

Rethinking Intellectual Property: History, Theory, and Economics

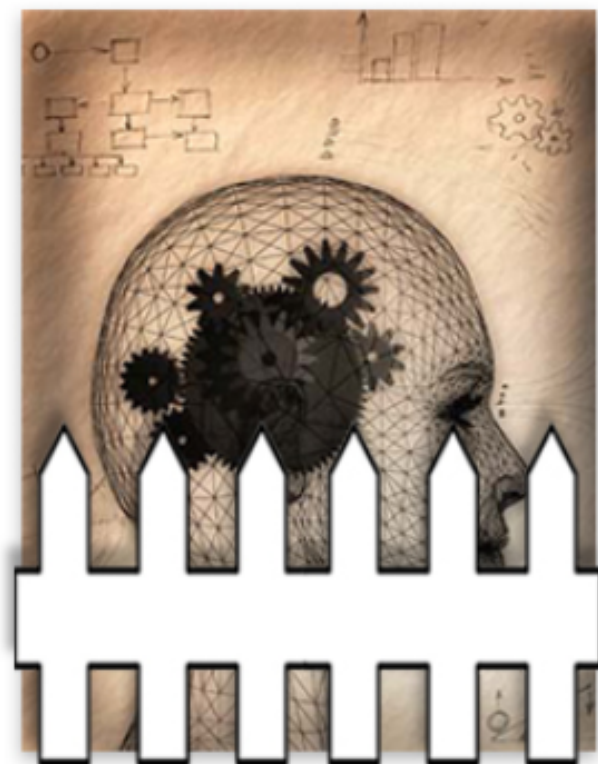
Law (cont.); History and Origins

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Outrages of the Week/Recent News

- See regular postings at www.c4sif.org
- The New Grave Robbers
 - increasing attempts to expand yet another type of IP right, the obscure “identity right” associated with the “right of publicity.
 - Tolkien estate trying to block novel with Tolkien as character
 - Threatens historical fiction
- Recent IP Cartel Advances
 - Sweden (Pirate Bay!) implements EU directive allowing Hollywood to gain court orders to get personal information of suspected file sharers.
 - Law proposed in Italy requiring Internet users to apply for and receive authorization from the Communications Ministry to upload video to Internet sites.
 - The same type of law is rumored to soon be proposed in the French parliament as well.

Outrages of the Week/Recent News

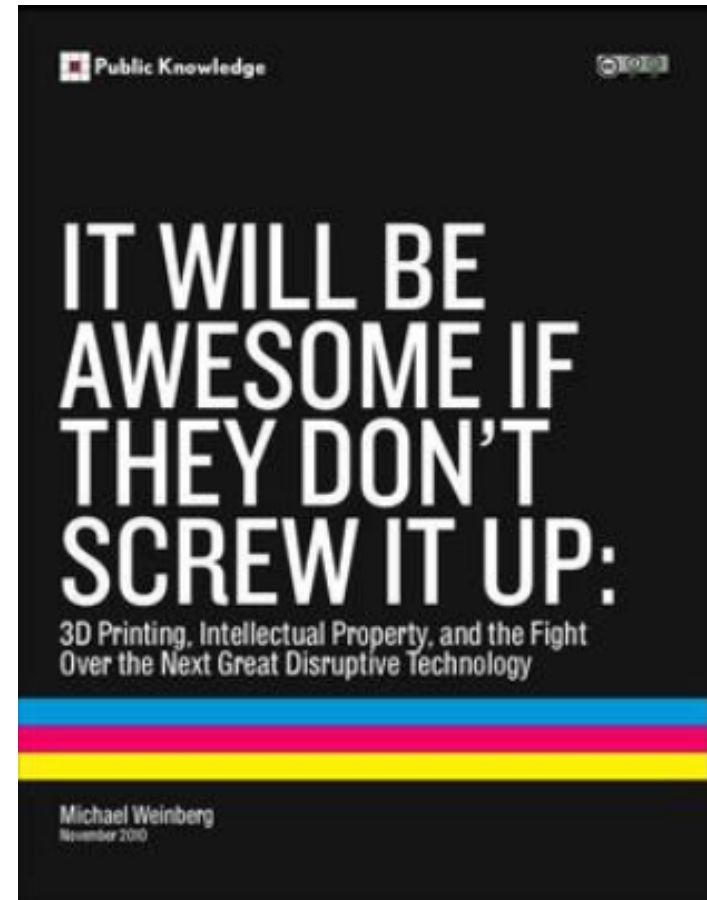
- Owning Language

- the recent use of trademark law by tech companies to try to monopolize the use of words and terms.

- For example, Microsoft is suing Apple, and Apple is suing Amazon, all over the right to use a simple two-word phrase: “app store.”

- White paper on 3D printing and the law: the coming copyfight

- “It Will Be Awesome if They Don’t Screw it Up: 3D Printing, Intellectual Property, and the Fight Over the Next Great Disruptive Technology”



Outrages of the Week/Recent News

- Priest on Patents

- “[I]n the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property.” –George Priest, “What Economists Can Tell Lawyers About Intellectual Property,” 8 Res. L. & Econ. 19 (1986).

- Patent Reform is Here! O Joy!

- My takedown of the America Invent Act

- Schulman: Kinsella is “the foremost enemy of property rights”

- Recording Industry Responsible For Entire World Economic Output

- the RIAA has demanded **\$75 trillion** in damages from file sharing site Lime Wire (!)

- Patenting Skywriting (1924)

Outrages of the Week/Recent News

- The Velvet Elvis and Other Trademark Absurdities
 - Now the Velvet Melvin
 - Taco Cabana and Two Pesos



Outrages of the Week/Recent News

- A New Slant on Trademark Law

- The Portland-based Asian-American band with a large Asian-American fan base, The Slants, has had their application for a federal trademark rejected by the U.S. Patent and Trademark Office, on the grounds that it is “racist.”

- Howard Hughes, Copyright, and Censorship

- Hughes purchased copyrights to several articles about him; then used them to attack an “unauthorized” biography with a copyright infringement suit.



Outrages of the Week (from Nov. 2010 course)

- Jury Dings File Sharer \$1.5 Million for 24 Songs
 - “Jammie Thomas-Rasset, the first file sharer to take a Recording Industry Association of America lawsuit to a jury trial, was dinged late Wednesday \$62,500 for each of 24 songs she pilfered on Kazaa — \$1.5 million in all.”

Where we left off...

- Nature and types of IP
 - Patent
 - Copyright
 - Trademark
 - Trade secret
 - Other
- Focus on **patent** and **copyright** (cont...)

Today's Lecture

- Law Continued:
 - Patent Rights and Remedies
 - Exhaustion doctrines
 - Defamation
 - Domain names
- History continued: Origins of Patent System
 - Machlup
 - Patent: monopoly privilege
 - Copyright: censorship

Focus

- The focus here will be ***patent*** and ***copyright***
 - Hard to say which is worse
- **Reputation rights** and publicity/media rights also unlibertarian
- Aspects of **trademark law** unlibertarian
 - Wrong plaintiff
 - Fraud not required
 - Antidilution rights
- Aspects of **trade secret law** unlibertarian
 - Injunctions
 - Third parties
- **All newer IP rights unlibertarian**
Once problems with copyright and patent are understood, easy to see how to view the other IP rights.



Law Continued: Patent Rights

- Preliminary: IP also called “Industrial Property” outside US
- Patent: Right to Exclude, not to Practice
- Is this clear?
 - 3 legged stool/chair example
 - Mousetrap example from AIP
- Difference between prior art and prior patent claims
 - Publications
 - Patents

Law Continued: Patent Rights

- Remedies: Injunctions

- Compulsory licenses

- Anthrax/Cipro case

- Illustrates redistribution aspects

- Some actually call for tax-funded innovation award/bonus system

- Madison 1787

- Polanyi 1944

- Russia 1834, Soviet Union 1941

- Recently: Joseph Stiglitz, Bernie Sanders, Alexander Tabarrok, others

- But cost too much in explicit payments

- Better to pass off cost to public

- “unfunded mandate”

Law Continued: Exhaustion Doctrine

- Student question
- **Patent: exhaustion doctrine**
 - the first unrestricted sale of a patented item exhausts the patentee's control over that particular item.
 - *Quanta v. LG Electronics*: LG licensed patents to Intel for use in microprocessors, with the condition that Intel notify buyers of those microprocessors that such buyers did not receive a patent license for the use of the Intel microprocessors together with non-Intel components. Intel notified Quanta of this limitation, but Quanta nonetheless proceeded to make and sell computer systems using Intel's chips and other components obtained elsewhere. LG Electronics sued Quanta for violation of the patents, while Quanta argued that the first sale doctrine applies. On June 9, 2008, the Supreme Court unanimously ruled in favor of Quanta.

Law Continued: Exhaustion Doctrine (cont.)

- **Copyright: First-sale doctrine**

- limitation on copyright
- allows the purchaser to transfer (*i.e.*, sell or give away) a particular lawfully made copy of the copyrighted work without permission once it has been obtained.
- This means that the copyright holder's rights to control the change of ownership of a particular copy ends once that copy is sold, as long as no additional copies are made.
- doctrine is also referred to as the "right of first sale," "first sale rule," or "exhaustion rule."

Law Continued: Exhaustion Doctrine (cont.)

● Copyright: First-sale doctrine

○ Omega watch case:

- See my post "[Leveraging IP](#)"
- Omega sells watches for less money in some countries
 - "geographical price discrimination"
- Costco buys Omega Seamaster from Paraguay, sells for \$1,299 instead of \$1,999
- Not fakes—no trademark
- Put a small globe logo on it—**copyright**
- sued Costco for copyright infringement
- "First Sale Doctrine" does not apply because the first sale of the Omega watches in question happened outside of the U.S.

Law Continued: Exhaustion Doctrine (cont.)

- **Copyright: First-sale doctrine**

- Omega watch case
- First-sale doctrine is why the used book sales and library loans do not infringe the author or publisher's copyright.
- *WSJ*: “in a global economy, could have large implications. ... Constrain the first-sale doctrine and you throw a wrench into the business of used-book stores, garage sales (including the electronic garage sale that is eBay), and any and every sort of secondhand shop. And yes, **even public libraries** might find themselves facing the challenge of figuring out which books on the stacks were first sold in the U.S., and which were first sold abroad.”
- The “first-sale doctrine” is the exception to the Copyright Act that allows any purchaser of a
- legal copy of a book or other copyrighted work to sell or lend that copy

Law Continued: Exhaustion Doctrine (cont.)

- Law is confused

- In Quanta court said that LGE's license agreement with Intel "broadly permits Intel to make, use, or sell products free of the patent claims."
 - It did not grant a license to "Intel to make, use, and sell microprocessor products only in the field of microprocessor products combined with other LGE-licensed products ... There was no explicit field-of-use limitation on Intel's manufacturing, using, and selling rights ... LGE failed to go right to the point and expressly deny Intel any license to make microprocessor products that would be combined with other products.
- So can just restrict license
- Courts will then limit contract rights, or permit exhaustion doctrine to be overridden
- Similar with copyright and restrictions on contract rights with first-sale doctrine

- Granting of state monopoly privileges leads to infringement on property and contract rights

Law Continued: Reputation Rights

- Defamation

- Libel: written
- Slander: oral
 - All communication is “verbal”—even written
- Statement that damages reputation
 - Truth usually a defense
 - Fact vs. opinion
 - Parliamentary privilege
 - Public figure: need to show actual malice

- Other

- False light
- invasion of privacy—publicly revealing private fact
- Blackmail
- Publicity rights

Law Continued: Domain Names

- Several questions about domain names
- Uniform Domain-Name Dispute-Resolution Policy
 - 3 elements:
 - domain name is **identical** or **confusingly similar** to complainant's trademark;
 - registrant has no rights or **legitimate interests** in the domain name; and
 - domain name registered and being used in "bad faith"
 - Bad faith "factors" include:
 - Registered primarily for the purpose of selling to trademark owner (see ACPA);
 - Registered primarily to disrupt the business of a competitor; or
 - Tried to attract, for commercial gain, internet users to website, by creating a likelihood of confusion with the complainant's mark.

Law Continued: Domain Names (cont.)

- Anticybersquatting Consumer Protection Act

- Established a cause of action for registering, trafficking in, or using a domain name **confusingly similar** to, or **dilutive of**, a trademark or personal name.
 - These are trademark law (Lanham Act) concepts
- Aimed at “cybersquatters” who register Internet domain names containing trademarks with no intention of creating a legitimate web site, but instead plan to sell the domain name to the trademark owner or a third party.

Law Continued: Domain Names (cont.)

- UDRP Examples:

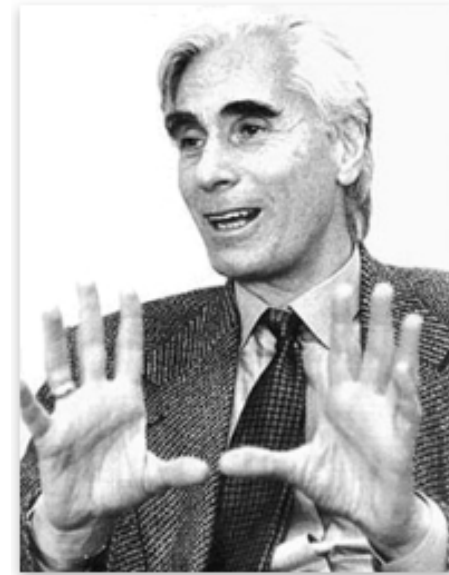
- *Madonna Ciccone, p/k/a Madonna v. Dan Parisi and "Madonna.com"*
 - arbitration panel found against the defendant registrant based on all three “bad faith” factors and ordered the domain name turned over to Madonna
- Actor Robert De Niro has claimed ownership of all domain names incorporating the text "Tribeca" for domain names with any content related to film festivals
 - In particular, he has a dispute with the owner of the website <http://tribeca.net>

History: The Immaculate Conception of IP

- Rothbard, Robert Nozick and the Immaculate Conception of the State

- “Beginning with a free-market anarchist state of nature, Nozick portrays the State as emerging, by an invisible hand process that violates no one's rights, first as a dominant protective agency, then to an "ultraminimal state," and then finally to a minimal state.”

- “for every State where the facts are available originated by a process of violence, conquest, and exploitation: in short, in a manner which Nozick himself would have to admit violated individual rights.”



History: The Immaculate Conception of IP (cont.)

- Conventional account

- The libertarian Founding Fathers enshrined it as a **natural right** in the Constitution
- Article I, Section 8, Clause 8 of the Constitution grants Congress the power “**to promote the progress of science and useful arts**”
 - Science = copyright
 - Useful arts = patent
 - Trademark: IC clause for federal; state law still persists
 - Trade secret: mostly state law
- Confusion: both utilitarian *and* a natural right
 - Utilitarian: we “need” it to “encourage innovation”
 - Search for the right “balance”
 - Natural: Locke; Constitution; modern descriptions;
 - “Creationism”
 - As we shall see, Locke and Founders didn’t regard it as natural
 - Just a policy tool (utilitarian)

Real Origins of IP

- Patents and copyrights originated in *monopoly and censorship*.
- "*Rationality ex post facto*.— Whatever lives long is gradually so saturated with reason that its irrational origins become improbable. Does not almost every accurate history of the origin of something sound paradoxical and sacrilegious to our feelings? Doesn't the good historian *contradict* all the time?"
 - Nietzsche, [*Dawn*](#), Book 1

Real Origins of IP

● Patent

- sovereigns or monarchs issued monopolies to favored people to get them indebted to the sovereign, to raise fees
- exclusive monopolies that protected various goods and services for a limited period of time
- comes from the Latin *patente*, signifying open, as distinct to closed letters or private letters. “Open letters” granted by the monarch that gave someone authorization to do something like to be the only person to sell a certain good in a certain area



Real Origins of IP (cont.)

- 1st statute: England's [Statute of Monopolies of 1623](#): 14 year terms.
 - Took power of granting monopolies away from King and gave to Parliament
 - Reduced royal power and set strict criteria for patents
 - Replaced indefinite and broad with definite and restricted monopoly
- At time of Statute of Monopolies, patents were not yet called “intellectual property”
- later propaganda ploy
- *“Those who started using the word property in connection with inventions had a very definite purpose in mind: they wanted to substitute a word with a respectable connotation, 'property', for a word that had an unpleasant ring, 'privilege'.”*
 - --F. Machlup and E. Penrose: "The Patent Controversy in the Nineteenth Century." *J. Econ. Hist.* 10 (1950), p.1, 16

Patents and Piracy

- An early use of the letters patent in the 1500's was granting authority to **pirates**
 - gave them a monopoly over the spoils of their piracy for some certain period of time.
 - Francis Drake given a Letter Patent on
- He attacked Spanish ships sailing north with ~~enlarge piracy~~ the treasures back home to the Queen. He was famous for this.
- modern-day IP “pirates” don't kill people, break things, murder
 - Ironic that one of the original uses of patents was to authorize real piracy



IP as Monopoly

- Libertarians get indignant if you call IP a monopoly
- Statists much less honest nowadays.
 - [Dept. of War](#) until 1947, then the Dept. of Army of the “New Military Establishment,” and in 1949, the Department of Defense.
- It’s widely recognized that patents are state-granted monopolies: Richard Epstein; U.S. Supreme Court; Arnold Plant; Rothbard.
 - U.S. courts [routinely note](#) the “Historic Tension Between Patent And Antitrust Law”—because patent is a monopoly grant, yet antitrust law is opposed to private monopolies.
 - First modern patent statute, England’s [Statute of Monopolies of 1623](#).
 - Purpose: to provide monopoly profit to inventors so as to incentivize them to innovate and file for patents

Copyright as Censorship

- Before the printing press books were manually copied
 - elaborate system of **censorship** and control over scribes
 - Church: Index Expurgatorius, or *List of Prohibited Books*
 - Stationer's Company (1557) given monopoly over applying printed books (to suppress Protestantism)
- **Copyright law in Europe arose from efforts by the church and governments to regulate and control the output of printers**
 - B&L: "Galileo's trial was, in an important way, an exercise in copyright enforcement by the Pope of Rome."
 - 1637, Stationer's Company seized and destroyed unauthorized books and presses
- **So the roots of copyright are in censorship**
 - No wonder it still leads to censorship today
 - Movies burned, books banned (literally)



History: The Immaculate Conception of IP (cont.)

- *“The pro-copyright theologians argue that copyright as a natural property right emerged from the mists of the common law and took definite form as the result of the invention of the printing press and the increase in potential and actual piracy after 1450. They dismiss the historical ties between copyright and the Crown's grants of printing monopolies, its efforts to suppress heretical or seditious writing, and to exercise censorship control over all publications. This line of argument tends to infuriate the anti-copyright scholars who point out that the first copyright statute in history, the Statute of Anne of 1710, was a direct outgrowth of an elaborate series of monopoly grants, Star Chamber decrees, licensing acts, and a system involving mandatory registration of titles with the Stationers' Company.”*
 - B. Ringer: "[The Demonology of Copyright](#)." in "Perspectives on Publishing" edited by P. Altbach and S. McVey (1976)

History Continued: Origins of Patent System

- Further Questions about History and Origins of Patent
- Machlup's 1958 Senate Study
 - Early History (pre-1624)
 - Spread of the Patent System (1624-1850)
 - Rise of the Anti-patent movement (1850-1873)
 - Victory of the Patent Advocates (1873-1910)

Patents: Early History (pre-1624)

- 500 BC: Greek city of Sybaris (now southern Italy): annual culinary competitions giving winner “the exclusive right to prepare his dish for one year”
- Kings granted exclusive rights 14th century
- First general patent law: Republic of Venice, 1474
- 16th Century: used by German Princes
- Sometimes granted **protection** from the restrictive regulations of guilds
 - designed to **reduce** existing monopoly positions and increase competition
 - So patents sometimes credited with **liberating** industry from restrictive regulations by guilds and local authorities and with aiding the industrial revolution in England
 - Note **similarity to initial use of copyright legislation** to counter **ensorship** of author’s own works

Patents: Early History (pre-1624) (cont.)

- Reasons for original 14 year patent term: two consecutive 7-year apprenticeships:
 - Machlup (1958): “The duration of patents has been determined by historical precedent and political compromise. The 14-year term of the English patents after 1624 was based on the idea that 2 sets of apprentices should, in 7 years each, be trained in the new techniques, though a prolongation by another 7 years was to be allowed in exceptional cases.”

Patents: Early History (pre-1624) (cont.)

- Often granted to favorites of court or for revenue purposes
 - Abuses; Unpopular
 - In 1603, in the "Case of Monopolies," a court declared a monopoly in playing cards void under **common law**
 - 1623-24: Parliament passed the Statute of Monopolies forbidding the granting by the Crown of exclusive rights to trade, with **the exception of patent monopolies for inventions.**
 - These types of monopolies not as unpopular
 - Statute of Monopolies sometimes referred to as the "**Magna Carta** of the rights of inventors."

Patents: Spread of the Patent System (1624-1850)

- Statute of Monopolies 1623: the basis of the present British patent law
 - became the model for the laws elsewhere
 - South Carolina enacted in 1691 the first "general" patent law, as distinguished from authorization to the Crown to make patent grants
 - France and US enacted comprehensive patent law 1790s
 - Later, 1790s-1800s, in Austria, Russia, Prussia, Belgium, Netherlands, etc.

Patents: Rise of the Anti-patent movement (1850-1873)

- Pressure to expand patents in Britain, Germany, etc. in 1800s
 - Engineers, inventors, and related groups, certain industrialists
 - Free-trade groups opposed patent monopolies
 - Led to commissions and studies
 - Calls for abolition
- Swiss legislature refused to enact patent law 1849, 1851, 1854, twice in 1863
 - 1863: "economists of greatest competence" said patent system was "pernicious and indefensible"
 - Losing battle.
 - Like **Obamacare** (inevitable, creeping, concentrated interest groups),
 - and **minimum wage** (in the face of universal denunciation by economists)
- Netherlands repeals patent law 1869
 - Convinced that "a good law of patents is an impossibility"

Patents: The Victory of the Patent Advocates (1873-1910)

- Patents had been attacked along with tariffs by free-traders
- Panic of 1873 (depression) □ rise of protectionism, nationalism
 - Reduced opposition to tariffs, protectionism, and patents
 - Opened door to increase in patent propaganda by interest groups
- Switzerland gave in finally 1887
 - “Mechanical model” limitations to patentability removed **1907** due to German tariff threats
- The Netherlands, the last holdout, last bastion for "free trade in inventions," reintroduced a patent system in 1910, effective in 1912

Patent as Monopoly

- From earlier in class:

- At time of Statute of Monopolies, patents were not yet called “intellectual property”
- later propaganda ploy
- *“Those who started using the word property in connection with inventions had a very definite purpose in mind: they wanted to substitute a word with a respectable connotation, 'property', for a word that had an unpleasant ring, 'privilege'.”*
 - --F. Machlup and E. Penrose: "The Patent Controversy in the Nineteenth Century." *J. Econ. Hist.* 10 (1950), p.1, 16

Patent as Monopoly (cont.)

- *“While some economists before 1873 were anxious to deny that patents conferred “monopolies”--and, indeed, had talked of “property in inventions” chiefly in order to avoid using the unpopular word “monopoly”--most of this squeamishness has disappeared. But most writers want to make it understood that these are not “odious” monopolies but rather “social monopolies”, “general welfare monopolies”, or “socially earned” monopolies. Most writers also point out with great emphasis that the **monopoly grant is limited and conditional.**”*
 - --F. Machlup, 1958

Upcoming Topics...

- Overview of Justifications for IP
- Property, Scarcity, and Ideas
 - the nature of property rights, role of scarcity, and the function of the market
- Perversity of artificial scarcity of information and knowledge
- Diluting effect of new rights
 - Negative and positive rights
 - Inflation analogy
 - IP rights as positive right
 - Redistribution of rights
 - Recall origin in monopoly privilege and censorship
- The basis of libertarian rights and norms
 - Big topic