

Intellectual Property and Its Alternatives: Incentives, Innovation and Ideology

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Context and Research Problem

This dissertation examines the ability of intellectual property (IP) and its alternatives to both facilitate and impede innovation. Over the past 30 years there has been both an expansionary IP policy regime marked by significant increases in IP protection and a flourishing of alternatives to IP as digital technologies empower end users to create and disseminate intellectual works. However, it remains unclear as to whether alternatives to IP can mitigate the problems of exclusionary IP rights while also encouraging innovation. This dissertation provides a theoretical framework for analyzing alternatives to IP focusing on the incentives structures utilized, ability to produce innovative outcomes, and the kind of innovation engendered with the aim of identifying which alternatives are substantive alternatives to IP.

Thesis

Intellectual property rights possess two specific characteristics with regards to incentives and outcomes. IP is incentivized through a self-interested pecuniary motive, and the outcome, which may be generally classified as innovation, necessarily includes a legal right to exclude that limits access and is focused on wealth creation. Therefore, true substantive alternatives IP must possess an alternative ideology that emphasizes social goals beyond wealth maximization. The production of true alternative intellectual goods must come from more than the simple pecuniary incentive and its outcomes should include enhancing access to information.

Theoretical Framework and Methodology

Employing critical theory the dissertation combines macro-level theorization drawing on the works of Joseph Schumpeter, Kenneth Arrow, Daniel Bell, Manuel Castells, David Harvey and others with micro-level case studies to utilize both theory and empirical evidence to generate new theoretical insights and support normative arguments and policy recommendations.

Incentives for the Production and Distribution of Intellectual Goods

- The dominant Anglo-American justificatory theory of IP, utilitarianism, places central emphasis on IP as a necessary incentive for innovative behaviour
- Use of pecuniary incentives to incent innovative behaviour ignores the numerous extant incentives for the production and distribution of intellectual goods and the problem that the granting of exclusionary rights encourages innovation inhibiting strategic uses of such rights
- The increasing focus on pecuniary incentives reflects the rising dominance of neoclassical economic theory in policymaking and jurisprudence

Innovation

- Foundational economic texts on innovation by Schumpeter and Arrow emphasize the importance of market structure in incenting innovation, and reject the premise that pecuniary incentives are the ideal incentive mechanism; however, these insights are ignored in neoclassical economics
- Empirical studies on IP and innovation have robustly demonstrated that IP is at best only a moderate incentive for innovative activity, and in many cases disincentivizes innovation while encouraging socially wasteful rent-seeking behaviour in the forms of excessive litigation and lobbying
- Numerous overlapping IP rights contribute to patent thickets (Shapiro) or anticommons (Heller) that inhibit inventive and creative activity
- Alternatives to IP including open source software, prizes and open access scholarly publishing demonstrate that innovation does occur in absence of exclusionary rights and pecuniary incentives

Ideological Dimensions of Innovation

- The strong, positive connotation of innovation has been coopted by neoliberal policymakers to advance national and corporate policies, including expansionary IP policies, that extoll innovation for the narrow, instrumentalist goals of wealth creation and productivity growth
- The economic conception of innovation undermines the historical linkage between innovation and human progress and the ability of innovation to generate social and moral improvement
- Increased levels of innovation are also invoked by proponents of the information society/age, including Daniel Bell and Manuel Castells, as a key indicator of the arrival and character of a new society; however, such analyses fail to fully appreciate the role of IP rights

Case Studies – Songwriters Association of Canada’s Monthly ISP Fee and Defensive Publishing

- The Songwriters Association of Canada’s proposal for a monthly internet service provide (ISP) fee to legalize all forms of file-sharing is not a substantive alternative to copyright as it focuses solely on pecuniary incentives, provides no ability for individuals to engage in transformative uses of existing musical works and celebrates innovation for its ability to generate business models, while failing to fully account for the cultural importance of music
- Defensive publication (also known as pre-emptive publication) is a substantive alternative to patenting as it utilizes a range of incentive structures, facilitates innovation by improving patent quality, and enables broader access to information than the patent system though the commodification of the major defensive publication services introduces cost barriers to the informational content of defensive publications

Conclusions and Recommendations

- Substantive alternatives to IP such as prizes, open source software and defensive publishing succeed because they recognize and utilize non-pecuniary incentives, facilitate broader access to intellectual goods and their informational content and encourage innovation for more than economic purposes
- In the case of copyright the expansionary IP regime remains dominant though not completely unchallenged, but in the case of patents the expansionary consensus has fissured
- In the U.S. federal support for a number of alternatives to IP has helped enhance the nation’s innovation ecosystem; however, fiscal instability and sovereign debt concerns imperil the continued support for alternatives, while in Canada the federal government must provide greater support for alternatives to IP is necessary to improve the country’s poor innovation performance