# Staking Out the Middle Ground
# On Intellectual Property

## IP Justice Policy Paper

Intellectual property issues do not form a simple dichotomy – "shall we protect intellectual property or not?" Rather, there are varying degrees of protection that may be applied to intellectual property in varying contexts, and the appropriate balance is a question that must be answered individually in individual cases.

The extremes of IP maximalism and IP minimalism can both be harmful to society. A balanced approach might be termed "IP optimalism" and the purpose of this paper is to define and characterize such an approach.

### Intellectual Property Origins and the Modern IP Social Contract

The origins of IP definition and protection go back several centuries to the beginning of mechanical printing and the industrial economy. Ruling monarchs originally used exclusive printing privileges as a tool to suppress criticism, and printing guilds embraced such privileges as a way of suppressing competition and generating monopoly profits for their businesses. Patents also arose originally in the context of protectionism, later evolving as rewards for loyalty to the monarch, extending the feudal model of land ownership to industrial production. Authors and inventors were not originally intended as the primary beneficiaries of these protections, but rather the monarchs who wished to control the engines of the industrial economy by making their owners dependent upon the protection of the monarch in return for the right to dominate their industries.

The modern concept of intellectual property as a social contract between the state and authors and inventors (rather than ongoing privileges granted to publishers and manufacturers in return for institutional loyalty) arose somewhat later. Monopolies had become contentious as societies increasingly recognized the harmful socioeconomic ramifications of concentrated market power. In this context, IP rights were re-justified by constraining them to limited scope and limited terms (thus accruing eventually to a public domain) and by carving out additional limitations that allow for certain forms of fair use/fair dealing and personal use, thus yielding important public benefits. This temporary and excepted grant of monopoly rights still allows the opportunity costs of creative efforts to be compensated appropriately, maintaining a balance between the rights of creators and those of users.

Consequently, by the late 1700s the public benefits of intellectual property rights formed the fundamental motivation expressed in the Progress Clause of the U.S. Constitution.[1] In the present day, important international treaties such as the WIPO Copyright Treaty (WCT)[2] and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[3] contain similar language emphasizing public benefits and the balance of rights between creators and users of intellectual property.

Under the contemporary version of the IP social contract, the fundamental goal of IP rights is to promote public benefits generally, not to reward specific individuals or collectives unilaterally. Specific application of IP rights may not always promote this goal, and in such cases they are justified in being ameliorated because they yield negative consequences typical of monopolies, such as excessive pricing, restricted availability and access, and constraint of public expression and invention.

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[1] The U.S. Constitution Article 1, Section 8, Clause 8 states that Congress has the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

[2] The WCT preamble states that contracting parties recognize "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention". The Berne Convention itself contains provisions that explicitly permit certain free uses of works including "quotations" and "illustrations for teaching" (Article 10) and "certain articles and broadcast works" or "works seen or heard in connection with current events" (Article 10*bis*), as well as a provision for compulsory licenses (Article 13). Developing countries are granted special provisions in Berne's Appendix limiting the right of translation (Articles II and V), and the right of reproduction (Article III).

[3] The TRIPS preamble states that members desire "to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade" and recognize "the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base." TRIPS additionally contains provisions such as the following:

- "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." (Article 7 "Objectives")
- "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology." (Article 8 "Principles")
- "Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, ... " (Article 40)

**Dynamics of the IP Social Contract**

The causal theory underlying the contemporary IP social contract is as follows:

1. Creative work requires time, skilled labor and other finite resources such as raw materials, tools, and workspace.

2. In order to invest in such resources, one must either have excess capacity (thus pursuing creative endeavors for fun and/or speculation), or else it must be possible to compensate opportunity costs by exploiting the value of one's creative work in a market. Most potential creators do not have more than a limited amount of excess capacity, thus compensation becomes an important enabler and incentive for creative work.

3. The results of creative effort generally fall into the realm of "public goods" – goods that (a) can be acquired and used without diminishing the amount available to others and that (b) one cannot readily exclude others from acquiring and using. Thus, there is no natural market where creators can profitably exploit the value of such goods.

4. Assigning limited property rights for fixed works and designs creates an artificial market for potential exploitation of their value to compensate the opportunity costs of creating them, thus leading to increased and/or higher quality creative activity. Previously existing models for promoting creative work include patronage/contract work and live performance – but the systematic and structural limitations of such models warrant creating a market for fixed results of creative work: abstract "intellectual goods."

Given this model as a premise, it is nevertheless important to be sensitive to the negative consequences of creating such property rights for goods of significant value to society. If the social costs of protecting rights surrounding the goods outweigh the social benefits of creating them, then there is no net benefit to society and those protections lose their justification under the social contract. These negative consequences can be generally grouped into two realms:

- <u>Restricted flow of information through society</u>
  Since information is naturally non-rivalrous, rights that grant privileged use of information artificially constrain the normal flow of information, among creators as well as among users. Creators typically draw significantly from existing works of others in creating their own original works, and without access to those works the total domain of creativity is substantially narrowed. It is in the interest of creators to have access to the creative works that precede them.

- <u>Reduced competition in the market for creative works</u>
  IP rights constitute monopoly power over the acquisition and use of creative works and inventions, with all of the ramifications of monopolies in general.

Those ramifications include excessively high prices (and the resulting reduced accessibility to poorer buyers), excessively high barriers to entry (via narrow control of market exposure, distribution, and remuneration), and substantial reduction of the incentive to innovate and to maintain or improve the quality of goods. Thus, excessive market power undermines the very qualities of competitive markets that make them appropriate as a societal channel for incentives to create new works and inventions.

**Specific Areas of Contention in IP Policy**

Several areas of IP policy are particularly contentious, in the endeavor to find an appropriate balance between creators and users of intellectual property:

- Public Domain and Limited Terms of Protection
  The existence of creative works and inventions whose use is not restricted at all benefits both users and creators. Users clearly benefit from free access to those works, however creators also benefit from that access, as most creativity proceeds from existing works to create new derivations. Even the most original creators generally benefit from the result of robust exposure to the works of others. Limited terms of protection are specifically intended to deliver creative works and inventions to the public domain, in order to provide exactly that benefit.

  IP maximalism is characterized by a desire to return to the days of perpetual monopoly, which precludes any creative work from ever accruing to the public domain. In particular, the strategy is to continually extend existing finite terms of IP protection by additional finite amounts periodically over time. This has been described as creating perpetual terms of IP protection "on the installment plan."[4] IP optimalism seeks to protect the benefits that both users and creators receive from the existence of a robust public domain, which maximizes the creation of new works and inventions. In particular, IP optimalism seeks to ensure that limited terms of protection remain limited in the long term.

- Fair Use, Fair Dealing and Personal Use
  These limitations and exceptions to IP rights provide important public benefits that are not entirely unlike public domain, by enabling quotation, educational illustration, library use, and personal/noncommercial uses that do not undermine the commercial market for intellectual property. They allow culture to flow broadly throughout society without significantly reducing the general ability to exploit the value of IP commercially, resulting in a net benefit to society.

  IP maximalism seeks to protect the private power to exploit IP commercially without regard for any constraints on such use. IP optimalism recognizes the

[4] This phrase is attributed to Peter Jaszi by Lawrence Lessig in his book Free Culture, 2003, p. 216

irreplaceable value of such use to society and seeks to protect the balance of such use with commercial exploitation to maximize the net social benefit.

- Administrative Formalities
  In order to ensure the most fluid possible market for intellectual property, it is important to design efficient and inexpensive processes for identifying and administering those property rights. In the past, bureaucratic paperwork obstructed the operation of the market and there was reasonable motivation to remove them, but in the era of digital communications the lack of formal registration and identification poses the greater obstacle to a fluid market than their presence. Clearing rights to use content in derivative works becomes expensive and time consuming without a central clearinghouse for such rights, thus raising high barriers to entry in the production of works that incorporate many others (such as movies that use music recordings owned by others). Clarity in the processes of registering, renewing and marking intellectual property would reduce the administrative costs of licensing works for commercial use and contribute to a more fluid marketplace with lower barriers to entry.

  IP maximalism is happy to leave such administrative costs high, because it increases the ability of large, powerful creators to maintain market power against smaller and weaker creators. IP optimalists endorse greater standardization and clarity, with less ominous penalties for mistakes than suffering a total loss of rights. This maintains market competition, which benefits society.

- Compulsory Licensing
  There are some cases where certain types of intellectual property or market structures are important enough to society to remove the rights of creators to withhold their creations from the market, while nevertheless maintaining creators' rights to be compensated for the use of those creations. Medicines that are critical to the survival of large populations may be far too expensive for those populations or their governments to purchase, even if alternative producers are capable of supplying enough of the product to meet the demand at much lower prices. Broadcast media may not be able to negotiate individual licenses inexpensively enough to regularly include the content of others in their programs, even if there is a substantial market for programming that combines content from many sources. Cable video distribution services may not be able to provide consistent packages of programming without a guarantee that they may re-transmit the signals of broadcast channels to their customers. In such cases, governments have imposed statutory requirements for IP rights holders to allow use of their property, with prices set by collective or governmental negotiations.

  IP maximalism seeks to retain all possible rights of creators on principle, including the right to refuse use by others. While some rightsholders may accept voluntary forms of collective licensing, they object to statutory requirements by governments. IP optimalism recognizes that the justification of IP rights is premised upon yielding net public benefits, and public needs may outweigh the

effectiveness of granting creators discretion in controlling the use of their creations, while allowing that creators still deserve appropriate compensation for use of their creations. Voluntary collective licensing still may warrant public regulation (to protect against anti-competitive practices of collective price fixing), and thus may not ultimately remain purely voluntary in all respects.

**Conclusion**

The granting of IP rights is not an end in itself, nor a moral principle. It is a practical tool to promote public benefits. Some rights are given to creators while other rights are given to users, and maximizing the net public benefit requires optimizing the balance between creator and user rights without allowing either to dominate in an unproductive manner.