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Diverging Rationales in Intellectual Property Law

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ABSTRACT-SUMMARY

In this work I analyze how, in a very subtle way and concomitantly in different areas (patents, copyrights and trademarks) the traditional *progressive* rationale of intellectual property is being eroded and replaced by a *reactionary* rationale.

Most economists agree, in general terms, to the tangible property theory (construct of Coase, Demsetz and Alchiam, inter alia) but when we turn to analyze intangible good's market regulation those same economists seldom agree. Intellectual Property is a problematic area, one plausible explanation is because of the relative novelty of the discipline. Intellectual Property also sparks fiery global debates (usually of the North-South type) since it's has become the legal superstructure of the so-called knowledge economy.

Analyzing the intrinsic logic of the traditional rationale of Intellectual Property we discover a progressive, pro-market and pro-innovation field of law. Intellectual property rights are legal monopolies and as such are anomalies in market economies, justifiable if only if strict conditions are met. In every case, the remedy should be less painful than the illness. One situation that can justify a monopolistic regulatory solution are public goods (namely, a market failure) which are affected by non-rivalry and non-excludability properties. Useful knowledge (works, innovations, and so on) are public goods, hence the regulator grant intellectual property rights to spur the creation and dissemination of such knowledge. Arguably, to foster and not to stifle creative destruction.

Recent developments in copyright law (e.g. the US Copyright Term Extension Act of 1998), patents (e.g. the extension of patentable subject matter to include biological and genetic material), trademarks (e.g. the extension of the scope of the *ius excludendi* to non-confusionary uses in cases of dilution and initial interest confusion) and geographical indications (attempts to extend TRIPS wine and spirits standards of protection to foodstuffs) are examples of the change in rationale.

Such changes are aimed more at conserving the status quo than to foster innovation, creativity and progress. They look at the past, not to the future. Some authors even parallel the new purpose of intellectual property law to that of ancient *sumptuariae leges*. In short, contemporaneous intellectual property law is becoming reactionary. The progressive mechanisms are still there, but most of the new developments go in the opposite direction. Moreover, in many cases intellectual property law clash with the new digital paradigm and Internet-based business models. This raises serious welfarist concerns.

In this paper I do not intend to make a value-judgment. My sole aim is to signal the new direction intellectual property law is taking, to understand it causes and, with caveats, to try to predict its future developments.

In doing so I will proceed as follows: Firstly, I analyze the economic theories in support of – and against – intellectual property law. Secondly, I review what law-and-economics

scholars have said about the topic. Subsequently, I go deep into the recent changes of law and policy within the different branches of intellectual property law (copyrights, patents and trademarks). Finally, I attempt to explain the reasons behind the change and forecast the future direction of the discipline. Public Choice theory takes a preponderant role, as is best suited, in the view of this author, to explain the recent paradigm shift than other more purist economic theories.

Additionally, given the geographical and idiosyncratic character of ALACDE, if possible, I'd try to add a Latin American dimension to the discussion. In my opinion, intellectual property regimes are not "one-size-fits-all", local characteristics should be taken into account to serve topical public policy goals, whether a given country is a producer or consumer of knowledge-intensive goods, its competitive advantages and bargaining power in international fora, among other variables.

Finally, I'd like to mention that this paper is an adaptation of a broader and more ambitious PhD dissertation, in progress.