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Ending the Monopoly of Ideas: Compulsory Licensing in Intellectual Property

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The term 'intellectual property' seems innocuous. If property just is 'intellectual,' how important could it be? The truth is that intellectual property law is easily one of the most destructive forces in our economy. Nearly one-fourth of scientists responding to a survey by the American Association for the Advancement of Science, the largest general scientific body in the world, reported that patents were hampering their research.[1] In the European Union, over €60 billion are wasted every year on research and development of products that are already protected by patent law.[2] An experiment using a virtual world to simulate the effects of the US patent system found that the "participants were more likely to innovate when there was no intellectual property system at all, or when they could open-source their innovations and share them with people."[3]

Virtually every business that holds a dominant position in its field has gotten there not simply through good business practices, but also through the advantages afforded to them by intellectual property law. In 1998, Google filed patent number 6,285,999 on the "PageRank" system, laying the foundation for them to become the dominant force in internet search.[4] Monsanto has used its patents to control 95% of the soy and 80% of the corn markets, respectively. It used this power to increase the price of each by 28% and 25%, respectively, from 2008 to 2009.[5] "Patent pools" led to monopolies that had to be broken up using antitrust laws in the airplane [6], computer, and motion picture industries.[7]

Our society has not always been like this. In 1790, the year the US Patent Office first came into being, only three patents were granted.[8] Patents had to be deemed "sufficiently useful and important" by the three-person Patent Board, comprised of the Secretary of State, the Secretary of War, and the Attorney General. By July of 1836, only ten thousand patents had been granted.[9] In 2009 alone, 167,350 utility patents, the most common type of patent, were granted. IBM was granted 4,914 of these, a 17% increase over the previous year. Microsoft was granted 2,906, a 43% increase over the previous year and a 400% increase over 2003. Fifty companies received 29% of all patents granted in 2009.[10]

Patent and copyright terms have also expanded dramatically. The original US patent term was for fourteen years, should the Patent Board approve it. The patent term is now twenty years. "Under certain circumstances, patent term extensions or adjustments may be available."[11] The original US copyright term was for fourteen years with an option to renew the copyright for another fourteen years if the author was still alive. The current copyright term is now for the life of the author plus another seventy years. For works of corporate authorship, the copyright term is now one hundred and twenty years after creation or ninety five years after publication, whichever endpoint is earlier. This means

most works will be copyrighted for over a hundred years. Trademarks, which didn't even exist in federal statute until 1905, are in force as long as they are in use.[12]

This isn't even to mention all the costs associated with the intellectual property bureaucracy. The US Patent Office has approximately six years of patent applications, over one million filings, waiting to be evaluated.[13] Approximately, seven out of ten patents were approved at the start of the 2000's. Today, the number is less than half.[14] The average patent lawsuit will cost between $3 million and $10 million to litigate, and take between two to three years.[15] This amounts to a litigation cost of, at the minimum, $15.6 billion a year.[16] Merely getting a patent approved can cost $10,000 for a domestic filing and $100,000 for an international filing.[17] This amounted to a cost of $25.8 billion in 2009.[18] This isn't even to mention that, according to Barack Obama, the paper-based tracking system of the Patent Office is woefully "outdated."[19] As far as I know, nothing has been done to correct the situation.

Clearly, there is a problem. Our system is bogged down in waste and innovation is stifled. How do we correct it? Is the solution simply to eliminate intellectual property rights? I don't believe so. Piracy during the 1800's was a profound source of frustration for many authors [20] and inventors.[21] It also doesn't make sense that people shouldn't be rewarded for their creative work. Rewarding creators helps encourage more creation, something most people want.

The solution is to eliminate the ability of one person or entity to have the sole right to use a piece of intellectual property, while still rewarding the original creator of the intellectual property. The system that does this is compulsory licensing. In this system, every piece of intellectual property can be used in a derivative work, yet the original creator of the work is still compensated. The rate of compensation is either determined by the parties privately, or if an agreement cannot be reached, by a court.

The government sometimes uses compulsory licensing in antitrust cases, but only when it considers a firm's dominance to be a problem.[22] Moreover, when the government does use compulsory licensing, they do not use the market to determine rates. They simply determine the licensing rate themselves. In 1953, a district court used this power to order General Electric to license its light bulb patent for "free," a price General Electric surely was not happy with.[23] There have also been times when the government only allows a small handful of companies to license a piece of intellectual property. It is not open to the market at large.[24]

The next step to solving our intellectual property crisis is to eliminate the Patent Office and to replace it with a single repository for intellectual property that people want protection for. This idea was actually put forth by Jefferson in a 1791 bill, but unfortunately, it did not pass.[25] Without the government deciding what ideas are able to be protected, private firms spring up to search the registered intellectual property and inform individuals if they believe an idea or invention infringes upon something already registered. This eliminates long wait times, as people could presumably pay for faster searches. Plus, if a company does not perform well, it will presumably go out of business.

The elimination of the Patent Office may not even affect the number of intellectual property infringement law suits. Even with the Patent Office, there are still over 5,000 patent, copyright, and trademark suits every year.[26] The Patent Office also does not ensure that only "sufficiently important" creations receive protection, as was in its original mandate.

Well, unless you consider “the bird diaper,” “the pat on the back apparatus,” and the “initiation apparatus,” a “harmless” way to initiate a candidate into a fraternity by shocking him with electrodes, to be “sufficiently important.”[27]

These solutions are simple, but achieving them is difficult, because they would mean the government doing less. The government, and the powerful parties who benefit from government intervention into the economy, typically do not like the government to do less. Intellectual property law has also historically been a very important tool for government-sponsored censorship, an important tool of the state. This side of intellectual property law has started raising its ugly head again in recent years. Laws and treaties such as the ACTA treaty,[28] Britain’s Digital Millennium Copyright Act,[29] and Canada’s Copyright Modernization Act [30] all threaten to bring millions people across the world under the heel of a digital dictatorship. Clearly, our intellectual property system must be reformed before any more damage is done.

A commonly cited beginning to modern intellectual property is when Fillipo Brunelleschi was granted a three year patent for a barge with hoisting gear that carried marble along Italy’s Arno river in 1421.[31] This patent was given not only for technological innovation, but also because Brunelleschi was working on one of the most important projects of the day: building the dome on the Santa Maria del Fiore. This was like the Super Bowl to the people of Florence. People would gather to watch the dome being built. Santa Maria del Fiore was “the great spiritual center of the city,” and it “served as the venue for diplomatic visits, housed important political events, and welcomed within its walls many of the cultural, spiritual and intellectual leaders of the time.”[32] It had remained without a dome for over 100 years. Thus, the granting of the first patent had a decidedly political aspect to it.

The first patent in England was given by Henry VI in 1449 to John of Utynam for a technique on manufacturing stained glass.[33] This was the start of a long tradition whereby the Crown issued monopolies to “favoured persons,” or to people willing to pay. The granting of monopolies became a key source of revenue for the Crown. Soon, monopolies covered a whole range of known goods, such as salt,[34] and the right to provide services, such as the use of inns, ale houses and gold and silver thread.[35] The Statute of Monopolies of 1623 curtailed some of these abuses by stating that the Crown could only issue letters patent (a.k.a. monopolies) to the inventors or introducers of original inventions for a fixed number of years,[36] but the system was still far from without its flaws.

The most significant monopoly granted by the Crown from an intellectual property standpoint was the one given to the Stationers Company. In 1557, the Stationers were given a monopoly over printing in all of England. The Stationers Company was not a “company” so much as a guild. There was no stock to be owned. There were only positions of power to be attained within the guild. The guild was comprised primarily of bookbinders, booksellers, and printers,[37] although text writers and lymners (or illustrators) also played a role.[38]

At the head of the Stationers Company was the master, the principal officer. Below him were the upper and under warden. The master and wardens were given plenary powers of search at any time “in any place, shop, house, chamber, or building of any printer, binder or bookseller whatever […] for any books or things printed, or to be printed, and to seize, take, hold, burn, or turn to the proper use of the foresaid community.”[39] The master and upper and lower wardens were elected from the “Court of Assistants” and held their positions for a year.

The Court of Assistants was the real seat of power. They arbitrated disputes, collected dues, and decided admittance into the Company. They were supposed to be elected from the general body of the Company, which included apprentices and yeomanry, for a limited term, but in 1557, the year the Stationers were granted their monopoly, nine of the most senior members of the Company formed a court of eighteen assistants. They took control and membership in the court became for life unless the member was formally dismissed or retired.[40]

Although censorship may not have benefited the printing industry as a whole, it was clearly a motivation for Queen Mary in issuing the Stationers a monopoly. According to Lyman Patterson, "The charter itself, however, is dominated by the idea of suppressing prohibited books, and Mary's motive in granting it, whatever the source of the initiative involved, was to obtain an effective agency for censorship."[41] The Stationers became a de facto police squad.

The penalties for violating censorship rules were harsh. If someone was found importing a book from overseas, they could lose all their possessions and be put in prison. No book could be printed without examination by the Privy Council. No book of scripture could be printed without examination by the King, one member of the Privy Council, or a bishop. "If a person other than an allowed printer set up or worked at any press, he was to be set in the pillory, whipped through London, and suffer any other punishment deemed proper."[42]

Despite all this, there was still a sizeable black market for books. "Only between sixty and seventy percent of London-printed books were regularly entered in the registers, and the proportion of printed books entered fluctuated violently from year to year."[43] Even with the threat of public whipping, imprisonment, and the taking all of one's possessions, a black market still arose to meet a demand. Some things never change.
As a British colony, America abided by the same intellectual property laws as Britain. There was no Stationers Company, but books did have to be licensed. There also was an "informal cartel" of publishers who colluded "to keep prices artificially high."[44]

After the revolution, America continued to follow British intellectual property law closely. America copied much of Britain's intellectual property law verbatim, and even used the same time limits for intellectual property protection. (Luckily, Britain didn't sue for copyright infringement.) In fact, America followed British intellectual property law so closely that a misreading of British law led America to legalize the pirating of foreign books. The original British law had forbid "the importation, vending, or selling" of books in a foreign language printed beyond the sea; it didn't legalize piracy.[45] America's law was a constant thorn in the side of British authors, such as Dickens, who thought they were losing a fortune in America through piracy.[46]

As time went on, intellectual property law began to grow in importance in America. From 1860 to 1890, over 500,000 patents were issued for new inventions, ten times the number in the previous seventy years.[47] By 1904, more than two hundred copyright bills had been introduced into Congress.[48] Yet even with this growth, a popular movement never gathered enough steam to move intellectual property law from its foundation. Despite some minor disturbances, intellectual property law continued to grow into the monstrosity it is today.

Like with any good story (one that is not a tragedy anyway), there have been a few glimmers of hope. The first came in the rulings of Judge Learned Hand when he defined the

concept the “web of expression.” The second came when Congress amended the Copyright Act in 1909 to allow for compulsory licenses in the music industry. When these two concepts are combined, I believe they lay the groundwork for where intellectual property law needs to go.

As Siva Vaidhyanathan writes, “No jurist or legal scholar has had a greater effect on the business and content of American culture than Judge Learned Hand. For most of his career, Hand served on the US Second Circuit Court of Appeals in New York City. A student of William James and George Santayana at Harvard, Hand was passionate about matters of freedom, creativity, and intellectual progress. […] Hand played a part in most of the major copyright decisions of the day.”[49]

Hand thought that the plot of a story itself could not be copyrighted, but that the “value added” to it could. Hand’s central point was that when judging the extent of infringement between works that tell similar stories, one must distill the “very web of the author’s dramatic expression.” This “web” he defines as “the sequence of the confluents of all these means (plot, character, means of revelation, setting, themes), bound together in an inseparable unity.”[50]

Hand broke down the whole down to its parts to help see what was original and what was not. This is exactly what needs to be done in all intellectual property cases. As Mark Twain said, “As if there was much of anything in any human utterance, oral or written except plagiarism. […] [S]ubstantially all ideas are second-hand, consciously and unconsciously drawn from a million outside sources.”[51] We all are dependent upon past ideas for present ones. The question is how much. Hand’s framework helps guide us for making those decisions.

It’s been shown that Steamboat Mickey, the first Mickey Mouse film, relied heavily on Steamboat Bill, Jr., a film by Buster Keaton, who was enormously popular at the time.[52] Did Walt Disney rely exclusively on Keaton’s material? No. Should we barred from seeing Walt Disney’s film because he relied on Keaton’s material? No. But we could have been. That is the situation we are currently in. We are in an “all or nothing” scenario: a judgment of guilty means a work that is “too” derivative and cannot be seen or profited from. A judgment of not guilty means it can. We need to move to a system where both the original creator and “second user” are compensated according to what they each contribute to a derivative work.

The second glimmer of hope was Congress’s amendment to the Copyright Act in 1909 to allow for compulsory licenses in the music industry. This was strictly to allow greater freedom of expression in the music industry. As Lawrence Lessig writes, “Congress was quite explicit about its reasons for granting this right. Its fear was the monopoly power of rights holders, and that that power would stifle follow-on creativity.”[53] It has worked. The music industry allows far greater rights to “second comers” than any other artistic field.

If a person wants to create a derivative work from a book, he or she must get permission from the original author. The original author may allow for derivative works to be created, but may require the “second comer” to sign over any profits, as is the case with the Star Wars franchise.[54] The only problem with the compulsory licensing in the music industry is that is that Congress determines the rate instead of letting individuals try to determine it first.[55] The author of a song may want to license a song to a celebrity at a lower rate, because the author might feel the celebrity may make them more money in the long run

than the typical recording artist. The original author simply does not have the freedom to do that.

Why should compulsory licensing be good for the music industry and not good for every other field? Clearly, it shouldn't. All genres of art and all scientific creations would benefit from compulsory licensing. An active "second user" culture can also lead to an even greater appreciation of the original product. In Japan, there is something called doujinshi, which is "second user" manga. There are over 33,000 "circles" of doujinshi creators across Japan. Two times a year more than 450,000 Japanese gather to exchange and sell doujinshi. According to Lessig, "[I]n the view of many, it is precisely because [doujinshi] exists that Japanese manga flourishes."[56]

Some people may see a problem with compulsory licensing. They may ask, "If a person is able to use intellectual property at will, what is to keep that person from modifying an original creation just a slight bit and selling at a severely reduced price, thereby undercutting the competition?"

There is a solution to this. The "second user" is able to change the price only in accordance with how much they contributed to the derivative product. Let's say either the originator and "second user" agree, or a judge decides, that a "second user" contributed 10% to the derivative product. Let's say the "second user" contributed a new drum track to a song. If the original song was being sold for $5, then the "second user" would have the right to sell the derivative version for anywhere between $5 plus or minus 10% (i.e. $4.50 to $5.50.) 90% of the revenue generated from the derivative product would still have to go to whoever owned the rights to the original product.

Another objection someone may bring up is, "What if it is not in a company's interest to release a piece of technology? Like let's say something crazy happened, like Chevron owned the patent on the battery for the electric car.[57] What is to keep them from pricing a product so high it effectively removes the product from market?"

The government may be forced to have them re-price it. This can be done within limits. In the scenario painted, the intellectual property owner is pricing their product so high that if they decrease the price, they would actually make more. Because at a lower price, the owner would sell a higher quantity. The government could mandate the owner lower the price until the point when he or she stopped making more money through increased quantity sold. That is point is where the company is making the maximum amount of profit for that product.

I do not see a better scenario than this. We are being forced to either allow the domination of society by one individual, or the domination of the right to price this product by society. The rights of society must be respected too. This is not historically unprecedented. Before the ratification of the US Constitution, five of the original thirteen states, Connecticut, South Carolina, North Carolina, Georgia, and New York, all contained intellectual property-related price-control provisions in their state constitutions.[58] If the original party loses money by lowering the price, the party who initiated the suit could be liable for the losses.

Once this price is set, individuals or companies could license the intellectual property in its entirety. This would allow for competition based on production quality and customer service. If a company is able to charge more for an product based on superior brand recognition and/or customer service, that company should be able to keep whatever they earn beyond

the price set by the original company.

I believe these provisions eliminate the need for time limits on copyright and patent protection. Time limits seem to be built upon the belief that intellectual property law causes prices to be higher and for there to be less competition than there should be. My suggestions, however, eliminate these concerns. Why, after all, after a certain point should a publishing house profit from an author's work rather than the author's estate, or to whomever the author ascribed the rights of his or her work?

We need to change to a compulsory licensing system and eliminate the Patent Office. Current intellectual property law and bureaucracy leaves us as peasants, looking up at the one dome being built in the city. Intellectual property law that has been reformed under the guidelines I have outlined will unleash the creativity of human spirit, and help fill the skyline with as many domes as we desire.

Notes

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12. Lanham Trademark Act 15, USC, §§1147-27.

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Journal Sentinel, August 15th, 2009.

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16. Dan Horn, “Patent Litigation Lucrative, on Rise,” Cincinnati.com, July 26, 2009. This puts the total number of patent infringement lawsuits at 2600. 2600 * $3M = $7.8B. Since this is the cost for each side, the total cost is $15.6B. This does not even account for litigation costs in copyright, trademark, and trade secret cases. For instance, the Recording Industry of America filed 5,460 lawsuits in 2004 alone (“RIAA v. the People: Five Years Later,” Electronic Frontier Foundation, September, 2008.), meaning the total cost of litigation could be much higher.

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18. Tom Kivett, “American Companies Capture Less than Majority of 2009 U.S. Patent Pool,” IFI Patent Intelligence press release, January 12th, 2010. This states that US corporations received 49% of all utility patents issued, meaning foreign corporations received 51%. The total number of patent applications for 2009 was 457, 966. 457,966 * .49 * $10,000 = $2.2B. 457,966 * .51 * $100,000 = $23.6B. $2.2B + $23.6B = $25.8B. Again, this doesn’t account for copyright, trademark, or business secret. As a side note, the total patent numbers come from private sources and have not come from the US Patent and Trademark Office since 2006, because they found that “too many people were focusing on patent quantity and not patent quality.” (Timothy Pricket Morgan, “Big Blue Tops US Patent Grubber List,” The Register, January 19, 2009.) Isn’t that nice of them?

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40. Ibid., p. 33.

41. Ibid., p. 29.

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43. Ibid., p. 63.

44. Vaidhyanathan, p. 38.

45. Patterson, p. 199.

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50. Ibid, p. 109.

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58. Patterson, p. 189.

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