advisory committee on trade negotiations. This is a private sector committee that provides the US government with advice on trade negotiations. And if you look at the membership of this community, of this committee rather, it was dominated by the CEOs of US big business.

And all of these CEOs began singing from the same song sheet. Intellectual property would be good for General Motors, and as we know what's good for General Motors, is good for the United States. Over a period of time, this message was heard by the United States Trade Representative. But the United States trade representative had problems because other countries and especially the developing countries were really not interested in having an agreement on intellectual property in the GATT. Countries like India and Brazil, for example, realised that once, for example, rules on the patentability of pharmaceuticals would be enforced, would become part of their law, that would raise the cost of medicines for their public. And of course countries like India had poor people that would struggle, or really not be able to pay these prices, so they resisted this US agenda. What the US did ultimately was to enrol its partners, primarily the European Union, Japan and Canada in this intellectual property agenda. And it was able to enroll those countries because the CEOs of these multinational companies IBM, Pfizer reached out to their counterparts - the European pharmaceutical companies, the Japanese pharmaceutical companies, and persuaded them that an intellectual property rights agreement would benefit their industries.

And so you can imagine this is a series of concentric circles being made ever wider. More and more people were enrolled into this enterprise. This was much more than just simple lobbying. This was a very sophisticated exercise in networking. Various think tanks were paid money to write about what a jolly good idea it was to have intellectual property rights in the GATT. Academics were paid consultancy fees. This was essentially getting everyone to sing the same message. Newspapers were informed and editorials were written. All sorts, of in all sorts of ways, the message was sent out. Now this took a number of years but essentially when the Uruguay round of trade negotiations opened - that was the GATT round in which all this was negotiated - when it opened in 1986 intellectual property was part of the agenda. In many ways it's an astonishing achievement. It's not so much a story of power as it is a story of imagination of, of networking. Of course, these companies had money that made it feasible, they were able to pay for all of this, but nevertheless, if you think about that their agenda was to globalise intellectual property standards that ultimately would serve very few countries. And, in fact, in the 1980s we can be confident that the only country that really would have benefited from these rights - in other words the only country that was a net intellectual property exporter - was the United States.

So when you think about what happened, how a group of CEO's, admittedly of powerful companies, were able to make concrete a property idea for the entire world that has such huge implications for public health, for creativity, for the cost of textbooks, the cost of information it really shows how in some senses our world is fluid, that the rules aren't inevitable. If someone had argued against these rules, if consumers have been more organized, if countries really understood the terrible consequences, if we had really understood what this meant for Africa and the HIV AIDS epidemic, those CEOs might not have been able to pull this off. But, unfortunately, in the 1980s, people were ignorant. They really didn't understand the rules of the game. Today, it's a different situation. So in one way it's a story of big business power but in another way it's a story of the fluidity of our world. It shows that rules are invented and imposed and if that's true then they can be challenged.

Part 2. Some effects

The most obvious impact of course of monopoly privileges is that they raise the price of inputs. That's the whole point of a monopoly privilege, which is why the mediaeval period the term of these things will was restricted, and why they were seen as privileges. Um, we can think of all sorts of inputs - most obviously when you buy software you're paying for the copyright, or the patent term in that, unless of course you're making use of free software. We should never forget that people, to some extent, are rebelling against the system. They are trying to find ways to create and disseminate knowledge and algorithms, erm, for, for everybody's benefit and that that that's the kind of rebellion that's socially efficient. Other examples of increased input are, of course, seeds. Companies like Monsanto, for example, hold patent rights and have a business model that depends on making seeds proprietary. Well there is a very, very long list of things that are the subject of in, price increases, as a result of intellectual property. So that's one important effect.

There's a second important effect and that is, that the search or the creation of intellectual property rights, or monopoly privileges, triggers a craving, a carnivorous hunger, for more monopoly privileges. The media owner Rupert Murdoch once quipped a monopoly in business is a terrible thing unless you can get your hands on one. And multinationals spend their time trying to get their hands on more and more intellectual property. Because once something falls into the public domain, whether it's a book or whether it's a drug - imagine for example that you're the owner of patented medicine that is earning you \$4 billion a year, once that goes off patent we know that the generic industry will make that available much more cheaply to the public. And often generic companies will improve the quality the particular medicine because the methods of manufacture will have improved over the period that the patent has been held. So in all sorts of ways not only do we get cheaper products when they enter the public domain but we get better quality products, so that's very important.

The trouble is that this search for more and more monopoly privileges compromises our political system. Politicians all lobbied, they are sweetened, they are influenced in all sorts of ways, and unfortunately, I think, they cease to understand who they should be representing. Instead of representing consumers and citizens they listen too much to the big end of town.

A third social effect, a third consequence of intellectual property rights, is what I call gaming behaviour. The rights are really created for one specific thing as I've tried to indicate, invention, innovation but actually when we study intellectual property rights we find that they are used for purposes that they were never, ever intended for. And the best example that I can give to you of this is the way that they are used in the taxation system. I said that monopoly privileges, intellectual property were a form of private taxation. They were used by companies to raise taxes - a tax on innovation. But companies today also use intellectual property rights to avoid public taxes. So they gain private taxes from these property systems and they use these systems to avoid paying public taxes. So they benefit twice - once in terms of collecting private taxes a second time in avoiding public wants.

So what's an example? There is a phenomenon in international tax known as transfer pricing. In a nutshell, accountants, tax lawyers find ways for companies to shift their profits from a high tax jurisdiction, let's say it's the United States or Australia, to a low

tax jurisdictions, let's say this is Ireland or a country in the Caribbean somewhere, for example. Now of course the idea behind transfer pricing is to minimise tax. Now there are rules about this, but these rules have turned out to be ineffectual in the case of intellectual property rights. JP Morgan did a study a few years ago in which they pointed out that almost all multinational companies have centralised their intellectual property holdings for taxation purposes in various tax jurisdictions that are very favourable to those companies. So a US Senate committee, er, the subcommittee of independent investigations, which is looking into transfer pricing problems, has come up with some detailed case studies of transfer pricing by Microsoft.

Now in one of these case studies, Microsoft shifted something like \$21 billion from the US to Puerto Rico, for a saving of about \$4.5 billion dollars in tax. In other words, if it hadn't shifted that amount of money from its headquarters to Porto Rico, to a subsidiary, it would have had to pay four and a half billion dollars more. In another case study that the Senate committee came up with, Microsoft shifted, er a large amount of money, erm, to a small office in Dublin er, and it saved or rather it only paid 7.3% tax as a result of that particular transfer pricing game, and that worked out to about \$11 million per employee in that Dublin in that Dublin office and I think you'll agree that's an astonishing case of individual labour productivity. So these are the sorts of games that multinationals are playing using intellectual property.

Now the reason they use intellectual property is that these things, as I said right at the beginning of my talk are intangibles, they in a sense only exist on paper. You can't really touch the algorithm, it just exists as a piece of paper. It's referred to in another piece of paper, a contract. There is a licensing agreement, there's an assignment, and through a paper trail, or really a paper labyrinth since it is actually extremely difficult for tax offices to follow these things, these things, these intellect property rights are transferred in ways that save companies taxes. Now the OECD does have some rules about intra-company transfers but these rules are very difficult to apply to intangible property. For example, if you're dealing with tangible property, say it's a car or truck, erm, or it's some manufacturing plant, if you're transferring these things, the OECD rule says that you should, or principle says, that you should apply the principle of independent valuation, of arm's-length transfer. So that the transfer takes place at the proper market price. Now it's a relatively easy matter to obtain evaluation for some manufacturing equipment, but it's much harder to value intangible property. So that is one of the problems. Now as you can imagine the issues in this area are very technical.

But the basic point that I'm making is that these rights, these monopoly privileges, were never designed for the purposes of tax evasion games. They were designed to benefit the public. Instead, they are being used to degrade the fiscal base of states. And that means you and I as citizens as consumers are paying again twice. We pay more for these intellectual property products, we pay more for patent medicines through our taxes or out of our pocket and at the same time our governments do not collect enough taxes because the very same monopoly privileges are being used in private games that rob the public purse. So a pharmaceutical company is able to say to a government, this patented medicine, which we invested so much money in, you have to pay the full price if your citizens are to have it. And at the same time, they engage in games that'll mean that that government does not collect the revenue it should. And that has huge distributive effects for all of us.

Another important set of social consequences of globalising monopoly privileges really goes right to the heart of the state's ability to regulate. Regulate on matters such as health, for example. Once you create monopoly privileges and you disguise them as property rights, it makes the task of states when they regulate in the interests of public health, or in other areas that affect consumers, that much harder.

Part 3. Australia vs Big Tobacco

And so I'd like to finish this talk by saying a little bit about Australia's experience with its plain packaging, tobacco packaging legislation.

This is legislation that Australia enacted in 2011 and its purpose was to discourage the use of tobacco products. Now the evidence that we have is that if you sell cigarettes in plain packaging, without any of the diagrams or photos or colours, or pictures that normally appear on a cigarette pack, this makes the cigarette pack less desirable, less of a symbol. It impedes communication between the company and the cigarette smoker. And so there are some very good public health reasons obviously for why we should do all we can to discourage smoking. Now in the case of the plain packaging legislation, one of the obvious effects of the legislation is that it essentially strips all of the symbols and insignia and so on that a cigarette company would normally put on a packet. So in some sense it impedes the function of the brand. Now multinational companies are, of course, very interested in the psychological effects of brands. Indeed, they are very interested in neural affects, the things that are happening in our brains, when we see brands. In some sense, one could say that they are very interested in branding our brains, because they want lifelong allegiance from us and what better way to do that than to brand their brains as it were.

Now the cigarette companies really understood the significance of brands much earlier than most multinational companies. And that's because they were an international industry much earlier than most multinational companies. And so they really understood the significance of trademarks to their business model in ways that other companies did not. And so from quite an early point in their evolution they became proponents of strong trademark protection.

And what I'd like to do in the next few minutes is to show you a sequence of events that illustrates how important trademarks are to the cigarette industry and what the consequences are of globalising trademark standards for the states and how much more difficult it becomes to regulate in the name of public health. In order to explain the reason that Australia is now being, or is involved in trade litigation, with Honduras, the Dominican Republic and the Ukraine, I need to backtrack a little bit. You will remember earlier that I talked about the TRIPS Agreement, the agreement that globalised various standards of intellectual property protection. Every country that is a member of TRIPS or rather a member of the WTO, must comply with TRIPS obligations. TRIPS is a pillar of the World Trade Organisation. Now amongst its provisions are provisions relating to trademark protection. So there are standards there, in the agreement, that countries must respect when it comes to trademark protection.

Now one of the arguments against Australia's plain packaging legislation is that it breaches article 20 of TRIPS. Now without going into all the details, essentially what that article says is that a trademark should not be encumbered in some special way. The

basic idea is to try and give the trademark owner the unencumbered use of a trademark. So you can see immediately that when a country introduces plain packaging legislation, it specifies, for example, that the cigarette packet must be in a particular dull colour, one dull colour, it specifies the height of the font in which the brand name appears, you can see immediately the tension between a standard that says that a trademark should not be encumbered and plain packaging legislation. You can see the tension there. So it's not surprising that Honduras, the Dominican Republic, countries which have some tobacco industry are essentially pursuing Australia's plain packaging legislation in the WTO. That's not surprising.

But one might ask, how did Article 20 get into TRIPS? I mean why did states agree to this particular standard, because we've known about the problems of smoking for a long time, and we've known for a long time that plain packaging would help. So why on earth did this particular standard, why, how did article 20 make it into the TRIPS agreement. Well, you'll remember that I said earlier that a business coalition was primarily responsible for TRIPS. Well in the area of trademarks, the cigarette companies, the tobacco companies really understood, as I've said, the power of brands very early on and so they were very active in this area of trademark protection. They could basically see what was coming.

Now when it came to the TRIPS negotiations it wasn't just that these big businesses provided the government with the views, they did much more than that. They actually drafted an entire version of the TRIPS agreement from woe to go. They drafted sections on copyright protection, they drafted sections on patent law and they drafted sections on trademark law. So they actually presented, in 1988, the governments of all the world that were participating in these negotiations with some draft text. Now you might say that was jolly helpful but actually many governments now that are living with the consequences of the TRIPS Agreement do wonder whether it was so jolly helpful. Because of course the companies drafted these agreements with their particular business models in mind. So the pharmaceutical companies when they came to drafting patent standards were looking at the Indian companies, the generic companies, and they had ideas about rules that would suit Pfizer and other US pharmaceutical companies. And of course the tobacco industry had very strong views about the protection of trademarks.

The basic point I'm trying to make here is that when you put the pen in the hands of a multinational company, it's likely to draft standards that suit it and don't necessarily coincide with the public benefit. So now I'm going to show you a sequence of events that illustrate just how farsighted companies were when it came to trademark protection and how difficult it is now for states to regulate companies in the area of public health. And the kinds of difficulties that Australia faces when it comes to defending its plain packaging legislation.

This history that I'm talking about begins in 1964, when the US Surgeon General in a very famous and incredibly important report warned about the increased risks of smoking. And what was remarkable when you think about it is that in the following year 1965 the US Congress passed legislation requiring health warnings to appear on cigarette packets.

Now what's interesting about this is that in the 1970s, quite soon afterwards tobacco companies began to see that, erm, their business model as, because it relied on

trademarks could be threatened by this kind of legislation. And so most other things they began to get interested in the international dimensions of trademark protection.

And they became involved in the GATT and talks about improving protection trademarks. The principal that I've talked about, the principle of the unjustified encumbrance of the trademark, which the company's tabled in 1988, that didn't come until much later. So let's think about what happened here, and health activists, it should be said, really didn't get involved in plain packaging policy proposals till the 1980s. So one very important thing to emerge from this is that the tobacco companies in a sense were ahead of the game. They understood the dangers for their business model of the kind of legislation that the US Congress had passed in 1965 and they also saw the possibilities, the possibilities for them through strengthening trademark protection by becoming involved in the GATT. At this time very few consumer advocates, very few health advocates, would really have understood the implications of the GATT for public health regulation. Almost no one would have understood this. But the cigarette companies, the other multinationals that were involved in TRIPS were very farsighted. They understood the game, they were setting up the rules of the game well in advance.

Now, of course, this all takes time and it isn't until 1995 that the TRIPS Agreement along with all the other agreements that make up the World Trade Organisation came into operation. So there's a long history, sequence of steps, that have to be gone, but when in 1995, the TRIPS agreement came into operation, these strong standards of trademark protection were there and more importantly there were there globally. Every country that joins the World Trade Organisation has to comply with these particular standards. So Australia now passes its Tobacco plain packaging act in 2011 and almost immediately countries that had connections with the tobacco industry begin to request consultations in the WTO.

Now, of course, the tobacco industry launched litigation in Australia and the Australian High Court essentially upheld the validity of this legislation. But the problems first Australia don't end there. Australia now has to defend this legislation in the WTO. And this will be a tough and I suspect long contest.

Part 4 – Lessons from Australia's tobacco experience

So I think we can summarise the lessons of this particular case study by making three basic points.

- The first is that it's very, very dangerous to globalise monopoly privileges through the trade regime. I think I've said enough to show just how dangerous it is.
- Secondly, this case study shows us that, even in areas like trademarks, which you might say are consumer friendly or benign in some way, that increasing trademark protection does not necessarily benefit the public. And in particular because trademarks are so closely linked to brands and brands affect us as individuals, our identity, even our neural processes, that we need to understand these connections and think hard about the kinds of protections we offer trademark owners. And,
- the third lesson here is that once you do globalise monopoly privileges, you have to live with the consequences.

Now Australia is a rich state, it can hire lawyers to fight this particular action. But imagine if you're a poor country how are you going to essentially combat these global monopoly privileges, where are you going to get the resources from, what capacities do you have to contest these things. And, of course, the point is that poor countries were never really part of this agreement. In the 1980s, when TRIPS was negotiated, do we really think that African negotiators were at the table when an agreement that would affect HIV AIDS medicines was being signed, were they at table? No they weren't. This was a rich country agreement for rich countries. And I think everybody in rich countries really has some sort of responsibility now to look again at the effects of intellectual property rights, to rethink some of these things, and begin thinking about how we can change the rules so that they really, genuinely, serve the public.