

CULTURAL, POLITICAL, AND SOCIAL IMPLICATIONS OF INTELLECTUAL PROPERTY LAWS IN AN INFORMATIONAL ECONOMY

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Summary

Shifts towards the commodification of intangible goods – apart from historical means of economic management based on industrial strategies and the creation and sale of physical goods – have made intellectual property rights critical to capitalist accumulation in an increasingly globalized ‘informational’ economy. In mainstream policy discourses, intellectual policy rights are advanced as a means to provide incentives for creativity and innovation, and to secure economic rewards for investment in research and development while providing a socially optimal level of creative and technological goods. The broader cultural, political, and social implications of the increasing expansion and extension of intellectual property have attracted heightened attention and concern since the 1990s. A discussion of the historical justifications for intellectual property in Western legal traditions is followed by a consideration of how these laws increasingly shape conditions of culture and communication. We show how

the trade-based expansion of intellectual property has reoriented the traditional balance between private property rights and public interests, further entrenching historic inequalities and providing new obstacles to the realization of development and human rights in the global South, while reinforcing the marginalization of non-Western states, peoples, and cultures. The impact of intellectual property on access to medicine, health care, education, agriculture, and the preservation of food security, and biodiversity, illustrates the dangers of expanding intellectual property rights without consideration of public interests or the desirability of securing basic public goods. Responses to these debates demonstrate the need for – and the emergence of – new coalitions of states, activists, and critics able to forge a new politics of intellectual property that better balances private and public rights while furthering human rights and sustainable development.

1. Introduction

The cultural, political, and social implications of intellectual property rights (IPRs) are matters of growing concern. In the late 20th century, economists and critical theorists recognized that in many developed countries, long dominant industrial economies based upon the manufacturing, distribution, and consumption of tangible goods were being eclipsed in size and social impact by an emerging economic system based upon the creation, commodification, exploitation, and control of intangible (or information-based) goods. Characterized in various ways – the knowledge-based economy, the condition of postmodernity, the information or network society, post-industrial society, the creative economy, or simply the new economy – new technologies of communication and distribution have given new impetus to the intangible or immaterial dimensions of goods and services. The formulas, compositions, trademarks, advertising, branding, software, screenplays, designs, and formats upon which such goods and services are based, and the merchandising opportunities they afford, have become a driving force and an autonomous basis for the further accumulation of capital. In an economy that capitalizes upon intangibles, IPRs provide the fundamental legal means for protecting these assets and securing future rents. Broadly construed, intellectual property (IP) includes copyright, trademark, and patent rights and is sometimes seen to encompass related areas such as trade secrets, geographical indications, rights of publicity, and protections for industrial designs, plant varieties, databases, and integrated circuit topography. Generally these laws attach various individual proprietary rights to intangibles and thus enable these to be exchanged as commodities, thereby providing the basis for investment in informational goods including software, films, logos, modes of manufacture, pharmaceutical formulae, music, scripts, and business plans.

Purely economic considerations of IPRs, however, overlook the cultural, social, and political implications of these rights, as well as the consequences they may yield. The scope and strength of IP laws ensure problematic impacts far beyond their protection of economic goods, particularly since such laws have been effectively globalized through their expansion and projection in treaties, laws, and international trade agreements. The privatization of informational products and cultural expressions has significant implications for the nature of communications and the shape of political discourse in democratic societies and for states' capacities to further autonomous economic and

social development. It poses issues of access and distributional equity with respect to vital goods such as medicine, food, and health care; increasingly it implicates both individual self-expression and community self-determination. This range of cultural, political, and social concerns calls for a more comprehensive approach to IP, one that is attentive to the ways in which law shapes social representations and knowledge, influences public perceptions and social meanings, dictates the terms of access to fundamental resources in order to create constitutive forms of social inclusion that work to negate processes of exclusion and marginalization.

Although we focus on those aspects of the cultural, political, and social implications of IP that have received the most sustained political advocacy and scholarly attention, the size of this chapter renders certain exclusions inevitable. We therefore bypass the large field of neoclassical law and economics, and sidestep cultural studies of trademark and branding, sociological studies of research, development and innovation, studies of creativity and innovation, literature on product counterfeiting, grey marketing and other forms of ‘piracy,’ as well as alleged links between IP infringement, organized crime, and terrorism. We do this not merely for reasons of expediency and space but because the scholarship addressing these topics has shown less interest in social justice issues.

We begin by briefly charting the historical establishment and justifications for IPRs in modern Western states, which, we will argue, have increasingly emphasized private interests in IP over the public concerns that have been historically central to the rationale for providing such protections. We illustrate this with reference to copyright in Section 3, where we explore growing alarm about the tendency of IP to limit creative expression and democratic dialogue to the detriment of public interests in access to knowledge and free expression. These issues have expanded into global concerns about public goods in the light of the expansion of Western models of IP governance through the development and enforcement of international trade-based mechanisms for regulating IP, the topic of Section 4. Growing global inequities in access to informational goods have provoked widespread criticism and new forms of advocacy which insist that IPRs be reformed to better meet the social and economic development needs of a greater portion of the world’s population, and to better reflect human rights norms and values. Moreover, the European Enlightenment emphases and prejudices of these laws are increasingly questioned, particularly as the global commons assumed and depended upon by IP may create constitutive disadvantages for populations in the global South as well as minority and indigenous peoples, whose communities’ needs with respect to plant and human genetic resources, traditional knowledge, and traditional cultural expression are unaddressed by IPRs that are focused wholly on private rights and an undifferentiated public domain. These concerns suggest the need for a new and more pluralist legal dialogue to address the meaning and consequence of IP protections

2. Historical Justifications for Intellectual Property Protections and Current Realities

The history of IP protection dates back to the first patent statute, a Venetian statute of 1474, the first copyright law, Great Britain’s Statute of Anne in 1709, and medieval guild marks as progenitors of modern (nineteenth century) trademark legislation. IP protection for creators and innovators, as well as those who publish, manufacture, and

distribute works and innovations, is closely linked to the development of technologies that make it easier to reproduce, disseminate, and (re)appropriate literary, artistic, scientific, and commercial works. For example, without printing technologies and the means of creating copies of a book more readily than by manual transcription, there would have been little need for copyright, which originally extended privileges in the book trade to protect booksellers' investments. In the history of IPRs, intersecting social, technical, and legal factors are always at play. Political and social ideas about creation, innovation, and the character of existing and emerging technologies shape and are shaped by the legal institutions established to protect dominant and nascent interests. Following the advent of the printing press, subsequent media including photography, recorded music, radio, and video spurred further changes to copyright laws in order to maintain and extend the privileges of rights holders (rather than authors or creators), a tendency that has accelerated since the late twentieth century to the extent that the scope of private rights now far exceeds their historical justifications.

Throughout the early history of their development, both public benefits and private interests in the extension and enforcement of IPRs were subjected to legal, political, and public scrutiny. In these debates, some regarded IP as simply another form of private property held by way of natural right, while others perceived access to information and knowledge as the primary interest to be facilitated by state-granted rights in knowledge-based goods perceived as unique privileges. The very fact of publication (both of literary works and innovations) was considered a gift to the public that made a work unavoidably common. Neither books nor inventions were seen to exist in isolation but were regarded as linked into complex networks of communication. Thus, acceptance of a natural property right – which would legitimate perpetual rights – has always been rejected in principle as inhibiting the advancement of learning and knowledge. Nevertheless, in no small part due to Enlightenment and Romantic philosophy, during the eighteenth century the belief in the individual-as-creator took on a more prominent role in the law.

IPRs were ultimately designed to create a balance between private and public interests, granting authors and inventors a limited-term monopoly over works that could be assigned to publishers and manufacturers to protect their investments. Once this term ends, the protected works enter the public domain and are available for reproduction, imitation, appropriation, and transformation. This social balance is designed to bestow rights-based incentives for creators, by promising monetary rewards in a market society. Yet, to the disservice of the free flow of ideas, expressions, and technology in European and Anglo-American public spheres, IPRs tend to grant exclusive rights to private individuals – and, more recently, to corporations, under the legal fiction that granted them the status of individuals – on the basis of utilitarian calculations about the enhanced social benefits that would ensue. Authors' exclusive rights under copyright, for instance, may be viewed as a necessary evil in a free market economy – a limited monopoly to encourage creation for the purpose of furthering the arts and sciences, the learning essential to an enlightened citizenry, and the ongoing enrichment of the public domain. Copyright, protecting only a work's expression or an innovation's form, rather than the underlying ideas these contained, was thus regarded as a kind of tax on the public, strictly limited in time and in scope but needed to provide incentives for innovation.

Although patent monopolies were created prior to copyright legislation, the historic development of both legal systems shares a similar trajectory with respect to the priority given to the maintenance and promotion of a public pool of knowledge. Patent protection is granted to craft-makers and trades-people to protect the fruits of individual labor and to spur subsequent and parallel inventions. Patents are accorded to ensure that critical details be accessible to the public through disclosure of the pertinent information necessary to enable subsequent inventions. Simultaneously, patents protect inventions from being copied by competitors. Patent holders therefore benefit from limited exclusive rights attached to their works, which they can exploit until the patented information becomes appropriable by the public. Like copyright, the utilitarian arguments underlying patent laws aim at creating incentives for research, development and the creation of new products and ideas. Some philosophical traditions put individual ownership over patents at the very core of private property, while others see patents as limited monopolies that would, if not for the social benefits they bestow through disclosure, be illicit forms of unfair competition that limit free trade. The rights granted by patents, then, ensure a limited-term monopoly over the making, use or sale of protected information only in so far as these rights do not excessively prohibit other socially useful innovations. This inherent conflict between public and private rights as well as the tension between innovation and monopolization remains crucial to ongoing IP debates.

By the late nineteenth century, IP was regarded as an instrumental tool for maximizing social and economic benefits in an industrial society, rather than as a natural right to be afforded to individual creators as a mere consequence of creative effort. Nonetheless, market-savvy actors have always profitably exploited such rights in pursuit of private, rather than public agendas. The early history of US copyright lawmaking, for instance, is regarded as a classic demonstration of the instrumental role of the state in advancing the interests of capital and aligned elites. If IPRs were designed to foster social development, the major beneficiaries nonetheless were those accumulating private capital. As a consequence of this opportunity to profit, strong private, corporate and industrial lobbies are today pushing for more stringent, extensive and longer term IPRs, a tendency foreseen by early critics of these laws including drafters of the US Constitution.

The historical development of IP laws ideologically privileged Enlightenment concepts of liberal individualism and Romantic notions of individuated authorship and authorial control, despite the fact that their benefits primarily accrued to corporate collectivities as employers of creative labor and assignees of rights which creators and innovators cannot individually exploit. For this reason, IP operates largely to protect investment capital. Nonetheless, more relational understandings of creativity and innovation have gained greater credence in the late twentieth century, as has the capacity of technologies to democratize the dissemination of works and technologies and to de-legitimize individual authorial rights, particularly when these are exercised to support corporate censorship or rent-seeking behavior. For many artists, activists, scholars, and consumers today, the shared use of socially developed technologies promises a far greater pool of creative resources and services than those provided via the perpetuation of private monopolies based upon an ideological individuation of creativity and innovation. The increasing ubiquity of digital information and communications technologies and the

capacities these afford for ever-greater networked social collaboration in creative expression and technological innovation are furthering claims that the IP system faces a crisis of legitimacy.

3. Shaping Cultural Life and Conditions of Communication

Many critical scholars of intellectual property have remarked upon the capacity of IPRs – copyright, trademark and publicity rights particularly – to shape communications by affecting forms of private censorship. The nature and consequences of the potential conflict between freedom of speech and copyright power is the subject of great concern, much of it critical of the overreach of corporate copyright and trademark holders into the public realm of expressive freedoms. Although this conflict was first addressed in the US constitutional context, the issue has also surfaced and attracted critical attention in Canada, Europe, the United Kingdom, and South Africa. Copyright, arguably, is not appropriately put under a ‘new economy’ umbrella because it does not merely spur innovation but also regulates speech. It is, in other words, not merely an economic vehicle, but a communications instrument relevant to cultural policy. Copyright is understood to underwrite the free speech necessary to democratic society. It does so by providing a subsidy for a robust and independent media landscape, but it also imposes limitations to free speech that cannot always be justified, mainly by prohibiting or imposing prohibitive costs on expressions that copy or transform the expressive work of others (e.g., in the forms of parody, collage, or artistic criticism). Many IP systems afford fair use or fair dealing for such actions; however, the threat and subsequent cost of litigation often creates a chilling effect on these uses.

Copyright, like trademark and publicity rights, affects the ways in which meanings may be expressed and ideas circulated, preventing people from using some of the most powerful, accessible, and popular cultural forms to express alternative visions of social worlds. Because it controls reproduction, copyright limits flows of information, regulates the production and exchange of meaning, and shapes social relations of communication. Through the concentration in private hands of ownership over the cultural products they enable, copyright and trademark laws can be used as tools for the private, rather than governmental, control over speech. In many contemporary media landscapes, this results in the excessive control of free speech and flows of information by corporate actors in news, media, entertainment, and technology sectors.

Although copyright laws aim to ensure fair access to cultural goods, current laws pose special obstacles to creativity, cultural critique, and democratic dialogue because of limited fair use and fair dealing exemptions, widely acknowledged to be in need of re-conceptualization and reform. Although they are inherent and crucial aspects of human expression, copying and reproductive appropriation are throttled by copyright law and its recognition of limited exceptions that are not meaningfully related to the reality of creative expression, particularly in a networked digital milieu that facilitates and indeed depends upon copying, sharing, and new forms of collaboration. Despite ever more convincing theoretical explanations of the critical work that acts of creative appropriation accomplish, the legal landscape, even around contemporary ‘appropriation art,’ is far from settled, and the ethics of cultural appropriation constitutes an emerging and controversial field of study, as does the increasingly

impassioned rhetoric surrounding IP in digital environments and its consequences for public policy.

The uncertainties posed by copyright to everyday activities as well as its increasing obstruction of learning and creativity in digital environments are widely lamented, especially now that practices of reusing and copying – once the critical tools of an artistic avant-garde and other subaltern communities – are employed by all users of digital media as the underlying basis of the ‘cut and paste’ operations we regularly perform in digital contexts. Inherently reproductive digital technologies provide the most important tools of creativity for a new generation for whom digital remixing is a fundamental form of speech, thought, and identity. The average person inadvertently accomplishes an unseemly number of infringements daily, which has led to a tense situation where youths in particular have become targets of increasingly didactic and moralistic “anti-piracy” campaigns that simultaneously bring copyright law into ever greater disrepute while imperiling important new forms of creativity. Critics, frustrated by the lack of overarching cultural policy principles able to balance the restrictions imposed by corporate IP holders, are founding initiatives such as Free and Open Source Software, Creative Commons, and the Access to Knowledge (A2K) movement to establish processes of civil society cultural policy-making in the absence of decisive government political activity to better serve public needs for greater access to protected materials.

The chief argument of many open source thinkers is that software -- and by extension other culturally expressive work -- that is *not* subject to the constraints of IPRs better supports both the creative process and the public discourse vital to democracy. Among the most significant tools of such thinkers is the public license, which encourages the use of copyright powers to enforce sharing rather than restrict it. By insisting that all who participate in open source communities agree not only to contribute their efforts to a common pool, but also to share derivative creations, ever more sophisticated common resources can be cumulatively developed. The popularity of public licensing has now expanded far beyond the world of software, and includes cultural objects of all sorts, as the Creative Commons license illustrates.

Arguing against a ‘pay per use’ culture in which every cultural form is conceived of as a work to be protected by IPR and thus explicitly owned so as to require clearance before it can be used, cultural critics advocate the global adoption of the practices and conventions of peer-production-based communities (some of which are enabled through donations, while others are profit-oriented) such as Flickr and Wikipedia, which are built on similar principles of collaboration, sharing, and on the provision, rather than on the limitation of access to informational goods. This approach does not refute the regime of copyright, but actively engages its principles as tools to be deployed for public purposes. The novel exercise of such rights has helped to forge new communities and legitimizes and popularizes new norms. Corporate copyright holders are responding to the success of the popularity of peer-to-peer file sharing with new technological means for concentrating and restricting the online circulation and use of digital cultural works. Digital Rights Management (DRM) systems, which encrypt content in order to limit access to it, provide a ‘technological fix’ to this problem, enabling rights holders to physically and legally control and manage digitally distributed information. The

emerging digital landscape is increasingly governed by privately generated norms and technological measures backed up by legislative bodies, displacing public deliberations around the scope of copyright and its limits, which functions to turn large amounts of what was once in the public domain into private goods. Deployments of DRM result in violation of users' rights of fair use and freedom of expression; they have spurred a countercurrent of protest and resistance. Various solutions to this standoff have been proposed to provide compensation to owners without controlling the behavior of users with little consequence.

Although technologies for preventing unauthorized file sharing are still under development and their long-term viability is uncertain, rights holders are still assuming they will hold exclusivity in cyberspace. After initial standoffs and skirmishes, some entertainment industry actors, including distributors of video and online games, are embracing and encouraging fan-produced derivative works, largely within the parameters of strict permissions, with the ultimate purpose of generating further profits built upon the cultural content produced by appropriated consumer creativity. Scholars and activists urge consideration of greater user rights and policy reforms that take into account the important functions of digital realms of IP-protected culture as creative and learning environments and that defend users' circumvention of corporate technological barriers to their creativity.

The growing ubiquity of digital technology in consumer societies has renewed critical interest in the concept of the public domain and its limits. The public domain is constituted by intangible goods and forms that lack IP protection and is characterized as a cultural 'commons' or commonwealth. It has been described as a realm of socially shared informational goods lacking commodity status or defined through gift relations, and is occasionally considered a dimension of the public sphere. Methods for defining and mapping the public domain abound, but pragmatists suggest that it is more important to articulate what the public domain needs to be. Copyright critics argue that a reading of the existing case law in common law jurisdictions points to a more positive rendering of the public domain as an enlarged space of cultural productivity that serves the public interest, rather than a mere group of works that do not have IPRs attached. This point has been taken up with respect to IP and public goods more generally rather than under conditions of globalization.

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