

In search of a useful theory of the productive potential of intellectual property rights

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Abstract

Mainstream theory, which has informed the belief systems regarding the operation as well as the predicted social and economic effects of IPR systems, cannot explain why the IPR system generates different performance results and varying potential for growth across the firms, sectors and nations participating in the IPR system. This paper sketches a theory of the ‘productive potential of intellectual property rights’ which is able to do just that. Focusing on the ‘rules of the game’ embedded in the institutional IPR environment and the ‘play of the game’ within the alternative institutions of IPR governance, the paper emphasizes the importance of the nature or quality of the relationships among IPR stakeholders and the contribution of such relationships to the processes of financial and non-financial value creation and distribution from IPRs. The central role of cooperation, asymmetric relationships, and the effective resolution of conflicting interests amongst stakeholders is addressed. It is suggested that the proposed framework provides a better starting point for the design of IPR policy and management.

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1. Introduction

In most mature economies, the exploitation of intellectual property (IP) is legally protected through the use of intellectual property rights (IPRs), which have evolved alongside property rights on land, capital and labour. IPRs take the form of patents (in the case of knowledge embedded in novel ideas), trade secrets (where

there is no requirement of ‘novelty’), copyrights (in the case of knowledge embedded in original expressions or effort), trademarks (knowledge embedded in symbolic material) and other rights. Because control over the use of an IPR requires ownership or a license, the growing importance of knowledge-based assets and creative expressions in recent years has been accompanied by recognition that patents and copyrights represent strategic assets for those who own and control them. It is therefore not surprising that the pace at which individuals, firms and the public sector are using IPRs to privatise knowledge-based assets and creative expressions has been accelerating (see, e.g. Andersen, 2001; Jaffe and Trajtenberg, 2002). This trend has been pro-

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motivated by a growing number in industry, government and international agencies who argue that the privatisation of the intellectual capital and knowledge-based assets of individuals and firms offers many advantages. Large firms have reported extraordinary corporate results from using the IPR system.¹ The great expectations of policy-makers regarding the contribution of the IPR system to performance in the knowledge-based economy have been exposed by an increased enforcement of IPR regimes worldwide. Such initiatives include (among others): the Trade Related Aspects of the Intellectual Property Section (TRIPS) of the World Trade Organization (WTO); patent protection even beyond science-based principles (for example business methods and other computer-implemented inventions); exclusive rights on fundamental inventions (for example university science and procedures to obtain genetic codes); exclusive rights on traditional knowledge and traditional cultural expressions; increased privatisation of the public domain; increased period of protection; protection of trivial knowledge with very little inventive step.

Nevertheless, IPR policy encouraging increased enforcement has been largely based on the vision of policy-makers rather than on the findings of solid empirical research; and within the IPR research community, the social and economic effects of tightening the IPR system are not considered obvious.

1.1. *The need for a useful theory of IPRs*

Even with substantive improvements in research on patents and copyrights, it is important not to overlook the fact that our tools for understanding the dynamics of IPR systems remain blunt. Managers and policy makers tend to emphasize success stories associated with IPRs. While it is important to celebrate the enabling effects of the IPR system, it is also important to recognize that patents and copyrights may not be able to solve all corporate and economic problems. Rather, they may create problems of their own. When the IPR system does not perform in accordance with expectations, the reason put forward by many policy-makers, industrialists, IPR offices and practising lawyers is that this is due to mismanagement and lack of IPR protection in many small and medium-sized firms and in most countries in the world. Led by the views of WIPO (World Intellectual Property Organization) and the TRIPS agreement, many such officials conclude that the institutional framework

must be strengthened or adjusted in order to generate the expected advantages. By contrast, we suggest that even with optimal IPR legislation and enforcement in most firms and countries, the IPR system may not always perform as expected.

The limitations of the tools for analyzing the dynamics of the IPR system are not usually spelled out. However, because significant management and policy decisions are based on these frameworks, it is important to understand and communicate the limitations as well as the strengths.

A central test for theory is if it is useful. In Nelson and Winter's (1977: 36) search for a useful theory of innovation, we learn that for "theory to be useful . . . [it] must organize knowledge and guide research regarding what lies behind the different performance of the different economic sectors." This leads to the question of whether prevailing IPR theory is useful in explaining why the IPR system generates different performance results and varying potential for growth across firms, sectors and nations participating in the IPR system. At present, the answer would be 'no'.

By ignoring a wide range of real-life elements, prevailing mainstream IPR theory assumes that the interaction of micro-level units (e.g. firms and individuals) within IPR systems maximizes social and economic welfare at the sectoral, national and global levels. IPR regimes designed at national and international levels are also assumed to deliver maximum welfare for each (micro- and meso-level) participant within the IPR system. Yet while defenders of this perspective argue that IPR regimes bring convergence and close income and technology gaps, there is growing concern that strong IPR regimes may cause the very opposite. This is because the increasing privatisation and harmonization of knowledge-based assets, also associated with the more robust IPR regimes, has led to asymmetrical results across countries, regions, sectors and firms within sectors with respect to meeting the originally intended objectives of: stimulating innovation-based competition; fostering spillover and expansion of knowledge-based ideas and creative expressions; rewarding inventiveness and creativity throughout the economic system; and facilitating sustainable development of firms and industries.

In this context, the *theoretical logic* of mainstream theory of IPRs has been challenged. Andersen (2004) critically reviewed the assumptions underpinning mainstream theory of IPRs and argued the following. (i) Even if IPRs signal prospects for rewards, this may not always stimulate incentives to invest in invention and innovation, which in turn should stimulate innovation-based competition. (ii) Even if IPRs facilitate markets for ideas

¹ For example IBM, Siemens, Philips Electronics and Nokia at the EU hearings on software patents 2002–2005 (see Section 5).

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