

Removing Property from Intellectual Property: (Intended?) Pernicious Impacts on Innovation and Competition

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The screenshot shows the Hoover Institution website for the Project on Commercializing Innovation. The top navigation bar includes links for HOME, NEWS, GET INVOLVED, and SEARCH. Below this is a secondary navigation bar with links for ABOUT HOOVER, LIBRARY & ARCHIVES, RESEARCH, FELLOWS, PUBLICATIONS, and MULTIMEDIA. The main header reads "PROJECT ON COMMERCIALIZING INNOVATION". On the left is a sidebar menu with links: Home Page, About the Project, Members, News, Publications, Presentations, and Contact. The main content area features the title "Studying Market-Oriented, Property-Rights Approaches to Innovation" and lists three directors: Stephen H. Haber (co-investigator), F. Scott Kieff (primary investigator), and Troy A. Paredes (co-investigator). Below this is a section for "Core Components" with five bullet points: Intellectual Property and Innovation, Corporate Governance and Securities Regulation, Property Rights, Finance, and Developing Economies, Antitrust, and Bankruptcy. A search box on the right contains the text "Commercializing Innovati" and a "submit" button.

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Studying Market-Oriented, Property-Rights Approaches to Innovation

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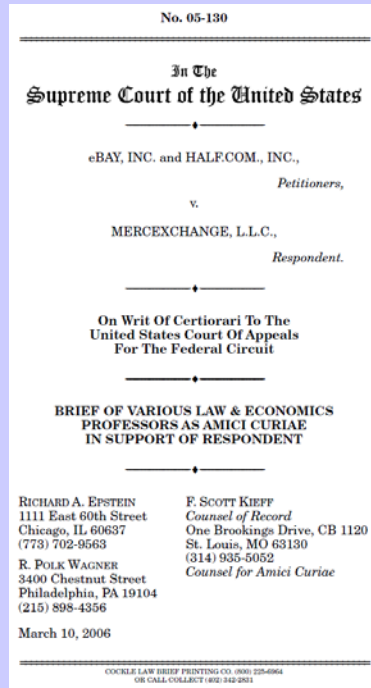
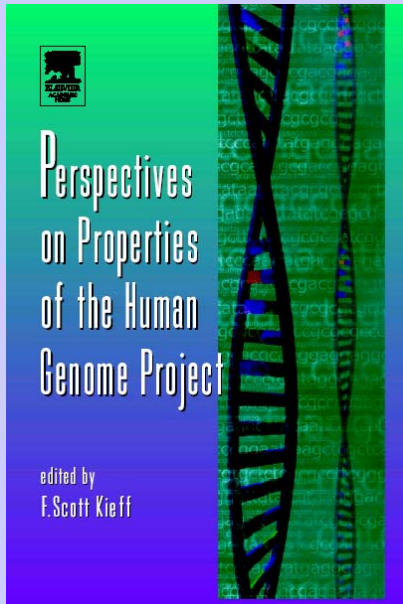
[Stephen H. Haber](#) (co-investigator) [F. Scott Kieff](#) (primary investigator) [Troy A. Paredes](#) (co-investigator)

Core Components:

- [Intellectual Property and Innovation](#)
The ways laws, rules, and norms can help private and public sectors work to facilitate the complex processes of innovation and its commercialization
- [Corporate Governance and Securities Regulation](#)
The ways individuals can order their private affairs within collective organizations, or firms, and the ways in which governments can regulate securities markets
- [Property Rights, Finance, and Developing Economies](#)
The role of property rights in intangible assets in the developing world
- [Antitrust](#)
Market structure and performance and the ways antitrust regimes can best promote competition
- [Bankruptcy](#)
The ways the possibility of bankruptcy can influence the way business deals are structured, even at the earliest stages of a venture

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Modes of Action



Appellate Mediation Program



PATENT PUBLIC ADVISORY COMMITTEE

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Why Have IP? Ever Forward!

Mark Twain's Connecticut Yank went to Warwick Castle, England. There he was magically transported back to the time of King Arthur. He did well. He was made First Minister. He was called Sir Boss. What was the first thing he did in power?

The very first official thing I did, in my administration – and it was on the very first day of it, too – was to start a patent office; for I knew that a country without a patent office and good patent laws was just a crab, and couldn't travel anyway but sideways or backwards.

Lord Robin Jacob, Royal Courts of Justice, London, England, *One Size Fits All?* in F. Scott Kieff, PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT 449 (2003).

Why Have IP? Really?!

Is intellectual property good?

To call it “intellectual” is misleading. It takes one's eye off the ball. “Intellectual” confers a respectability on a monopoly which may well not be deserved. A squirrel is a rat with good P.R.

* * * * *

[H]owever justified the cry, “what we need here is protection” may be for an anti AIDS campaign, it is not self evident for a process of the creation of new or escalated kinds of monopoly

Lord Robin Jacob, Royal Courts of Justice, London, England, *Industrial Property-Industry's Enemy*, The Intellectual Property Quarterly, Launch Issue, (Sweet & Maxwell), 1997, pp 3-15.

Property Rights in IP Are Key to Innovation and Competition

(See Kieff, *Coordination, Property & Intellectual Property: An Unconventional Approach to Anticompetitive Effects & Downstream Access*, 56 Emory L.J. 327 (2006))

- Increase innovation
 - Not just incentives to invent
 - Get inventions put to use
 - By facilitating coordination among complementary users of the invention (investors, managers, marketers, laborers, owners of other inventions, etc)
 - The D part of R&D
- Help new companies compete
 - Anti-monopoly weapons
 - Vital slingshot for David against Goliath
- History: Hon. Giles Rich, 1952 Patent Act – don't focus on inventing!

Property & Coordination – Mechanisms

(See Kieff, *Coordination, Property & Intellectual Property: An Unconventional Approach to Anticompetitive Effects & Downstream Access*, 56 Emory L.J. 327 (2006))

(See Kieff, *On Coordinating Transactions in Information: A Response to Smith's Delineating Entitlements in Information*, 117 Yale L.J. Pocket Part 101 (2007))

- Beacon effect, not control – start conversations
- Bargaining effect – get deals struck
- Liability rules
 - Boil everything down to \$\$, but what about unique assets?
 - Help get bad coordination done (Keiretsu effect)

Keiretsu Strategy for IP & AT

- Consider how big players play with and against each other
 - They'd love to talk directly
 - But face two key problems: trust, and antitrust
- What if every legal test turns on discretion?
 - This ensures large numbers of low value IP assets
 - Which helps them coordinate to keep out competition
 - Mitigates trust problem: improves communication
 - Decisions to push and yield transmit preferences
 - Discovery ensures fidelity
 - Mitigates antitrust problem: (blessed by Federal Judges)
 - Insulates from scrutiny generally
 - Mitigates chance of treble damages and jail time even if scrutinized
 - Avoids slingshots from Davids

Biotechnology Example

- Before 1980, U.S., Europe, & Japan all had NO patents in basic biotechnology, like DNA
- After 1980, only the U.S. has patents in biotech
 - Large increase in number of new drugs & devices actually commercialized
 - Large pool of ~ 1,400 small & medium biotech companies

(Source 2003 Hearing at House Energy & Commerce Committee, Health Subcommittee, Statement of Stanford Associate Dean Phyllis Gardner)

Software Example

- No meaningful patents 1972-1996: single large player
- Major threat to MS is not antitrust
- But it is Google, which raised capital and grew using strong patents on search during 1996-2007 window of availability

Popular View Today: Property Rights in IP Cause Problems

- Hold ups – stop things from getting done
- Hold outs – extract too much, breakdowns, etc.
- Trolls – name calling?
- Patent thickets & Anticommons – name branding (what about permit thickets?)
- Government shutdown and economic collapse
 - Blackberry's given to VIP's to pump brand and get hooked
 - Then fears of violent withdrawal if crackberries enjoined for even a moment
 - Our lives and way of life are at stake

Popular Response: Modest Proposals

- Just a few targeted uses of “pressure-release-valves”
 - One or both sides has large number of parties, thereby triggering problems of coordination, free-riding, holdouts, etc.
 - Even when both sides are each individuals, still face problems of bilateral monopoly, strategic behavior, and cognitive biases
 - Mixed sized models raise a mix of both problems

Impact: Not So Modest

- Focus misses the slight of hand
- Like in Jonathan Swift's story, title is not forthright
- Innovation's discontents have removed property from IP
 - We had plenty of liability rule release valves already
 - Now no property (except for large players who don't need it)
 - Now some big problems (caused by liability rules)
 - And getting worse (caused by new contracting rules)

Intuition of the Paper

- Liability rules force too many deals
 - Some deals shouldn't get done
 - Intervention when disagreement encourages disagreement
 - Harder for patentee to attract and hold constructive attention of a potential contracting party (can't hold-in the counterparty)
 - Removes patentee's option to terminate the negotiations in favor of striking a deal with a different party (can't hold-on to option)
 - Hits small firms worse since big firms have easier time holding-in
 - Have more \$\$\$ to finance litigation
 - Have leverage with reputation effects, relationships, bargaining power
- New contracting rules block deals
 - Licensees now can always renegotiate
 - License to one may now license all

Longstanding Liability Rules (good)

- Corporate, bankruptcy, litigation
- Uncertainty
- Limited experimental use but Hatch-Waxman Act for FDA
- Government Immunity
- Compare copyright

Recent Removal of Property (bad)

- Injunctions after *eBay* (2006)?
 - Only large players?
 - *Paice v. Toyota* not a compulsory license?
- Enhanced damages after *Seagate*
 - No duty of care, no need to get opinions
 - Now test may be whether preliminary injunction is granted
 - But if no permanent injunctions and more uncertainty how will you get preliminary relief?
- Experimental use after *Merck* (2005)
 - “all uses ... ‘reasonably related’ to ... information for submission under any federal law regulating...”
 - In a regulated industry, what doesn’t meet this test?
- Increased uncertainty
 - *KSR* (2007) and obviousness
 - *Comisky & Nuijten* (2007) and subject matter

Recent Changes to Contracting Rules (bad) (1)

- Licensees now can always re-negotiate
 - *Lear* (1969) allowed licensees to challenge but post *Lear* cases made clear licensees had to breach to do so
 - *Medimmune* (2006) now allows licensees to challenge while holding patentees to rest of deal
 - Contract fixes like covenant not to challenge won't work
 - Likely invalid under *Lear*
 - What would remedy be? Patentee wants licensee bound to all terms of original deal
 - Structured deals with stock options like those offered by Sean O'Connor would help; but still don't reach non-price terms

Recent Changes to Contracting Rules (bad) (2)

- License to one may now license all
 - *Quanta* (2007/8?) raises tension between freedom of contract and freedom from restrictive servitudes running with chattels
 - Petitioners want a first sale rule that is super strong and immutable
 - But would give undue windfall to opportunistic third parties who would be able to assert licenses they never thought they had.
 - And would frustrate reasonable expectations of everyone who settled cases and struck patent license agreements in reliance thinking limits would be respected (transition issue, but long and broad impact)
 - And would make settling future disputes significantly more difficult (high price and high coordination problems)

Where Do We Go from Here?

- More to come?
 - New patent bill in Congress
 - More cases in SCT (*Labcorp 2?*) and Fed. Cir. (various)
 - FTC and DOJ actions (*Rambus*)
 - EC competition actions (*Intel, Qualcomm, Apple, Rambus, MS*)
 - WHO, WTO, WIPO (development & health agendas)
- Bottom Line
 - Frustrating good coordination
 - Facilitating bad coordination