INTELLECTUAL PROPERTY RIGHTS AND DEVELOPING OR LEAST DEVELOPED COUNTRIES: STRATEGIES FOR POLICY MAKERS

Md. Rizwanul Islam*

Background

Theoretically, laws in general, as it is expressed in almost every typical textbook on Jurisprudence, are just and impartial, but the tenacity of this righteous expression is not beyond question. Any law inevitably is concerned with and aimed at achieving certain objectives through the adoption of certain set of principles. Hence, it unavoidably follows that because of the asymmetry among the subjects of any law, both at national and international level, often legal rules would be causing discomforts to certain groups more than the others. This underlying policy orientation and concomitant lopsided impact on different actors is very much applicable to the subject matter of this article - intellectual property (IP) law.

IP law includes a range of subject matters- inventions protected by patents, literary and artistic works and computer software's protected by copyright, reputation of marks of products and services protected by trademark, important corporate information protected from reaching the hands of competitors by trade secret, distinctive quality of products

* PhD Candidate at the School of Law, Macquarie University, Sydney, Australia; Lecturer (on Study leave), Northern University Bangladsh; LL.M (Intellectual Property & Technology Law) National University of Singapore; LL.B. (Honours) University of Dhaka. The author would like to acknowledge the support of the Macquarie University Research Excellence Scholarship. He is grateful to his former colleague and friend, Shah Muhammad Mushfiqur Rahman, for his insightful comments on this article. Any errors or inadequacies are, of course, author's alone.

corresponding to a specific geographical location or origin by geographical indication etc. Notwithstanding the diversity among the scope of subject matters of the IP law, the tying note is their uniqueness of being rights in intangible assets that arise out of some form of intellectual effort.

All IP rights to a certain degree create monopoly rights in favor of the right holders. Despite society's aversion towards monopoly, IP rights are granted since it is believed that they are tools for ensuring greater payback to the society. Nevertheless, it must not be forgotten that these rights are essentially granted not to augment the benefits of the business enterprises not even the authors or inventors, but as an incentive for invention and creation so that the consumers and society at large can gain.[1] In other words, IP rights are granted as a quid pro quo with the expectation that by the grant of a bundle of exclusive rights, the society would benefit from increased innovation.

However, in recent times with the adoption of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),[2] we are witnessing two radical approaches towards IP rights. On the one hand, there has been a consistent campaign for stronger IP rights based in some cases on exaggerated estimates of the profits resulting from such stronger regimes. On the other hand, there have been strong criticisms of IP rights depicting them as one of the principal stumbling block for industrialization of the developing countries. Arguably, the accuracy lies somewhere in between these extreme edges. In this article arguments of the opposing quarters are discussed briefly. This article argues that depending on the structure of the intellectual property regime, it can have both positive and

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[1] Although IP rights are basically economic rights there is also non-economic undertone in IP rights, for instance the concept of moral rights in copyright work which is concerned with the protection of the personality of the authors and artists. For a comprehensive account of authors' and artists' moral rights see, Hansmann, Henry and Santilli, Marina, "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" Vol. 26, No.1 *Journal of l egal .Studies* pp. 95-143. (1997).

[2] Agreement *on Trade-Related Aspects of Intellectual Property Rights,* 15 April, 1994, Marrakesh Agreement Establishing the WTO, Annex IC, 33 I.L.M. 81 (TRIPs).

negative impacts on the development of a developing country or a least developed country (LDC). It concludes by recommending some policy considerations for the policy makers in the developing and Laces. The debate over the impact of IP rights on developing and Laces is of course a complex one and this brief article would only cover a few key aspects. The brief analysis of the issues in this article can by no means claim to be exhaustive, it merely endeavors to present a brief overview of some of the key issues in the ongoing debate on the role of IP rights in the economic development and welfare of developing and Laces. The coverage of a number of issues and brevity in their analysis entails the inescapable hazard of lack of focus, nonetheless the hazardous passage is embarked on to provide a snapshot of the pressing issues that developing and Laces should consider regarding IP rights.

Bangladesh being classified as an LDC[3] faces the common challenges of other economically less developed states. Hence, the issues discussed in this paper are quite pertinent for its policy makers too.

The Lesson of Yesterday's Violators Turning into Today's Advocates of Enforcement

It is intuitive that due to the disparity of innovations and IP resources, developed states who in general are net exporters of IP stand to gain more from stringent protection of the rights. Laces and developing countries naturally attempt to lower IP rights protection to reduce the cost of imitation of technology and developed countries seek to raise the level of IP rights protection and thereby gaining more profits from innovations. Even the USA, the most vocal voice for stronger IP protection in today's world, had in the 19th century, during the early phase of its industrialization process, very weak IP protection and copying of foreign

[3] 'The WTO's determination of LDC status is dependent on such designation by the United Nations and currently there are in total 32 LDC member states of the WTO. However, there is no strictly defined WTO status of "developed" or "developing" countries. Developing countries in the WTO are designated on the basis of self-selection even though this is not necessarily automatically accepted by other members.

works without permission of their authors' was the order of the day. The state of affairs in Europe prior to the development of an international copyright system was not much different either.[4] Curiously, early copyright laws in the USA offered limited protection to domestic authors and allowed copying of works published in foreign countries.[5]

It is ironical that yesterday's violator's are today's enforcers with the change of their economic stature. Due to the gradual shift in the nature of production from labor intensive to technology intensive, it is not improbable that today's emerging economic giants like China and India would be tomorrow's crusader against violation of IP rights once their economy becomes more specialized in production of knowledge intensive commodities.

The less than pleasing record of intellectual property rights protection of today's primary advocates of rigorous IP rights regime, of course, does not in itself mean that developing and Ides should also do the same as a wrong cannot be remedied by committing another wrong. The importance of the historical evidence rather lies in highlighting the fact that countries at different stages of development have different policy orientation. It also indicates that the application of the same set of rules for countries at different stages of industrial development is untenable and would hurt the interests of the economically poorer states. Thus, it is no wonder that the TRIPS Agreement has raised so much concern among many observers, as unlike the other international IP rights agreements executed in the past, it lays down certain basic standard of rights protection and member countries of the World Trade Organization (WTO) cannot simply provide for national treatment and most favored nation treatment.[6]

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[4] Gana, Ruth L., "The Myth of Development, the Progress of Rights: Human Rights to Development and Ownership of Intellectual Property" *haw and Policy*, Vol. 18, No. 4, pp. 315 - 353, at p. 327 (1996).

[5] Ibid.

[6] Principle of most favoured nation (MFN) treatment principle requires that any advantage, favour, privilege or immunity granted by a member to the nationals of any other country (irrespective of whether that other country is a WTO member or not) shall be accorded immediately and unconditionally to

The Benefits of Lax IP Regimes and Pitfalls of too Strong IP Regimes

If a developing country does not provide for sufficient legal mechanisms for dealing with special cases, for example, parallel imports[7] or compulsory licenses[8] to be resorted to serve people during emergencies, its people may be denied access to life saving patented drugs. Because of the huge gap between the price of patented drugs and its generic version this could make a big difference. To take one example, the cost of the patented version of a single drug called fluconazole used in the treatment of HIV patients is $20 per day in Kenya, whereas the cost of its generic version produced in Thailand is just 70 cents per day.[9] The global concern for access to medicine and need for flexibility in the IP rights regime has been recognized in the Doha Declaration on the TRIPS Agreement and Public Health.[10] In the declaration member states affirmed that:

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the nationals of all other Members subject to certain specified exemptions. The principle of national treatment requires that WTO Members must accord nationals of other member states treatment no less favorable than that it accords to its own nationals with regard to the protection3 of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. With respect to performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under the TRIPS Agreement.

Parallel Import refers to a genuine. non-counterfeit product imported to a country from the territory of another country without the permission of the entity having IP rights over that product. Goods that are imported by parallel import are often referred to as grey products.

[8] Compulsory licensing denotes the decision of a government to allow someone else to produce the patented product without any sort of authorisation or consent of the patentee.

[9] Richards, Donald G., *Intellectual Property Rights and Global Capitalism: the Political Economy of the TRIPS Agreement,* Armonk, New York, 2004. at p. 156 (2004) referring to Hoffman, Vivian, 'Health Groups Say Poor Nations Need access to Generic Drugs Boston globe', November 27: A 15 (1999).

[10] *Declaration on the Trips Agreement and Public Health,* adopted on 14 November 2001, WTO Doc No WT/MIN (Ol)/DEC/2, 20 November 2001.

> We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.[11]

The declaration also affirms that in each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles and acknowledges each member's right to grant compulsory licenses and the freedom to decide the grounds upon which such licenses are granted .[12] It also reaffirms that each member state of the WTO is free to establish its own regime for exhaustion of IP rights without challenge, subject to the most favored nation treatment (MFN) and national treatment provisions of Articles 3 and 4.[13]

Furthermore, it cannot be denied that many poor states do not even possess the technological capacity to imitate and so are unable to produce life saving drugs on their own. Hence, the provision of article 31(f) of the TRIPS Agreement which required that any patented material produced under a compulsory license must be used predominantly for the supply of the domestic market of the member state that grant the license was a big obstacle for them. Therefore, even a compulsory license under the existing legal framework in the international system, might not have aided them in saving their people. This concern was acknowledged in the Doha Declaration but was not addressed adequately as it merely instructed the Council for TRIPS to find an expeditious solution to the problem and to report to the General Council of the WTO before the end of 2002.[14]

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[11] Ibid, para 4 of the Doha Declaration on Public Health.

[12] Ibid, para 5 of the Doha Declaration on Public Health.

[13] Ibid.

[14] Para 6 of the Doha Declaration on Public Health.

Subsequently, on 30 August 2003 the General Council of the WTO decided to waive the rigorous requirement of Article 31(f) of the TRIPS Agreement and allowed generic copies made under compulsory licenses to be exported to countries that lack production capacity subject to the requirement that certain conditions and procedures are followed.[15]

Then on 6 waiver to be a permanent feature of the TRIPS and once adopted by two-thirds majority of total WTO membership, for the very first time a core WTO agreement will be amended. This decision of the General Council may be taken as a symbolic victory of developing and Laces and should encourage them to struggle for advancing public health arguments in other areas of IP rights policy.

Recently there has also been a trend of lengthening the terms of protection of copyright works without much of a cogent justification for such extension. Although what duration of protection is reasonable cannot be suggested with precision, without any specific public benefit of extension, keeping works away from public domain for a longer period does not seem to be essential to encourage creation. An extended duration of copyright protection would only block entry of multiple publishers or means of distribution of works and concomitant loss for consumers would be deprivation of the benefit of price competition .[16]

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[15] *Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, Decision of the General Council of 30, August 2003,* WTO DOC No WT/L/540 and Corr.l, 1 September 2003. (2003 waiver). Any importing Member has to make a notification to the Council for TRIPS, specifying the names and expected quantities of the product/s needed and that the eligible importing member in question, other than LDCs must confirm that it has insufficient or no manufacturing capacities in the pharmaceutical sector for the product/s in question in one of the was set out in the Annex to this Decision; and further confirm that, where a spharmaceutical product is patented in its territory, it has granted or intends to grant a compulsory licence in accordance with Article 31 of the TRIPS Agreement and the provisions of this Decision.

[16] Khong, Dennis W. K, "Orphan Works, Abandonware and the Missing Market for Copyrighted Goods", *International.lournal of Gaw and Information Technology,* Vol. 15 No. 1, pp 54 - 89, at p. 62 (2007).

above TRIPS Agreement's requirement.[21] If this trend continues, then the breadth of multilateral rules might be further stretched as the TRIPS-plus obligations can be sought to be incorporated in future negotiations in the WTO. Even if this does not occur because of the increasing collective power of individually weaker developing and Laces at the WTO, these states can surely be pressed for more concessions on IP rights when they bilaterally negotiate trade treaties with their developed counterparts. Thus, 1P protection can develop without any proper account of the need for such protection. More importantly, in this process developing and Laces would lose the limited flexibility available to them in the TRIPS Agreement and the ensuing result might be nothing less than disastrous.

Pitfalls of Too Lax Protection of IP Rights and Profits of Effective IP Rights

The principal argument of the proponents of TRIPS Agreement revolves around the notion that a uniform set of high standards of IP protection would galvanize local creativity and innovation, magnetize flow of foreign direct investment (FDI)[22] and promote transfer of technology to the developing and Laces fuelling development. It is argued by the advocates of strong IP rights that the short term cost of strong IP rights are outweighed by long term welfare gains. It is also argued that the international recognition of IP rights should be viewed as an incentive for innovation producing countries to develop new technologies which in their next generation are manufactured by follower countries.[23] In this way, continued technological progress and economic growth can be secured and from a dynamic point of view is beneficial for both leaders and followers

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[21] For an overvicw of IP rights in bilateral treaties, see Drano's, Peter, "Bits and Bops: Bilateralism in Intellectual Property", *Journal of world Intellectual Property* Vol. 4, No. 6 pp. 791 - 808, (2001).

[22] FDI denotes any investment which is made to acquire a sustained commercial interest in enterprises operating outside of the geographical border of the investor.

[23] Fisch, Gerhard and Speyer, Bernhard, "TRIPs as an Adjustment Mechanism *Intereconomics*, Vol. 30, No. 2, pp. 65-69, March/April, 1995.

of technological innovation.[24] In other words, according to this school of thought protection of IP rights is not a zero sum game where only one party stands to gain from the rent procured from the other. Weak imp rights can promote significant imitative activities but at the same time may not be conducive for development of innovative local enterprises, the argument goes. Furthermore, lack of strong protection may deter firms to invest in overseas market into stages of production that involve any significant transfer of proprietary knowledge, which could easily fall in the hands of competitors.[25]

It is often overlooked that IP rights are not always mere rewards to the innovators, authors or artists; they also have an important objective of preventing deception of the in North-South Trade", trademarks can generate an incentive for firms to invest in maintaining and improving the quality of their products. The existence of a trademark or service mark in itself does not prevent imitation or copying of protected goods or service as long as they are marketed under a different brand name and hence the risk of abuse of market power is relatively low. When an enterprise passes off its goods in the name of another enterprise that happens to be better known in the market, it not just reaps off the profit of another enterprise but also deceives the consumer about the origin and quality of the product. Similar considerations also apply to the infringement of geographical indication.

If violation of 1P rights becomes the norm, even local inventors and creators of artistic work would be deprived of the fruits of their intellectual labor. The protection of IP rights in economically poor states may play at least a limited role in reducing the brain drain of their best creative and inventive minds as recognition of IP rights can make it easier for them to gain from their creativity and inventiveness in their home country.[26] Brain

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[24] Ibid.

[25] Braga, Carlos A. 1'rimo. Fink, Carsten and Sepulveda, *Claudia Pay, Intellectual Property Rights and Economic Development*, World Bank Discussion Paper No 412, World Bank, Washington DC, 2000, at 32.

[26] Finston, Susan, "India: A Cautionary Tale on the Critical Importance of Intellectual Property Protection", Vol. 12 No. 3, hordham Intellectual

drain, obviously is a complicated phenomenon and a complex web of economic and ethical issues is involved with it and hence the nexus between brain drain and protection of IP right may be too remote or at least debatable, but it can surely be said that wide spread piracy is harmful for a number of domestic interest groups - authors, publishers, artists etc. The view of many economists that the patent system by stimulating innovation improves dynamic efficiency at the short term cost of static efficiency arising from the costs of monopoly associated with the grant of patent[27]- seems to have some justification.

Policy Options for Developing Countries and Laces

In this increasingly interconnected world where information can cross borders at unprecedented ease and pace countries should include oral disclosure made on foreign lands to form part of the state of the art and thereby exclude traditional knowledge from patentability. To ensure better protection of their traditional knowledge the countries that are rich in this type of knowledge should take concerted effort and develop databases containing information on indigenous knowledge. Patent offices across the globe should be more cautious in scrutinizing patent claims and specifications in cases involving biotech industry.

It appears that Two's powerful dispute settlement mechanism with the scope of retaliation for non-compliance with the rules was perceived to be more effective than the relatively toothless mechanisms for reviewing state's compliance with World Intellectual Property Organization (WIPO) based mechanisms that were cumbersome and had never been utilized in practice.[28] Integration of international trade and IP rights law does not

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Property, *Media and Entertainment Law Journall*, pp. 887 -895, at pp. 889-91 (2002).

[27] Report of the UK Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, Commission on Intellectual Property Rights, London, 2000 at p. 14.

[28] Although the II' treaties administered by the WIPO treaties contain provisions that failing negotiations, a signatory state can challenge the compliance of another member's regime before the International Court of Justice (ICJ), they also contain an opt-out clause allowing member states to declare that they are

seem to be a natural process and gives rise to problems because the economics of IP rights is significantly different from that of the products, traditionally the subject matter of international trade law.[29] Ideologically, IP rights protected by the TRIPS Agreement are at odds with the other agreements of the WTO as the former is trade restrictive in essence, while the latter group essentially promotes freer trade.[30] In future attempts of integrating IP rights with trade agendas, more judicious approach should be taken.[31]

Monopoly rights granted by IP rights and concomitant market powers may induce right holders to engage in anti-competitive business practices. Such abuses generally relate to business strategies, for example (a) IP rights may facilitate cartelization of potential competitors through cross-licensing agreements fixing prices (b) licensing agreements can be used to exclude competitors in particular markets by raising entry barriers through tie-in sales or restrictions on the use of related technology (c) IP rights titles can be used to intimidate competitors by threatening or initiating malicious, frivolous litigation and opposition proceedings - raising market entry barriers, particularly for new and small enterprises.[32] To prevent this kind of abuse of IP rights developing and Laces policy makers need to maintain ideal competition rules capable of providing appropriate actions to such abuses.

In areas like parallel import of goods protected by trademark where apart from quality control and threat to goodwill there is very little compulsive

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not subject to the jurisdiction of the IC.I. See, for instance, Article 32 of the *Berne Convention for the Protection of Literary and Artistic Works*, 1886 and Article 28 of the *Paris Convention, for the Protection of Industrial Property*, 1883.

[29] Barton, John H., "The Economics of Trips: International Trade in Information-Intensive Products", Vol. 33, No. 3/4, *George Washington International Law, Review*, pp. 473 -501, at p. 474 (2001).

[30] Islam, M. Ratiqul, "The Generic Drug Deal of the WTO from Doha to Cancun: A peripheral Response to a Perennial Conundrum" Vol. 7 No. 5, *Journal of World Intellectual Property* pp. 675 - 692, at 676 (2004).

[31] That is, the W1P0 should lead the future negotiations regarding IP rights and the role of the WTO in such negotiations should be as limited as possible.

[32] Braga, supra note 25, at 37.

arguments on right holders' part (most of the arguments raised by the right holders against grey goods are in essence against infringing goods) against adoption of international exhaustion, countries should consider aiding its consumers more taking into account the right holders' legitimate business interest.[33] Parallel imports can be an important means of dismantling artificial division of markets and fostering increased price competition for products protected by IP rights.

It is important to note that the US authorities had resorted to extraordinary measures in protecting their population not just from existing public health concern but also from perceived threats.[34] In the aftermath of September 11 terrorist attack on the US, the authorities there allowed production of a generic drug that is used to treat anthrax, even though a German company called Bayer had patent over the drug.[35] It gives an example that even economically developed states do not pay much consideration to IP rights when it deems that immediate action to safeguard its population is required. Before pledging stronger protection of IP rights through the adoption of bilateral Fats, developing countries should very carefully scrutinize the potential cost and benefits of such regimes. They should look beyond the short term benefits often offered as a trade off for stronger IP protection in the form of increased market access for their exports. They have to calculate the cost of such protection on various domestic interest groups and visualize how they would deal with unforeseen contingencies.

Because of their vast resources in terms of traditional knowledge, developing and Laces have to collectively strive for ensuring benefits from this kind of resources that is exploited by pharmaceuticals in the developed world. It is estimated that at least 7000 medical compounds used in production of medicine in western world are derived from plants and in the early 1990s the value of developing country germless was more than

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[33] This can be done by putting limitations that such import would be allowed so long as there is no change in quality of the goods after it was marketed.

[34] Islam, supra note 30, at 681.

[35] Ibid.

$32,000 million per year, nevertheless their earnings for the raw materials and knowledge that they export, was negligible.[36] This disproportionate earnings of developing and Laces from traditional knowledge and resources is unacceptable. To safeguard their collective interests developing and Laces can establish a fund that can be used in defending their traditional knowledge being monopolized by patents granted in developed states

Conclusion

Current global strain regarding IP regime perhaps has to a considerable extent been aggravated by exaggerated promises from developed states concerning the profits of strong IP regimes and the overestimated hope of developing states and Laces of benefiting from such regime. An effective IP regime may be a factor in attracting FDI which in all likelihood is a non-decisive factor and more importantly, if IP rights prevailing among developing and Laces are further harmonized by international legal instruments, IP rights would be even less germane to FDI decisions.[37] Hence, policy makers in developing and Laces have to realize that IP rights cannot wipe out the prevailing disparities in the world nor can it be a magic tool for drawing huge flow of FDI.

The ideal legal regime both at national and international level is perhaps that one which can strike a balance between rival legal interests and formulate principles those would not heavily favor any particular group. During international negotiations at the WTO and WIPO, strategy for developing states should be to forge coalitions capable of eliciting flexibilities for them to redress their concerns. Their concerted action is necessary to initiate negotiations on the way the TRIPS Agreement is interpreted and implemented which would be consistent with the object and purposes of the agreement. Because of their resources in indigenous knowledge, the,, must strive for achieving just rewards from exploitation of such rights.

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[36] Schuler, supra note 16 at 160.

[37] Correa, Carlos M., *Intellectual Property Rights, the WTO and Developing Countries: the TRIPS Agreement and Policy Options for Developing Countries* , Zed Books, New York, 2000, at p. 30.

The UK Commission on Intellectual property rights rightly concluded that the interests of developing countries would best be served if their policy makers can design their IP rights regimes in a way that suits their particular economic and social circumstances.[38] At national level, domestic policy makers should along with formulation of proportioned legal principles, aim for educating public as regards the cost of blatant disregard of IP rights.

If there is unlimited public demand for pirated goods, then policing on enforcing the rights would be virtually impossible. Public perception towards IP rights is important tool of ensuring compliance because those laws are more likely to be enforced that can command the ,general assent or tolerance of the community in which they operate.[39] A haven for pirated products is no less unwarranted than an extravagant IP regime. Such a haven for piracy is not just injurious to the corporate interests, but also gives a wrong gesture to the domestic authors and inventors and stifles innovation and creation.

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[38] Supra note 27 at 155.

[39] Fitzmaurice, G.G., "The Foundations of the Authority of International Law and the Problem of Enforcement" Vol. 19, *Modern Law Review* pp. 1-13, at pp. 1-2 (1956)