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## Avinash Kumar



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

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# **TITLE- INTELLECTUAL PROPERTY** **FUNDAMENTALISM: DEVELOPED VIS A** **VIS DEVELOPING COUNTRIES**

AUTHORED BY - DR. SUKRITI YAGYASEN,

Assistant Professor of Law,

St Joseph's College of Law, Bengaluru, Karnataka, India.

## **Abstract**

### **Intellectual Property Fundamentalism: Developed vis a vis Developing Countries**

"Intellectual Property Fundamentalism" refers to a strict adherence to intellectual property (IP) laws and regulations, often without consideration for the broader societal implications, particularly in the context of developing countries. In this paper further clarification about this concept of IP fundamentalism will be discussed.

Developed countries, which often have robust IP protection frameworks, advocate for strict enforcement of IP laws to protect the rights of creators, innovators, and companies. They argue that strong IP protection fosters innovation and economic growth by incentivizing investment in research and development. Developed countries that are the major producers and exporters of copyright and trade mark protected goods and services have much to gain from them. Therefore, much is lost financially by multinational corporations and citizens of these countries as a result of rampant counterfeiting and piracy in developing countries. This situation is further aggravated by lax IPR protection regimes in developing countries that fail to enforce harsher sanctions such as criminal procedures. Thoroughly unsatisfied with this situation, businesses that lose profits by lax IPR enforcement have continued to demand governments of developed countries to address this issue promptly. Since certain governments are structured in ways that allow interests of such businesses headquartered within their jurisdiction (or even sometimes outside them) to convert rapidly to national trade policies and negotiating strategies that align closely to these interests, the pressure imposed by these governments on developing countries for change has been irresistible. This paper tries to understand that how does it creates a favourable environment to demand strict IPR enforcement, lobbying groups based in developed countries have utilised heavy propaganda campaigns extolling the virtues of intellectual

property protection and the dangers of tolerating counterfeiting and piracy, claiming that they are immoral, unfair and that revenue generated from them fund has created a potentially dangerous IPR enforcement paradigm, which has attempted to demonise countries with lax IPR enforcement mechanisms. Some commentators have referred to this line of action as intellectual property fundamentalism. This paper will analyse this concept and how it is beneficial or detrimental for developing countries.

*Keywords- Developed countries, IP protection frameworks, Counterfeiting and piracy, Multinational corporations, Trade policies, Negotiation strategies.*

### **Intellectual Property Fundamentalism: Developed *vis a vis* Developing Countries**

"Intellectual Property Fundamentalism" refers to a strict adherence to intellectual property (IP) laws and regulations, often without consideration for the broader societal implications, particularly in the context of developing countries.

Developed countries, which often have robust IP protection frameworks, advocate for strict enforcement of IP laws to protect the rights of creators, innovators, and companies. They argue that strong IP protection fosters innovation and economic growth by incentivizing investment in research and development.

However, this approach can sometimes be detrimental to developing countries. Here's why:

1. **Access to essential goods:** Strict IP enforcement can limit access to essential goods, such as medicines, for people in developing countries. Pharmaceutical patents, for example, can keep drug prices artificially high, making life-saving medications unaffordable for many.
2. **Technological development:** Developing countries often need access to technology and knowledge to advance their own development goals. Strict IP regimes can restrict access to these technologies, hindering technological progress in these regions.
3. **Cultural expression:** IP laws can also limit the ability of people in developing countries to express their culture and heritage freely. For example, indigenous knowledge and traditional cultural expressions may be appropriated and patented by entities from developed countries, depriving the original creators of their cultural heritage.
4. **Innovation and entrepreneurship:** Excessive IP protection can stifle innovation and entrepreneurship in developing countries by creating barriers to entry for small

businesses and innovators who may not have the resources to navigate complex legal frameworks or pay for expensive licenses and patents.

In response to these challenges, there have been calls<sup>1</sup> for more balanced and flexible approaches to IP protection, particularly in the context of developing countries. This might include measures such as compulsory licensing for essential medicines, exemptions for educational and research purposes, and support for open access initiatives that promote the sharing of knowledge and technology.

Ultimately, the goal should be to strike a balance between protecting the rights of creators and innovators and ensuring that intellectual property laws serve the broader interests of society, including promoting access to essential goods, fostering innovation, and preserving cultural heritage.

Developed countries that are the major producers and exporters of copyright and trade mark protected goods and services have much to gain from them. Therefore, much is lost financially by multinational corporations and citizens of these countries as a result of rampant counterfeiting and piracy in developing countries. This situation is further aggravated by lax IPR protection regimes in developing countries that fail to enforce harsher sanctions such as criminal procedures. Thoroughly unsatisfied with this situation, businesses that lose profits by lax IPR enforcement have continued to demand governments of developed countries to address this issue promptly. Since certain governments are structured in ways that allow interests of such businesses headquartered within their jurisdiction (or even sometimes outside them) to convert rapidly to national trade policies and negotiating strategies that align closely to these interests, the pressure imposed by these governments on developing countries for change has been irresistible.<sup>2</sup> To create a favourable environment to demand strict IPR enforcement, lobbying groups based in developed countries have utilised heavy propaganda campaigns extolling the virtues of intellectual property protection and the dangers of tolerating counterfeiting and piracy, claiming that they are immoral, unfair and that revenue generated

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<sup>1</sup> Severe pressure has been exerted on developing countries to adopt strict IPR protection regimes that are similar or even stronger to the regimes practiced in developed countries by way of Free Trade Agreements (FTAs) and multilateral agreements like the ACTA.

<sup>2</sup> Dutfield, G, 'To copy is to steal: TRIPS, (un)free trade agreements and the new intellectual property fundamentalism', available at: [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2006\\_1/dutfield/dutfield.pdf](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2006_1/dutfield/dutfield.pdf), accessed on 27/03/2020.

from them fund has created a potentially dangerous IPR enforcement paradigm, which has attempted to demonise countries with lax IPR enforcement mechanisms. Some commentators have referred to this line of action as intellectual property fundamentalism.<sup>3</sup>

## I. Rhetoric on IPR Enforcement

Notwithstanding the inordinate demands from business and pro-business interest groups in developed countries, enforcement of harsher sanctions against IPR violations has progressed very slowly in developing countries. After having attempted through many avenues to pressurise developing countries for compliance, lobbying groups seem not yet satisfied with the pace of progress. Therefore, to revitalise the drive for strict enforcement in their own countries and to make the non-complying governments blameworthy for their inaction, campaigners have attempted to create a new paradigm which deploys rhetoric to threaten governments and scaremonger consumers. The type of language used by promoters of this paradigm has gone to the extent of labelling non-enforcing governments as evil entities that support terrorism and non-enforcement of sanctions against IPR violations as conniving with theft and robbery. These campaigns have been predominantly launched by lobbying groups based in the USA, with the support of some government agencies like the United States Trade Representatives.

## II. Factors Hindering Criminal IPR Enforcement in Developing Countries

Promoting higher standards of IP enforcement has been the priority of developed countries in recent years through multilateral, regional and bilateral negotiations.<sup>4</sup> They have claimed that stronger IP protection encourages innovation and foreign direct investment that create new jobs and accelerate the rate of economic growth. According to this claim, one would have expected wealth to flow from rich countries to poor countries or equally either way. However, enforcement of higher standards of IP protection has made wealth flow from the poor to the rich. According to a World Bank publication in 2002, enforcement of the TRIPS standards for protection represents a yearly US\$ 20 billion plus transfer of wealth from technology importing nations, many of which are developing countries, to the technology exporters, few, if any, of which are developing countries.<sup>5</sup>

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<sup>3</sup> *Ibid.*

<sup>4</sup> X. Li, 'WCO SECURE: Lessons Learnt from the Abortion of the TRIPS-plus-plus IP Enforcement Initiative' (South Centre, December 2008) ix, available at: <http://www.iadb.org/intal/intalcdi/PE/2009/03830.pdf>, accessed on 12/03/2020

<sup>5</sup> World Bank, 'Global Economic Prospects and the Developing Countries 2002' quoted in, Dutfield.

In addition to the asymmetry in transfer of wealth created by IPR enforcement, developing countries encounter a number of concerns that impede the enforcement of strict IPR regimes. These concerns are capable of tilting the cost-benefit balance significantly towards cost, if weighed against the benefits of enforcement. These concerns include the lack of a strong physical infrastructure, lack of political will, inadequate resources, lack of technical assistance, social and cultural factors and minimal benefits from strict enforcement to local economies. Regarding criminal enforcement of IPR, although the level of influence and the gravity of these concerns vary from jurisdiction to jurisdiction, the operation of them can be seen in many developing states. In fact, these issues have, in some situations, compelled governments to relegate criminal IP legislation to statute books only or not legislate at all, regardless of continuous threats from developed countries of punitive measures such as embargos and export bans. Therefore, in ascertaining the underlying reasons for the insufficient enforcement of criminal IPR legislation in developing countries further analysis of the above-mentioned concerns is imperative. Such analysis will highlight the impact of these issues on criminal IPR enforcement and assist the determination of the justifiability of weaker enforcement measures in developing countries.

### *1.1. Social and Cultural Factors*

Attitudes towards intellectual property infringement vary across countries and cultures. These differences in attitudes are mainly because ‘cultures differ in terms of the entity to which they assign a right of ownership’ of intellectual property rights.<sup>6</sup> In much of the West, there is an acceptance of individualism and individual ownership, which is not found in some other parts of the world. For example, individual ownership may receive less prominence in the collectivist cultures in the East. The difference in the social unit in which ownership is vested in the West and the East derives from social and cultural factors which have moulded the respective societies. Social and cultural factors as well as historical and religious backgrounds of many developing countries in Asia differ noticeably to those of Western countries, and this is also true in the case of African and Latin American countries. For instance, Asia has been subjected to diverse religious influences (Islam, Buddhism, Taoism, Hinduism and Christianity) and social movements within single states and regionally, as well as the brunt of different colonial powers (Portuguese, Dutch, French, British and others).<sup>7</sup> As a result, the religious and social movements that are still respected and practised in

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<sup>6</sup> Justice L. Harms, ‘The Enforcement of Intellectual Property Rights by means of Criminal Sanctions: An Assessment’ (WIPO Advisory Committee on Enforcement, 2007) 9, available at: [http://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_4/wipo\\_ace\\_4\\_3.doc](http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_4/wipo_ace_4_3.doc), accessed on 10/01/2021

<sup>7</sup> Endeshaw, Assafa, ‘Intellectual Property Enforcement in Asia: A Reality Check’ (2005) 13 Int’l J.L. & Info. Tech 378.

these societies continue to influence social ideologies and the society's decision-making process. Therefore, differences in attitudes with the West should be expected in these societies in relation to many social aspects. Consequently, the approaches followed by these countries in relation to IP protection cannot be evaluated without considering the social and historical backgrounds of individual countries.

Intellectual property rights are aimed at ensuring personal gain, an idea stemming from private property rights, which are among the fundamental concepts upon which many Western states are built.<sup>8</sup> The Western concept of property stems from the philosophy of natural law and liberalism which tends towards individualism. It is concerned that an improper focus on the glory and well-being of the "community as a whole" will result primarily to the benefit of the few, the powerful and the well-off, at the expense of the many, the weak and the poor.<sup>9</sup> It is rooted in equality and, therefore, tends to exalt the individual whose choices should be curtailed only when they interfere with others' rights.<sup>10</sup> John Locke, writing at the end of the seventeenth century, is widely regarded as the central figure of classical liberalism. He described a state of nature in which all men are equal above all in their desire for self-preservation, which eventually gives way to a social conduct establishing civil society, with its limited purpose of protecting the rights of man.<sup>11</sup> He elaborates the man's right to property in this state of nature as follows:

Though the Earth and all inferior creatures be common to all Men, yet every man has a *property* in his own *Person*. This no Body has any Right to but himself. The labour of his Body and the Works of his Hands, we may say, are properly his. Whatsoever then he removes out of the State of Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by his *Labour* something annexed to it that excludes the common right of other Men.<sup>12</sup>

Therefore, Locke justifies the idea of private property in relation to the labour undergone by

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<sup>8</sup> Wei Shi, 'The Paradox of Confucian Determinism: Tracking the Root Cause of Intellectual Property Rights Problem in China' (2008) 7 J. Marshall Rev. Intell. Prop. L. 454 at 458.

<sup>9</sup> Christopher Wolfe, 'Natural Law and Liberalism: Can this Marriage be Saved?', available at: [www.isi.org/lectures/text/pdf/wolfe.pdf](http://www.isi.org/lectures/text/pdf/wolfe.pdf), accessed on 11/03/2020.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> John Locke, *Two Treatises of Government* (edited by Peter Laslett, Cambridge University Press, 1988) 287-288, also see John Locke, *Essays on the Law of Nature*, Edited by W. von Leyden, (Oxford at the Clarendon Press) 25-29.

man to create the same. He further states, “Labour put a distinction between them and common. That added something to them more than Nature, the common Mother of all, had done; and so, they became his private right.”<sup>13</sup> This liberal philosophy, with considerable variations, has been advanced by many philosophers in the United Kingdom, Continental Europe and in the United States during the seventeenth century onwards.<sup>14</sup> As such, the idea of private property and rights attached has its roots running down to the Western liberal philosophy. In contrast, in most Asian developing countries the influence of oriental religions has valued the idea of communal property, as opposed to private property. For example, in China, Confucian ethics, that is composed not of “individuals” per se, but of their interactions and interdependencies as a community, has placed a relatively low value on terms based on individuals and profit, while placing a high value on the concept of communal property.<sup>15</sup> Inventing a product or authoring a work of art is an accomplishment of the community, and is expected to be shared.<sup>16</sup>

Advancing, learning, and creating works are in the public domain, and are not considered objects privately owned by persons.<sup>17</sup> It is not that Confucianism, which has been there for over 2500 years, blatantly rejects the protection of individual success; rather it rewards individual successes on a different basis. In this regard, it emphasises on personal development, in contrast to personal gain. This has helped the creation of a culture in China in that the individual success is viewed as important primarily because of his or her contribution to society.<sup>18</sup> On this premise, in relation to the creation of intellectual property, the society would respect and place the creator at a high level of social standing for the contribution he or she made to the society by the creation, but not reward the creator financially.

Further, Confucianism has a strong emphasis on learning by copying applied to all aspects of

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<sup>13</sup> *Ibid*

<sup>14</sup> In the United Kingdom significant contributions were made subsequent to the Scottish enlightenment in the eighteenth century by David Hume, Thomas Reid and Adam Smith. In Continental Europe the writings of Voltaire and Immanuel Kant have played a key role in the development of liberalism. In the United States noticeable contributions have been made by Alexander Hamilton, James Madison and John Jay after the American Revolution.

<sup>15</sup> Wei Shi, ‘Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offence?’ (2006-2007) 32 N.C.J Int’l L. & Com. Reg. 9.

<sup>16</sup> Arthur Wineburg, ‘Jurisprudence in Asia: Enforcing Intellectual Property Rights’ 5 University of Baltimore Intellectual Property Law Journal 25.

<sup>17</sup> *Ibid*

<sup>18</sup> John Allison & Lianlian Lin, ‘The Evolution of Chinese Attitudes towards Property Rights Invention and Discovery’ (1999) 20 U. PA. J. Int’l Econ L. 742.

life in China.<sup>19</sup> For centuries, the copying of all kinds of works has been regarded as honourable and necessary. While Western cultures perceive copying as a form of inferior imitation, in China,<sup>20</sup> “such copying in effect bore witness to the quality of the work copied and to its creator’s degree of understanding and civility”.<sup>21</sup> However, it is true that the current levels of imitation have gone far beyond ‘learning by coping’ emphasised by Confucian ethics, where fake luxury products are mass-produced only for profit and not for any artistic admiration.

Nevertheless, it could be argued that the Chinese society may take further time than Western societies to deal aggressively with imitation markets, since copying per se was not something drastically wrong or considered with disdain in these communities.

Under the philosophy of Buddhism, which is the predominant religion in some Asian countries, the idea of accumulating personal wealth is not encouraged. Attachment to things is basically incompatible with Buddhism. Buddhists follow the path of moderate asceticism, including strict celibacy and repudiation of all personal property.<sup>22</sup> As a result, societies influence by Buddhism in the East may attach less importance to personal enrichment contrary to the Western approach.

Therefore, government may not prioritise the implementation of policies that seek strict enforcement of private property rights, like criminal IPR enforcement. In relation to the approach in Islam towards innovation and creation, a study conducted by the EU as to the attitudes of people in societies where Islam is the main religion it was found that: Although a different view (compared to Confucianism) prevails in societies where Islam is the major influence the effect is very much the same. This is that without God man is unable to create knowledge-a view that diminishes the role of the inventor.<sup>23</sup>

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<sup>19</sup> Kenneth Ho, ‘A Study into the Problem of Software Piracy in Hong Kong and China’ (Intellectual Property Department, The Government of the Hong Kong Special Administrative Region), available at: [http://www.ipd.gov.hk/eng/intellectual\\_property/study\\_aids/piracy\\_hk\\_china\\_copyrt/piracy\\_hk\\_china\\_c.htm#2.1](http://www.ipd.gov.hk/eng/intellectual_property/study_aids/piracy_hk_china_copyrt/piracy_hk_china_c.htm#2.1), accessed on 12/03/2020.

<sup>20</sup> *Ibid*

<sup>21</sup> *Ibid*

<sup>22</sup> Steven Cory, *The Spirit of Truth and the Spirit of Error 2* (Moody Bible Institute of Chicago, Moody Press, 1986) 56.

<sup>23</sup> J. Freitas Santos and J. Cadima Ribeiro, ‘An Investigation of the Relationship Between Counterfeiting and Culture: Evidence from the European Union’ EURAM 2006, quoted in, Justice Harms Justice Harms, Louis, “The Enforcement of Intellectual Property Rights by means of Criminal Sanctions: An Assessment”, WIPO Advisory Committee on Enforcement 2007, available at: [www.wipo.int/edocs/mdocs/enforcement/en/.../wipo\\_ace\\_4\\_3.doc](http://www.wipo.int/edocs/mdocs/enforcement/en/.../wipo_ace_4_3.doc), accessed on 10/01/2021.

Consequently, in relation to the creation of IPR, it is felt that the creator does not deserve much credit and the award of monopolistic rights to exploit his creation, since it is only God who made the creation of knowledge possible and not the creator alone. Because of the influence of such ideologies copying and imitating the creations of others may not be considered wrongful per se in some societies in Asia. As observed by a US practitioner:

In Asian cultures, inventions are freely disclosed, copying is a high form of flattery, and the individual is subservient to the community.... Not only is the substantive law of private intellectual property rights alien to Asian society, but so is the concept of enforcing statutes through private litigation.<sup>24</sup>

Therefore, the cultural history of Asia does not support the idea of protecting proprietary creative work. As observed by some commentators, “in many Asian nations the highest compliment one can be paid is to be copied”<sup>25</sup>. In this light, when the social and cultural attitudes in societies are not very familiar with outright protection of personal property rights, governments in countries with such social mindsets may become reluctant to utilise the most coercive tool of regulation, i.e. criminal law, to regulate and protect intellectual property rights, regardless of any external pressures. However, it can be argued that these religious teachings could not have such a significant influence in the current global economic environment, since many of the Asian countries actively participate in international trade and reap benefits from it. For example, China has been the fastest growing economy in the world for several years and has benefited heavily from capitalism. Nevertheless, one cannot rule out the impact such religious and cultural ideologies, which have been practiced and revered for centuries, could have in these societies when the enforcement of strict IPR regimes demonstrably favours Western interests.

### *1.2.Lack of Political Will*

Another fundamental factor which has hindered the criminal enforcement of IPR is the lack of political will on the part of governments of developing countries. Not all governments have been convinced that criminalising IPR infringements is in their best interest. This has been due to a variety of reasons. Although these reasons might appear to be unreasonable from the perspective of rights’ owners, they could be very important to the governments concerned and the citizens of

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<sup>24</sup> Feinberg, Joel, *Harm to Self* (Oxford University Press, 1986).

<sup>25</sup> Rinne Swinyard and Kau Keng ‘The Morality of Software Piracy: Across-Cultural Analysis’ (1990) *Journal of Business Ethics* 655.

developing countries. It is reasonable to believe that any government would weight the pros and cons of criminal enforcement of IPR before taking any affirmative steps. In this regard, short term benefits to the local economies could become more attractive to governments and receive priority over long-term advantages, which may also entail additional costs. Criminal enforcement of IPR does not bring any immediate benefits to developing countries. The benefits can only be expected in the long term. Although non-enforcement of criminal sanctions has been heavily criticised by developed countries, such inaction could be advantageous to poorer countries. On one hand, non-enforcement causes minimal impact on local economies and citizens of developing countries. On the other hand, the domestic economies may gain in absolute terms when foreign IP is imitated, particularly when it is not accompanied by outflow of payment.<sup>26</sup>

By having weak laws or not enforcing laws developing countries could create a non-tariff barrier to entry in domestic markets for foreign producers.<sup>27</sup> It is difficult for the foreign producers to compete with the lower production costs of pirates who duplicate and counterfeit from foreign sources.<sup>28</sup> Further, the establishment of a local market based on imitation, creation of more local jobs and the satisfaction of consumer demand through the supply of cheap commodities could be very attractive to governments, since it does not cost them a penny.<sup>29</sup>

Such a functional local economy could lay the foundations for the emergence of local industries with minimal government expenditure and support. While it may be true that local creative works will suffer if imitation gets out of hand, and no government in all recorded history has allowed that to happen for long, it remains a fact that where those works are in short supply foreign works become natural targets for exploitation and learning.<sup>30</sup> Thereafter, upon the gradual establishment of vibrant local industries, capable of competing in the international markets, governments may consider implementing strict IPR regimes that are beneficial to local economies at that point of time. As Frederick Abbott states, “The piracy of intellectual property fuels economic development until the country reaches the point where IPR protection becomes economically advantageous to a sufficiently strong set of domestic vested interests.”<sup>31</sup>

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<sup>26</sup> Endeshaw, Assafa, ‘Intellectual Property Enforcement in Asia: A Reality Check’ (2005) 13 Int’l J.L. & Info. Tech 381.

<sup>27</sup> Ostergard, Robert, *Development Dilemma: The Political Economy of intellectual Property rights in the International System* (LFB Scholarly Publishing LLC, New York 2002).

<sup>28</sup> *Ibid*

<sup>30</sup> *Ibid*.

<sup>31</sup> F. Abbott, ‘The WTO TRIPS Agreement and Global Economic Development’ (1997) Public Policy and Global Technological Integration 3.

In this background, it can be argued that effective enforcement of criminal IPR legislation in developing countries could vitiate the benefits local economies derive from imitation of foreign products in the short term. Further, there is no doubt that increased IPR protection and enforcement can lead to the development of new local industries and to additional foreign investment and access to the information and technology necessary for growth.<sup>32</sup> However, economic growth is also closely linked with other factors such as high levels of human capital attainment, efficient capital allocation, political stability and strong physical infrastructure.<sup>33</sup> Without many of these other factors in place, the argument that increased IPR protection and enforcement leads to increased economic growth fails to carry weight with many governments of developing countries.<sup>34</sup> As such, it is probable that governments may delay the introduction of strict IPR protection measures until these other factors necessary for economic growth are also well in place.

In addition to economic factors, there have been ideological reasons that contributed to the lack of political will for criminal IPR enforcement in some developing countries. In China, for example, Communism has substantially influenced the political ideology in the twentieth century. When the Chinese Communists assumed power in 1949, they abolished the entire corpus of the existing legal regime and began to introduce a new legal system based largely on the Soviet model.<sup>35</sup> With regard to intellectual property, the Soviet experience proved satisfactory to the fledgling Chinese Communists because the values underlying the Soviet model reflected, in large measures, traditional Chinese attitudes towards intellectual property.<sup>36</sup> Because of the ideological predisposition, the mentality of sharing wealth became dominant, and the IPR regime was deeply embedded in the notion that “individual rights are most readily defended as effective means to state ends”.<sup>37</sup> Accordingly, China’s IPR protection regime was built upon the foundation that sustains “the balance between collective and individualistic

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<sup>32</sup> Mark Wu, ‘Intellectual Property Rights in Global Trade Framework: IP Trends in Developing Countries’ (2004) 98 Am. Soc’y Int’l. L. Proc. 105

<sup>33</sup> *Ibid*

<sup>34</sup> Pengelly, T, ‘Technical Assistance on IPRS for Developing Countries: Some Strategic Policy Issues and Recommendations for Future Priorities for Donors and Developing Countries’ (2003) ICTSD-UNCTAD Dialogue, 2nd Bellagio Series on Development and Intellectual Property 7, available at: <http://ictsd.org/i/ip/25558/>, accessed on 12/04/2021.

<sup>35</sup> Geoffrey Willard, ‘An Examination of China’s Emerging Intellectual Property Regime: Historical Underpinnings, the Current System and Prospects for the Future’ 6 Indiana International & Comparative L. Rev. 411 at 417.

<sup>36</sup> *Ibid*.

<sup>37</sup> Robert Weatherley, *The discourse of Human Rights in China: Historical and Ideological Perspectives* (Palgrave 1999) 104.

thought,”<sup>38</sup> and “the harmony of interests between individuals and the state they belong to”.<sup>39</sup> At present, the Chinese Communist government has been pressurised by Western countries to implement criminal IPR legislation to protect individual property rights of foreign citizens in China.<sup>40</sup> The Western notion of intellectual property rights vehemently contradicts the Communist ideology of sharing wealth, discussed above. Although the Chinese government may have abandoned some of its Communist ideologies in the process of reaping benefits from globalisation and market economies, it has been careful not to unconditionally embrace Western concepts that could threaten the foundations of Communist rule. Therefore, although new laws have been legislated, China has maintained the position that by imposing incompatible standards for protection of foreign IPR, China, together with other developing countries, is being exploited and dominated.<sup>41</sup>

### 2.3. *Lack of Resources and Other Priorities*

One of the main factors that has been either tangentially addressed or ignored in IPR enforcement discussions is the economics of IPR enforcement. Although the drive for enhanced enforcement, backed by developed countries, puts the main burden on individual states, it systematically eludes the question of resources needed to enforce such rules.<sup>42</sup> As a result, the cost of IPR enforcement in developing countries has to be borne by local governments and taxpayers who have nothing to do with foreign IP holders or receive no commensurate revenue from them. These costs rise exponentially with the intensity and extent of IPR enforcement. As a result, for criminal IPR enforcement, which is the most severe form of sanction requiring more attention of public institutions, additional funds are required to establish the necessary environment and infrastructure to arrest and punish wrongdoers. In this regard, it is necessary to create enforcement agencies and specialised courts to have a knowledgeable work force for detection and adjudication and to raise awareness among the public of the need for criminal enforcement.<sup>43</sup> However, expecting developing countries to allocate resources from their very limited budgets for criminal IPR enforcement measures and to ignore other more compelling local issues may not be realistic.

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<sup>38</sup> Robert Bejesky, ‘Investing on the Dragon: Managing the Patent versus Trade Secret Protection Decision for Multinational Corporation in China’ (2004) 11 TULSA J. Comp. & INT’L L 437.

<sup>39</sup> Weatherley, Robert, *The discourse of Human Rights in China: Historical and Ideological Perspectives* (Palgrave, 1999).

<sup>40</sup> See, P. Ollier, ‘The End of the Beginning’ (May 2007) 169 *Managing Intellectual Property* 16, for an elaborate analysis of this dispute.

<sup>41</sup> *Ibid.*

<sup>42</sup> C. Correa, ‘The Push for Stronger Enforcement Rules: Implications for Developing Countries’ (ICTSD Programme on Intellectual Property Rights and Sustainable Development, 2009) 31, available at: <http://ictsd.org/downloads/2009/03/fink-correa-web.pdf>, accessed on 13/03/2020

<sup>43</sup> Endeshaw, *supra* note 35.

#### *2.4. Is Lax Criminal IPR Enforcement in Developing Countries Reasonable?*

This may be a very difficult question to answer on an objective premise. After considering the harm caused by counterfeiting and piracy to international trade and to the health and safety of the public, it may appear that criminal IPR enforcement to counter the circulation of fake goods should be the responsibility of every government. However, when one looks at underlying circumstances from a subjective stand, the initial appearance changes drastically.

This article has so far attempted to demonstrate the difficulties and crosscutting interests encountered by developing countries when enforcing criminal sanctions for IPR protection. It further analysed criminal IPR enforcement as a development issue, which improves gradually with the level of economic development. In this light, it can be argued that only by observing the circumstances faced by developing countries subjectively can the reasonableness of lax criminal IPR enforcement could be ascertained more vividly. Therefore, considering the above analysis, it is contended that there is some justification in the reluctance shown by developing countries to implement strict criminal sanctions for IPR protection. However, the reasonableness of non-enforcement should vary from country to country, depending on the level of development and the degree of participation in international trade. When a country advances with economic development the reasonableness of non-enforcement should also fade away, since economic stability addresses many of the other concerns that hinder criminal IPR enforcement measures.

### **III. Intellectual Property Fundamentalism**

Developed countries that are the major producers and exporters of copyright and trade mark protected goods and services have much to gain from them. Therefore, much is lost financially by multinational corporations and citizens of these countries as a result of rampant counterfeiting and piracy in developing countries. This situation is further aggravated by lax IPR protection regimes in developing countries that fail to enforce harsher sanctions such as criminal procedures. Thoroughly unsatisfied with this situation, businesses that lose profits by lax IPR enforcement have continued to demand governments of developed countries to address this issue promptly. Since certain governments are structured in ways that allow interests of such businesses headquartered within their jurisdiction (or even sometimes outside them) to convert rapidly to national trade policies and negotiating strategies that align closely to these interests, the pressure imposed by these governments on developing countries for change has

been irresistible.<sup>44</sup> Severe pressure is exerted on developing countries to create a favourable environment to demand strict IPR enforcement, lobbying groups based in developed countries have utilised heavy propaganda campaigns extolling the virtues of intellectual property protection and the dangers of tolerating counterfeiting and piracy, claiming that they are immoral, unfair and that revenue generated from them fund has created a potentially dangerous IPR enforcement paradigm, which has attempted to demonise countries with lax IPR enforcement mechanisms. Some commentators have referred to this line of action as intellectual property fundamentalism.<sup>45</sup>

### *3.1. The Dangers of IP Fundamentalism*

There is no doubt that governments all over the world, regardless of the state of development, understand the danger posed by pirated and counterfeit goods to their societies. However, there are development-affiliated issues and ideological concerns in developing countries that support the existence of imitation markets and stymie efforts that counter such activity. As demonstrated, the influence of such concerns in these countries has left legal reforms required for effective implementation of sanctions to counter counterfeiting and piracy lagging behind. Enforcement of criminal sanctions has been the area most affected; sanctions have been either delayed or totally ignored by governments. It is felt that developing countries have ignored the enforcement of criminal sanctions not out of choice, but since non-enforcement was the only available option. Therefore, it is argued that, “nine times out of ten, the choices available to developing countries to protect or not to protect foreign IPR would be the same, regardless of the rewards they might reap or the punishments they might face for success or default in enforcement.”<sup>46</sup>

In this background, the effectiveness and the justification of the present vociferous and threatening campaigns launched by the governments and interest groups in developed countries, with the objective of fear-mongering public to reject imitations and force developing countries to enforce strict IP regimes with criminal deterrence raise legitimate concerns. In this regard, on one hand, the strong emphasis on a “fight” against counterfeiting and piracy does not remove the suspicion of civil society, especially in the West, that IP may help increase the gap between the rich and the poor. In fact, at the Transatlantic IPR Collaboration Conference

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<sup>44</sup> Dutfield, G, ‘To copy is to steal: TRIPS, (un)free trade agreements and the new intellectual property fundamentalism’, available at: [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2006\\_1/dutfield/dutfield.pdf](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2006_1/dutfield/dutfield.pdf), accessed on 27/03/2020.

<sup>45</sup> *Ibid.*

held by the US Chamber of Commerce in April 2009 it was highlighted by the participants that offensive campaigns create negative sentiments for IPR protection in the consumer's mind. It was stated by the participants that: The campaigns attempted to shame people who violated IPR rules. Public service announcements made people feel bad about themselves. This had a negative effect on consumers. They felt that they were being unnecessarily betrayed by big industry. The big stick approach "you are breaking the law and could go to jail" was just not credible and left the intended audience with sour feelings.<sup>47</sup>

On the other hand, these campaigns have unreasonably threatened poorer countries for stronger IP regimes, with minimal regard to the difficulties faced by them and underlying reasons for non-enforcement. The idea of threatening developing countries without offering adequate support has also widened the north-south divide in relations to IP enforcement. It is also argued that the more robust US groups are in their calls for action, the more it betrays the determination of a superpower to push others around for its narrow interests.<sup>48</sup> In this regard, Edenshaw states, "the more this criticism of other nations and their activities appear confined to unilateral expectations and interests, the more local people and businesses in these countries see the IP system as an instrument of multinational companies and not necessarily amenable to benefiting all."<sup>49</sup> He further argues that, "the upshot of this growing perception of the US stance on international enforcement of IP is that it might trigger anti-US sentiments on a wider scale and reinforce disregard for IP generally or even lead to campaigns singling out US interests and goods or services."<sup>50</sup> The wider dissemination of such sentiments is capable of creating an unprecedented north-south polarisation towards IP protection that could significantly hinder world trade.

On a different context, the danger of using rhetoric, even among close allies, was clearly seen during the recent oil spill in the Gulf of Mexico. In this regard, the anti-BP rhetoric used by the American President Barack Obama<sup>51</sup> was heavily criticised by the Conservative Mayor of

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<sup>47</sup> F. Pietrucha, 'Counterfeiting and Piracy Hurt Real People' (America.gov-Telling America's Story, 6th May 2009), available at: <http://blogs.america.gov/ip/2009/05/06/counterfeiting-and-piracyhurt-real-people/>, accessed on 12/02/2020.

<sup>49</sup> *Ibid.*

<sup>50</sup> Davey, Neil, 'The problem with fake foods' (Food Safety, Business Action to Stop Counterfeiting and Piracy, International Chamber of Commerce), available at: [http://www.gdspublishing.com/ic\\_pdf/fsa/gds3.pdf](http://www.gdspublishing.com/ic_pdf/fsa/gds3.pdf), accessed on 07/07/2020.

<sup>51</sup> Mr Obama has sparked anger in the UK by insisting on using BP's former name – British Petroleum – which was axed back in 1998 and making statements such as, "I want to know whose 'ass to kick' at BP" and that "BP chief executive Tony Hayward should be sacked".

London Boris Johnson<sup>52</sup> and the former trade and industry secretary of the UK Lord Tebbit<sup>53</sup>. It was felt that this row was threatening to cast a shadow on Anglo-American relations and the ‘special relationship’ between the two countries.<sup>54</sup>

#### IV. Conclusion

Developing countries face a myriad of cross-cutting interests when initiating criminal sanctions for the protection of IPR. Although the levels of impact of these interests are subjective, they could have been instrumental in IP policy deliberations in many developing countries. Considering the gravity of these issues, it is contended that there is reasonable justification for the lack of interest demonstrated by some developing countries in enforcing effective criminal sanctions for the protection of IPR. However, notwithstanding this, the West has consistently sought to impose IP laws on developing countries with differing notions of IP as conceived in the West. This assimilation, justified by Western countries on the premise that IP represents an absolute moral value and irrefutable economic logic is not borne out by the history of copyright in Europe and America.<sup>55</sup> Therefore, it appears unreasonable for developed countries to restrict poorer countries determining their own contours of enforcement by external pressure. In this regard, developed countries can justifiably be accused of hypocrisy when they demand that the rest of the world adopt their own IP standards before the developing countries feel, for very good reason, they are ready for them.<sup>56</sup> As such, it is important for developed countries and Western interest groups not to disparage the efforts already taken by developing countries and allow further leverage and support for improvements. In this background, the rhetoric deployed by some interest groups to pressurise developing countries to adapt strict enforcement regimes pose a danger for future developments. It is contended that this approach, which should be rejected, further widens the developed-developing divide in IP enforcement unnecessarily. Therefore, it is suggested that what is required is a more amicable and a supportive enforcement paradigm that is also acceptable to developing countries as well. Such a paradigm should not

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<sup>52</sup> Mr. Johnson told the BBC Radio 4’s Today programme, “I do think there’s something worrying about the anti-British rhetoric that seems to be permeating from America”.

<sup>53</sup> Lord Tebbit wrote on the *dailymail* website, “Mr. Obama’s attitude was explicable but despicable”.

<sup>54</sup> Nicola Boden, ‘Cameron at odds with Tories as he refuses to publicly back BP after Tebbit and Boris attack Obama’s ‘anti-British rhetoric’ *Mailonline* (14 June 2010), available at: <http://www.dailymail.co.uk/news/article-1285467/BP-OIL-SPILL-Lord-Tebbit-Boris-Johnsonattack-Obamas-anti-British-rhetoric.html>, accessed on 13/07/2020.

<sup>55</sup> Burkitt, Daniel, ‘Intellectual Property Copyrighting Culture – the History and Cultural Specificity of the Western Model of Copyright’ (2001) I.P.Q. 146.

<sup>56</sup> Dutfield, G, ‘To copy is to steal: TRIPS, (un)free trade agreements and the new intellectual property fundamentalism’, available at: [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2006\\_1/dutfield/dutfield.pdf](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2006_1/dutfield/dutfield.pdf), accessed on 27/03/2020.

make developing countries fear criminal IP enforcement as stifling development, but a measure that supports sustainable development and could be advanced and shaped at their own pace. It is suggested that there are alternative and more amicable ways that could be used to obtain positive support from developing countries for criminal IPR enforcement. These approaches recognise the necessity of considering the importance or lack of importance of IP policy to poorer countries at different levels of economic development. Further, they also identify the necessity of ensuring the active involvement of local interest groups when attempting to convince governments of developing countries of the desirability of criminal IPR enforcement.

