Fair Trade no subsitute for intellectual property

Tim Wilson

Having fairly successfully colonised the specialist coffee market, Fair Trade activists have turned their attention to health care. In the lead-up to the 2006 Toronto World Aids Conference, Oxfam International broadened its 'Make Trade Fair' campaign to include pharmaceuticals.

This is an unfortunate development. The broadening of the campaign into the pharmaceutical industry exposes it as the politically-motivated, not development-motivated, campaign that it is.

Despite its high rhetoric, fair trade is not merely about consumers exercising their trade justice preferences. In its 2002 report, *Mugged: Poverty in your coffee cup*, Oxfam International made 48 recommendations to reform the international coffee trade. Five of the 48 recommendations related to changing consumer behaviour. The remaining 43 included destroying already produced coffee beans, demanding companies buy from Fair Trade suppliers and regulating who could produce and trade coffee beans through a re-established, binding and corruptible International Coffee Agreement.

Fair trade is marketed as a consumer-driven campaign; its foray into pharmaceutical demonstrates that its real aim is to regulate trade outcomes. The fair trade campaign wants to weaken and hold back the development of intellectual property (IP) regimes to achieve their anti-market ideological agenda. The application of fair trade principles to the pharmaceutical industry would hurt, not help, public health around the globe.

Pharmaceutical companies make a profit by innovating and producing life-saving, life-extending and life-enhancing medicines. The costs of invention can reach up to US$800 million per product. As few as one in 10,000 makes it through all the clinical trials and tests to market commercialisation. Yet, because those that do succeed can earn hefty profits, the industry is an easy target for anti-market fair trade activists.

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The pharmaceutical industry's asset base is intangible. To ensure that pharmaceutical companies are able to invest in developing new medicines, they rely on their IP protections. IP rights ensure that companies are able to reap the rewards of their investment as well as spurring on the next round of innovation.

A strong IP rights system is vital to preserve the industry's interests and to drive it to produce the medicines that ensure we live longer, happier lives.

However, IP regulation differs across the world. Individual countries have a system of registration and enforcement for trademarks, copyright and patents—there is no such thing as an international patent. A company needs to register a patent with each national registrar to ensure that it can have its intellectual property protected.

The pharmaceutical industry relies on patents, and the international standard is that those patents last for at least 20 years. However, once the lengthy process of obtaining marketing approvals has been completed, this period is often whittled down to a mere 12 years for companies to recoup the cost of their investment.

The 'Make Trade Fair' campaign wants domestic IP rights regimes to be weakened under the banner of 'public health'. But to do so would undermine the incentive to develop new medicines.

Market-based economies rely heavily on property rights. In his 2002 book, *The Mystery of Capital*, Peruvian economist Hernando de Soto articulated his now legendary thesis on the consequences of undermining property rights. Where property rights are not enforced, goods and services fail to attract investment. Stifled investment stymies innovation and the optimisation of limited resources. It ensures that individuals cannot prove their ownership and their access to credit is therefore limited. The opportunies foregone are borne by individuals and society as a whole.

IP is no different. In fact, IP is more heavily dependent on strong property rights regimes. At least with traditional property there is a tangible good. IP is an intangible good that can be stolen and replicated easily. A failure to establish and enforce IP rights is a direct disincentive innovation. Without strong IP protection, IP-dependent businesses would have an almost impossible time attracting investment.

Behind the mirage of 'public health' the fair trade campaign is directly attacking the fundamental infrastructure of a market-based economy.

The battle over TRIPS

This campaign is nothing new. It first started in 1994 when, as part of the conditions for the establishment of the newly formed World Trade Organisation, countries required the inclusion of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. The purpose of TRIPS was simple—if a country wanted to be a member of the WTO, it needed to establish and enforce IP rights regimes. It was tantamount to stating that being a member of the WTO also required a demonstrated commitment to a market-based economy.

The benefits are obvious. For large IP-exporting countries, notably the United States, they could ensure that their commercial interests were not being undermined. There were also substantial long term benefits for developing countries. Failure to have IP rights regimes would mean that they could not attract the investment necessary to move from a derivative manufacturing base to one which develops and markets original products. TRIPS requires patents to last for at least 20 years.

Since its adoption, TRIPS has come under fire. It has been blamed by fair trade activists for major public health disasters ever since. They argue that IP regimes allow big pharmaceutical companies to register patents and thereby inhibit the sale of 'generic' medicines. By keeping generics out, prices of medicines are kept high. This limits developing countries' access to medicines against the interests of public health—solely for the benefit of pharmaceutical companies.

Fair trade activists have sought to reform TRIPS to further weaken developing-country IP rights regimes. Few developing countries have strong IP rights regimes. Pharmaceutical companies rarely bother registering their IP in developing countries where they stand no reasonable chance of earning a return. Registering a patent is not cheap. The regulatory burdens are significant, requiring substantial paperwork and fees. The industry draws the vast majority of the return on its investment from developed countries by selling to consumers and governments.

China allegedly has an IP rights regime, yet IP theft is common, and legal processes for enforcement are flouted. Fair trade activists want to keep it that way.

Fair trade activists have failed to recognise the importance of poor health services in developing countries. It is easy to argue that all medicines should be freely available. It is an implausible argument when the consequences of delivery are considered. The poorest countries barely have the medical and logistical infrastructure to deliver basic healthcare without factoring in complex medicines such as Anti Retroviral medicines.

Trade in generics became a hot political point in 2001. At the commencement of the Doha Development Round of negotiations in the WTO, there was a strong push to weaken TRIPS to promote 'public health' concerns.

Compulsory licensing commitments were introduced to refine TRIPS to allow for the temporary suspension of patents during major public health crises. Countries were even entitled to begin trading in generics where they did not have the infrastructure to produce medicines. They were also given approval for parallel imports—that is, even when the medicines were available within countries, if they could be sourced cheaper elsewhere, they could import them.

Both the industry and governments recognised that legitimate leeway was needed to support the interests of public health. The industry has donated a substantial volume of medicine to the developing world, to the extent that Oxfam produced a report analysing the industry's significant philanthropy. The conclusion of the report, perhaps not surprisingly, was that giving away free medicines wasn't enough, they had to give away their IP too.

Oxfam also argued that it is essential to establish an international regulatory body to set prices for medicines. These prices would vary from country to country. Participation from industry in the price-setting would merely be 'encouraged'.

The anti-IP rights campaign has changed its focus. Before falling under the fair trade banner, the campaign sat with professional left-wing activists. Their arguments were largely fought out in multilateral fora such as the WTO and the World Aids Conference Ministerial.

Now that the anti-IP agenda is under the banner of the fair trade campaign, their misleading and deceptive campaign will be fed directly into the 'Make Trade Fair' network—made up of church groups, soft-left political movements and well intentioned, but ultimately misguided, social justice organisations. This will ensure that the campaign moves from the international to the domestic context. Governments will then have to address these concerns and IP rights regimes will suffer.

The push for fair trade pharmaceuticals demonstrates that the campaign is about regulating production and prices, not consumer-driven 'trade justice'. If the fair trade campaign is successful in targeting pharmaceutical companies, it may temporarily flood markets with cheap generic medicines, but the benefits will be scant when the funds for the next major public health outbreak are needed.

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