

The Political Economy of Intellectual Property

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The dramatic expansion of intellectual property rights represents a new stage in commodification that threatens to make virtually everything bad about capitalism even worse. Stronger intellectual property rights will reinforce class differences, undermine science and technology, speed up the corporatization of the university, inundate society in legal disputes, and reduce personal freedoms.

We have no precise measure of the extent of intellectual property, but a rough calculation by Marjorie Kelly suggests the magnitude of intellectual property rights. At the end of 1995, the book value of the Standard and Poor (S&P) index of 500 companies accounted for only 26 percent of market value. Intangible assets were worth three times the value of tangible assets. Of course, not all intangible assets are intellectual property rights, but a substantial proportion certainly is.

While the legal protection of intellectual property might seem inseparable from contemporary global capitalism, until fairly recently capitalists were equivocal about such things. During the first six decades of the nineteenth century, corporations in the United States were not inclined to respect such intellectual property rights. For example, they often paid as little as possible, or nothing at all, to inventors. In addition, the United States did not even recognize international copyrights.

The free-marketeers of the nineteenth century vigorously opposed intellectual property rights as feudalistic monopolies. Their view of intellectual property rights mostly dominated political economic opinion in the United States until the massive depression of 1870s weakened faith in market forces. In the context of the economic crisis, business was desperate for anything that would return profits to what they considered to be an acceptable level.

At first, business owners tried forming cartels and trusts to hobble competitive forces. In response to vigorous protests, Congress passed the Sherman Antitrust Act. However, corporations were able to use patents, which were perfectly legal, as a convenient loophole to evade the intent of that law. Through patent pools, they could divide up the market and exclude new competitors. In this way, intellectual property rights were important in establishing monopoly capitalism.

The strengthening of intellectual property rights accelerated once again as the bloom wore off the post-Second World War Golden Age and the United States' export surplus disappeared. Behind closed doors, corporate leaders successfully lobbied the government to strengthen intellectual property rights that would give advantages to their industries. Just as in the late nineteenth century, business saw property rights as a means of increasing profits when economic conditions began to sour. The public never had a clue about the extent to which the government had given away important rights.

The Bizarre World of Intellectual Property Rights

Today, intellectual property rights claims go far beyond patent protection for useful inventions and copyrights for new music. Some claims are so outlandish that they would be humorous if the courts did not take them so seriously. For example, lawyers are now suggesting that athletes should patent the way they shoot a basket or catch a pass.

The American Society of Composers, Authors, and Publishers (ASCAP), ever on the lookout for more royalties, was about to sue the Girl Scouts for singing Row, Row, Row Your Boat and other songs around campfires until adverse publicity caused it to relent.³ On the same day that the Girl Scout article appeared, a *Wall Street Journal* article reported that the National Basketball Association was engaged in a suit against America Online over the transmission of game scores and statistics from NBA games in progress.⁴ In another case, someone, in all seriousness, patented the correct way of lifting a box.⁵ In one remarkable case, a patient found that his doctor had patented genetic material from the patient's own body without informing him. The patient sued for compensation, but the courts upheld the doctor's rights to the intellectual property encoded in the patient's genes.⁶

Absurd claims to informational property rights have been expanding by leaps and bounds. People have successfully convinced the Patent and Trademark Office to grant property rights for everything from colors to a specific number.⁷ The Patent and Trademark Office even registered the frowny emoticon as a trademark of Despair.com. Ralph Lauren won a victory in an appeals court in 2000, when his lawyers forced a magazine, begun in 1975 as the official publication of the U.S. Polo Association, to change its name because Lauren claimed the word Polo as intellectual property.⁸ In a similar case, when educators at the Australian Institute of Management listed a twenty-year-old course, Effective Negotiation Skills, on the organization's Web site, a United States training group, Karrass, told the institute to take the course description off the site because Karrass has a U.S. trademark over the expressions effective negotiating, advanced effective negotiating, and effective sales negotiating.⁹

One critic of the patent system even succeeded in winning a patent for Kirchoff's law, a scientific principle first developed in 1845, proving that the electric current flowing into a function equals the current flowing out. If an individual critic of the patent system is able

to manipulate the Patent and Trademark Office into registering such ridiculous claims, think of how much profit-maximizing corporations, with enormous resources available for research and legal expenses, are able to stake out as private property.

To illustrate this point, Richard Stallman, winner of a MacArthur genius award, challenged Bruce Lehman, then head of the U.S. Patent and Trademark Office, at a contentious meeting. Stallman produced a voluminous, unwieldy printout of a computer program he had written earlier with several colleagues. He explained that the program was currently in use on more than a million computers, including those of the U.S. Air Force and major companies, such as Intel and Motorola. Just a few lines of code can be enough to infringe a patent, and this compiler has ten thousand pages, Stallman said, gesturing to the document. How many patents does it infringe? I don't know. Nobody does. Perhaps you can read the code and tell me? he challenged Mr. Lehman.

The Dual Economy

Intellectual property rights change the nature of competition. Most industries that do not enjoy the protection of intellectual property rights find themselves involved in intense competition, which lowers their profits. In contrast, companies with intellectual property rights face limited competition and can enjoy elevated profits.

For example, Federal Reserve Board Chairman Alan Greenspan recently told Congress: Indeed, a striking feature of the current cyclical episode relative to many earlier ones has been the virtual absence of pricing power across much of American business, as increasing globalization and deregulation have enhanced competition. In this low-inflation environment, firms have perceived very little ability to pass cost increases on to customers.

Let us decode the Chairman's words. For agricultural products, steel, and other commodity-like goods with no intellectual property protection, competitive forces put powerful pressure on profits. If the entire economy were like those industries, a severe crisis would engulf it. In particular, those industries that depended on intellectual property would tend to be especially vulnerable. Reproduction costs for software, pharmaceuticals, or movies are trivial. In the language of economics, marginal costs are small and fixed costs are high. Without the legal protection of intellectual property rights, strong competition in such industries would mean certain bankruptcy. Consequently, monopoly in these sectors is essential, and monopoly is made possible by intellectual property rights protection.

A few years earlier, Greenspan was emphasizing a different part of the economy, breathlessly rhapsodizing about a weightless economy:

The world of 1948 was vastly different from the world of 1996. The American economy, more than now, was viewed as the ultimate in technology and productivity in virtually all fields of economic endeavor. The quintessential model of industrial might in those days was the array of vast, smoke-encased integrated steel mills in the Pittsburgh

district and on the shores of Lake Michigan. Output was things, big physical things.

Virtually unimaginable a half-century ago was the extent to which concepts and ideas would substitute for physical resources and human brawn in the production of goods and services. In 1948 radios were still being powered by vacuum tubes. Today, transistors deliver far higher quality with a mere fraction of the bulk. Fiber-optics has [sic] replaced huge tonnages of copper wire, and advances in architectural and engineering design have made possible the construction of buildings with much greater floor space but significantly less physical material than the buildings erected just after World War II. Accordingly, while the weight of current economic output is probably only modestly higher than it was a half-century ago, value added, adjusted for price change, has risen well over threefold.

Over and above the obvious exaggeration, Greenspan's words here appeal to the marvels of high technology. But the so-called weightless economy has more to do with the legislated powers of intellectual property that the government granted to powerful corporations. For example, companies such as Nike, Microsoft, and Pfizer sell stuff that has high value relative to its weight only because their intellectual property rights insulate them from competition.

In his more recent testimony, Greenspan noted, however, a firm is inherently fragile if its value-added emanates more from conceptual as distinct from physical assets. This possibility would be even more terrifying to holders of intellectual property was it not for the powerful protection that the state provides. Not a day goes by when some legislature or some courtroom fails to grant new powers to holders of intellectual property.

The Costs of Intellectual Property Rights

Intellectual property rights are in the process of corrupting society in a number of ways. First of all, intellectual property rights will reinforce class differences. Worldwide, the rich have become richer to an unimaginable extent in recent years. The members of the Forbes 400, a compilation of the 400 richest people in the United States, have a combined net worth of \$1 trillion-greater than the gross domestic product of China.

Between 1995 and 1998, the average annual income for a member of this elite group rose from \$50 million to a staggering \$110 million. The obscene wealth of a Bill Gates of Microsoft, a Phil Knight of Nike, and all of the other instant Internet billionaires, alongside the sizable residue of poverty that blights the contemporary United States, reminds us of the link between the distribution of income and intellectual property.

Emblematic of the extent of this new distribution of property, in 1999 outside of those who have inherited their wealth, three of the four richest people in the world, according to a *Forbes* magazine survey, owed their wealth to Microsoft, one of the major holders of intellectual property rights, befitting the so-called New Economy in which DOS Capital has supplanted *Das Kapital*.

Perhaps the famous trickle down effect could justify the obscene maldistribution of wealth if intellectual property rights actually improved productivity. In fact, intellectual property rights are terribly destructive of productivity on many counts. First of all, intellectual property rights undermine the very science and technology that they are supposed to promote. Intellectual property rights are to science what tollbooths are to highway traffic. Both create bottlenecks and impede forward progress, but in the case of intellectual property rights, innumerable disputes arise about who gets to collect the tolls and how much the tolls should be. To the extent that the present system of intellectual property rights constricts the flow of new technologies, it imposes another incalculable cost on society.

For example, virtually no new technology is the product of a single person or even a single corporation. Ideas and discoveries, what Marx called universal labor, draw upon a multitude of sources. Sorting out who deserves legitimate credit for any technology is impossible. Just consider the complexity of a large software system with 100,000 components. It can use hundreds of previously patented techniques. Because each patent search costs about a thousand dollars, searching for all the possible patent potholes in the program could easily run well over \$1 million, and that far exceeds the cost of writing the program.

Intellectual property rights spawn a system of wasteful litigation. Already, by the early 1990s, Intel's annual litigation budget alone was believed to be at least \$100 million. No doubt it has grown significantly since then.

Intellectual property rights also create an atmosphere of secrecy, which is inimical to scientific progress. Finally, the quest for intellectual property rights is speeding up the corporatization of the university. Universities now routinely sell to corporations the rights to the patents developed in university laboratories, often at public expense.

Oil or Intellectual Property

While energy sources are the central to maintaining life itself, let alone the capitalist mode of production, intellectual property rights are now every bit as important in maintaining the international financial balances of the U.S. economy. Domestic access to oil will remain important, of course, so long as the comfortable classes continue to ride in their SUVs and heat and cool their mega-mansions, but the energy requirements for the domestic production of material goods becomes increasingly less important as production moves to low-wage peripheral areas of the world. Intellectual property rights have become the financial counterweight to deindustrialization, because the revenues that they generate help to balance the massive imports of material goods. Unfortunately, this means of payment still remains woefully insufficient to reimburse the rest of the world for the imports to United States.

The strengthening of intellectual property rights is perhaps the most pressing U.S. foreign policy objective today, possibly even more so than oil. The government's efforts go well beyond shoring up the legal rights of holders of this kind of intellectual property. The full weight of its power is brought to bear against all evildoers who would dare to create knock offs of a Disney cartoon or a Nike swoosh. In the words of Thomas Friedman, perhaps the most enthusiastic proponent of globalization at the *New York Times*:

The hidden hand of the market will never work without a hidden fist—McDonald's cannot flourish without McDonnell Douglas, the designer of the F-15. And the hidden fist that keeps the world safe for Silicon Valley's technologies is called the United States Army, Air Force, Navy and Marine Corps....Without America on duty, there will be no America Online.

Lest the skeptical reader dismiss Friedman's clever phrasing as nothing more than a rhetorical flourish, consider the words of William Cohen, the secretary of defense in the Clinton administration. In February 1999, upon his arrival in Seattle—a city that a few months later became a symbol of resistance to the policies that he was sent to advocate—to speak to the employees of Microsoft, the secretary told reporters, I will point out that the prosperity that companies like Microsoft now enjoy could not occur without having the strong military that we have. Friedman and Cohen have expressed what is probably the central thrust of the foreign policy of the government of the United States.

Intellectual Property and Corporate Control

Guarding the property rights of typical material commodities is relatively simple. Because most commodities are assembled in stores or warehouses, the owners merely have to watch over the commodities in question to ensure that unauthorized people do not take possession of them. In the case of intellectual property, the materiality of the good is irrelevant. A song or a program can be downloaded virtually everywhere by anybody. As a result, protecting intellectual property requires control over people rather than things. Consequently, the protection of intellectual property is necessarily more intrusive than for material commodities.

Purveyors of intellectual property implore the government, often with success, to mandate modifications that limit the capacity of modern technologies to violate intellectual property rights—even if they cause inconvenience to the consumers whom capitalism is supposed to serve.

A frightening, albeit ridiculous, example of this invasiveness came from a Canadian case in which a farmer was accused of stealing Monsanto's intellectual property by planting genetically engineered seeds. The farmer protested that he had not planted Monsanto's seeds. The judge ruled that even though the court had no evidence to prove that the genetic material had not drifted onto his property in pollen from other farms, this farmer had the obligation to police his fields to protect Monsanto's intellectual property.

According to the decision, the source...is really not significant....Growth of the seed, reproducing the patented gene and cell, and sale of the harvested crop constitutes taking the essence of the plaintiffs' invention, using it, without permission. In so doing the defendants infringed upon the patent interests of the plaintiffs. Of course, to expect farmers to prevent pollen from drifting onto their fields strains credulity—even in a corporate-dominated society.

Conclusion

So here is a property right that undermines science, burdens the economy with expensive litigation, and infringes on personal freedom. To make matters more absurd, public research forms the basis of the great advances in intellectual property. Yet the leaders of the capitalist world can find no better way to lift the rate of profit than to promote the expansion of intellectual property rights.

Notes

1. Marjorie Kelly, *The Divine Right of Capital* (San Francisco: Bennett-Koehler, 2001), 16.
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3. Elisabeth Bumiller, *ASCAP Tries to Levy Campfire Royalties from Girl Scouts and Regrets It*, *New York Times*, 17 December 1996. Also, see *Girl Scouts Don't Have to Pay Fees to Sing Songs*, *Wall Street Journal*, 27 August 1996.
4. *America Online Faces Lawsuit by NBA Over Data on Games*, *Wall Street Journal* 29 August 1996.
5. Walsh, *Patently*, S32
6. James Boyle, *Shamans, Software, and Spleens* (Cambridge, Mass.: Harvard University Press, 1996), 2124.
7. Simson Garfinkel, *A Prime Legal Patent: Legal Rights to a Number Upset Programmers and Lawyers*, *Scientific American* 273 (July 1995): 30.
8. Seth Shulman, *PB&J Patent Punch-Up*, *Technology Review* 104 (May 2001).
9. David James, *Trademarks: Latest Word on the Internet: It's Legal Chaos*, *Business Review Weekly* (Australia), 4 February 2000.
10. Seth Shulman, *Owning the Future: Staking Claims in the Knowledge Frontier* (Boston: Houghton-Mifflin, 1999), 11.
11. *Ibid.*, 69.
12. Alan Greenspan, *Federal Reserve Board's Semiannual Monetary Policy Report to the Congress Before the Committee on Banking, Housing, and Urban Affairs*, 7 March 2002, www.federalreserve.gov/boarddocs/hh/2002/March/Testimony.htm.

13. Alan Greenspan, Technological Advances and Productivity: Remarks at the 80th Anniversary Awards Dinner of the Conference Board, New York City, 16 October 1996, www.federalreserve.gov/boarddocs/speeches/1996/19961016.htm
14. See the discussion in Michael Perelman, *Steal This Idea* (New York: Palgrave, 2002).
15. Greenspan, Technological.
16. Peter Newcomb, The Richest People in America, *Forbes* 164 (October 1999): 169.
17. See Erika Brown, et. al., Global Billionaires, *Forbes* 164 (July 1999): The phrase DOS Capital was coined by George Bittlingmayer and Thomas W. Hazlett in DOS Kapital: Has Antitrust Action Against Microsoft Created Value in the Computer Industry?, *Journal of Financial Economics* 55 (March 2000): 329359.
18. Fred Warshofsky, *The Patent Wars* (New York: Wiley, 1994), 168.
19. Thomas Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Strauss & Giroux, 1999), 373.
20. Robert Burns, Post-Cold War Worries: Cohen to Call for Strong Military in High-Tech Visit, Associated Press, 18 February 1999, www.abcnews.go.com/sections/us/DailyNews/cohen990218.html.
21. Cited in Perelman, *Steal*, 123.