

Steal This Idea: The Corporate Confiscation of Creativity

Introduction: How Intellectual Property Rights Enrich the Few While Undermining Liberty, Science and Society

The New Economy of Intellectual Property Rights

Back in the 1960s, after 30 publishers turned his project down, Abbie Hoffman's Steal This Book became a best seller. Today, the direction of permissiveness to which the title appealed has changed its course. The atmosphere in which Hoffman's tongue-in-cheek suggestion of petty larceny against business would find broad acceptance has given way to an environment in which the law sanctifies giant corporations' grand theft of the fruits of creativity in the form of intellectual property rights.

This book explains how the ever-tightening grip of intellectual property rights threatens to undermine science, economic progress, personal liberty, and democracy. Of course, intellectual property rights are nothing new. They are just a fancy name for patents, copyrights, and trademarks -- privileges that have been with us for centuries. But in recent years, intellectual property rights have taken on unprecedented powers. Before I go any further, consider the following examples of the abuses associated with intellectual property.

Suppose that you suffer from a rare, but fatal disease. A corporation offers you a treatment that costs a half-million dollars for the first year and a somewhat lesser amount each year thereafter for the rest of your life. Then you find out that government scientists had discovered the medicine and that a quirk in the law allowed the company to have the exclusive license to market this medicine. This maneuver allowed the company to catapult itself into the ranks of the leading biotech companies.

Suppose that you plant some seeds, then at the end of the harvest season you save some seeds to replant next year. Should you do so, you may well find yourself charged with theft.

Suppose that you are an undergraduate work-study student partially supporting yourself by doing low-level chores in a university laboratory. You come up with some ideas that are unrelated to your duties in the laboratory. You think that these ideas might have some promise, so you patent them. Not too long thereafter, in retribution for your action you find yourself working on a chain gang having been convicted of misappropriation of property.

I did not have to make up these scenarios. A government report found that Genzyme did actually charge that much for alglucerase in the treatment of Gaucher disease. Monsanto sends out armies of inspectors to check on whether farmers are replanting its seeds. Petr Taborsky did spend time on a chain gang for the nefarious crime of patenting his own idea. Welcome to the brave new world of intellectual property.

I will discuss these examples in more detail later in the book, but they are only the tip of the iceberg. Today, the scope of intellectual property is exploding. Like a lethal virus that quickly mutates into even more deadly forms, claims of intellectual property rights are vaulting into undreamt-of areas. Worse yet, the legal system is validating these claims.

You can patent a human gene, an animal, software code, a way of doing business, and even a number. These and many other forms of intellectual property rights are fast supplanting more conventional forms of property as the principal basis of wealth and power.

The Perversion of Intellectual Property

The original intent of intellectual property rights did have some merit. Supposedly, society granted the monopoly rights associated with intellectual property -- and they are monopoly rights -- to encourage creative activity. In addition, the law required that the applicant immediately disclose information regarding the proposed patent.

In a comparatively backward country, such as the early United States, advanced science and technology comprised a relatively small part of the overall production process. Instead, traditional knowledge remained the basis for most production processes.

The information disclosed in the patent process very likely could have spurred others to innovative activity, especially because inventors were solitary figures. In addition, scientific activity was fairly sparse. Moreover, the patents at the time were narrowly applicable to a particular product or process rather than general discoveries with far-reaching consequences. This characteristic meant that the patent system was relatively unambiguous. Consequently, the sort of litigation associated with the contemporary system of intellectual property would not pose inordinate costs.

Today, matters are completely different. Intellectual property covers just about everything. The system is riddled with overlapping claims. The contemporary system of intellectual property, rather than spreading information, creates a pervasive atmosphere of secrecy. Litigation is becoming far more important than creativity. In fact, I will show that intellectual property rights threaten to stifle creativity. Taking a historical view, we can compare the system of intellectual property to a stimulant that may well have promoted economic and cultural progress in an earlier period, but now threatens to exhaust creative activity.

Even in the arts, intellectual property rights offer very little to the mass of creative artists. In contrast, intellectual property rights grant enormous powers to corporations that distribute music or run movie studios. These corporations typically wield their power to the disadvantage of the artists, as well as society at large.

In science, intellectual property rights encourage secrecy and wasteful duplication of effort. They hold back economic progress by fostering inefficient monopolies. They encourage costly litigation that dissipates an unimaginable amount of time and resources. Over and above these problems, intellectual property rights pervert the entire scientific

process by undermining the traditional incentives to engage in the basic scientific research essential to developing future improvements in technology.

I want to put to rest the popular notion that intellectual property rights represent the major vehicle of progress in modern market economies. The same sorts of problems that infect the scientific process repeat themselves in the economy as a whole. So, intellectual property rights, rather than advancing economic development, will actually obstruct future progress by disrupting the scientific process by promoting fragmentation, unnecessary duplication, and secrecy. At the same time, intellectual property rights will bog business down in a morass of horrendous litigation.

Finally, on a larger scale, intellectual property rights shape the very nature of society. Intellectual property rights already constitute an increasingly large share of property in the advanced market economies, especially the United States. Activities surrounding intellectual property are fast becoming the core economic functions in advanced capitalist economies.

Besides the damage that intellectual property rights impose on the scientific process, intellectual property rights concentrate wealth in the hands of the few. The unconscionably unequal distribution of wealth and income in the United States today does incalculable harm largely crippling the potential of millions of people brought up in a destructive environment of poverty and deprivation.

I will also show how the increasingly powerful hold of intellectual property also threatens society in a number of more fundamental ways, including the subversion of democracy itself.

Setting the Stage

Indeed, a major theme of this book will be that, for the most part, the undeniable economic progress of recent decades had little to do with intellectual property. Instead, recent spectacular scientific and technological advancements largely represent the fruits of earlier public investment in science and technology, even though private corporations

later won the intellectual property rights. In short, in the field of intellectual property rights, as is the case so often in advanced market economies, costs are socialized, while benefits are privatized.

These changes are political. As one legal theorist explained, "Property is never for long anything more or, really anything different from what some politically appointed court says it is" (Bazelon 1963, p. 64). Although the public at large has had little input in the transformation of intellectual property rights, they affect virtually every aspect of life today, from the food you eat to the kind of medical care that you get. Intellectual property rights largely determine the sort of entertainment that the market offers. More important, expanding the boundary of intellectual property restricts the range of what people are allowed to do. In addition, measures to enforce intellectual property rights have to develop even faster than intellectual property does. As a result, intellectual property rights have a major impact on the personal rights, as well as the civil liberties that people enjoy as citizens.

The promotion of intellectual property rights may well rank as one of the very highest priorities of the current government of the United States. Again, I will explain these claims and give more concrete examples later in the book.

For now, I only want to set the stage for a deeper discussion about the extent to which intellectual property is changing the ground under our feet. What is happening is not accidental. Powerful forces are presently using their enormous influence to change the way society works. I will explain more about this process as you work your way through this book.

When I began my research for this book, I was already under the impression that the government of the United States was engaged in a dramatic construction of a new economic regime based on such intellectual property rights. I knew that this transformation was occurring on a world scale through agencies such as the World Trade Organization.

At the time, I had never dreamt how far-reaching this transformation would be. Nor had I understood that debates over intellectual property rights were a recurrent theme in the conflicts about the political economy of the United States.

I realize that at first glance, this orchestrated transformation of the economy might seem reasonable. Many holders of intellectual property rights would have people believe that their good fortune represents an appropriate reward for the sort of individual achievements that power the modern economy. The popular press, insofar as it takes note of intellectual property rights at all, treats them as if they were a natural part of the so-called New Economy, which seems to offer seductive promises of convenience and prosperity. This prosperity, as I noted before, is far from shared by all. Instead, intellectual property rights have contributed to one of the most massive redistributions of wealth that has ever occurred.

Intellectual Property and the Distribution of Income

I will call attention to the connection between intellectual property rights and the widening disparities in income distribution, both globally and domestically. The bulk of all intellectual property is held by a handful of firms, universities, and well-off individuals, accentuating the grotesque inequalities of wealth and income that put a large portion of future generations at risk.

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 (Newcomb 1999). Between 1995 and 1998, the average annual income for a member of this elite group rose from \$50 million to a staggering \$110 million, while the tax rate on their adjusted gross income fell from 30 percent to 22 percent (Mandel 2001). The obscene wealth of a Bill Gates of Microsoft or a Phil Knight of Nike, or even of the lesser instant Internet billionaires, alongside the sizable residue of poverty that

blights the contemporary United States, reminds us of the existence of a link between distribution of income and intellectual property.

Emblematic of the extent of this new distribution of property, 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 (Brown, Donovan, Gordon and Newcomb 1999), befitting the so-called New Economy in which DOS Capital has supplanted Das Kapital (Bittlingmayer and Hazlett 2000 coined the expression DOS Capital).

Of the 60 new names on the Forbes list, 19 had fortunes derived from Web businesses (Newcomb 1999). While Forbes can celebrate the wealth of the few, the poverty of the many means that the world loses the intellectual potential of the vast majority of people, some of whom are undoubtedly among the most brilliant people in the world.

Internationally, a regime of intellectual property rights condemns the poorest countries of the world to an even more disadvantaged future. For example, the United Nations reports that in 1993 just 10 countries accounted for 84 percent of global research and development expenditures. These same countries controlled 95 percent of patents registered in the United States during the past two decades. The rich, industrialized countries now hold 97 percent of all patents worldwide. Compounding the inequity, more than 80 percent of patents granted in developing countries belong to residents of industrial countries (United Nations 1999, p. 68). No doubt this situation has worsened in the intervening years.

Protecting the intellectual property of the already rich nations channels the world's wealth away from the impoverished countries. This increasing gap between the rich and poor nations provides the wealthy countries with an even greater advantage in producing intellectual property in the future. This relationship between intellectual property and the polarization of the distribution of wealth and income has yet to register, either in the

public consciousness or in the literature of economics. Earlier students of monopoly had no difficulty in making a direct connection between the elevated mark-ups that sellers charged and a corresponding loss on the part of their customers. They realized that the pervasive influence of monopoly harmed the public at large, over and above the obvious losses that individuals suffered as consumers. To my knowledge, nobody has continued to apply the logic of that tradition to present-day moguls, who owe their power to the special monopoly protection given to their intellectual property.

The question of intellectual property rights goes well beyond considerations of abstract measures of the distribution of wealth, such as Gini ratios. Right now people are literally dying because of the powers of intellectual property rights. For example, in Africa, where AIDS is rampant, transnational corporations have been using the U.S. government to pressure poor African nations to refrain from using their legislative authority to obtain licenses for the right to produce pharmaceuticals at a more affordable price. The drug companies have been charging people many times more for treatment than the majority earn in a year.

Advocates of this new distribution of wealth tend to explain it in terms of the personal achievements of the beneficiaries of intellectual property rights. On closer examination, the development of their intellectual property owed more to public investment than to their personal accomplishments in most of the cases, except for artistic creations. Under this new regime, ideas first developed in public universities or government laboratories, even after they have become common knowledge, suddenly transform themselves into the private property of multinational corporations.

For example, in September 1997 a Texas-based company named RiceTec Inc., won patent U.S. Patent No. 5,663,484 on basmati rice lines and grain. Of course, this company, a subsidiary of RiceTec AG of Liechtenstein, the chairman of which is reigning Prince Hans-Adam II of that tiny principality, did not invent basmati rice. Farmers in the far-off Greater Punjab region, now divided between India and Pakistan,

have been growing basmati rice for centuries. This effort to win an intellectual property right ignored the longstanding contributions of the Punjabi farmers in developing basmati.

Only under intense pressure from the Indian government and public interest groups did the company withdraw its patent claim for basmati rice. The Patent and Trademark Office did grant the company three of its claims for varieties of rice that it developed by cross breeding with traditional basmati rice.

I do not pretend that intellectual property is the only cause of the increasingly unequal distribution of income around the world. During the same decades that intellectual property rights have been strengthened, in the United States the rights of unions have been weakened; cheap imported goods have displaced millions of decently paying working-class jobs; and the tax codes have radically tilted in favor of the wealthy. While discussion of these and many other explanations for the growing inequality in the distribution of income have been fairly common, the relationship between the increasing power of intellectual property and the distribution of income has almost gone without comment.

Treating Knowledge as Private Property

I already mentioned that intellectual property rights have a long tradition, dating back centuries. However, this new regime of intellectual property rights is unlike anything the world has ever known. I will show that most of the privileges associated with this new regime are artifacts of a particularly misguided approach to the treatment of knowledge and information.

Ironically, while defenders of intellectual property rights sanctimoniously cloak themselves with the rhetoric of the free-market, in truth, intellectual property rights represent an annihilation of market forces. After all, intellectual property rights are monopolies, a fact that the term "intellectual property" conveniently obscures.

The natural outcome of the present system of intellectual property rights is a world of excessive litigation, intrusive violations of privacy, interference with scientific research, and a lopsided distribution of income. Although defenders of this new regime claim that it will provide incentives that will promote rapid technical and scientific progress, I will show why it will ultimately lead to a morass of litigation and confusion that will inevitably derail the scientific process.

Although holders of intellectual property are quick to demand their rights under the patent system, the initial logic of the patent law was supposed to be an implicit exchange. The inventor would profit from monopoly rights for a short time in return for revealing to the public information about the invention. This arrangement was intended to encourage people to invent and innovate, while spreading information at the same time.

The lengths of time that holders of patents or copyrights get to exercise their monopoly rights today wildly exceed the time necessary to encourage intellectual work. Worse yet, perhaps the majority of these increasingly powerful rights reflect no contribution whatsoever on the part of the holder. Patent holders today often reveal no important information to the rest of society. Instead, people or corporations are holding rights to intellectual property merely on the basis that they were the first to stake a claim, even though they made little or no contribution to the overall discovery.

The impulse to make such claims is not necessarily new. Karl Marx claimed that the invention of the windmill caused the emperor, the nobility, and the priests to squabble over who owned the wind (Marx 1977, p. 496). What is new is the degree to which the legal system has sanctioned such demands. Later, I will go into detail regarding some particularly egregious cases.

In a sense, this aspect of intellectual property rights is not at all novel. After all, throughout history, a small minority of the population has become wealthy by claiming property rights to land or other goods that belonged to the community at large. So you

should not be surprised that today, when knowledge and information are so crucial to the economy, the tradition of looting of the commons should extend to knowledge and information.

The government, as well as the mass media, mostly remains silent about the flagrant abuses associated with the current system of intellectual property. Even worse, when either the government or the mass media address the issue of intellectual property, they actively support the alleged rights of those who claim ownership to intellectual property. In this environment, those who protest the unjust claims of those who hold the private property rights to this public property find themselves either ignored or marginalized. This emerging system of intellectual property represents an ominous extension of "the social costs of private enterprise."

I should also add another dimension of public support of intellectual property. While a company such as Nike may not have been as dependent on government research as a pharmaceutical producer or an Internet company, virtually every company that depends on intellectual property owes an enormous debt to the government for protecting its intellectual property, not only domestically, but also internationally. For example, the U.S. government uses its political muscle to get other countries to reduce their support of their domestic cinema to expand the market for American films. Similarly, the United States government has been bullying poor nations to prevent them from making lower-cost versions of lifesaving pharmaceutical products. I will show how this tactic is contributing to the AIDS crisis, especially in Africa.

Rather than engaging in frank discussion about the public contribution to private intellectual property rights, we hear instead endless praise about the efficiency of the emerging system. If this new regime were to become so efficient that everyone could have more because of the great contributions of intellectual property, then the maldistribution of wealth might be an acceptable price to pay. Under that scenario, the benefits of the resulting technological efficiencies could be so widespread that virtually

everyone could be better off. Unfortunately, these enclosures of the mind will actually have baleful consequences for technology, as well as the distribution of wealth and income.

I will devote a considerable part of the book to showing how intellectual property rights are undermining the development of future technology by corroding both the academic environment, as well as the proper functioning of science itself. Intellectual property rights undermine the working of the market, making the economy become far less efficient. Finally, intellectual property rights create a more intrusive society that corrodes individual rights, especially privacy. I covered the last problem of intellectual property rights in an earlier book, Class Warfare in the Information Age (Perelman 1998).

Presently, the lure of profit combined with the lack of adequate public funding has seduced the scientific community largely to turn its back on basic research and to concentrate on corporate-sponsored research. In addition, within this increasingly profit-oriented research environment, employers are compelling researchers to adopt a code of secrecy, even though open communication has been one of the essential features of the scientific achievements of the past.

While this strategy might produce some quick returns, its long-term implications are ominous. Those interests that are rapidly accumulating intellectual property rights are very effective in extracting the maximum value from preexisting public research, without contributing much to make comparable progress possible in the future. Worse yet, in the current rush to restructure the economy by reducing the public sector to a minimum, the now popular neoliberal policies being put in place are preventing the development of a new generation of basic scientific research.

Taking Stock of Intellectual Property

Fighting against the corporate confiscation of creativity is an uphill battle. Despite its importance, many people probably find intellectual property to be a very abstract,

perhaps even forbidding subject, remote from the forefront of public concerns. Indeed, intellectual property rights hardly register in the public consciousness, except when specific issues, such as the Napster controversy come into popular view.

Earlier, I mentioned that the very term "intellectual property" helps to obscure what is at stake in the ever-expanding grasp of intellectual property rights. Until fairly recently, the use of the expression "intellectual property" was uncommon. People occasionally referred to "literary property," since the private ownership of the author was generally clear-cut. However, the use of the more general expression "intellectual property" was very rare. An opinion in an 1845 circuit court case, *Davoll v. Brown*, mentioned intellectual property. An 1873 Supreme Court decision, *Mitchell v. Tilghman*, 86 U.S. 287, quoted a letter using the phrase, which did not appear in a Supreme Court decision again until 1949, in *C.I.R. v. Wodehouse*, 337 U.S. 369.

The practice of labeling the monopolistic privileges of patents, copyrights and trademarks as intellectual property conveniently insulated them against criticism. Although a small minority of people may express scorn for intellectuals, for the most part society has a high regard for the intellect. More important, today, property occupies a hallowed position in political discussions in the United States. Combining the two terms as "intellectual property" makes these monopoly rights virtually unassailable.

Attacks on property of any kind have emotional associations in the contemporary United States, which cast those who would whittle away at these monopolies as thieves who would deprive owners of their rightful property. In other words, the monopolists become the upholders of justice, while those who challenge them take on the roles of callous miscreants who must be punished, or at least restrained. The irony is, of course, that the privileges associated with patents, copyrights, and trademarks are monopolistic, and as such, are incompatible with a free market.

At first, my critical assessment of intellectual property rights may seem counterintuitive, given the effusion of fanciful rhetoric concerning the so-called New

Economy. To be sure, modern technological wonders seem to be the hallmark of contemporary society. Each day the media recounts tales of new medical breakthroughs. Similarly, in electronics magnificent technological developments sprout up everywhere.

I recognize that the emergence of these impressive technologies coincides with the strengthening of intellectual property rights, but intellectual property rights have done relatively little to further this technology. Instead, much of the credit belongs to a long history of basic science and research mostly conducted without the benefit of intellectual property. In fact, virtually all of the great advances in modern technology are the result of research, both in basic science and technological applications, provided by public institutions or public funds. Without that prior groundwork, much of the current boom in technology would have been impossible.

Besides, until recently, intellectual property rights were not very important either within Internet software or in the production of computer hardware. In fact, this absence of strong intellectual property rights explains why fierce competition has kept computer prices falling so rapidly.

I will show how the spread of intellectual property rights, rather than promoting technological progress, threatens to cripple progress in medicine, as well as in science in general. For example, I will show how the pharmaceutical companies have displayed an almost total disinterest in the African market. With a shocking disregard for human life, they actually refuse to produce some drugs that are known to be effective for diseases endemic to Africa. Presumably, the number of people who can afford to pay for these medicines is too small to make production worthwhile.

While individual problems associated with intellectual property, such as the AIDS scandal or the litigation associated with Napster, may engage people, I am certain that we need to see these particular cases as symptoms of a larger crisis of intellectual property rights.

The Choice Ahead

Society has three options regarding the current system of intellectual property. First, we could trust the free market to allocate the fruits of knowledge and information. To do so, I will argue would prove to be an unmitigated disaster. Although you might not think so from reading the business press, in reality free markets are incompatible with intellectual property. In the absence of secrecy, virtually no business could make a profit by putting time and resources into the development of science or information, since competitors could take advantage of such investments without having to invest anything. Secrecy, however, is inimical to progress. In addition, the dogma of free markets precludes public investment in science and technology as an alternative to private investment.

The second option is to follow the present course by continuing to grant those who supposedly develop intellectual property the exclusive right to its benefits for a set period of time. I do not deny the promise of gain from intellectual property rights might cause somebody, someplace, sometime to create some socially useful technology. But I will make the case that intellectual property rights will shrink, rather than expand the economic pie. The sweeping scope of intellectual property rights represents a serious threat to both scientific and technological progress.

Such a regime of intellectual property also creates an atmosphere of secrecy, which will certainly inhibit progress. In addition, it leads to an excessive duplication of efforts because companies attempt to work around the intellectual property rights of others. Eventually, it will lead to so much litigation that progress can be brought to a virtual standstill.

The third option is to treat the knowledge and information that society develops as a social good -- the property of society as a whole. This option has never been fully attempted, but it seems to be the most promising of the three.

In a sense, the period immediately following World War II was an amalgam of the second and third options. In the United States, researchers working under the auspices of the government or within the university system engaged in a massive but

uncoordinated technological enterprise. At the same time, private corporations were able to capture much of the benefits of this research and transform it into private intellectual property.

Presently, public research is withering. Even where government funding is available, conditions attached to the research usually contaminate the outcome. Researchers now must conform more than ever before to the narrow interests of the corporate sector. This corporate pressure threatens the future prospects for society.

Let me repeat for emphasis: while the plethora of new technologies that come on the market almost daily might create the impression that the corporate sector is performing magnificently, in truth, these rapid advances are the fruits of previous scientific efforts, often dating back many decades. Cutting off public support for research and technology and relying on the corporations threatens to stifle the flow of technological progress in the future.

In short, the ongoing elevation of the place of intellectual property will fall quite short of its promise on a number of counts. Nobody can predict the full costs of the course we are now following, but they are certain to be substantial.