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Intellectual Property, Authorship, and the Commons

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Introduction

The right to own property is a core value of western democracy. According to Hegel (1959), "If emphasis is placed on my needs then the possession of property appears as a means to their satisfaction, but the true position is that, from the standpoint of freedom, property is the first embodiment of freedom and so is in itself a substantive end." A key factor in the gradual weakening of the monarchy and the establishment of an independent parliament during the 16th, 17th, and 18th centuries in England was the ownership of private property, (Pipes 1999). Thus private property was a critical force for political change.

Since having entered the 'information age', it is evident that ownership and control of information have become an important form of political and economic power. It is therefore no surprise that the notion of property has been extended to a range of information-based products through the use of patents and copyrights. While it is clear that new forms of property are important, applying existing laws pertaining to property has been anything but straightforward.

This paper will examine anomalies that arise from attempts to extend intellectual property law to the information age. These will be examined in the context of the philosophy and history of property. Property has been an important topic for legal philosophers including, Locke, Hume, Hegel, Kant, and Marx. In addition, the history of property, especially in Great Britain and the United States has been closely tied to political change. At present, there is considerable legislative and political activity in this area including the General Agreement on Tariffs and Trade (GATT) and the Digital Millennium Copyright Act (DMCA). Up until now, most discussions in this area have been carried out by legal experts. Because legislative decisions in this area are likely to have wide ranging and profound effects, it is important that dialog extend to others.

The remainder of this article will proceed as follows. First, it will briefly discuss notions of property and intellectual from a historical standpoint. Next it will describe characteristics of physical property and contrast them with intellectual property. Following this, it will describe some bizarre manifestations of IP law. The next section will examine the romanticized concept of author and inventor. The article will conclude with a summary of observations and issues.

A Short History of Intellectual Property

Intellectual property is a term that has only recently come into usage. It refers to patents, copyrights, trade secrets, and trademarks. Patents pre-date the three other forms of IP. Although the specific origin of patents is not known, early patents were granted in England and Venice in the 15th century. The earliest known English patent was awarded by Henry VI to John of Utynam in 1449. The patent gave John a 20 year monopoly for his method of making stained glass. A patent ordinance was established in Venice which suggests that patents were granted there earlier in the century.

Early on, the terms patent and monopoly were synonymous. The patent holder was granted a monopoly for the production of some product for a limited period of time. In 1610, James I was pressured into revoking previous patents. In his "Book of Bounty" he stated that, "monopolies are things contrary to our laws." In the Statute of Monopolies of 1624, Section 6 states that all monopolies are illegal except those, "for a term of 14 years or under hereafter to be made of the sole working or making of any manner of new manufactures within this Realm of the true and first inventor" and such monopolies should not be "contrary to the law or mischievous to the State by raising prices of commodities at home or hurt of trade." (The UK Patent Office n.d.) Thus the earliest discussions of patents center on the tension between the public interest and the interest of the inventor.

Copyright law has a more recent history, beginning in the United States with the Copyright Act of 1790. This act set the length of the copyright to be 14 years with the possibility of a 14 year extension if the author was still living. Since then the duration for a copyright has been extended to today's life of the author plus 50 years. Congress is considering extending the 50 years to 70. Some have suggested that this proposed extension is motivated by the fact that the copyright for Mickey Mouse™ is due to expire.

During its 211 years of copyright law, the United States has shifted from a consumer of intellectual property to a producer. During the 19th century, U.S. publishers produced copyrighted works by such authors as Dickens and Gilbert & Sullivan's "Pirates of Penzance" without so much as a blush or a penny in royalties. It is ironic now to note the self-righteousness of those who vociferously decry the Chinese differing position with respect to intellectual property.

Kant defines property as follows, "Anything is *"Mine" by Right* or is rightfully Mine, when I am so connected with it, that if any other Person should make use of it without my consent, he would do me a lesion or injury. The subjective condition of the use of anything is *Possession* of it." (Morris, 1959 p. 245) Included within property rights is the right of alienation or the right to transfer property that one owns (Boorstin 1941). Alienation transfers possession. This is one key difference between physical property and intellectual property based on information.

Some Bizarre Manifestations of IP Law

Patenting Basmati Rice

In September 1997, the U.S. Patent Office awarded patents to Rice Tec Corporation of Alvin, Texas. Although basmati rice has been grown on the Indian sub-continent for centuries, Rice Tec was able to obtain a patent. The patent was originally based on 20 claims. Four of the claims were specific to characteristics of the rice grain. The remaining sixteen specified breeding techniques and characteristics and properties for cultivation outside India. When faced by a challenge from the Indian government, Rice Tec withdrew the four claims associated with the rice grain. However, the remaining sixteen claims as well as the patent remain. Conceivably, under the General Agreement for Tariffs and Trades (GATT), independent Indian farmers could be prosecuted for patent violations.

PricewaterhouseCoopers (PwC) Digitection Service

PwC's Digitection service is described as a means of helping large corporate clients protect their intellectual assets in a digital world. The Digitection service includes a search bot that will find instances in which a company's intellectual property has been used in violation of copyright law. After analyzing data concerning copyright infringements, PwC can take the results to the client, investigators, and lawyers. One can envision a growth industry of copyright infringement lawsuits for activities that previously fell under the fair use designation.

John Moore v. The Regents of the University of California

In September 1984, John Moore was treated for a rare form of cancer, 'hairy cell leukemia' (HCL). He sued the U. of California, "…on the grounds that the two UCLA researchers took advantage of him by using his cells of research that has led to a patent of undetermined financial value." Moore's treatment involved the removal of his spleen. Apparently, he signed a consent form giving his permission for the operation. Cells from his spleen were used to develop a tissue culture called 'Mo' after Mr. Moore's name. The cell culture is used to produce various substances valuable for scientific research including: immune interferon, macrophage activating factor, and T-cell growth factor (Harris 1992).

In its ruling against Moore, the California Supreme Court argued that his cells were a raw material and that patent law is not applicable to the discovery of raw material. The two UCLA researchers, by growing his cells in a culture were rewarded for their inventive effort in performing the difficult art of growing a cell culture.

Authorship, Invention, and the Commons

In the west, we hold a romantic image of the author or inventor. For example, there is the tale of James Watt, inventor of the steam engine. As the story goes, Watt, inspired by the image of his tea kettle boiling on the stove, invented the steam engine that provided the basis for the railroad. However, this ignores the fact that steam engines had been used for years to remove water from mines (Basalla 1988). In a similar vein, the notion of author carries the romantic image of creative genius. The term plagiarize has as its root the Latin word for kidnapper, *plagiarius*. What is interesting is that authors regard their literary works as something akin to giving birth. For example, although Charles Sanders Peirce was the founder of American Pragmatism, he chose to describe his philosophy using the term 'pragmaticism'. He chose this name because it was, "…ugly enough to be safe

from kidnappers." (Apel, 1995, p. *xix*). The creative genius fiction emphasizes the act of creation at the expense of any foundation for the work.

Much of the justification for intellectual property law is based on the desert-labor theory of property associated with Locke (Fisher 1999). This is the notion that a person deserves to own something created from his or her own labor that uses raw material for its production. Raw material (from the desert) belongs to the commons. It belongs to no one and everyone.

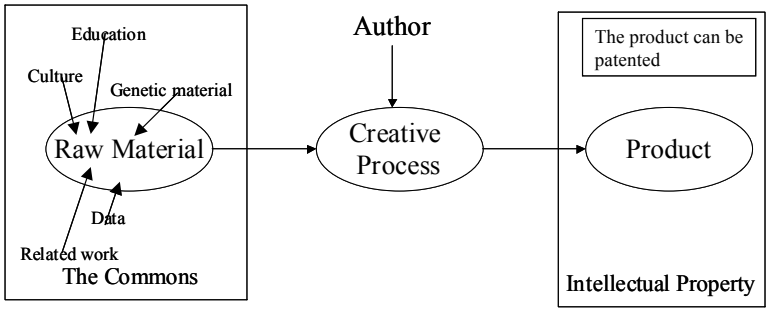

Figure 1. The Creation of Itellectual Property

James Boyle (1996) argues that by taking the romantic author viewpoint, current copyright and patent law fails to give appropriate credit for the 'raw material'. IP law, by awarding patent and copyright protection protects the author's investment in creating an original work. However, another function of IP law has been to protect the public interest. According to Boyle, the current scheme will serve to make everything in the commons patentable or copyrightable. One interpretation for the explosion in the sheer number of patents, copyrights, and trademarks during the last half of the 20th century is we are experiencing an IP land grab. Eventually there may be little or no 'raw material' to be used to create new works. By taking a hard line that information is property, the public is losing out in favor of special economic interests in today's information economy.

Concluding Comments

Over the past six centuries, there has been a movement in how patents and copyrights have been described from monopolies to property. By describing them as monopolies the interest of the public is clearly represented whereas describing them as property shifts the balance of power to the author/inventor or as is most often the case, to the corporate entity that owns the results of the author/inventor's work. One reason this has occurred is through the extensive lobbying of corporate interests, e.g. Jack Valenti's unyielding efforts on the part of the Motion Picture Association of America. That legislatures would respond can be attributed to the pro-producer bias as hypothesized by Anthony Downs.

At the root of the shift in conceptualizing intellectual fruits as property is Locke's desert-labor theory of property and the complementary notion of the heroic author/inventor. The diminution of the commons and the aggrandizement of the 'creator's' efforts are corollary concepts. An alternative can be found in the Buddhist concept of 'dependent origination' or the fundamental interdependence of things. "It teaches that all beings or phenomena exist or occur only because of their relationship with other beings or phenomena. Therefore, nothing can exist in absolute independence of other things or arise of its own accord." (NSIC 1983 p. 62). This concept is exemplified by the maxim, "When you drink the water, don't forget the person who dug the well."

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UK Patent Office http://www.patent.gov.uk/patent/history/index.htm, no date.