

Patents on Life: Law, Social Ethics, and Religion (London, 12 Mar 2020)

Tom Berg

Let me add my thanks to everyone that Roman thanked, including Duncan and Christopher, and especially to Tom Leonard, the IT team, and everyone at Kilburn & Strode for hosting this event and rolling with the punches. Thanks also to my terrific co-editors and our chapter authors.

I'm sorry not to be with you in person. In our new world of remote content delivery, I'd also be glad to do remote networking. If anyone is interested in chatting further about the issues here, I'd be glad to do so. Reach me at the email address on-screen, tberg at stthomas.edu.

Our book gathers varying perspectives, including religious perspectives, on the social and ethical questions raised by patents on life, whether human, animal, or plant life. We conceive the book as a resource across disciplines, to help lawyers, policymakers, NGOs, ethicists, and religious leaders understand each other's perspectives. Let me touch on three aspects.

First: The book broadly defines what constitute the “moral”/social issues raised by biotech patents. They include of course exclusions from patentability, especially in European law, that reflect ethical or public-policy concerns about certain technologies: for example, exclusion of inventions involving human embryos or human germline modifications. Several other chapters address concerns that patent-supported rents may undermine equitable access to medicines or treatments for people lacking resources. Of course, that concern must be weighed on any issue against patents' potential encouragement of innovation and commercialization, and also in light of flexibilities like compulsory licenses or alternative rewards like prizes or public subsidies. Our chapters take varying positions on these balances; but all

insist that distributional effects matter. Other chapters cover controversies over fair distribution of benefits from the use of genetic resources in biodiverse nations, and fair licensing practices with respect to farmers using genetically modified crops.

Second: our trans-Atlantic set of authors has allowed interesting comparisons of European and American attitudes toward patents and morality. As to patentability, at least, Europe has many more restrictions than the US, several of them reflecting explicit or implicit ethical judgments. Christopher's wonderful chapter, along with others, explains the European provisions and cases. Whether one sees these limits as significant, they do preserve a moral discourse about patents that is virtually absent from US law. In America the attitude is, as our chapter author Margo Bagley has put it, "Patent first, ask questions later."

Take one example: patents involving use of human embryos, a subject on which you might expect America's large pro-life movement would be vocal. But it was the European Court of Justice, applying the EU Biotech Directive, that denied patentability to any invention whose technical teaching involves the destruction of an embryo after fertilization. I realize the stem-cell research community has workarounds of that ruling (which some of our authors discuss); but there are still constraints. By contrast, the US PTO has issued more than 1,000 patents on embryonic stem-cell research; and any concern about their validity comes not because of morality, but because they may involve naturally occurring products or processes. In America, pro-lifers ignore ESC patents and instead focus on blocking federal funding for the research. President George W. Bush interpreted the funding restrictions as stringent; there's speculation that Donald Trump may reinstate that interpretation. But the European Commission has rejected efforts to forbid government funding of research.

Likewise, when the abortion drug RU-486 appeared in the 1980s, anti-abortion activists blocked its regulatory approval but said nothing about the patent it received. Kara Swanson of Northeastern University points out that the patent in fact helped pro-lifers keep the drug out of the US because they needed to lobby only the patentholder company.

I don't wish to overstate the Europe-US differences, but they are real. Americans tend to see patents more as private ordering—closer to “property” in the full sense—and less as a form of innovation subsidy. The USPTO has almost completely dodged the moral and cultural debates that occasionally break out in Europe. Our trans-Atlantic lens put that in focus.

A third theme addresses the question, if I may paraphrase Tina Turner, “What’s faith got to do with it?” The book aims not only to address the range of social-ethical issues on life patents, but also to add religious reflections to the discussion. Global patent debates have incorporated insights from economics and from human-rights discourse, but not much from religion. We hope the book will bridge that gap: that it will help lawyers, policy activists, and policymakers to understand what religious perspectives can offer, and help religious thinkers and leaders to understand biotech patents and thus have more to offer.

The great religious traditions, at their best, can contribute. They have long, rich histories of reflection on the human condition and what human beings owe each other. Their stories and imagery may overlap with secular moral values: the Good Samaritan story parallels other teachings that all human beings deserve equal respect. But the story situates this teaching in a larger vision about the meaning of human life. As IP scholar David Opderbeck has said, religious thought, at its best, can “root [moral principles] in a richer social imagination that gives them meaning

and weight.” Religion should not dominate moral discourse, especially in any pluralistic setting. But it can contribute.

Religion’s relevance is also empirical: it’s an important source of public values worldwide, especially in developing nations. When policymakers face issues like compulsory drug licensing for public health, understanding the relevant religious values may help them incorporate public sentiment in their policies and help outsiders understand the policies. Middle Eastern and African governments, especially as they become more democratic, will reflect the outlook of their large Muslim and Christian populations, respectively. It’s better to have thoughtful articulations and applications of those religious traditions. An example is our book’s chapter by Mohammed el-Said, Lancashire Law School, on Islamic understandings of the purposes of biotechnology and the justification and limits of IP.

Finally, religion is relevant because religious groups act concretely in matters involving life patents. Professor Matthews’ book describes how the Quakers’ UN Office helped convene other NGOs to work on both access to essential medicines and protection of indigenous knowledge and genetic resources. The Vatican has also spoken on these issues as an official participant-observer at the WTO and the UN. One thing Pope Benedict and Pope Francis agree on is the need to temper what Benedict called “excessive zeal” for intellectual property rights in healthcare when tempering is necessary to meet pressing human needs. As detailed in one of our chapters, Latin American and US bishops have repeatedly urged that trade agreements should ensure indigenous peoples rewards from genetic resources and should not enforce patent rights that seriously inhibit farmers’ practices such as reuse of seeds.

The Catholic Church also has extensive “on-the-ground” experience serving seriously ill people, subsistence farmers, and other persons whom patent policy may

affect. If Doctors Without Borders deserves a hearing for its views on patenting of essential medicines, Catholic Relief Services deserves a hearing for its views on seed patents and genetic resources.

As our chapter by Kathy Liddell and Simon Ravenscroft says, “Broad ethical and moral considerations are here to stay in patent law whether we like it or not.” We hope this book will expand and enrich such analysis / and encourage people from many disciplines to join in fruitful, perhaps surprising conversations—like this one!

Thank you all.