

Patents and Copyrights *

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Which of the two (patents and copyrights), if either, is consonant with the purely free market, and which is a grant of monopoly privilege by the state? In this part, we have been analysing the economics of the purely free market, where the individual person and property are not subject to molestation. It is therefore important to decide whether patents or copyrights will obtain in the purely free, noninvasive society, or whether they are a function of government interference.

Almost all writers have bracketed patents and copyrights together. Most have considered both as grants of exclusive monopoly privilege by the state; a few have considered both a part and parcel of property right on the free market. But almost of everyone has considered patents and copyrights as equivalent: the one as conferring an exclusive property right in the field of mechanical inventions, the other as conferring an exclusive right in the field of literary creations.⁹³ Yet this bracketing of patents and copyrights is wholly fallacious; the two are completely different in relation to the free market.

It is true that a patent and a copyright are both exclusive property rights and it is also true that they are both property rights in *innovations*. But there is crucial difference in their *legal enforcement*. If an author or a composer believes his copyright is being infringed, and he takes legal action, he must "prove that the defendant had 'access' to the work allegedly infringed. If the defendant produces something identical with the plaintiff's work by mere chance, there is no infringement."⁹⁴ Copyrights, in other words, have their basis in the prosecution of implicit theft. The plaintiff must prove that the defendant stole the former's creation by reproducing it and selling it himself in violation of his or someone else's contract with the original seller. But if the defendant independently arrives at the same creation, the plaintiff has no copyright privilege that could prevent the defendant from using and selling his product.

Patents on the other hand, are completely different. Thus:

You have patented your invention and you read in the newspaper one day that John Doe, who lives in a city 2,000 miles from your town, has invented an identical or similar device, that he has licensed the EZ company to manufacture it....Neither Doe nor the EZ company...ever heard of your invention. All believe Doe to be the inventor of a new and original device. They may all be guilty of infringing your patent...the fact that their infringement was in ignorance of the true facts and unintentional will not constitute a defense.⁹⁵

Patent, then, has nothing to do with implicit theft. It confers an exclusive privilege on the first inventor, and if anyone else should, quite independently, invent the same or similar machine or product, the latter would be debarred by violence from using it in production.

We have seen in chapter 2 that the acid test by which we judge whether or not a certain practice or law is or not consonant with the free market is this: Is the outlawed practice implicit or explicit theft? If it is, then the free market would outlaw it; if not, then its outlawry is itself government interference in the free market. Let us consider copyright. A man writes a book or composes music. When he publishes the book or the sheet of music, he imprints on the first page the word "copyright." This indicates that any man who agrees to purchase this product also agrees as part of the exchange *not* to recopy or reproduce this work for sale. In other words, the author does not sell his property outright to the buyer; he sells it *on condition* that the buyer not reproduce it for sale. Since the buyer does not buy the property outright, but only on this condition, any

* (Excerpt from Chapter 10: Monopoly and Competition, *Man, Economy, and State: A Treatise on Economic Principles Volume II*, Nash Publishing, Los Angeles 1970, pp 652-660)

⁹³ Henry George was a notable exception. See his excellent discussion in *Progress and Poverty* (New York: Modern Library, 1929), p. 411 n.

⁹⁴ Richard Wincor, *How to Secure Copyright* (New York: Oceana Publishers, 1950), p. 37.

⁹⁵ Irving Mandell, *How to Protect and Patent Your Invention* (New York: Oceana Publishers, 1951), p. 34.

infringement of the contract by him or a subsequent buyer is *implicit theft* and would be treated accordingly on the free market. The copyright is therefore a logical device of property right on the free market.

Part of the patent protection now obtained by an inventor could be achieved on the free market by a type of "copyright" protection. Thus, inventors must now *mark* their machines as being patented. The mark puts the buyer on notice that the invention is patented and that they cannot sell that article. But the same could be done to extend the copyright system, and without patent. In the purely free market, the inventor could mark his machine *copyright*, and then anyone who buys the machine buys it *on the condition* that he will not reproduce and sell such a machine for profit. Any violation of this contract would constitute implicit theft and be prosecuted accordingly on the free market.

The patent is incompatible with the free market *precisely to the extent that it goes beyond the copyright*. The man who has not bought a machine and who arrives at the same invention independently, will, on the free market, be perfectly able to use and sell his invention. Patents prevents a man from using his invention even though all the property is his and he has not stolen the invention, either explicitly or implicitly, from the first inventor. Patents, therefore, are grants of exclusive monopoly privilege by the state and are *invasive* of property rights on the market.

The crucial distinction between patents and copyrights, then, is not that one is mechanical and the other literary. The fact that they have been applied that way is an historical accident and does not reveal the critical difference between them.⁹⁶ The critical difference is that copyright is a logical attribute of property right on the free market, while patent is a monopoly invasion of that right.

The application of patents to mechanical inventions and copyrights to literary works is peculiarly inappropriate. It would be more in keeping with the free market to be just the reverse. For literary creations are unique products of the individual; it is almost impossible for them to be independently duplicated by someone else. Therefore, a *patent*, instead of a copyright, for literary productions would make little difference in practice. On the other hand, mechanical inventions are discoveries of natural law rather than individual creations, and hence similar independent inventions occur all the time.⁹⁷ The simultaneity of inventions is a familiar historical fact. Hence, if it is desired to maintain a free market, it is particularly important to allow *copyrights*, but not patents, for mechanical inventions.

The common law has often been a good guide to the law consonant with the free market. Hence, it is not surprising that common-law copyright prevails for *unpublished* literary manuscripts, while there is no such thing a common-law *patent*. At common law, the inventor also has the right to keep his invention unpublicized and safe from theft, i.e., he has the equivalent of the copyright protection for unpublicized inventions.

On the free market, there would therefore be no such thing as patents. There would, however, be copyright for any inventor or creator who made use of it, and this copyright would be *perpetual*, not limited to a certain number of years. Obviously, to be fully the property of an individual, a good has to be permanently and perpetually the property of the man and his heirs and assigns. If the state decrees that a man's property ceases at a certain date, this means that the *State* is the real owner and that it simply grants the man use of the property for a certain period of time.⁹⁸

Some defendants of patents assert that they are not monopoly privileges, but simply property rights in inventions or even in "ideas." But, as we have seen, everyone's property right is defended in libertarian law without a patent. If someone has an idea or plan and constructs an invention, and it is stolen from his house,

⁹⁶ This can be seen in the field of *designs*, which can be either copyrighted or patented.

⁹⁷ For a legal hint on the proper distinction between copyright and monopoly, see F E Skone James, "Copyright" in *Encyclopaedia Britannica* (14th ed.; London, 1929), VI, 415-16. For the views of nineteenth century economists on patents, see Fritz Machlup and Edith T Penrose, "The Patent Controversy in the Nineteenth Century," *Journal of Economic History*, May, 1950, pp. 1-29. Also see Fritz Machlup, *An Economic Review of the Patent System* (Washington DC: United States Government Printing Office, 1958).

⁹⁸ Of course, there would be nothing to prevent the creator or his heirs from voluntarily abandoning this property right and throwing it into the "public domain" if they so desire.

the stealing is an act of theft illegal under general law. On the other hand, patents actually invade the property rights of those *independent* discoverers of an idea or invention who made the discovery after the patentee. Patents, therefore, *invade* rather than defend property rights. The speciousness of this argument that patents protect property rights in ideas is demonstrated by the fact that not all, but only certain types of original ideas, certain types of original innovations, are considered patentable.

Another common argument for patents is that "society" is simply making a contract with the inventor to purchase his secret, so that "society" will have use of it. In the first place, "society" could pay a straight subsidy, or price, to the inventor; it would not have to prevent all later inventors from marketing *their* inventions in this field. Secondly, there is nothing in the free economy to prevent any individual or group of individuals from purchasing secret inventions from their creators. No monopolistic patent is necessary.

The most popular argument for patents among economists is the utilitarian one that a patent for a certain number of years is necessary to encourage a sufficient amount of research expenditure for inventions and innovations in processes and products.

This is a curious argument, because the question immediately arises: By what standard do you judge that research expenditures are "too much," "too little" or just about enough? This is a problem faced by every governmental intervention in the market's production. Resources--the better lands, laborers, capital goods, time--in society are limited, and they may be used for countless alternative ends. By what standard does someone assert that certain uses are "excessive," that certain uses are "insufficient," etc.? Someone observes that there is little investment in Arizona, but a great deal in Pennsylvania; he indignantly asserts that Arizona deserves more investment. But what standards can he use to make this claim? The *market does* have a rational standard: the highest money incomes and highest profits, for these can be achieved only through maximum service of consumer desires. This principle of maximum service to consumers and producers alike--i.e., to everybody--governs the seemingly mysterious market allocation of resources: how much to devote to one firm or to another, to one area or another, to present or future, to one good or another, to research as compared with other forms of investment. But the observer who criticizes this allocation can have no rational standards for decision; he has only his arbitrary whim. This is especially true of criticism of *production-relations*. Someone who chides *consumers* are buying too much cosmetics may have, rightly or wrongly, some rational basis for his criticism. But someone who thinks that more or less of a certain resource should be used in a certain manner or that business firms are "too large" or "too small" or that too much or too little is spent on research or is invested in a new machine, can have no rational basis for his criticism. Businesses, in short, are producing for a market, guided by the ultimate valuations of consumers on that market. Outside observers may criticize ultimate valuations of consumers if they choose--although if they interfere with consumption based on these valuations they impose a loss of utility upon consumers--but they cannot legitimately criticize the *means*: the production relations, the allocations of factors, etc. by which these ends are served.

Capital funds are limited, they must be allocated to various uses, one of which is research expenditures. On the market, rational decisions are made in setting research expenditures, in accordance with the best entrepreneurial expectations of an uncertain future. Coercively to encourage research expenditures would distort and hamper the satisfaction of consumers and producers on the market.

Many advocates of patents believe that the ordinary competitive conditions of the market do not sufficiently encourage the adoption of new processes and that therefore innovations must be coercively promoted by the government. But the market decides on the rate of introduction of new processes just as it decides on the rate of industrialization of a new geographic area. In fact this argument for patents is very similar to the infant-industry argument for tariffs--that market processes are not sufficient to permit the introduction of worthwhile new processes. And the answer to both the arguments is the same: that people must balance the superior productivity of the new processes against the cost of installing them, i.e., against the advantage possessed by the old process in being already built and in existence. Coercively privileging innovation would needlessly scrap valuable plants already in existence and impose an excessive burden upon consumers. For consumers' desires would not be satisfied in the most economic manner.

It is by no means self-evident that patents encourage an increased absolute quantity of research expenditures. But certainly patents distort the *type* of research expenditures being conducted. For while it is true that the *first* discoverer benefits from the privilege, it is also true that his competitors are excluded from production in the area of the patent for many years. And since one patent can build upon a related one in the same field, competitors can often be indefinitely discouraged from *further* research expenditures in the general area covered by the patent. Moreover, the patentee is himself discouraged from engaging in further research in this field, for the privilege permits him to rest on his laurels for the entire period of the patent, with the assurance that no competitor can trespass on his domain. The competitive spur for further research is eliminated. Research expenditures are therefore *overstimulated* in the early stages before anyone has a patent, and they are *unduly restricted* in the period after the patent is received. In addition, some inventions are considered patentable, while others are not. The patent system then has the further effect of artificially stimulating research expenditures in the *patentable* areas, while artificially restricting research in the *nonpatentable* areas.

Manufacturers have by no means unanimously favored patents. R A Macfie, leader of England's flourishing patent-abolition movement during the nineteenth century, was president of the Liverpool Chamber of Commerce.⁹⁹ Manufacturer I K Brunel, before a committee of the House of Lords, deplored the effect of patents in stimulating wasteful expenditure of resources on searching for untried patentable inventions, resources that could have been better used in production. And Austin Robinson has pointed out that many industries get along without patents:

In practice the enforcement of patent monopolies is often so difficult....that competing manufacturers have in some industries preferred to pool patents; and to look for sufficient reward for technical invention in the....advantage of priority that earlier experimentation usually gives and in the subsequent good-will that may arise from it.¹⁰⁰

As Arnold Plant summed up the problem of competitive research expenditures and innovations:

Neither can it be assumed that inventors would cease to be employed if entrepreneurs lost the monopoly over the use of their inventions. Businesses employ them today for the production of nonpatentable inventions, and they do not do so merely for the profit which priority secures. In active competition....no business can afford to lag behind its competitors. The reputation of a firm depends upon its ability to keep ahead, to be first in the market with new improvements in its products and new reductions in their prices.¹⁰¹

Finally, of course, the market itself provides an easy and effective course for those who feel that there are not enough expenditures being made in certain directions. *They can make these expenditures themselves*. Those who would like to see more inventions made and exploited, therefore, are at liberty to join together and subsidize such effort in any way they think best. In that way, they would, as consumers, add resources to the research and invention business. And they would not then be forcing other consumers to lose utility by conferring monopoly grants and distorting market's allocations. Their voluntary expenditures would become *part of the market* and express ultimate consumer valuations. Furthermore, later inventors would not be restricted. The friends of invention could accomplish their aim without calling in the state and imposing losses on a large number of people.

⁹⁹ See the illuminating article by Machlup and Penrose, *op. cit.*, pp. 1-29.

¹⁰⁰ Cited in Edith Penrose, *Economics of the International Patent System* (Baltimore: John Hopkins Press, 1951), p. 36; Also see *ibid.*, pp. 19-41.

¹⁰¹ Arnold Plant, "The Economic Theory Concerning Patents for Inventions," *Economica*, February, 1934, p. 44.