



PUBLIC CHOICE AND BLOOMINGTON SCHOOL PERSPECTIVES ON INTELLECTUAL PROPERTY

The basic argument for protecting intellectual property is that if new inventions and creative works are not protected from imitation, innovators won't be able to profit from their efforts and won't have the incentive to create in the first place. While true, this is far from the whole story. In a new study, George Mason University professor [Alex Tabarrok](#) and Mercatus scholar [Eli Dourado](#) show that our political approach to protecting intellectual property, starting with the Copyright Act of 1790, has resulted in outcomes worse than the initial problem—and the traditional view ignores the valuable opportunities of intellectual “commons” that result from the freedom to experiment with ideas without the interference of intellectual property rights.

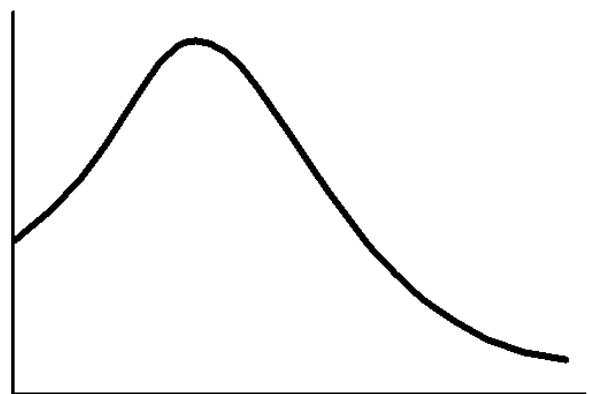
For the complete study, see [“Public Choice and Bloomington School Perspectives on Intellectual Property.”](#)

KEY FINDINGS

This paper draws on two branches of economics to explore the other incentives in the intellectual property system: public choice and institutional economics, or the “Bloomington school.”

- History shows that special interests have heavily influenced both copyright and patent law, as public choice would predict, resulting in laws that fail to foster innovation, in a reversal of intent.
- Patents are a cost to those who seek to build on previous work, so an increase in patenting can reduce total innovation.
- Contrary to popular assumption, sometimes the commons doesn't lead to tragedy. Bloomington scholars conceive of an “opportunity of the commons.” In the presence of the right rules, a commons can provide collective benefits that are

Innovation



Patent Strength

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not available using strict intellectual property laws and enforcement. Wikipedia is a startling example of success in the absence of intellectual property right protection.

PUBLIC CHOICE

Background

The field of “public choice” studies the incentive to use and abuse the political system to gain private benefits. Patent and copyright holders have strong incentives to engage in political action to increase the strength of their rights beyond what is in the public interest, and they have done so with gusto.

Public Choice and Copyright

- *History.* The first Copyright Act in the United States was passed in 1790, but Congress didn’t write the first draft of the bill—it was written by Noah Webster, cousin to Senator Daniel Webster and the author of numerous textbooks and, of course, the famous dictionary that still bears his name. Webster also lobbied hard to get copyright terms extended in 1831; he succeeded.
- *Scope.* Over time, the scope of copyright gradually increased, expanding from books, to maps and charts, and then to prints (1802), musical compositions (1831), plays (1856), photographs (1865), paintings, drawings, and statues (1870), motion pictures (1912), sound recordings (1971), computer programs (1980), and architectural works (1990).
- *Term.* The big change in copyright law came in 1976. Copyright terms went from a maximum of 56 years to life of the author plus 50 years, or 75 years for works of corporate authorship. Terms were extended retroactively, which rewarded existing copyright holders. Absent time travel, however, retroactive rewards can’t increase the stock of existing works or provide a benefit to the public. Terms were extended again by 20 years in 1998.

As Jessica Litman recounts in her legislative history of the 1976 Copyright Act, “Most of the statutory language was not drafted by members of Congress or their staffs at all. Instead, the language evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines.” Content owners pushed for changes to copyright that went far beyond anything that was in the public interest.

Public Choice and Patents

Special interests have also influenced patent law, though they have operated more through the courts than through legislation. In 1982, they got Congress to vest the newly created Court of Appeals for the Federal Circuit with exclusive jurisdiction for patent trial appeals. Parties who lost patent cases in federal trial courts all had to appeal to the same court.

- *Impact of specialization.* This concentration of legal jurisdiction resulted in an interpretation of patent law that doesn’t foster innovation but is great for patent attorneys. Specialized attorneys now argue cases before specialized judges, and they all take their purposes for granted. There is no one to push back on the notion that patents are all benefits and no cost. In addition, the specialized court has made it easy for patent interests to influence the judicial selection process to ensure that judges favor expansive patent rights.
- *Scope.* The Federal Circuit has used its exclusive jurisdiction over patent appeals to expand the scope of patents and even to undermine the Supreme Court. The Supreme Court has ruled three times that pure software simply cannot be patented. But the Federal Circuit has continuously eroded those rulings, and following a ruling in 1998, the number of software patents has exploded—they now constitute half of all patents.

The Supreme Court, however, continues to hold that pure software algorithms are not patentable and has begun to push back against the Federal Circuit.

The Bloomington School

The Bloomington school studies the incentive to cooperate and produce in the absence of formal rights and obligations. While intellectual property doubtlessly creates an incentive to create new works and inventions, it is not the only source of such incentives. These other incentives are worth exploring in light of the way that the current IP regime encourages manipulation of the political system to go beyond what is in the public interest.

- *Impact of specialization.* By extending copyright terms retroactively, Congress has robbed the country of a huge body of work that could now be available as source material for new works, even though many current important copyright holders relied on the public domain for many elements of their creative works. Similarly, excessive patenting, supported by the rulings of the Federal Circuit, has reduced the stock of ideas upon which new innovators may freely build. Without all these patents, innovation in products such as smartphones would no longer be limited to those firms that were big enough to support a legal department able to deal with hundreds of patent cases at a time.
- *A thriving commons.* Wikipedia is proof that the incentive to create isn't always supplied by intellectual property, and is a startling example of how a commons can thrive. Wikipedia has hit upon a set of institutions that rewards the human desire to communicate and to explain without burdening contributors with bureaucratic rules. Without availing itself of the rewards provided by intellectual property, it has generated over 30 million articles in 286 languages and become the world's leading online encyclopedia.

CONCLUSION

Stronger IP is not always better. Special interests will try to distort the political process to support their own goals. To maximize the dynamism and productivity of our economy, we should try to incentivize creativity and innovation with more than laws.