

Prof. Peter Drahos (Australian National University)

Laboratorium Lucernaiuris: “Six Minutes to Midnight: Can Intellectual Property Save the World?”

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In 1947, the *Bulletin of the Atomic Scientists of Chicago* showed on its front cover a clock set at seven minutes to midnight, with midnight being the moment of apocalypse. After two atomic bombs had been released over Nagasaki and Hiroshima the clock was supposed to help inform the public of the dangers of nuclear energy. In 2007, the clock further took into account technologies leading to climate change and biological developments that threaten biosecurity, and was set five minutes to midnight. Currently, the clock rests at six minutes to midnight.

With this metaphor, Peter Drahos introduced his Laboratorium Lucernaiuris Lecture at the University of Lucerne, co-funded by the i-call research centre (International Communications and Art Law, Lucerne), given on 13 December 2011. The internationally renowned and awarded Professor of Law from the Australian National University (ANU) discussed the how the looming cataclysm of global climate change is an issue of governance and whether intellectual property (IP) can be used to deal with the arising governance “trilemma”. In short: Could IP rights help the world to avoid catastrophic climate change?

Peter referred to what the world is facing as an “Energy Trilemma”, relating to: (1) interests in energy security; (2) climate change goals; and (3) the longing for abolishing energy poverty caused frictions. On the one hand, Peter noted the importance of having energy security, which in 2009 mainly depended on oil (32.8%), coal/peat (27.2%) and natural gas (20.9%). Avoiding energy poverty also requires access to energy and is an essential precondition for development, as evidenced in China and India. On the other hand, these interests in energy can and do contradict the aim of preventing or limiting the effect of climate change. A global transition to renewable energy or improvements to existing fossil fuel technologies could bridge the Trilemma. However, how can the powerful industries and interests involved in the energy sources, which cover around 80% of global need, be moved or replaced, and by what? What governance could trigger the urgent shift and resolve the global Trilemma?



Historically, globalised governance has taken place through three mechanisms: negotiation, coercion and innovation. International *negotiations* have been successful on many occasions in reaching globalised standards. For example, negotiations have produced the international trade regime existent in the World Trade Organization (WTO), universal human rights, international IP systems, and even some environmental treaties, such as the Montreal Protocol on Substances that deplete the Ozone Layer of 1987. However, Peter noted that all these international negotiations took a long time. With regard to climate change, however, a long negotiation may become the “long goodbye”. According to data presented by Peter, projections require that resolutions must be found within the next few years, since temperatures peak in 2020. The world does not have enough time to undergo successful negotiations.

As to *coercion*, this typically involves one powerful state driving a global issue forward and using military and/or economic measures to achieve this. Peter used the international IP system as an example of how this can be successful. The US predominantly pushed through a globalised IP treaty regime to limit free-riding of IP in China, India, Brazil and the USSR. However, there were many reasons why this worked, namely: China was not yet a member of the WTO and so more easily coerced. Brazil suffered trade sanctions and India was threatened with such. The USSR was breaking up. There was already quite a lot of harmonisation with the Bern and Paris Conventions from the 19th Century. And, importantly, the US had support from the private sector, Europe and

Japan. These factors do not exist in the arena of battling against climate change and, thus, it is hard to see how coercion could be used.

Finally, the underlying theory of IP and specifically patent law stipulates that IP protection or patents offer an incentive to innovate, and this results in the creation of inventions that would otherwise not exist. Thus, it is possible that widening patent incentives, such as through longer terms, could incite more *innovation* to solve climate change. Peter noted, however, that IP also “unleashes opportunistic behaviour” as there is a “twin incentive effect”. There is a first incentive to obtain IP rights and then another to increase the right once owned. This results in lobbying for more rights and “rent-seeking”, whereby IP owners or potential owners seek more for little in return and abuse the existing rules. Peter considers this a waste of resources and concludes that IP is often more about opportunistic protectionism than it is about innovation.

Overall, as negotiations and coercion are not realistic options and the patent institution will do little to drive the required science, Peter concluded that there needs to be a large amount of government investment to stimulate innovation and this needs to be done by a state with leadership and governance strength, and existent networks to spearhead the drive. He proposed – though reluctantly – that the only state capable of achieving this is the US.

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