

Consumer Related Aspects of Intellectual Property

Md. Lokman Hussain¹

Moral basis of intellectual property (IP) is explained mainly through liberty, personality, utilitarian welfare maximization and social plan theories. Further, World Trade Organization (WTO) mechanism for protection of the JPs under the TRIPs Agreement also provided some flexibilities and granted extensions for transitional period in order to implement intellectual property. This article argues that the justificatory theories of JP and the flexibilities and extensions in TRIPs Agreement reflect that consumer rights play a justificatory role for intellectual property. It then illustrates this relationship through patent, copyright, trademark and competition law. The article supports the view that ensuring a balance between these two regimes is necessary for better IP legislation and more reasoned judgments in IP related cases.

Introduction

The speedy growth of techno-civilization or what may be called the era of science, with 'digital revolution and other technological breakthroughs of the past several decades'² has given rise to a large amount of 'intellectual properties' in their different forms. Thus, intellectual property has globally become a matter of economic, social, cultural and political importance and interest.³ Globalization of market and products is shaped by the economic institution like WTO that formulated Agreement on Trade Related Aspects of Intellectual Property Rights (hereafter TRIPs Agreement) for protection of the IPRs.⁴ Consequently, intellectual property norms are globally being translated into more strict legal texts.⁵

¹ The author is a Lecturer at the Department of Law and Human Rights, University of Asia Pacific. He completed his LLB and LLM from University of Dhaka. He can be reached at lokmanbinnur@uap-bd.edu. The author acknowledges the valuable comments and suggestions from reviewers, teachers, and colleagues at various stages of this article.

² Peter S. Menell and Suzanne Scotchmer, "Intellectual Property Law," in *Handbook of Law and Economics*, ed. A.M. Polinsky and S. Shavell (Amsterdam: Elsevier, North Holland, 2007). < <https://go.gol/11mCS> >

³ Ibid.

⁴ *Agreement on Trade-related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, 33 ILM 1197 (TRIPs Agreement).

⁵ It is strict in comparison to the earlier mechanism of protection under customary international law, where the states would enjoy the independence in ensuring intellectual property rights. See: Frederick M Abbott,

On the other hand, consumer rights are an emerging regime as a parental policy of the states.⁶ Unlike IPs there is no globally strict consumer rights agreement.⁷ Consumer protection is based on the market principles or more specifically competition process of market economy. And in recent decades they are increasingly being regulated and ensured by special consumer protection legislations. The modern free market is based on competition where the concern for consumer plays an important role, thus, providing an inherent concern for the consumer interest.⁸ However, the increasing monopoly of markets by many giant companies and asymmetric competition and syndication or other practices may undermine this inherent concern for consumer rights.

Though it has been seen that the consumer rights developed as a movement to address the vulnerabilities of a consumer because of the market imbalance, it is also related to the theoretical and moral foundation of intellectual property. There are at least four such moral justifications - utilitarian welfare maximization (also known as economic defense), liberty, personhood or personality theory, and social plan theory for achieving the goals of just and attractive society.⁹ Analysis of the justificatory theories of the intellectual property affirms that intellectual property is justified because, among others, it ensures benefits for the consumers. Consumer right works as a justification of intellectual property in the narratives of these theories. Besides this, TRIPs Agreement included some flexibilities and granted extensions to the transition period for the implementation of the Agreement. These measures have their roots in consideration for consumer rights and they are tools for ensuring the balance between intellectual property and consumer rights.

Analysis of specific intellectual properties shows that they are related with consumer rights. The former influences, ensures, and perhaps affects the latter. Even a special branch of legislation -competition law- has emerged for, among other things, ensuring a balance

"TRIPs and Human Rights: Preliminary Reflections," in *International Trade and Human Rights: Foundations and Conceptual Issues*, eds. F. Abbott, C. Breining-Kaufmann & T. Cottier (University of Michigan Press, 2006), 145. Available at: <https://ssrn.com/abstract=1922823>

⁶ UNCTAD, *United Nations Guidelines for Consumer Protection* (New York and Geneva: United Nations, 2016), UNCTAD/DJTC/CPLP/MISC/2016/1. Hereafter the UN Guidelines.

⁷ Ibid.

⁸ See for example: Cyd Essock., "The Consumer's Role: The reins of the free-market economy lie in the hands of the consumer," (1978). Available at the website of Foundation for Economic Education (FEE), <https://fee.org/articles/the-consumers-role/>. Accessed on 30 September 2018.

⁹ William Fisher, "Theories of Intellectual Property," in *New Essays in the Legal and Political Theory of Property*, ed. Stephen R Munzer (Cambridge University Press, 2001), 168-199.

between consumer rights and intellectual property regimes. Without competition law, protection of the interests of many producers and consumers may not be possible. That will ultimately weaken the basic norm of 'free market'. Besides guarding the basic norm of the free market, this particular branch of legislation also plays a balancing role between intellectual property and consumer rights. This article also analyzes the judgment of the Indian Supreme Court in *Novartis AG vs Union of India and Others*¹⁰ to find out that how the court ensures the balance between consumer rights and intellectual property. Moreover, although the article does not elaborate the rationales, analyzing the relationship of intellectual property and consumer rights at a justificatory level is important for enacting better legislation. Further, taking consumer rights into consideration is necessary to find a more informed interpretation of laws for intellectual property protection and overall, for ensuring a balance between these two regimes.

Development of Intellectual Property

Intellectual property, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields.¹¹ The legal rights include, literary, artistic or scientific works, performances of performing artists, phonograms and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks, commercial names and designations which result from intellectual activity in the industrial, scientific, literary or artistic fields.¹² Interestingly this list also includes protection against unfair competition as it is necessary for ensuring the protection of innovations. Moreover, this particular issue is a necessary tool for ensuring a balance between intellectual property and consumer rights. It is also pertinent to summarize that, in its core, intellectual property rights are actually rights of exploitation in information.¹³

¹⁰ *Novartis AG v. Union of India & Others*, MIPR 2013 (1) 0313 (SC). (Also referred as Glivec case or Gleevec case.)

¹¹ WIPO, *WIPO Intellectual Property Handbook: Policy, law and Use* (Geneva: World Intellectual Property Organization, 2004). It is to be noted that, instead of defining intellectual properties, their categories are summarized for the purpose of this article. And the definition is avoided because the several justificatory theories have been analyzed instead of endorsing and relying on any particular one.

¹² Article 2(viii), *The Convention Establishing the World Intellectual Property Organization (WIPO)*, concluded in Stockholm on July 14, 1967 and came into force on April 26, 1970 and amended on September 28, 1979, Document no. TRT/CONVENTION/002, http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283854.

¹³ Peter Drahos, "The Universality of Intellectual Property Rights: Origins and Development," in *WIPO/UNHR Intellectual Property and Human Rights: A Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights*, (Geneva: World Intellectual Property Organization, 1999), 13-41. Publication No. 762(E). Available at: http://www.wipo.int/edocs/pubdocs/en/intproperty/762/wipo_pub_762.pdf.

However, the rights which are considered as intellectual property rights are not new.¹⁴ From ancient times through modern ages there are examples of IP in popular Western account of history. The existing international mechanism can be said to have its historical beginning with the rise of the Law of Nations. Intellectual property cut across the borders by the means of international instruments like the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) of 1883 and 1886 respectively.¹⁵

The administering authorities of these two conventions, Paris Union and Berne Union, were integrated to form the United International Bureaux for the Protection of Intellectual Property in 1893 under the supervisory authority of the Swiss Government.¹⁶ The "Convention Establishing the World Intellectual Property Organization (WIPO)" was signed at Stockholm in 1967 and entered into force in 1970.¹⁷ This Convention removes the supervisory authority of the Swiss Government and grants the WIPO the status same as other intergovernmental organization. Through an agreement on December 17, 1974, WIPO became a specialized agency of United Nations (UN) system of organizations.¹⁸ IPRs were placed in the GATT as strategy for forum shifting for strict enforcement of IPRs, converting IPRs as trade-related intellectual property. In 1994 as a package of WTO agreements the Agreement on Trade Related Aspects of Intellectual Rights (henceforth referred as the Agreement, TRIPS) was concluded.¹⁹

¹⁴ Above n. 13

¹⁵ The former was to start protection for their own industrial property covering technology based subject areas like patents, designs, trademarks, and so on. See: M Towhidul Islam, "Problems and Politics of IPRS Protection from WIPO to WTO: The Case Study of Bangladesh," *Sri Lanka Journal of International Law* 21, no. 1 (2009): 1-59.

¹⁶ The organization is best known in its French acronym BIRPI. In 1960 BIRPI was moved from Berne to Geneva. See: WIPO, *Background Reading Material on Intellectual Property* (Geneva: World Intellectual Property Organization, 1988), 37.

¹⁷ WIPO, *Handbook*.

¹⁸ *Ibid*, 4-5.

¹⁹ Some of the WTO member countries pressurized and insisted on forum shifting for IPRs from WIPO to WTO. The reasons are- first, the WIPO as UN special agency is sympathetic to developing and least developed countries; second, the role of the WIPO becomes highly crucial because of the increased volume of trade and reliance significantly on intellectual goods; and third, the lack of effective enforcement mechanisms under the WIPO Unions makes worries particularly for developed. The debate between developed and developing countries brought conclusion reasoned by the power in the side of developed North. See: Islam, "Problems and Politics of IPRS," above n. 15.

However, some academics argue that the Agreement was not made by taking into account the serious concerns of developing countries. Concerns were two fold: first, the proposed protection of TRIPs would make them pay high costs for accessing modern technology and second, the protection of their socio-economic conditions would be in peril if the protection of TRIPs was prioritized.²⁰ The first of this is directly identified as the consumer right. This concern about developing countries does not negate the consumer right aspect in general. The second concern is indirectly affecting the consumers of these countries. Prioritizing TRIPs will cause the countries to lose their comparative advantage of reverse engineering; TRIPs' stringency blocks the free trade principle, traditional knowledge and biodiversity. They all have a cumulative effect on 'sustainable consumption' and other consumer rights. Thus, the twofold concerns are based actually on the concern over consumer interests, in particular, of developing countries.

Development of Consumer Rights

The term 'consumer' was an economic concept. The legal connotations of the term are of a recent emergence.²¹ Literally the word consumer means a person who uses goods or services. 'Consumer' refers to a natural person, regardless of nationality, acting primarily for personal, family or household purposes.²² Historical existence of consumer protection dates back to ancient documents like Code of Hammurabi and Twelve tables. Roman 'Lex Julia de Annona' statute of 50 B.C. is recorded to be the earliest instrument in the world protecting consumer protection.²³ Writers also find the root of consumer property rights in religious scriptures like the Bible and the Quran.²⁴

²⁰ M Rafiqul Islam, *International Trade Law of the WTO* (Oxford University Press, 2006), 382-383; Islam, "Problems and Politics of IPRS," above n. 15. It is true that the debate between developed and developing countries is of great importance for understanding the jurisprudence of TRIPs in particular and modern intellectual property law in general. But the issue should also be addressed from the perspective of consumer rights.

²¹ Mizanur Rahman, *Consumer Protection Law and the Swedish Approach* (Dhaka: Prudential Publications, 1994), 4.

²² Article 3, *the UN Guidelines*, UNCTAD/DITC/CPLP/MJSC/2016/1, above n. 6.

²³ This Roman statute provided consumer protection for Roman Citizens besides providing commercial operations with legal protection. See: "The Truth Behind the History of Consumer Protection Laws," <http://consumer.laws.com/consumer-protection-laws>.

²⁴ See for example, Ahamuduzzaman, Md. Lutfor Rahman, and Nahida Nazmus Zannat, "A Contextual Analysis of the Consumer Rights Protection Laws with Practical Approach: Bangladesh Perspectives," *ASA University Review* 3, no. 2 (2009): 187-212.

The 20th century's development of consumer protection laws in the United Kingdom and other parts of Europe and development of antitrust and antimonopoly laws in the United States of America came to protect consumers through principles like caveat emptor,²⁵ duty of care, and through preventing unethical pricing, the exploitation of the commercial market, and violation of constitutionality.²⁶ Further, the US President John F. Kennedy's speech of March 15, 1962 is remarkable for setting the agenda of UN consumer rights guidelines. It provides four basic rights of a consumer, - the right to safety, the right to be informed, the right to choose and the right to be heard.²⁷

Specifically, in the last half of the 20th century, Acts of Parliament emerged ensuring consumer protection.²⁸ One important issue here is that the rise of consumer protection law in Europe has been motivated by understanding that the 'law has always been a tool for social engineering devoted to the ultimate wellbeing of the individual'.²⁹ Consumer protection in state level has varied historical existence but it is an emerging regime in international level. The United Nations Conference on Trade and Development (UNCTAD) in United Nations and Consumer International and other international organizations are the prominent advocates of consumer rights. The justification for consumer rights is based on basic human rights such as the right to life, food and health.

In the international level, workable categories and consensus have been established. The United Nations Guidelines for Consumer Protection (UNGCP) was adopted by consensus resolution of the United Nations General Assembly on 9 April 1985. It has been expanded and modified in 1999 and recently in 2015.³⁰ Following are the eleven 'legitimate needs' of consumers

²⁵ This is a leading doctrine regulating the relationship of consumer and seller. This Latin maxim means "let the buyer beware." See, for example: Walton H. Hamilton, "The Ancient Maxim Caveat Emptor," *Yale Law Journal* 40, no. 8 (1931): 1133.

²⁶ Rahman, "Consumer Protection," above n. 21.

²⁷ John F. Kennedy, "Special Message to the Congress on Protecting the Consumer Interest," March 15, 1962. Available online at the American Presidency Project, by Gerhard Peters and John T. Woolley, <http://www.presidency.ucsb.edu/ws/?nid=9108>.

²⁸ Rahman, *Consumer Protection Law*. Chapter 2 of the book contains several examples from around the world focusing mainly on Europe.

²⁹ *Ibid.* p. 34.

³⁰ The Guidelines were adopted by UN General Assembly in 1985 (resolution 39/248 of 16 April 1985). Later it was modified by the Economic and Social Council in 1999 (resolution 1999/7 of 26 July 1999). Last revised and adopted by the UN General Assembly in 2015 (resolution 70/186 of 22 December 2015). UNCTAD, UNCTAD/DITC/CPLP/MISC/2016/1, above n. 6.

mentioned in the UN Guidelines:³¹ (a) Access by consumers to essential goods and services; (b) The protection of vulnerable and disadvantaged consumers; (c) The protection of consumers from hazards to their health and safety; (d) the promotion and protection of the economic interests of consumers; (e) Access by consumers to adequate information; (f) Consumer education; (g) Availability of effective consumer dispute resolution and redress; (h) Freedom to form consumer groups or organizations and to present their views in decision-making processes; (i) The promotion of sustainable consumption patterns; (j) Protection for consumers using electronic commerce at a level afforded in other forms of commerce; (k) The protection of consumer privacy and the global free flow of information."³² These guidelines are international reference point for making national consumer protection policies and enacting consumer protection laws.³³ It requires the states to 'take appropriate steps at the national or regional levels to implement these guidelines.'³⁴

Many of these rights are linked with intellectual property rights. For example, the right to fair price may be influenced by patent and copyright protection. Besides this, intellectual property and consumer rights are also deeply connected in theoretical narratives and in different provisions of international legal instrument. First, some of the theories of intellectual property are based on consumer rights in general. Second, the international protection mechanism of IP, TRIPs in particular, also provides flexibilities and exceptions that may help in ensuring a balance between the consumer rights and intellectual property rights. The reason for taking consumer rights into consideration is to make the IP regime more balanced and sustained. We will now look at some of the theoretical foundations of intellectual property to identify the roles of consumer rights in justifying intellectual property, in the following sections.

³¹ Ibid, article 5. Some words in the list are omitted.

³² Consumer International has simplified the consumer rights into the following terms: access, inclusivity, safety, protection of economic interests, information, education, redress, representation, sustainability, e-commerce rights, and privacy. See: Consumer International, *Consumer Protection: Why it Matters to You* (London: Consumer International, 2016). Available at: <https://www.consumersinternational.org/media/2049/un-consumer-protection-guidelines-english.pdf>

³³ Detail guidelines are provided mainly in part V of the Guidelines. The Guidelines also provides 'principles of good business practices for conducting online and offline commercial activities with consumers' (part IV of the Guidelines).

³⁴ Article 96, *the UN Guidelines*, UNCTAD/DITC/CPLP/MISC/2016/1.

Consumer Rights in Justificatory Theories of Intellectual Property

Theories of intellectual property

"[T]he laws and institutions we have are not features of the natural world like gravity, but are human creations, set up and sustained by human decisions."³⁵ In acting collectively and politically, our choices, for changing the situation we live in, are guided and evaluated by the justificatory theories.³⁶ Laws of intellectual property are also human creations, continued and exercised by deliberate human decisions. They are also guided by the following theories: welfare maximization (also known as economic defense), liberty theory, the personhood or personality theory, and social construction theory for achieving the goals of just and attractive society. Analysis of these theories shows that they are connected to another branch of legislation.

Conversational benefits of the theories of the intellectual property include improvement of interaction between the courts, lawmakers and administrative agencies.³⁷ Also, explicit reliance on any theory will improve the conversation between lawmakers, policymakers and people at large, the consumers.³⁸ It is argued here that theories of IP to some extent rely on the consumer rights. Recognizing this relation and making a balance between IP and consumer rights will make the legislations better.

The theories are actually the moral foundations of intellectual property rights. Thus, these rationales have been identified as the basis of Human Rights, leading to the conclusion that intellectual property rights are human rights.³⁹ For example, Article 27 of **UDHR** and Article 15 of **ICESCR** enlists the right of the creators as human right.⁴⁰ However, each of the broad

³⁵ Jeremy Waldron, "Property Law," in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis M. Patterson (Wiley-Blackwell, 2010), 14. Here he differentiated between natural sciences and social sciences.

³⁶ Ibid.

³⁷ Fisher has provided a concise account of this theories while describing the benefits of these theories. See in Fisher, 'Theories, I' above n. 9.

³⁸ Ibid.

³⁹ For details of relation between intellectual property and human rights see: M Towhidul Islam, "Protection of Public Interests through a Human Rights Framework in the TRIPs Agreement: Realities and Challenges," *Journal of Intellectual Property Law & Practice* 4, no. 8 (2009): 573-582; Abbott, above n. 5; L. R. Helfer, "Human Rights and Intellectual Property: Conflict or Coexistence?" *Minnesota Intellectual Property Review* 5, no. 1 (2003): 47-61. Available at: <https://scholarship.law.umn.edu/milr/vol5/iss1/2>.

⁴⁰ Article 27(2) of *the Universal Declaration of Human Rights* proclaims: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

categories of these theories will now be analyzed to find how are they connected to consumer rights.

Liberty (Locke to Nozick)

According to this view the, individual has the moral right over his labor and merit. He should be compensated for the labor he has spent. When an individual mixes⁴¹ his labor with any property it creates his ownership over such property.⁴² According to this justification we are the self-owners.⁴³ Thus, the persons are generally the owners of the fruits of their labor, and the taking away of these fruits without their consent damages the person.⁴⁴ This argument is mainly based on the idea of John Locke. The idea is that 'a person who labors upon resources that are either un-owned or "held in common" has a natural property right to the fruits of his or her efforts, and that the state has a duty to respect and enforce that natural right.'⁴⁵ One of the conditions (provisos) in Locke's labor theory of property is that the appropriation of intellectual property is legitimate if 'there is enough and as good left for others.'⁴⁶ This has

Article 15 of ICESCR proposes an approach balancing the rights of the creators and the consumers as the authors moral right is preceded by the right of everyone "to enjoy the benefits of scientific progress and its applications." Regarding authors' rights it states that every author has the right "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." *International Covenant on Economic, Social and Cultural Rights* (ICESCR), adopted 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), p. 49, U.N. Doc. A/6316 (1966).

⁴¹ There are debates over what does 'mix' mean. Critically examining the Nozick's critique Robert P Merges has shown that 'mixing' means applying labors. Robert P Merges, *Justifying Intellectual Property* (Harvard University Press, 2011), 42-44.

⁴² John Locke, *Second Treatise of Government*, in the version by Jonathan Bennett presented at www.earlymoderntexts.com, Section 27 states that: "Though men as a whole own the earth and all inferior creatures, every man has a property in his own person; this is something that nobody else has any right to. The labour of his body and the work of his hands, we may say, are strictly his. So when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own; and in that way he makes it his property."

⁴³ Richard A. Epstein, "Possession as the Root of Title," *Georgia Law Review* 13, (1979): 1221, available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2235&context=journal_articles; Justin Hughes, "The Philosophy of Intellectual Property," *Georgetown Law Journal* 77, (1988): 287, available at: <https://cyber.harvard.edu/IPCoop/88hugh.html>. For critique of this theory, see: Herman T. Tavani, "Locke, Intellectual Property Rights, and the Information Commons," *Ethics and Information Technology* 7, (2005): 87-97, DOI 10.1007/s10676-005-4584-I; Peter Drahos, *A Philosophy of Intellectual Property* (Australia National University, eTEXT, 2016).

⁴⁴ M Towhidul Islam, "Protection of Public Interests through a Human Rights Framework in the TRIPs Agreement: Realities and Challenges," *Journal of Intellectual Property Law & Practice* 4, no. 8 (2009): 573-582.

⁴⁵ Fisher, "Theories," above n. 9.

⁴⁶ Locke, *Second Treatise*, above n. 42, Section 27 states that: "He has removed the item from the common state that nature has placed it in, and through this labour the item has had annexed to it something that excludes the

been interpreted by Robert Nozick as that acquisition of property through labor is legitimate if other persons do not suffer thereby any net harm.⁴⁷ Nozick explains that granting patent to an inventor 'does not deprive others of an object which would not exist if not for the inventor.'⁴⁸ Thus, protection of intellectual property helps the consumers, they are not hurt.⁴⁹ But consumers may be indirectly be deprived of some possible benefits from the subsequent inventors who invented the same independently as the subsequent inventors are not permitted to make and sell the same.⁵⁰ But the term limitation on patent helps the consumers to get benefit from the inventions of which patent has been expired, as anyone can use that knowledge to provide the similar solution at a low cost. It is evident that, intellectual property, according to this theory, is justified for ensuring that it does not cause any harm to the consumers. In other words, IPs are justified because they are beneficial and helpful for the consumers. However, it seems that it is presumed in this theory that all the creative works and inventions bring benefit to the people. But fruits of individual's labor and merit are rather help-neutral. Inventions are not categorically good or bad rather the benefit depends upon the use of the creation. The inventions may not be beneficial in themselves, as they are value-neutral and dependent on the use. At the same time the benefit should be measured against the cost that has been borne by the user. Moreover, a logical gap is apparent in this theory. As the theory suggests that protection of inventions is justified as they are beneficial. But benefit-neutrality of the inventions suggest that the inventions are to be protected 'if, not 'as', they are beneficial or helpful.

Personality theory (Kant)

According to Immanuel Kant our creations is part of our personality. The will of the individual is the basis of property. In Kantian analysis, personality of an individual is thrived through exercise of his will on any object. Thus, the creations of his mind are expressions of his personal will. The dignity and autonomy of an individual works as the moral foundation for the protection of creations of an individual. Other people, including the consumers and users of the creations, 'have a duty to respect claims over objects' and inventions or creations 'that

common right of other men: for this labour is unquestionably the property of the labourer, so no other man can have a right to anything the labour is joined to-at least where there is enough, and as good, left in common for others."

⁴⁷ Fisher, "Theories," above n. 9; Robert Nozick, *Anarchy, State and Utopia* (Blackwell, 1974, Reprint 1999).

⁴⁸ Nozick, *Anarchy*, 182.

⁴⁹ Fisher, "Theories," above n. 9.

⁵⁰ Nozick argued that independent and subsequent inventors' rights should be protected. Nozick, *Anarchy*, 182.

are bound up with the exercise of an individual's will.⁵¹ However, this exercise of autonomy over objects and abstract creations is not unrestricted. The rights over property 'must not be so broad that they interfere with the freedom of fellow citizens.'⁵² Kantian Universal Principle of Right (UPR) puts constraints over the intellectual rights.⁵³ Thus, the protection for consumer rights is necessarily present within the Kantian justification of intellectual property. Intellectual property should be protected to the extent that it does not violate the freedom of consumers. On the other hand, duties are owed by the consumers to the authors and inventors claiming intellectual property.⁵⁴

Utilitarian reward and welfare maximization (Bentham to Landes and Posner)

The utilitarian reward theory is also known as economic defense approach. Inventors or creators will not invent or create in the absence of incentives of compensation at its full social value.⁵⁵ So, reward prevents less-likeness of the inventors when it is given through intellectual property; intellectual property excludes others from using the inventions without compensating the inventor. This system of reward ensures the creation of socially valuable materials, the materials that the consumers value. According to Landes and Posner, one justification of trademark is that it reduces the consumers' search cost.⁵⁶ They also argue that 'trademarks can sometimes be socially harmful', causing harm to the consumers, and thus, trademarks 'should be (and usually are) protected when they are socially beneficial and not when they are, on balance, deleterious.'⁵⁷ In comparison with the liberty theory, this is more reasoned in its logic. Trademarks shall be protected 'if they are beneficial to the consumers, the society at large. Besides trademark, Landes and Posner have also illustrated the moral justification of copyright law. They argue that 'striking the correct balance between access' of the consumers to the products 'and incentives' to the authors 'is the central problem in copyright law.' For copyright to be justified it must 'maximize the benefits from creating

⁵¹ Robert P Merges, *Justifying Intellectual Property* (Harvard University Press, 2011), 72.

⁵² *Ibid*, 90.

⁵³ *Ibid*, 89 - 91.

⁵⁴ *Ibid*, 72.

⁵⁵ Islam, "Protection of Public Interests," above n. 39.

⁵⁶ William M Landes and Richard A Posner, "Trademark Law: An Economic Perspective," *Journal of Law and Economics* 30, (1987): 265.

⁵⁷ Fisher, "Theories," above n. 9.

additional works minus both the losses from limiting access and the costs of administering copyright protection.⁵⁸

Achieving the goals of just and attractive society

The latest and fourth theory for justifications of intellectual property is based on the 'proposition that property rights in general and intellectual property rights in particular can and should be shaped so as to help foster the achievement of a just and attractive culture.'⁵⁹ This theory envisions that 'in this world, all persons would enjoy both some degree of financial independence and considerable responsibility in shaping their local social and economic environments.' One of the proponents of this theory suggests that 'the copyright term should be shortened, thereby increasing the size of the "public domain" available for creative manipulation.'⁶⁰ Copyright owners' authority to control the preparation of "derivative works" should be reduced for the same reason. Finally, compulsory licensing⁶¹ systems are used to balance the interests of artists and "consumers" of their works.⁶²

Besides the above, 'consumer welfare' is a component of such a society. Fisher argues that while protecting intellectual property, the guideline for an attractive society 'urges us to select a combination of rules that will maximize consumer welfare by optimally balancing incentives for creativity with incentives for dissemination and use. That goal must, however, be tempered by other aspirations.'⁶³

Relationship between Consumer Rights and Laws of Competition, Patent, Trademark and Copyright

Competition law - a too/for balance between intellectual property and consumer rights

Competition is the basis of modern free market economy. As IP laws grant certain types of monopoly over the IP protected products, the monopolies may lead to anti-competitive situation. Effective competition law is necessary to ensure healthy competition in the

⁵⁸ William M Landes and Richard A. Posner, "An Economic Analysis of Copyright Law," *Journal of Legal Studies* 18, (1989): 325-33, 344-53.

⁵⁹ Fisher, "Theories," above n. 9.

⁶⁰ Neil Weinstock Netanel, "Copyright and a Democratic Civil Society," *The Yale Law Journal* 106, no. 2 (1996): 283-387.

⁶¹ Compulsory licensing is a flexibility in TRIPs.

⁶² Netanel, "Copyright."

⁶³ Fisher, "Theories," above n. 9.

market.⁶⁴ There are principles which are to reduce the imbalance that may arise out of protection and monopolistic rights over intellectual properties, for example, patents and copyrights have a fixed period only. Further, once a product is patented, the formula or knowledge become published which help others to develop further and innovate. However, competition law protects some of the very fundamental and categorical rights of the consumers like being free from deception, domination and control of any producer. It also provides the measures to control the price and to prevent the anti-competitive practice which avail the consumers a fair price environment. For example, the object of the Competition Act 2012 of Bangladesh provides that it was enacted for encouraging, securing and sustaining healthy competition environment in business and trade sectors through preventing, controlling and removing anti-competitive acts like collusion, oligopoly, monopoly, combination and domination.⁶⁵ While the intellectual property systems allow limited ways of monopolies, competition law may reduce the possibility of adverse effects of exclusive rights in IP upon consumer interests. Thus, competition law works as a tool for the balance between intellectual property and consumer rights.⁶⁶

Trademark protects consumer rights⁶⁷

Consumers can confidently buy products or services because of reliable international trademark protection and enforcement mechanisms to discourage counterfeiting and piracy.⁶⁸ Thus, trademarks protect consumers from low standard products. It has already been mentioned that trademark reduces the search cost of the consumers.⁶⁹ Perhaps, among the several intellectual properties trademark is justified solely on the basis of consumer interest.⁷⁰ But there are challenges as well. An owner's exclusive rights of the trademark may lead to price

⁶⁴ UNCTAD has mentioned several other benefits including poverty reduction. See for example, UNCTAD, "Why competition and consumer protection matter," <https://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx>.

⁶⁵ Preamble of the Competition Act, 2012 of Bangladesh.

⁶⁶ Article 10bis of the *Paris Convention for the Protection of Industrial Property* of March 20, 1883 provides rule for prevention of unfair competition.

⁶⁷ There are arguments that trademark actually falls within the domain of consumer rights, not intellectual property. But this article treats trademark as a domain of intellectual property as in TRIPs Agreement.

⁶⁸ WIPO, *What is Intellectual Property* (WIPO Publication No. 450(E), ISBN 978-92-805-1555-0), 4. Available at: http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf

⁶⁹ Landes and Posner, "Trademark Law," above n. 56.

⁷⁰ Michael Grynberg, "More than IP: Trademark Among the Consumer Information Laws," *William & Mary Law Review* 55, no. 4 (2014): 1429. Available at SSRN: <https://ssrn.com/abstract=2446667>.

hike and monopoly.⁷¹ Besides protection of the trademark, effective regulation to control the price is also equally important for the protection of consumers.

Patent and consumer rights - progress and a moral dilemma

One of the compelling reasons for the protection of intellectual property is that 'the progress and well-being of humanity rest on its capacity to create and invent.'⁷² WIPO reminds us that 'without the rewards provided by the patent system, researchers and inventors would have little incentive to continue producing better and more efficient products for consumers.'⁷³ Consumers are also victims of contaminated and black market medicines.⁷⁴ If a patent is made compulsory, it can protect consumers from such contaminated medicines and experimental medicines. There are also concerns for consumers of third world countries under strict international patent system.⁷⁵ High cost of patented products may restrict the access to many lifesaving medicines. This challenge has been well addressed by extending the period for application of TRIPs in medicine. WTO TRIPs regime has provided extension and flexibilities for medicine. This has ensured the access to medicine for many consumers in the world.⁷⁶

Another moral dilemma may arise over the benefit of intellectual property for the consumers. It cannot be gainsaid that IP mechanisms inspire innovations but innovations may not always bring the collective good for a large amount of people. For example, new models of a product contain different and new intellectual property. The very 'design' of a new model of

⁷¹ Ibid, 1434. One of the benefits of the trademark is that as the consumers 'rely on trademarks, sellers can invest in quality without fear that competitors will copy their trademarks to undercut them with a similarly labeled product.' This benefit 'is often framed as a benefit afforded by trademark law to sellers.'

⁷² WIPO Publication No. 450(E), above n. 68, 3.

⁷³ Ibid, 4.

⁷⁴ See for example, "Substandard and Falsified Medical Products," World Health Organization, January 3 I, 20 I 8, <http://www.who.int/news-room/fact-sheets/detail/substandard-and-falsified-medical-products>. Zaggocare, "Dangers of Black Market Medications: More Common Than you Think," <https://zaggocare.org/dangers-of-black-markets-medications-more-common-than-you-think/>.

⁷⁵ For example, it is also argued that the products that are made in the developing countries not directly address the needs of the people of third world. For example, the R&D in West may invest a lot of money in cosmetics and such type of products while the third world countries struggle with basic human necessities. The merit of this concern lies in the universality of intellectual property right. As we have seen that intellectual property is also a universal human right and moral justification of the intellectual property suggests that IP is protected for it contributes to the benefit and progress of mankind, economic imbalances between the countries create doubt over the promise of progress that intellectual property gives.

⁷⁶ More discussion on this has been provided later in this article.

the same product is a new intellectual property.⁷⁷ But the user of a current or earlier model could not both be loyal to the earlier model and be a consumer of the latest models of the product. Here lies the moral dilemma that if the consumers remain loyal to the old model and try to build a sustainable consumption habit then the new models of a product will remain unsold. The market will be affected. Innovations will be discouraged and slowed down affecting the IP system. As a result, in order to keep the flow of market and money and to inspire the innovation and IP system, people should buy. People should consume even if they do not need to. Though the authorities claim that 'intellectual property system helps strike a balance between the interests of innovators and the public interest,'⁷⁸ there is a moral dilemma which lies between intellectual property and consumer rights. An illustrated example is the Glivec case in India, which will be discussed in the following section.

Copyright and consumer rights in digital era

Harsh copyright laws can have an adverse effect on least developed countries. In Bangladesh the Copyright Act, 2000 contains certain exceptions⁷⁹ for ensuring that knowledge does not become too expensive to reach. If these exception clauses are properly implemented, no impediment may occur in the intellectual development of its population. Moreover, one strong criticism of copyright is actually caused by the change in the fundamental understanding of economy about the resource. In traditional economy, copy cost (cost of expression) of the intellectual product was high. And thus, restriction of copying was possible through economic principle based on scarcity of resources. But because of the development of technology, the cost of copy is now reduced to zero.⁸⁰ For example, some scholars argue that dissemination cost of information on digital media approaches to zero as the number of users grow larger. Thus, charging users a fee for appropriating any digital information is unfair as information should be free (or nearly free) so as to reflect its dissemination costs.⁸¹ Even with two clear drawbacks⁸² in the argument, it can be argued that

⁷⁷ Notably there is a novelty requirement for patent. While new models may sufficiently feel the criteria of 'novelty,' they may not substantially change the level of basic utility the product is used for. Besides, 'industrial designs' are intellectual property in themselves.

⁷⁸ WIPO Publication No. 450(E), above n. 68, 3.

⁷⁹ Section 72, the Copyright Act, 2000 of Bangladesh.

⁸⁰ For extensive narratives of the idea see: Jeremy Rifkin, *The Zero Marginal Cost Society: the Internet of Things, the Collaborative Commons, and the Eclipse of Capitalism* (New York: Palgrave Macmillan, 2014); Mark A. Lemley, "IP in a World Without Scarcity" *NYU Law Review* 90, (2015): 460.

⁸¹ W Coy, "On Sharing Intellectual Properties in Global Communities," in *Localizing the Internet: Ethics Issues in Intercultural Perspective*, eds. J. Fruhbauer, R. Capurro, and T. Hassmanninger (Munich: Fink Verlag, 2007). It was originally presented as a lecture at the 2004 International ICIE Symposium, Karlsruhe,

at least in a large amount of digital information, the argument may fairly be applied. Mark Lamely has suggested rethinking a post scarcity economic principle and IP law which is of a long tenn paradigm shift to be taken place.⁸³ But at present, strategies of discriminatory IP regime for different types of content in the digital form may help to ensure a balance between the intellectual property and consumer protection.

Consumer rights in the TRIPs Agreement

The relevance of consumer rights with regard to some specific intellectual properties has already been discussed in the previous part of this article. Interactions between intellectual property and consumer interests includes that 'patent law is not a very effective tool for protecting the health and safety of consumers.'⁸⁴ While copyright law may restrict the private use of works, it should maintain appropriate 'balance between the interests of authors, entrepreneurs and users.'⁸⁵ It has already been mentioned that trademarks are regarded as a consumer protection law.⁸⁶ TRIPs Agreement under WTO is the international mechanism for implementing the intellectual properties. Different provisions and measures under TRIPs regime suggest that consumer interests are taken into consideration in TRIPs Agreement. The objectives of, flexibilities in, and extension of transition period of TRIPs Agreement are linked with the concern for consumer interests.

Principles and Objectives of the TRIPs Agreement recognizes the consumer rights

The TRIPs Agreement recognizes the intellectual property rights are private rights.⁸⁷ Patents, trademarks, copyrights, geographical indications, industrial designs, integrated circuits, trade

Germany. Referred in Adam Moore, and Ken Himma, "Intellectual Property," in *the Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2014). Available at: <http://plato.stanford.edu/archives/win2014/entries/intellectual-property/>.

⁸² Both of them relate to the 'fair price.' One is ignoring the free consent based transactions and role of free consent in setting up price, and the other is ignoring the fact of high 'production cost' in addition to 'dissemination cost.' Digital contents requiring big budgets will be difficult.

⁸³ Mark A. Lemley, "IP in a World Without Scarcity" *NYU Law Review* 90, (2015): 460.

⁸⁴ Ansgar Ohly, "TRIPs and Consumer Protection," in *TRIPs plus 20: From Trade Rules to Market Principles*, ed. Hanns Ullrich et al. (Springer, 2016). DOI: 10.1007/978-3-662-48107-3_22. He analyzes 'whether the world is better off with intellectual property rights, one must ask whether the intellectual property right produces a favorable trade-off between the short-term cost to consumers through higher prices and long-term benefit to consumers through increased innovation.'

⁸⁵ Ibid. Though he argues that 'regarding copyright exceptions as consumer protection law would distort rather than clarify the policy balance,' it should be reminded that the exceptions in copyright law help in ensuring balance and thus they are connected to consumer interests as a balancing and external aid.

⁸⁶ Ibid. See also: Michael Grynberg, "More than IP," above n. 70.

⁸⁷ Preamble, *TRIPs Agreement*.

secrets, plant varieties and undisclosed information are the different kinds of intellectual property. The Agreement provides exclusive rights over them. Writers identified the TRIPs as one-size-fits-all⁸⁸ or, more precisely, super-size-fits all.⁸⁹ Considerable differences among societies and unequal economic conditions of the people of different countries make it difficult for TRIPs to be fit for all. To resolve this problem the TRIPs agreement has introduced some flexibilities. Besides compulsory licensing,⁹⁰ parallel imports,⁹¹ Bolar exception,⁹² choosing between patent and sui generis, the agreement provides two articles, Articles 7 and 8 of TRIPs, in interpreting and implementing the agreement.

Article 7 provides the objectives of the TRIPs Agreement. It states that: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to balance of rights and obligations." This article requires that social and economic welfare should be considered while implementing protection mechanisms for intellectual property.

Article 8 of the agreement Contains a pronouncement of the principles of TRIPs. Article 8(1) lays out the public interest principle in the TRIPs Agreement. The provision allows the member states to adopt TRIPs consistent measures 'to protect public health and nutrition, and to promote the public interest.' Article 8(2) extends this scope by allowing them to adopt measures 'to prevent the abuse of intellectual property rights by rights holders.' Both the provisions enable the member states to take measures for ensuring balance between trade related aspects of intellectual property with its consumer related aspects.

After a detailed discussion of this two articles, *Peter K. Yu* has identified multiple roles that Articles 7 and 8 can play in facilitating a more flexible interpretation and implementation of the TRIPs Agreement. It focuses on the different ways in which the provisions can be put into

⁸⁸ P. Drahos and R. Mayne, "Preface," in *Global Intellectual Property Rights Knowledge: Access and Development*, eds. P. Drahos and R. Mayne (Palgrave Macmillan, 2002).

⁸⁹ Peter K Yu, "The Objectives and Principles of the TRIPs Agreement," *Houston Law Review*, (2009).

⁹⁰ A compulsory license provides that the owner of a patent or copyright licenses the use of their rights against payment either set by law or determined through some form of arbitration.

⁹¹ A parallel import is a non-counterfeit product imported from another country without the permission of the intellectual property owner.

⁹² In patent law, the research exemption or safe harbor exemption is an exemption to the rights conferred by patents, which is especially relevant to drugs. This exemption is known as the Bolar provision or Roche-Bolar provision, named after the case *Roche Products v. Bolar Pharmaceutical*.

effective use.⁹³ Some of these roles are important as regards consumer interests. For example, the role that it works as a 'shield' against aggressive expansion of intellectual property rights and demands for TRIPs-plus protections. Like a shield, the articles defend the right of the member states to use the flexibilities provided in the agreement. Developing countries, having a large number of consumers of IP protected goods, are using these flexibilities provided in the agreement. For example, the Glivec case in India shows that the Indian definition and the court's assertion of the definition of "patentability" has successfully utilized the flexibility given in the agreement through the means of national legislation. Another such role is that it works as a 'bridge' to connect the TRIPs regime with intellectual property and other related international regimes.⁹⁴ Thus, these provisions (article 7 and 8 of the Agreement) work as a link between consumer protections and intellectual property rights. Besides these, the contentious role of the articles, as a 'sword' to challenge the lack of balance in the international intellectual property system, may also be relevant for making the balance between consumer interests and intellectual property rights. But because of the TRIPs consistency requirement, it is not clear whether it will really put a check on the imbalance between IP and Consumer rights. However, it has been affirmed that, 'consumer interest considerations have rightly entered the agenda of intellectual property law and policy. Articles 7 and 8 of the TRIPs Agreement provide a basis for taking them into account when interpreting the Agreement.'⁹⁵

TRIPs Agreements'Exceptions and Extensions are influenced by consumer interests

It has been referred that TRIPs Agreement has inserted several flexibilities in the Agreement considering the interests of the users (consumers) of least developed countries. For example, the TRIPs Agreement allows compulsory licensing. Compulsory licensing is a mechanism that includes 'granting of a license by a government to use a patent without the patent-holder's permission.'⁹⁶ By this mechanism a government may 'grant licenses for patent use in situations where the patent-holder is either not using the patent within the country or is not using it adequately.'⁹⁷ Compulsory licensing is a very convenient instrument for the

⁹³ Yu, "The Objectives," above n. 89.

⁹⁴ Ibid.

⁹⁵ Ohly, above n. 84.

⁹⁶ Sara M Ford, "Compulsory Licensing Provisions Under the TRIPs Agreement: Balancing Pills and Patents," *American University International Law Review* 15, no. 4 (2000): 941-974.

⁹⁷ Ibid.

protection of consumer rights in developing, more specifically in least developed countries as it provides states the scope to fulfill their domestic needs producing a particular product.

Compulsory licensing has been ensured in intellectual property earlier under Article 5 of the Paris Convention and under Article 31 of TRIPs Agreement. Article 31 provides the provisions to be respected during 'use of the subject matter of a patent without the authorization of the right holder, including its use by the government or third parties authorized by the government.'⁹⁸ The member states in Doha Declaration⁹⁹ reaffirm, in paragraph 4, 'the right of WTO members to use, to the full, the provisions in the TRIPs Agreement, which provide flexibility for' public health.¹⁰⁰ They recognize, in paragraph 5, that '[e]ach member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted'.¹⁰¹ Members also affirm that each member is free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.¹⁰²

TRIPs extensions on Public Health Ground- balancing the interests of the consumers of medicine

Initially Least Developed Countries (LDCs) were not under any obligation to implement TRIPs Agreement for 10 years from 1st January 1996. Later, this transition period was extended by TRIPs Council for 7.5 years that ended in 1 July 2013.¹⁰³ The transition period has further been extended up to 1 July 2021, or earlier, upon graduation from the LDC category by a decision IP/C/64 of the TRIPs Council!¹⁰⁴

Besides this general extension of transition period, there has been specific extension of patenting pharmaceuticals on the ground of public health. In other words, the concern of consumers of pharmaceuticals has influenced the implementation policy of TRIPs

⁹⁸ Article 31, TRIPs Agreement.

⁹⁹ *Doha Declaration on the TRIPs Agreement and Public Health*, adopted 14 November 2001, WTO Doc No WT/MJN(01)/DEC/2, 20 November 2001.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² See for discussion: Md Rizwanul Islam, "Intellectual Property Rights and Developing of Least Developed Countries: Strategies for Policy Makers," *Dhaka University Law Journal* 19, no. 1 (2008): 115 - 129.

¹⁰³ TRIPs Council on the Extension of the Transitional Period, <https://www.un.org/ldcportal/TRIPs-agreement-transitional-period-for-implementing-the-agreement-article-66-1/>

¹⁰⁴ Council for TRIPs, Extension of the Transition Period under Article 66.1 of the TRIPs Agreement for Least-Developed Country Members Decision of 11 June 2013, No. IP/C/64.

Agreement, pharmaceutical patents in particular. Following the Doha Declaration of 2001,¹⁰⁵ the TRIPs Council decided that, "[l]east-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply sections 5 and 7 of Part II of the TRIPs Agreement or to enforce rights provided for under these Sections until 1 January 2016."¹⁰⁶ This transition period has further been extended in Council's decision No. IP/C/73¹⁰⁷ allowing the developing countries the flexibility 'until 1 January 2033, or until such a date on which they cease to be a least developed country Member, whichever date is earlier.'¹⁰⁸ This extension reflects, among others, the necessity to create a balance between strict implementation of intellectual property and consumer rights. One interesting and illuminating example of ensuring such a balance in intellectual property jurisprudence has been found in Indian Supreme Court's decision in Glivec case. The next part of this article discusses that case.

It can be argued that, it is the 'role of social policy' of industrialized countries, 'not of consumer protection law to ensure access to food and medicine to those who cannot afford to pay market prices.'¹⁰⁹ But TRIPs Council has extended the transition period taking the public health into consideration. Interestingly, no one would disregard the fact that consumer protection is some sort of social policy implemented through legislation. This is also supported by one of the theories of intellectual property known as Social Plan theory. Going one step further into the broad background does not actually negate the relation between consumer protection law and intellectual property rather affirms it. For example, TRIPs extension and flexibility in implementation of patent in pharmaceutical sector has been influenced by the fact of high price of patented medicine. This significant aspect ensures the principle of 'promotion and protection of consumers' economic interests.' Moreover the emergence of consumer rights protection shows that the 'imbalances and failures which arise in the course of the development of an economic system based on the free play of market

¹⁰⁵ *Doha Declaration*, above n. 99.

¹⁰⁶ Council for TRIPs, Extension of the Transition Period under Article 66.1 of the TRIPs Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products, Decision of the Council for TRIPs of 27 June 2002, Document No. IP/C/25.

¹⁰⁷ Council for TRIPs, Extension of the Transition Period Under Article 66.1 of the TRIPs Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products Decision of the Council for TRIPs of 6 November 2015, Document No. IP/C/73.

¹⁰⁸ *Ibid.*

¹⁰⁹ Ohly, above n. 84.

the same product is a new intellectual property.⁷⁷ But the user of a current or earlier model could not both be loyal to the earlier model and be a consumer of the latest models of the product. Here lies the moral dilemma that if the consumers remain loyal to the old model and try to build a sustainable consumption habit then the new models of a product will remain unsold. The market will be affected. Innovations will be discouraged and slowed down affecting the IP system. As a result, in order to keep the flow of market and money and to inspire the innovation and IP system, people should buy. People should consume even if they do not need to. Though the authorities claim that 'intellectual property system helps strike a balance between the interests of innovators and the public interest,'⁷⁸ there is a moral dilemma which lies between intellectual property and consumer rights. An illustrated example is the Glivec case in India, which will be discussed in the following section.

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⁸¹ W Coy, "On Sharing Intellectual Properties in Global Communities," in *Localizing the Internet: Ethics Issues in Intercultural Perspective*, eds. J. Fruhbauer, R. Capurro, and T. Hassmanninger (Munich: Fink Verlag, 2007). It was originally presented as a lecture at the 2004 International ICIE Symposium, Karlsruhe,

The interpretation of Section 3(d)¹¹⁴ of the Indian Patent Act, 1970 was the central point of judgment. Besides the reasoning regarding the technical analysis of inventive step,¹¹⁵ the court reasoned to make a balance between public health (consumers of medicines) and commercial interests (IP owners). The judgment provides a through reference to the parliamentary debates over the inclusion of section 3(d) in particular and broad issues of social justice and public health that worked as rationale and the policy objectives of India in reforming patent legislation since the middle of the last century.¹¹⁶ The court also referred to the Article 3 of the Doha Declaration¹¹⁷ where the member states recognize "the concerns about [intellectual property's] effects on prices." The court also referred to the provision of section 83 (g) of the India's Patent Act 1970 that provides that "patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public." Here we should recall that the justificatory theories of intellectual property are based on the benefit and progress of the humanity. Consideration of broad issues like social justice and public health in protection of intellectual property has its root in the justificatory theories that have been discussed at the beginning of this article. The broad issues of public health and social justice can be translated into specific consumer rights like access to necessary goods and services and protection of economic interest and right to fair price.

¹¹⁴ Section 3(d) has been inserted in the list of 'what are not inventions within the meaning of the Act' by the 2005's Amendment of India's Patent Act of 1970. The clause reads as follows: "[T]he mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant." The provision has further been explained for more clarification. "For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy." Responding the claims and controversy round section 3(d), Correa CM, has clarified that 'Section 3(d) is not discriminatory under the terms of Article 27.1 of TRJPs Agreement. See for details: Carlos M. Correa, "Is Section 3(d) Consistent with TRJPs?" *Economic & Political Weekly* 48, no. 32 (2013): 49-52.

¹¹⁵ For example, the following article has focused on the technical side. Prashant Reddy Thikkavarapu, "The Indian Supreme Court's judgment in the case of Glivec® -the Uncertain Future of Pharmaceutical Patents in India" *Pharmaceutical Patent Analyst* 3, no. 2 (2014): 117-119. Here he referred to concern about and appreciation of section 3(d) from USA, Brazil and South Africa. The writer, analyzing on basis of narrow technical aspect of innovative step in pharmaceutical patent, opined that the court's interpretation is narrow, but he has not referred to the issue of broad public health and consumer needs as social justice perspective to understand the balance between these two regimes.

¹¹⁶ For example, paragraphs 79 through 86 provide the parliamentary debates over the purpose of the amendment of Indian Patents Act 1970.

¹¹⁷ *Doha Declaration*, above n. 99.

In this case the court considered the issue of access to medicine to large number of people, including that of India, who rely on generic drugs from India.¹¹⁸ Besides the fact that generic drugs help ensure access to medicine, price was also a separate and important consumer right issue that has been addressed in this case. It was a matter of concern in the parliamentary debate that under the 'exclusive marketing right' granted by the patent office, Novartis fixed an 'excessively high price' for Glivec.¹¹⁹ The price for the Glivec was \$2,600 per patient per month, while the generic versions of Glivec were available in India for under \$200 per patient per month.¹²⁰ Selling price of imatinib by Novartis caused a 'considerable discomfort' to the scientist who was behind the invention of imatinib. 'Pharmaceutical companies,' he asserts, 'should achieve a return on their investments. But this does not mean the abuse of these exclusive rights by excessive prices and seeking patents over minor changes to extend monopoly prices.'¹²¹ The court also "expressed its bewilderment over the price of the drug."¹²² In response, Novartis stressed on the fact that they provided the drug free of cost to the needy people under a charitable program. Interestingly the company could not satisfy the court regarding why the company could not stop the charitable program and reduce the unusually high price of the drug and maintain the total revenue of the company at the same level. This reflects that not only the economic interest of the consumer of the said drug are undermined by the approach of the alleged IP owner in the pricing of the drug but also the right to access by economically weaker consumers is threatened.

Though the consumer right was not an issue in the case, it has played a role under the broader issues of public health and social justice. Section 3(d) of the Indian Patents Act 1970 reaffirms the vital distinction between the concepts of invention and patentability and the judgment has maintained that this 'distinction is the heart of the Patents Act.'¹²³ It can be

¹¹⁸ See for example, *Novartis AG v. Union of India*, above n. 10, ¶4.

¹¹⁹ *Ibid.*, ¶82.

¹²⁰ "Timeline of Key Events in Novartis's Attack on the Pharmacy of the Developing World," The MSF Access Campaign, February 12, 2012, <https://www.msfaaccess.org/content/timeline-key-events-novartiss-attack-pharmacy-developing-world>. (The Access Campaign is part of Medecins Sans Frontieres (MSF), an international, independent, medical humanitarian organisation. It won Nobel Peace Prize in 1991. Its headquarter is in Geneva, Switzerland.

¹²¹ Brian Druker, "Don't abuse patents: scientists," *Live Mint*, August 15, 2007, <https://www.livemint.com/Opinion/26rbSkGiTxNYKobb0568kL/Don8217t-abuse-patents-scientists.html>. He also adds that this type of practice 'goes against the spirit of the patent system.' And the inventions in medicine become possible because of 'vital investments made by the public sector over decades that make the discovery of these medicines possible'.

¹²² *Novartis AG v. Union of India*, above n. 10, at footnote no. 21.

¹²³ *Novartis AG v. Union of India*, above n. 10, ¶ 102.

argued that this heart should remain healthy to address the imbalance that may emerge out of strict implementation of intellectual property between intellectual property and consumer rights. Taking consideration of the social justice and consumer protection into account, the court has ensured a balance between pharmaceutical patent and consumers' access to medicine through using the flexibility in the TRIPs Agreement. It has rightly been observed that the Glivec case has set 'an important precedent for access to medicines by putting the pharmaceutical industry on the reach of patent law.'¹²⁴

Conclusion

Though it may seem that intellectual property and consumer rights are not related with each other in any important way but an in-depth look to the issue shows that they are so related. Further, investigation into justifications of the theories of intellectual property shows us that the very moral foundations of intellectual property are in many respects linked with consumer rights. Locke's proviso of no harm in labor and merit theory, Kant's Universal Principle of Right, utilitarian argument in case of trademark and copyright, and social plan theory refer to and ensure consumer rights in theoretical foundation of intellectual property. The idea of progress and welfare of mankind has a role in theories of intellectual property that may guide the laws and judgments to ensure a balance between intellectual property and consumer rights.

On the other hand, the concern about the impact of TRIPs Agreement on consumer rights¹²⁵ has later been addressed by compromises as it incorporated the flexibilities, for example - compulsory license, and made extensions to the transition period of implementation. The transition period for implementation of TRIPs Agreement has been extended till 2021 while the extension of transition period for implementation of patent protection has been extended to 2033 on the ground of public health. These flexibilities and extensions in TRIPs are the compromises within WTO mechanism for the protection of intellectual property. The compromises are in one hand, between the political and economic interests of developed and

¹²⁴ Ravinder Gable and Jillian Clare Kohler, "To patent or not to patent? the case of Novartis' cancer drug Glivec in India," *Globalization and Health* 10, no. 3 (2014), <https://doi.org/10.1186/1744-8603-10-3>.

¹²⁵ For example, Robert N Mayer has stated that: "the intellectual property provisions of the Uruguay Round may turn out to be more damaging to consumer interests than the provisions that allow consumer protection policies to be challenged as technical barriers to trade." Robert N Mayer, "Protectionism, Intellectual Property, and Consumer Protection: Was the Uruguay Round Good for Consumers?" *Journal of Consumer Policy* 21, (1998): 195-215.

developing countries in respect of ensuring social justice while the compromises are reflections of taking consumer interests into the moral justifications of intellectual property.

Considering some specific intellectual properties, it has been found that the two regimes of intellectual property and consumer rights are closely linked with each other. They mutually influence and promote each other. Implementation of one demands consideration of the other. Thus, consumer rights should be taken into consideration while implementing and interpreting intellectual property laws.

The Indian Supreme Court's judgment in *Novartis AG vs Union of India & Others*, has shown that it involves a legislation that uses the flexibility in TRIPs and the judiciary has ensured the balance between the interest of the consumers and the intellectual property rights.