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Against intellectual property

There is a strong case for opposing intellectual property. Among other things, it often retards innovation and exploits Third World peoples. Most of the usual arguments for intellectual property do not hold up under scrutiny. In particular, the metaphor of the marketplace of ideas provides no justification for ownership of ideas. The alternative to intellectual property is that intellectual products not be owned, as in the case of everyday language. Strategies against intellectual property include civil disobedience, promotion of non-owned information, and fostering of a more cooperative society.

The original rationale for copyrights and patents was to foster artistic and practical creative work by giving a short-term monopoly over certain uses of the work. This monopoly was granted to an individual or corporation by government. The government's power to grant a monopoly is corrupting. The biggest owners of intellectual property have sought to expand it well beyond any sensible rationale.

There are several types of intellectual property or, in other words, ownership of information, including copyright, patents, trademarks, trade secrets, design rights and plant breeders' rights. Copyright covers the expression of ideas such as in writing, music and pictures. Patents cover inventions, such as new substances or articles and industrial processes. Trademarks

are symbols associated with a good, service or company. Trade secrets cover confidential business information. Design rights cover different ways of presenting the outward appearance of things. Plant breeders' rights grant ownership of novel, distinct and stable plant varieties that are "invented."

The type of property that is familiar to most people is physical objects. People own clothes, cars, houses and land. But there has always been a big problem with owning ideas. Exclusive use or control of ideas or the way they are expressed doesn't make nearly as much sense as the ownership of physical objects.

Many physical objects can only be used by one person at a time. If one person wears a pair of shoes, no one else can wear them at the same time. (The person who wears them often owns them, but not always.) This is not true of intellectual property. Ideas can be copied over and over, but the person who had the original copy still has full use of it. Suppose you write a poem. Even if a million other people have copies and read the poem, you can still read the poem yourself. In other words, more than one person can use an idea—a poem, a mathematical formula, a tune, a letter—without reducing other people's use of the idea. Shoes and poems are fundamentally different in this respect.

Technological developments have made it cheaper and easier to make copies of information. Printing was a great advance: it eliminated the need for hand copying of documents. Photocopying and computers have made it even easier to make copies of written documents. Photography and sound recordings have done the same for visual and audio material. The ability to protect intellectual property is being undermined by technology. Yet there is a strong push to expand the scope of ownership of information.

This chapter outlines the case against intellectual property. I begin by mentioning some of the problems arising from ownership of information. Then I turn to weaknesses in its standard justifications. Next is an overview of problems with the so-called "marketplace of ideas," which has important links with intel-

lectual property. Finally, I outline some alternatives to intellectual property and some possible strategies for moving towards them.

Problems with intellectual property

Governments generate large quantities of information. They produce statistics on population, figures on economic production and health, texts of laws and regulations, and vast numbers of reports. The generation of this information is paid for through taxation and, therefore, it might seem that it should be available to any member of the public. But in some countries, such as Britain and Australia, governments claim copyright in their own legislation and sometimes court decisions. Technically, citizens would need permission to copy their own laws. On the other hand, some government-generated information, especially in the US, is turned over to corporations that then sell it to whomever can pay. Publicly funded information is “privatised” and thus not freely available.¹

The idea behind patents is that the fundamentals of an invention are made public while the inventor for a limited time has the exclusive right to make, use or sell the invention. But there are quite a few cases in which patents have been used to suppress innovation.² Companies may take out a patent, or buy someone else’s patent, in order to inhibit others from applying the ideas. From its beginning in 1875, the US company AT&T collected patents in order to ensure its monopoly on telephones. It slowed down the introduction of radio for some 20 years. In a similar fashion, General Electric used control of patents to retard the introduction of fluorescent lights, which were a threat to its sales of incandescent lights. Trade secrets are another way to suppress technological development. Trade secrets are protected by law but, unlike patents, do not have to be published openly.

1. Dorothy Nelkin, *Science as Intellectual Property: Who Controls Research?* (New York: Macmillan, 1984).

2. Richard Dunford, “The suppression of technology as a strategy for controlling resource dependence,” *Administrative Science Quarterly*, Vol. 32, 1987, pp. 512-525.

They can be overcome legitimately by independent development or reverse engineering.

Biological information can now be claimed as intellectual property. US courts have ruled that genetic sequences can be patented, even when the sequences are found "in nature," so long as some artificial means are involved in isolating them. This has led companies to race to take out patents on numerous genetic codes. In some cases, patents have been granted covering all transgenic forms of an entire species, such as soybeans or cotton, causing enormous controversy and sometimes reversals on appeal. One consequence is a severe inhibition on research by non-patent holders. Another consequence is that transnational corporations are patenting genetic materials found in Third World plants and animals, so that some Third World peoples actually have to pay to use seeds and other genetic materials that have been freely available to them for centuries.

More generally, intellectual property is one more way for rich countries to extract wealth from poor countries. Given the enormous exploitation of poor peoples built into the world trade system, it would only seem fair for ideas produced in rich countries to be provided at no cost to poor countries. Yet in the GATT negotiations, representatives of rich countries, especially the US, have insisted on strengthening intellectual property rights.³ Surely there is no better indication that intellectual property is primarily of value to those who are already powerful and wealthy.

The potential financial returns from intellectual property are said to provide an incentive for individuals to create. In practice,

3. Peter Drahos, "Global property rights in information: the story of TRIPS at the GATT," *Prometheus*, Vol. 13, No. 1, June 1995, pp. 6-19; Surendra J. Patel, "Intellectual property rights in the Uruguay Round: a disaster for the South?" *Economic and Political Weekly*, Vol. 24, No. 18, 6 May 1989, pp. 978-993; Darrell A. Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996).

though, most creators do not actually gain much benefit from intellectual property. Independent inventors are frequently ignored or exploited. When employees of corporations and governments have an idea worth protecting, it is usually copyrighted or patented by the organisation, not the employee. Since intellectual property can be sold, it is usually the rich and powerful who benefit. The rich and powerful, it should be noted, seldom contribute much intellectual labour to the creation of new ideas.

These problems—privatisation of government information, suppression of patents, ownership of genetic information and information not owned by the true creator—are symptoms of a deeper problem with the whole idea of intellectual property. Unlike goods, there are no physical obstacles to providing an abundance of ideas. (Indeed, the bigger problem may be an oversupply of ideas.) Intellectual property is an attempt to create an artificial scarcity in order to give rewards to a few at the expense of the many. Intellectual property aggravates inequality. It fosters competitiveness over information and ideas, whereas cooperation makes much more sense. In the words of Peter Drahos, researcher on intellectual property, “Intellectual property is a form of private sovereignty over a primary good—information.”⁴

Here are some examples of the abuse of power that has resulted from the power to grant sovereignty over information.

- The neem tree is used in India in the areas of medicine, toiletries, contraception, timber, fuel and agriculture. Its uses have been developed over many centuries but never patented. Since the mid 1980s, US and Japanese corporations have taken out over a dozen patents on neem-based materials. In this way, collective local knowledge developed by Indian researchers and

4. Peter Drahos, “Decentring communication: the dark side of intellectual property,” in Tom Campbell and Wojciech Sadurski (eds.), *Freedom of Communication* (Aldershot: Dartmouth, 1994), pp. 249-279, at p. 274.

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villagers has been expropriated by outsiders who have added very little to the process.⁵

- Charles M. Gentile is a US photographer who for a decade had made and sold artistic posters of scenes in Cleveland, Ohio. In 1995 he made a poster of the I. M. Pei building, which housed the new Rock and Roll Hall of Fame and Museum. This time he got into trouble. The museum sued him for infringing the trademark that it had taken out on its own image. If buildings can be registered as trademarks, then every painter, photographer and film-maker might have to seek permission and pay fees before using the images in their art work. This is obviously contrary to the original justification for intellectual property, which is to encourage the production of artistic works.

- Prominent designer Victor Papanek writes: "...there is something basically wrong with the whole concept of patents and copyrights. If I design a toy that provides therapeutic exercise for handicapped children, then I think it is unjust to delay the release of the design by a year and a half, going through a patent application. I feel that ideas are plentiful and cheap, and it is wrong to make money from the needs of others. I have been very lucky in persuading many of my students to accept this view. Much of what you will find as design examples throughout this book has never been patented. In fact, quite the opposite strategy prevails: in many cases students and I have made measured drawings of, say, a play environment for blind children, written a description of how to build it simply, and then mimeographed drawings and all. If any agency, anywhere, will write in, my students will send them all the instructions free of charge."⁶

5. Vandana Shiva and Radha Holla-Bhar, "Intellectual piracy and the neem tree," *Ecologist*, Vol. 23, No. 6, 1993, pp. 223-227.

6. Victor Papanek, *Design for the Real World: Human Ecology and Social Change* (London: Thames and Hudson, 1985, 2nd edition), p. xi.

- In 1980, a book entitled *Documents on Australian Defence and Foreign Policy 1968-1975* was published by George Munster and Richard Walsh. It reproduced many secret government memos, briefings and other documents concerning Australian involvement in the Vietnam war, events leading up to the Indonesian invasion of East Timor, and other issues. Exposure of this material deeply embarrassed the Australian government. In an unprecedented move, the government issued an interim injunction, citing both the Crimes Act and the Copyright Act. The books, just put on sale, were impounded. Print runs of two major newspapers with extracts from the book were also seized.

The Australian High Court ruled that the Crimes Act did not apply, but that the material was protected by copyright held by the government. Thus copyright, set up to encourage artistic creation, was used to suppress dissemination of documents for whose production copyright was surely no incentive. Later, Munster and Walsh produced a book using summaries and short quotes in order to present the information.⁷

- Scientology is a religion in which only certain members at advanced stages of enlightenment have access to special information, which is secret to others. Scientology has long been controversial, with critics maintaining that it exploits members. Some critics, including former Scientologists, have put secret documents from advanced stages on the Internet. In response, church officials invoked copyright. Police have raided homes of critics, seizing computers, disks and other equipment. This is all rather curious, since the stated purpose of copyright is not to hide information but rather to stimulate production of new ideas.⁸

7. George Munster, *Secrets of State: A Detailed Assessment of the Book They Banned* (Australia: Walsh & Munster, 1982).

8. Wendy M. Grossman, "alt.scientology.war," *Wired*, Vol. 3, No. 12, December 1995, pp. 172-177, 248-252.

The following examples show that the uncertainty of intellectual property law encourages ambit claims that seem to be somewhat plausible. Some targets of such claims give in for economic reasons.

- Ashleigh Brilliant is a “professional epigrammatist.” He creates and copyrights thousands of short sayings, such as “Fundamentally, there may be no basis for anything.” When he finds someone who has “used” one of his epigrams, he contacts them demanding a payment for breach of copyright. Television journalist David Brinkley wrote a book, *Everyone is Entitled to My Opinion*, the title of which he attributed to a friend of his daughter. Brilliant contacted Brinkley about copyright violation. Random House, Brinkley’s publisher, paid Brilliant \$1000 without contesting the issue, perhaps because it would have cost more than this to contest it.⁹

- Lawyer Robert Kunststadt has proposed that athletes could patent their sporting innovations, such as the “Fosbury flop” invented by high jumper Dick Fosbury. This might make a lot of money for a few stars. It would also cause enormous disputes. Athletes already have a tremendous incentive to innovate if it helps their performance. Patenting of basketball moves or choreography steps would serve mainly to limit the uptake of innovations and would mainly penalise those with fewer resources to pay royalties.

- The US National Basketball Association has sued in court for the exclusive right to transmit the scores of games as they are in progress. It had one success but lost on appeal.¹⁰

- A Scottish newspaper, *The Shetland Times*, went to court to stop an online news service from making a hypertext link to its

9. David D. Kirkpatrick, “Brilliant minds may think alike, but Brilliant lines can cost you,” *Wall Street Journal*, 27 January 1997, p. B1.

10. Lance Rose, “Technical foul: the NBA double dribbles on intellectual property,” *Wired*, Vol. 5, No. 1, January 1997, p. 96.

web site. If hypertext links made without permission were made illegal, this would undermine the World Wide Web.¹¹

These examples show that intellectual property has become a means for exerting power in ways quite divorced from its original aim—promoting the creation and use of new ideas.

Critique of standard justifications

Edwin C. Hettinger has provided an insightful critique of the main arguments used to justify intellectual property, so it is worthwhile summarising his analysis.¹² He begins by noting the obvious argument against intellectual property, namely that sharing intellectual objects still allows the original possessor to use them. Therefore, the burden of proof should lie on those who argue for intellectual property.

The first argument for intellectual property is that people are entitled to the results of their labour. Hettinger's response is that not all the value of intellectual products is due to labour. Nor is the value of intellectual products due to the work of a single labourer, or any small group. Intellectual products are social products.

Suppose you have written an essay or made an invention. Your intellectual work does not exist in a social vacuum. It would not have been possible without lots of earlier work—both intellectual and nonintellectual—by many other people. This includes your teachers and parents. It includes the earlier authors and inventors who provided the foundation for your contribution. It also includes the many people who discussed and used ideas and techniques, at both theoretical and practical levels, and

11. Rob Edwards, "Scottish court case could unravel the Web," *New Scientist*, 16 November 1996, p. 5.

12. Edwin C. Hettinger, "Justifying intellectual property," *Philosophy and Public Affairs*, Vol. 18, No. 1, Winter 1989, pp. 31-52, quotes at pp. 39 and 42. See also David Vaver, "Intellectual property today: of myths and paradoxes," *Canadian Bar Review*, Vol. 69, No. 1, March 1990, pp. 98-128.

provided a cultural foundation for your contribution. It includes the people who built printing presses, laid telephone cables, built roads and buildings and in many other ways contributed to the “construction” of society. Many other people could be mentioned. The point is that any piece of intellectual work is always built on and is inconceivable without the prior work of numerous people.

Hettinger points out that the earlier contributors to the development of ideas are not present. Today’s contributor therefore cannot validly claim full credit.

Is the market value of a piece of an intellectual product a reasonable indicator of a person’s contribution? Certainly not. As noted by Hettinger and as will be discussed in the next section, markets only work once property rights have been established, so it is circular to argue that the market can be used to measure intellectual contributions. Hettinger summarises this point in this fashion: “The notion that a laborer is naturally entitled as a matter of right to receive the market value of her product is a myth. To what extent individual laborers should be allowed to receive the market value of their products is a question of social policy.”

A related argument is that people have a right to possess and personally use what they develop. Hettinger’s response is that this doesn’t show that they deserve market values, nor that they should have a right to prevent others from using the invention.

A second major argument for intellectual property is that people *deserve* property rights because of their labour. This brings up the general issue of what people deserve, a topic that has been analysed by philosophers. Their usual conclusions go against what many people think is “common sense.” Hettinger says that a fitting reward for labour should be proportionate to the person’s effort, the risk taken and moral considerations. This sounds all right—but it is not proportionate to the value of the results of the labour, whether assessed through markets or by other criteria. This is because the value of intellectual work is affected by things not controlled by the worker, including luck

and natural talent. Hettinger says “A person who is born with extraordinary natural talents, or who is extremely lucky, *deserves* nothing on the basis of these characteristics.”

A musical genius like Mozart may make enormous contributions to society. But being born with enormous musical talents does not provide a justification for owning rights to musical compositions or performances. Likewise, the labour of developing a toy like Teenage Mutant Ninja Turtles that becomes incredibly popular does not provide a justification for owning rights to all possible uses of turtle symbols.

What about a situation where one person works hard at a task and a second person with equal talent works less hard? Doesn't the first worker deserve more reward? Perhaps so, but property rights do not provide a suitable mechanism for allocating rewards. The market can give great rewards to the person who successfully claims property rights for a discovery, with little or nothing for the person who just missed out.

A third argument for intellectual property is that private property is a means for promoting privacy and a means for personal autonomy. Hettinger responds that privacy is protected by not revealing information, not by owning it. Trade secrets cannot be defended on the grounds of privacy, because corporations are not individuals. As for personal autonomy, copyrights and patents aren't required for this.

A fourth argument is that rights in intellectual property are needed to promote the creation of more ideas. The idea is that intellectual property gives financial incentives to produce ideas. Hettinger thinks that this is the only decent argument for intellectual property. He is still somewhat sceptical, though. He notes that the whole argument is built on a contradiction, namely that in order to promote the development of ideas, it is necessary to reduce people's freedom to use them. Copyrights and patents may encourage new ideas and innovations, but they also restrict others from using them freely.

This argument for intellectual property cannot be resolved without further investigation. Hettinger says that there needs to

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be an investigation of how long patents and copyrights should be granted, to determine an optimum period for promoting intellectual work.

For the purposes of technological innovation, information becomes more valuable when augmented by new information: innovation is a collective process. If firms in an industry share information by tacit cooperation or open collaboration, this speeds innovation and reduces costs. Patents, which put information into the market and raise information costs, actually slow the innovative process.¹³

It should be noted that although the scale and pace of intellectual work has increased over the past few centuries, the duration of protection of intellectual property has not been reduced, as might be expected, but greatly increased. The US government did not recognise foreign copyrights for much of the 1800s. Where once copyrights were only for a period of a few decades, they now may be for the life of the author plus 70 years. In many countries, chemicals and pharmaceuticals were not patentable until recently. This suggests that even if intellectual property can be justified on the basis of fostering new ideas, this is not the driving force behind the present system of copyrights and patents. After all, few writers feel a greater incentive to write and publish just because their works are copyrighted for 70 years after they die, rather than just until they die.

Of various types of intellectual property, copyright is especially open for exploitation. Unlike patents, copyright is granted without an application and lasts far longer. Originally designed to encourage literary and artistic work, it now applies to every memo and doodle and is more relevant to business than art. There is no need to encourage production of business correspondence, so why is copyright applied to it?¹⁴

13. Thomas Mandeville, *Understanding Novelty: Information, Technological Change, and the Patent System* (Norwood, NJ: Ablex, 1996).

14. David Vaver, "Rejuvenating copyright," *Canadian Bar Review*, Vol. 75, March 1996, pp. 69-80.

Intellectual property is built around a fundamental tension: ideas are public but creators want private returns. To overcome this tension, a distinction developed between ideas and their expression. Ideas could not be copyrighted but their expression could. This peculiar distinction was tied to the romantic notion of the autonomous creator who somehow contributes to the common pool of ideas without drawing from it. This package of concepts apparently justified authors in claiming residual rights—namely copyright—in their ideas after leaving their hands, while not giving manual workers any rationale for claiming residual rights in *their* creations.¹⁵ In practice, though, the idea-expression distinction is dubious and few of the major owners of intellectual property have the faintest resemblance to romantic creators.

The marketplace of ideas

The idea of intellectual property has a number of connections with the concept of the marketplace of ideas, a metaphor that is widely used in discussions of free speech. To delve a bit more deeply into the claim that intellectual property promotes development of new ideas, it is therefore helpful to scrutinise the concept of the marketplace of ideas.

The image conveyed by the marketplace of ideas is that ideas compete for acceptance in a market. As long as the competition is fair—which means that all ideas and contributors are permitted access to the marketplace—then good ideas will win out over bad ones. Why? Because people will recognise the truth and value of good ideas. On the other hand, if the market is constrained, for example by some groups being excluded, then certain ideas cannot be tested and examined and successful ideas may not be the best ideas.

15. James Boyle, *Shamans, Software, and Spleens: Law and the Social Construction of the Information Economy* (Cambridge, MA: Harvard University Press, 1996).

Logically, there is no reason why a marketplace of ideas has to be a marketplace of *owned* ideas: intellectual property cannot be strictly justified by the marketplace of ideas. But because the marketplace metaphor is an economic one, there is a strong tendency to link intellectual property with the marketplace of ideas. As discussed later, there is a link between these two concepts, but not in the way their defenders usually imagine.

There are plenty of practical examples of the failure of the marketplace of ideas. Groups that are stigmatised or that lack power seldom have their viewpoints presented. This includes ethnic minorities, prisoners, the unemployed, manual workers and radical critics of the status quo, among many others. Even when such groups organise themselves to promote their ideas, their views are often ignored while the media focus on their protests, as in the case of peace movement rallies and marches.

Demonstrably, good ideas do not always win out in the marketplace of ideas. To take one example, the point of view of workers is frequently just as worthy as that of employers. Yet there is an enormous imbalance in the presentation of their respective viewpoints in the media. One result is that quite a few ideas that happen to serve the interests of employers at the expense of workers—such as that the reason people don't have jobs is because they aren't trying hard enough to find them—are widely accepted although they are rejected by virtually all informed analysts.

There is a simple and fundamental reason for the failure of the marketplace of ideas: inequality, especially economic inequality.¹⁶ Perhaps in a group of people sitting in a room discussing an issue, there is some prospect of a measured assessment of different ideas. But if these same people are isolated in front of their television sets, and one of them owns the television station, it is obvious that there is little basis for testing of ideas. The reality is that powerful and rich groups can

16. C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989).

promote their ideas with little chance of rebuttal from those with different perspectives. As described in chapter 2, the mass media are powerful enterprises that promote their own interests as well as those of governments and corporations.

In circumstances where participants are approximate equals, such as intellectual discussion among peers in an academic discipline, then the metaphor of competition of ideas has some value. But ownership of media or ideas is hardly a prerequisite for such discussion. It is the equality of power that is essential. To take one of many possible examples, when employees in corporations lack the freedom to speak openly without penalty they cannot be equal participants in discussions (see chapter 5).

Some ideas are good—in the sense of being valuable to society—but are unwelcome. Some are unwelcome to powerful groups, such as that governments and corporations commit horrific crimes or that there is a massive trade in technologies of torture and repression that needs to be stopped. Others are challenging to much of the population, such as that imprisonment does not reduce the crime rate or that financial rewards for good work on the job or grades for good schoolwork are counterproductive.¹⁷ (Needless to say, individuals might disagree with the examples used here. The case does not rest on the examples themselves, but on the existence of some socially valuable ideas that are unwelcome and marginalised.) The marketplace of ideas simply does not work to treat such unwelcome ideas with the seriousness they deserve. The mass media

17. On these points, see respectively Jeffrey Ian Ross (ed.), *Controlling State Crime: An Introduction* (New York: Garland, 1995); Steve Wright, “The new technologies of political repression: a case for arms control?” *Philosophy and Social Action*, Vol. 17, Nos. 3-4, July-December 1991, pp. 31-62; Nils Christie, *Crime Control as Industry: Towards Gulags, Western Style* (London: Routledge, 1994, 2nd edition); Alfie Kohn, *Punished by Rewards: The Trouble with Gold Stars, Incentive Plans, A’s, Praise, and other Bribes* (Boston: Houghton Mifflin, 1993).

try to gain audiences by pleasing them, not by confronting them with challenging ideas.¹⁸

The marketplace of ideas is often used to justify free speech. The argument is that free speech is necessary in order for the marketplace of ideas to operate: if some types of speech are curtailed, certain ideas will not be available on the marketplace and thus the best ideas will not succeed. This sounds plausible. But it is possible to reject the marketplace of ideas while still defending free speech on the grounds that it is essential to human liberty.

If the marketplace of ideas doesn't work, what is the solution? The usual view is that governments should intervene to ensure that all groups have fair access to the media. But this approach, based on promoting equality of opportunity, ignores the fundamental problem of economic inequality. Even if minority groups have some limited chance to present their views in the mass media, this can hardly compensate for the massive power of governments and corporations to promote their views. In addition, it retains the role of the mass media as the central mechanism for disseminating ideas. So-called reform proposals either retain the status quo or introduce government censorship.

Underlying the market model is the idea of self-regulation: the "free market" is supposed to operate without outside intervention and, indeed, to operate best when outside intervention is minimised. In practice, even markets in goods do not operate autonomously: the state is intimately involved in even the freest of markets. In the case of the marketplace of ideas, the state is involved both in shaping the market and in making it possible, for example by promoting and regulating the mass media. The world's most powerful state, the US, has been the driving force behind the establishment of a highly protectionist system of intellectual property, using power politics at GATT, the General Agreement on Tariffs and Trade.

18. Robert M. Entman, *Democracy without Citizens: Media and the Decay of American Politics* (New York: Oxford University Press, 1989).

Courts may use the rhetoric of the marketplace of ideas but actually interpret the law to support the status quo. For example, speech is treated as free until it might actually have some consequences. Then it is curtailed when it allegedly presents a “clear and present danger,” such as when peace activists expose information supposedly threatening to “national security”. But speech without action is pointless. True liberty requires freedom to promote one’s views in practice.¹⁹ Powerful groups have the ability to do this. Courts only intervene when others try to do the same.

As in the case of trade generally, a property-based “free market” serves the interests of powerful producers. In the case of ideas, this includes governments and corporations plus intellectuals and professionals linked with universities, entertainment, journalism and the arts. Against such an array of intellectual opinion, it is very difficult for other groups, such as manual workers, to compete.²⁰ The marketplace of ideas is a biased and artificial market that mostly serves to fine-tune relations between elites and provide them with legitimacy.²¹

The implication of this analysis is that intellectual property cannot be justified on the basis of the marketplace of ideas. The utilitarian argument for intellectual property is that ownership is necessary to stimulate production of new ideas, because of the financial incentive. This financial incentive is supposed to come from the market, whose justification is the marketplace of ideas. If, as critics argue, the marketplace of ideas is flawed by the presence of economic inequality and, more fundamentally, is an artificial creation that serves powerful producers of ideas and legitimates the role of elites, then the case for intellectual property is unfounded. Intellectual property can only serve to aggravate the inequality on which it is built.

19. Baker (see note 16).

20. Benjamin Ginsberg, *The Captive Public: How Mass Media Promotes State Power* (New York: Basic Books, 1986).

21. Stanley Ingber, “The marketplace of ideas: a legitimizing myth,” *Duke Law Journal*, Vol. 1984, No. 1, February 1984, pp. 1-91.

The alternative

The alternative to intellectual property is straightforward: intellectual products should not be owned. That means not owned by individuals, corporations, governments, or the community as common property. It means that ideas are available to be used by anyone who wants to.

One example of how this might operate is language, including the words, sounds and meaning systems with which we communicate every day. Spoken language is free for everyone to use. (Actually, corporations do control bits of language through trademarks and slogans.)

Another example is scientific knowledge. Scientists do research and then publish their results. A large proportion of scientific knowledge is public knowledge. There are some areas of science that are not public, such as classified military research. It is usually argued that the most dynamic parts of science are those with the least secrecy. Open ideas can be examined, challenged, modified and improved. To turn scientific knowledge into a commodity on the market, as is happening with genetic engineering, arguably inhibits science.

Few scientists complain that they do not own the knowledge they produce. Indeed, they are much more likely to complain when corporations or governments try to control dissemination of ideas. Most scientists receive a salary from a government, corporation or university. Their livelihoods do not depend on royalties from published work.

University scientists have the greatest freedom. The main reasons they do research are for the intrinsic satisfaction of investigation and discovery—a key motivation for many of the world's great scientists—and for recognition by their peers. To turn scientific knowledge into intellectual property would dampen the enthusiasm of many scientists for their work. However, as governments reduce their funding of universities, scientists and university administrations increasingly turn to patents as a source of income.

Language and scientific knowledge are not ideal; indeed, they are often used for harmful purposes. It is difficult to imagine, though, how turning them into property could make them better.

The case of science shows that vigorous intellectual activity is quite possible without intellectual property, and in fact that it may be vigorous precisely because information is not owned. But there are lots of areas that, unlike science, have long operated with intellectual property as a fact of life. What would happen without ownership of information? Many objections spring to mind.

Plagiarism

Many intellectual workers fear being plagiarised and many of them think that intellectual property provides protection against this. After all, without copyright, why couldn't someone put their name on your essay and publish it? Actually, copyright provides very little protection against plagiarism.²² So-called "moral rights" of authors to be credited are backed by law in many countries but are an extremely cumbersome way of dealing with plagiarism.

Plagiarism means using the ideas of others without adequate acknowledgment. There are several types of plagiarism. One is plagiarism of ideas: someone takes your original idea and, using different expression, presents it as their own. Copyright provides no protection at all against this form of plagiarism. Another type of plagiarism is word-for-word plagiarism, where someone takes the words you've written—a book, an essay, a few paragraphs or even just a sentence—and, with or without minor modifications, presents them as their own. This sort of plagiarism *is* covered by copyright—assuming that you hold the copyright. In many cases, copyright is held by the publisher, not the author.

22. Laurie Stearns, "Copy wrong: plagiarism, process, property, and the law," *California Law Review*, Vol. 80, No. 2, March 1992, pp. 513-553.

In practice, plagiarism goes on all the time, in various ways and degrees,²³ and copyright law is hardly ever used against it. The most effective challenge to plagiarism is not legal action but publicity. At least among authors, plagiarism is widely condemned. For this reason, and because they seek to give credit where it's due, most writers do take care to avoid plagiarising.

There is an even more fundamental reason why copyright provides no protection against plagiarism: the most common sort of plagiarism is built into social hierarchies. Government and corporate reports are released under the names of top bureaucrats who did not write them; politicians and corporate executives give speeches written by underlings. These are examples of a pervasive misrepresentation of authorship in which powerful figures gain credit for the work of subordinates.²⁴ Copyright, if it has any effect at all, reinforces rather than challenges this sort of institutionalised plagiarism.

Royalties

What about all the writers, inventors and others who depend for their livelihood on royalties? First, it should be mentioned that only a very few individuals make enough money from royalties to live on. For example, there are probably only a few hundred self-employed writers in the US.²⁵ Most of the rewards from intellectual property go to a few big companies. But the question is still a serious one for those intellectual workers who depend on royalties and other payments related to intellectual property.

The alternative in this case is some reorganisation of the economic system. Those few currently dependent on royalties could instead receive a salary, grant or bursary, just as most scientists do.

23. Thomas Mallon, *Stolen Words: Forays into the Origins and Ravages of Plagiarism* (New York: Ticknor and Fields, 1989); Ari Posner, "The culture of plagiarism," *The New Republic*, 18 April 1988, pp. 19-24.

24. Brian Martin, "Plagiarism: a misplaced emphasis," *Journal of Information Ethics*, Vol. 3, No. 2, Fall 1994, pp. 36-47.

25. Vaver, 1990 (see note 12).

Getting rid of intellectual property would reduce the incomes of a few highly successful creative individuals, such as author Agatha Christie, composer Andrew Lloyd Webber and filmmaker Steven Spielberg. Publishers could reprint Christie's novels without permission, theatre companies could put on Webber's operas whenever they wished and Spielberg's films could be copied and screened anywhere. Jurassic Park and Lost World T-shirts, toys and trinkets could be produced at will. This would reduce the income of and, to some extent, the opportunities for artistic expression by these individuals. But there would be economic resources released: there would be more money available for other creators. Christie, Webber and Spielberg might be just as popular without intellectual property to channel money to them and their family enterprises.

The typical creative intellectual is actually worse off due to intellectual property. Consider an author who brings in a few hundred or even a few thousand dollars of royalty income per year. This is a tangible income, which creators value for its monetary and symbolic value. But this should be weighed against payments of royalties and monopoly profits when buying books, magazines, CDs and computer software.

Many of these costs are invisible. How many consumers, for example, realise how much they are paying for intellectual property when buying prescription medicines, paying for schools (through fees or taxes), buying groceries or listening to a piece of music on the radio? Yet in these and many other situations, costs are substantially increased due to intellectual property. Most of the extra costs go not to creators but to corporations and to bureaucratic overheads—such as patent offices and law firms—that are necessary to keep the system of intellectual property going.

Stimulating creativity

What about the incentive to create? Without the possibility of wealth and fame, what would stimulate creative individuals to produce works of genius? Actually, most creators and innovators

are motivated by their own intrinsic interest, not by rewards. There is a large body of evidence showing, contrary to popular opinion, that rewards actually reduce the quality of work.²⁶ If the goal is better and more creative work, paying creators on a piecework basis, such as through royalties, is counterproductive.

In a society without intellectual property, creativity is likely to thrive. Most of the problems that are imagined to occur if there is no intellectual property—such as the exploitation of a small publisher that renounces copyright—are due to economic arrangements that maintain inequality. The soundest foundation for a society without intellectual property is greater economic and political equality. This means not just equality of opportunity, but equality of outcomes. This does not mean uniformity and does not mean levelling imposed from the top: it means freedom and diversity and a situation where people can get what they need but are not able to gain great power or wealth by exploiting the work of others. This is a big issue. Suffice it to say here that there are strong social and psychological arguments in favour of equality.²⁷

Strategies for change

Intellectual property is supported by many powerful groups: the most powerful governments and the largest corporations. The mass media seem fully behind intellectual property, partly because media monopolies would be undercut if information were more freely copied and partly because the most influential journalists depend on syndication rights for their stories.

Perhaps just as important is the support for intellectual property from many small intellectual producers, including academics and freelance writers. Although the monetary returns

26. Kohn (see note 17).

27. John Baker, *Arguing for Equality* (London: Verso, 1987); Morton Deutsch, *Distributive Justice: A Social-psychological Perspective* (New Haven: Yale University Press, 1985); William Ryan, *Equality* (New York: Pantheon, 1981).

to these intellectuals are seldom significant, they have been persuaded that they both need and deserve their small royalties. This is similar to the way that small owners of goods and land, such as homeowners, strongly defend the system of private property, whose main beneficiaries are the very wealthy who own vast enterprises based on many other people's labour. Intellectuals are enormous consumers as well as producers of intellectual work. A majority would probably be better off financially without intellectual property, since they wouldn't have to pay as much for other people's work.

Another problem in developing strategies is that it makes little sense to challenge intellectual property in isolation. If we simply imagine intellectual property being abolished but the rest of the economic system unchanged, then many objections can be made. Challenging intellectual property must involve the development of methods to support creative individuals.

Change thinking

Talking about "intellectual property" implies an association with physical property. Instead, it is better to talk about monopolies granted by governments, for example "monopoly privilege." This gives a better idea of what's going on and so helps undermine the legitimacy of the process. Associated with this could be an appeal to free market principles, challenging the barriers to trade in ideas imposed by monopolies granted to copyright and patent holders.

As well, a connection should be forged with ideals of free speech. Rather than talk of intellectual property in terms of property and trade, it should be talked about in terms of speech and its impediments. Controls over genetic information should be talked about in terms of public health and social welfare rather than property.

The way that an issue is framed makes an enormous difference to the legitimacy of different positions. Once intellectual property is undermined in the minds of many citizens, it will become far easier to topple its institutional supports.

Expose the costs

It can cost a lot to set up and operate a system of intellectual property. This includes patent offices, legislation, court cases, agencies to collect fees and much else. There is a need for research to calculate and expose these costs as well as the transfers of money between different groups and countries. A middle-ranking country from the First World, such as Australia, pays far more for intellectual property—mostly to the US—than it receives. Once the figures are available and understood, this will aid in reducing the legitimacy of the world intellectual property system.²⁸

Reproduce protected works

From the point of view of intellectual property, this is called “piracy.” (This is a revealing term, considering that such language is seldom used when, for example, a boss takes credit for a subordinate’s work or when a Third World intellectual is recruited to a First World position. In each case, investments in intellectual work made by an individual or society are exploited by a different individual or society with more power.) This happens every day when people photocopy copyrighted articles, tape copyrighted music, or duplicate copyrighted software. It is precisely because illegal copying is so easy and so common that big governments and corporations have mounted offensives to promote intellectual property rights.

Unfortunately, illegal copying is not a very good strategy against intellectual property, any more than stealing goods is a way to challenge ownership of physical property. Theft of any sort implicitly accepts the existing system of ownership. By trying to hide the copying and avoiding penalties, the copiers appear to accept the legitimacy of the system.

28. These two strategies are proposed by Peter Drahos, “Thinking strategically about intellectual property rights,” paper prepared for the Forum of Parliamentarians on Intellectual Property and the National Working Group on Patent Laws, 1996.

Openly refuse to cooperate with intellectual property

This is far more powerful than illicit copying. The methods of nonviolent action can be used here, including noncooperation, boycotts and setting up alternative institutions. By being open about the challenge, there is a much greater chance of focussing attention on the issues at stake and creating a dialogue. By being principled in opposition, and being willing to accept penalties for civil disobedience to laws on intellectual property, there is a much greater chance of winning over third parties. If harsh penalties are applied to those who challenge intellectual property, this could produce a backlash of sympathy. Once mass civil disobedience to intellectual property laws occurs, it will be impossible to stop.

Something like that is already occurring. Because photocopying of copyrighted works is so common, there is seldom any attempt to enforce the law against small violators—to do so would alienate too many people. Copyright authorities therefore seek other means of collecting revenues from intellectual property, such as payments by institutions based on library copies.

Already there is mass discontent in India over the impact of the world intellectual property regime and patenting of genetic materials, with rallies of hundreds of thousands of farmers.²⁹ If this scale of protest could be combined with other actions that undermine the legitimacy of intellectual property, the entire system could be challenged.

Promote non-owned information

A good example is public domain software, which is computer software that is made available free to anyone who wants it. The developers of “freeware” gain satisfaction out of their intellectual work and out of providing a service to others. The Free

29. The magazine *Third World Resurgence* has regular reports on this issue. See for example Martin Khor, “A worldwide fight against biopiracy and patents on life,” *Third World Resurgence*, No. 63, November 1995, pp. 9-11, and the special issues on patenting of life: No. 57, May 1995 and No. 84, August 1997.

Software Foundation has spearheaded the development and promotion of freeware. It “is dedicated to eliminating restrictions on people’s right to use, copy, modify and redistribute computer programs” by encouraging people to develop and use free software.

A suitable alternative to copyright is shareright. A piece of freeware might be accompanied by the notice, “You may reproduce this material if your recipients may also reproduce it.” This encourages copiers but refuses any of them copyright.

The Free Software Foundation has come up with another approach, called “copyleft.” The Foundation states, “The simplest way to make a program free is to put it in the public domain, uncopyrighted. But this permits proprietary modified versions, which deny others the freedom to redistribute and modify; such versions undermine the goal of giving freedom to *all* users. To prevent this, ‘copyleft’ uses copyright in a novel manner. Typically copyrights take away freedoms; copyleft preserves them. It is a legal instrument that requires those who pass on a program to include the rights to use, modify, and redistribute the code; the code and the freedoms become legally inseparable.”³⁰ Until copyright is eliminated or obsolete, innovations such as copyleft are necessary to avoid exploitation of those who want to make their work available to others.

Develop principles to deal with credit for intellectual work

This is important even if credit is not rewarded financially. This would include guidelines for not misrepresenting another person’s work. Intellectual property gives the appearance of stopping unfair appropriation of ideas although the reality is quite different. If intellectual property is to be challenged, people need to be reassured that misappropriation of ideas will not become a big problem.

30. *GNU’s Bulletin*, January 1995 (Free Software Foundation, 59 Temple Place, Suite 330, Boston MA 02111-1307, USA; gnu@prep.ai.mit.edu). See <http://www.gnu.org/> for the latest description.

More fundamentally, it needs to be recognised that intellectual work is inevitably a collective process. No one has totally original ideas: ideas are always built on the earlier contributions of others. (That's especially true of this chapter!) Furthermore, culture—which makes ideas possible—is built not just on intellectual contributions but also on practical and material contributions, including the rearing of families and construction of buildings. Intellectual property is theft, sometimes in part from an individual creator but always from society as a whole.

In a more cooperative society, credit for ideas would not be such a contentious matter. Today, there are vicious disputes between scientists over who should gain credit for a discovery. This is because scientists' careers and, more importantly, their reputations, depend on credit for ideas. In a society with less hierarchy and greater equality, intrinsic motivation and satisfaction would be the main returns from contributing to intellectual developments. This is quite compatible with everything that is known about human nature.³¹ The system of ownership encourages groups to put special interests above general interests. Sharing information is undoubtedly the most efficient way to allocate productive resources. The less there is to gain from credit for ideas, the more likely people are to share ideas rather than worry about who deserves credit for them.

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For most book publishers, publishing an argument against intellectual property raises a dilemma. If the work is copyrighted as usual, this clashes with the argument against copyright. On the other hand, if the work is not copyrighted, then unrestrained copying might undermine sales. It's worth reflecting on this dilemma as it applies to this book.

31. Alfie Kohn, *The Brighter Side of Human Nature: Altruism and Empathy in Everyday Life* (New York: Basic Books, 1990).

It is important to keep in mind the wider goal of challenging the corruptions of information power. Governments and large corporations are particularly susceptible to these corruptions. They should be the first targets in developing a strategy against intellectual property.

Freedom Press is not a typical publisher. It has been publishing anarchist writings since 1886, including books, magazines, pamphlets and leaflets. Remarkably, neither authors nor editors have ever been paid for their work. Freedom Press is concerned with social issues and social change, not with material returns to anyone involved in the enterprise.

Because it is a small publisher, Freedom Press would be hard pressed to enforce its claims to copyright even if it wanted to. Those who sympathise with the aims of Freedom Press and who would like to reproduce some of its publications therefore should consider practical rather than legal issues. Would the copying be on such a scale as to undermine Freedom Press's limited sales? Does the copying give sufficient credit to Freedom Press so as to encourage further sales? Is the copying for commercial or noncommercial purposes?

In answering such questions, it makes sense to ask Freedom Press. This applies whether the work is copyright or not. If asking is not feasible, or the copying is of limited scale, then good judgement should be used. In my opinion, using one chapter—especially this chapter!—for nonprofit purposes should normally be okay.

So in the case of Freedom Press, the approach should be to negotiate in good faith and to use good judgement in minor or urgent cases. Negotiation and good judgement of this sort will be necessary in any society that moves beyond intellectual property.