

Abstract

Justifying 'Patents on Life' – Valuations of Practices in Court Cases and Patent Offices

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The relation between inequalities and the patent system has been examined on different levels. Mostly critical economic and legal scholars (e.g., Boldrin & Levine 2008, 2013; Lemley 2009) suggest that macroeconomic aspects of the patent systems including, for example, monopolization and economic concentration of firms producing indispensable products (like drugs and seeds), have stratifying effects in different societal domains. Increasing market power of the west through monopolization of knowledge can – on a global or macroeconomic level – lead to increasing inequalities between the west and the south as well as between big and small market actors (big pharma vs. start up companies). For individuals, side effects of the patent system like high drug prices can increase social inequalities through insufficient access to important products.

Other critical research and reports of NGOs focus on the patentability of important products in the first place and thus, shedding light on the question: how do core actors justify the (im)possibility to patent crucial “products” leading to a monopolization of the same? Discussions surrounding patents on life nicely illustrate how borders about patentability of inventions get increasingly blurred over time and how the drawing up of frontiers is subject to negotiation processes of actors involved with different access to financial, cultural, social resources (e.g., big pharma vs. smallholder farmers).

Thus, what we find are firstly controversial debates about effects of patents and secondly that uncertainty about patents is prevalent in today's knowledge based industries. New technologies and scientific breakthroughs in molecular biology transform the fields itself and practices in regard to patent law. What can be legally protected under which circumstances remains uncertain and is shaped by negotiations within institutions such as courts and patent offices that transfer uncertainty on field to a legal level.

Empirically, I study landmark events to illustrate how institutional decisions in biotechnology have affected patent related practices. More specifically, I do so by drawing on decisions

from the German Federal Supreme Court in the late 60s and 70s (on the patentability of animal breeding methods and microorganisms), the popular court decision in the USA ‘Diamond v. Chakrabarty’, and USPTO¹ and EPO² announcements on the patentability of multicellular organisms and DNA in the 80s and 90s with the latter to be continued in the 21st century. The analysis allows to identify different types of patent-related uncertainty in the specific settings, to retrace actors’ justifications and valuations surrounding ‘patents on life’, and to show how perceptions shift over time.

While literature on Intellectual Property (IP) heavily relies on insights of legal studies (e.g., Lemley et al. 2009), I offer a theoretical framework that emphasizes the social construction and historical shift of IP-related uncertainties that are shaped by actors’ justifications (e.g., Boltanski & Thévenot 2006) and valuations (e.g., Lamont 2012).

In this paper, I first reveal based on legal and economic literature the relation between societal inequalities and the patent system on different levels in order to draw links to the track and to reveal its political relevance. Based on that, I argue that sites where inequalities are shaped are manifold and that stages of the legal sphere such as courts and other intergovernmental (e.g., EPO) and governmental institutions (e.g., courts) with its actors have to be closely observed to understand how law and legal practice is formed. Methodologically, I study based on a qualitative research design, publicly available landmark cases and decisions to show how critical patent practices shifted over time at first place.

Selected Sources

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¹ United States Patent and Trademark Office

² European Patent Office