

Intellectual Property Rights

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'Intellectual property' refers to various legal forms that confer rights of ownership over 'ideal, immaterial, or intangible objects'. Some of these legal forms are centuries old, others quite new. They have been redefined to enhance capital's economic domination and bourgeois hegemony with each major transition in capitalist development. Such transitions are always contested and conflictual, involving intra-class, cross-class, and popular struggles. In the globalizing knowledge-based economy of high-tech capitalism, IPRs have become central to accumulation. Accumulated knowledge in the sense of general labour is appropriated by private capital in and through IPRs. 'Während verwertungsrelevantes Wissen immer stärker in komplexen gesellschaftlichen Systemen erzeugt wird, wächst zugleich das Bestreben zu dessen Privatisierung und Monopolisierung in der Hand einzelner Unternehmen' (Hirsch 2001: 185). IPRs are the basis for extraprofits (based on above average productivity in manufacturing thanks to the privatization of knowledge) and monopoly rents (via licences, etc). Moreover, supported ideologically by the neo-liberal theory of property rights (North 1988), IPRs are also being used to massively extend the commodity form into the natural and social worlds. Capital is appropriating indigenous peoples' age-old knowledge about plants and seeds; parts of the human genome are being patented; university research is subordinated to the profit motive. However, at the same time as they are mobilized and expanded to promote accumulation, they become major sites of contradiction in the circuits of capital and key stakes in capitalist competition and class and popular struggles. On the one hand, massive efforts are made to extend the scope of IPRs and apply them globally. This can be seen in the US Supreme Court decision in the 1980s to treat life as an invention, allowing the US Patent Office to grant patents on life; and in the US-promoted initiative by advanced capitalist economies and high-tech multinational concerns to impose the TRIPS agreement on global trade in intellectual property. On the other hand, the extension of IPRs has provoked major international disputes among advanced capitalist economies, between these and 'Third World' states, and class and popular struggles.

Among many such conflicts, Native and US-American farmers are resisting pressure to use genetically-modified hybrid seeds; central American Indians struggle against biopiracy, i.e., the patenting of domestic plants by firms from the industrial states; the South African government opposed expensive patented AIDS-drugs; media firms engage in 'copy fights' against Napster and hackers using the Internet to circulate films and media products; and the free software movement promotes open codes against the monopolization of software production by defining software as the IP of Microsoft. Thus IPRs themselves have become objects of struggle. Some forces contest the very concept of IPRs in favour of free access to the intellectual commons; others call for alternative IPR regimes with radically different forms of organization of production and distribution. For the bourgeoisie, the struggle to define IPRs is also a struggle for hegemony insofar as private firms' commercial appropriation and monopolization of social knowledge is represented as a just reward for intellectual labour that must be defended against parasitic, free-riding capital and generalized consumer theft. In contrast, many opponents of this trend demand IPR-regimes that guarantee indigenous people's control over their traditional knowledge, protect open-source software producers against the blocking tactics and appropriation attempts of software monopolies, etc. Conflicts over IPR crystallize on the global level in negotiations over the TRIPS agreement as an „instrument to adapt civil society to the economic structure“(Gramsci, *Gef.6*, 1267)

Origins of the Concept of Intellectual Property Right

The history of intellectual property and intellectual property rights is often narrated in ideological terms as part of the struggle for hegemony. Some trace IP back to the 'economic secrets' of primitive societies about where to find the best sites for hunting and gathering; others ground it in evolutionary psychology or philosophical anthropology, citing children's love of keeping secrets. Likewise, ancient Greece and Rome are said to illustrate respect for industrial property right in the form of customary law and for intellectual property through ethical obligations to the authors of ideas. Later precursors are found in the medieval guild system, which allegedly protected IP through

its social enclosure of trade secrets. Repeating such stories disguises the specific nature and functions of IPRs in capitalism and tends to naturalize and legitimate them.

More rigorous historians note that the distinction between corporeal and incorporeal objects was first drawn in *philosophy* by the Stoics, was introduced into *legal* discourse in the 11th century, and then adapted to bourgeois intellectual property law in the 18th century. Intellectual property rights certainly did exist before the emergence of a bourgeois legal system based on the abstract, impersonal legal subject. But they belonged to a legal order that involved concrete privileges and freedoms and differentiated rights by status (Pashukanis 1978). For example, the medieval patent was a monopoly privilege used to raise revenue for local rulers and, where it had a direct economic function, it served to *circumvent guild control of innovation*. Under mercantilism, patents were used to encourage the import of technology and know-how and to promote foreign trade as well as raise revenue for the state. Only in capitalism did patents acquire their main function of *guaranteeing monopoly privileges for capital* in the commercial exploitation of inventions and other intellectual products. Similarly, whereas copyright served to protect the 'mystery' (*trade secrets*) of the printing trade and to exercise *state control* over ideas by the licensing of publishers, it later became a means of establishing the *automatic right of authors* to the fruits of their labour and, with the formal and real subsumption of intellectual labour under capitalist relations of production, a means of *protecting the markets* of the culture industries. A key turning point in this development were struggles in the eighteenth century over the ownership of the products of innovative *mental* labour as an activity now clearly distinguished from *manual* labour and entitled to its own rewards (Sherman and Bently 1999). Tracing the genealogies of different legal forms of intellectual property and the economic, political, and ideological struggles around each of them would show how a still far from coherent system of IPR developed through the gradual extension of the scope of IPRs and their growing systematization. There have been three main, albeit overlapping, stages in the development of bourgeois IP regimes from the industrial capitalist period onwards: (a) national regimes, (b) bi- and multilateral international regimes; and (c) global regimes. Global regimes have been promoted from the 1970s onwards by the United States

above all to consolidate its economic hegemony and favour its knowledge-intensive industries (Drahos and Braithwaite 2002).

Bourgeois intellectual property rights have been justified and attacked on several grounds. The five most important and influential justifications for intellectual property right all derive from various philosophical reflections on mental labour, the subject, and property that emerged in the Enlightenment or in reaction to it. The first justification generally extends the *Lockean* notion of the right to the fruits of one's own material labour by arguing that ideas and inventions are products of intellectual or mental labour. This takes Locke's arguments much further than he would have done, especially where IPRs involve monopoly privileges created by the state that undermine the Lockean requirement that 'enough and as good be left in common for others'. The *Kantian* and *Hegelian* justification is rooted in the rights of moral personhood and personal expression. Thus Kant argued that literary products of the mind were part of the author's person and hence inalienable; others had a 'natural obligation' to respect the author's ownership of his speech and its expression. Hegel's approach was more instrumental, arguing that property rights enabled the exercise of subjective freedom and the will to artistic expression. In contrast to Kant, he distinguished between mental ability as inalienable and its expression as external to the self. The latter could become the basis of property rights. This emphasis on personhood is being revived today in controversies over property rights in body parts, cell lines and other body products. *Utilitarian* justifications for IPRs emphasized their role in maximizing wealth or utility by striking the right dynamic balance between real but limited incentives for authors and inventors and the securing of some collective benefit from their creativity. For example, Adam Smith was generally opposed to monopoly but supported limited monopolies to promote innovation and commerce requiring substantial initial investments and risk. Bentham and John Stuart Mill argued along similar lines. Utilitarianism provides the core for most of the economic analysis that has been undertaken on intellectual property and the most appropriate IP regimes. Claims to property in the products of the intellect have been strongly criticized by *libertarians* from right and left, who argue that ideas are not inherently scarce and belong in the commons and that intellectual property depends on

monopolies granted by governments. An additional criticism refers to the conflict between freedom of expression and intellectual property as a form of censorship. Finally, principles of *distributive justice* have been invoked to protect traditional knowledge and resources against their unfair western scientific and corporate appropriation. Recent examples include farmers' rights (innovators entitled to intellectual integrity and access to germ plasm and technologies they have developed collectively over generations), traditional music, and biodiversity. Some of these justifications can be turned against the capitalist form of intellectual property right to demand other forms of control over the fruits of intellectual labour, other ways of organizing the general intellect, and new ways of overcoming the information and/or digital divides.

Marx and Engels on IP and IPR

Marx and Engels wrote much on knowledge, science, and property but little on industrial and intellectual property right. They seem to argue that every economy is a knowledge economy. They presented science as a collective endeavour and universal productive force, compared it to the forces of nature, and suggested that, because science revealed the laws of nature, its results functioned like a free gift of nature accessible to all without diminution (*German Ideology*; TSV part I: 391). However, Marx also notes that, as machinery and large industry become dominant in capitalism, science is separated from production as a distinct part of the social division of labour. It then begins to develop its own forms of organization and logic, and, under certain circumstances, '[i]nvention then becomes a business, and the application of science to direct production becomes a prospect which determines and solicits it' (1973: 703-4). This in turn creates the space for expanding the substantive scope and geographical reach of IPRs. Marx also analyzed product development, from early models with high costs, a short life, and a high rate of 'moral depreciation' to the final stage of 'critical revision', when the capital goods sector can begin to produce it more cheaply. This too points to the potential role of IPR to protect investments in technological innovation and new products.

Marx does not discuss intellectual property right as such in any detail. He would probably have interpreted it from four related viewpoints: as a form of commodity fetishism rooted in one-sided concern with the sphere of circulation; as a means of appropriating surplus value; as a means for redistributing surplus value; and as a key element in the production of relative surplus-value. First, the discourse of IPR involves at least three layers of **fetishism**: (a) it borrows the legitimacy of petty bourgeois property in tangible objects and its extension to capitalist property; (b) it argues that nicht-stoffliche objects are, like tangible property, scarce and must be allocated efficiently through the market – ignoring the state's roles in creating artificial scarcity as a means of generating rents and in defending the 'private property rights' thereby created as if they were natural; and (c) it justifies capital's appropriation of the creative force of waged intellectual labour through the doctrine of 'work for hire', which vests IPRs in the capitalist employer rather than the actual artists, scientists, inventors, etc. Second, in the **circulation** sphere, IPRs are required once intellectual production is oriented to the market. Marx wrote that, because 'commodities cannot go to market and make exchange of their own account, they must have recourse to their owners'; and the latter must 'mutually recognize in each other the rights of private proprietors' (*Capital I*: 000). Thus, insofar as intellectual products circulate as commodities, they too must have juridical owners. This is especially vital when these products are nicht-stofflich, non-excludable, and mobile and hence require the artificial scarcity created by juridical protection to secure commercial returns. Third, regarding **revenue distribution**, returns to intellectual property are one among several revenue categories in the distribution of surplus value (cf. Krämer 2002). Fourth, in the **sphere of production**, IPRs have two key roles. They enable intellectual products from department I to enter the production of Department II [cf. Marx on the role of the rent agreement in capital accumulation, *Capital*: 000]. And they correspond to specific features of intellectual production. For, as Marx argued in *Theories of Surplus Value*, the costs of producing an innovation differ from the costs of reproducing it. He notes that '[t]he binomial theory, for example, can be learnt by a schoolboy in an hour' (*TSV*, vol 1). This problem can sometimes be resolved without IPRs (witness the large bourgeois literature on the material, non-

juridical aspects of knowledge management and intellectual product strategy). But IPRs also help to counteract this tendency because they grant a juridical rather than *de facto* monopoly on innovative products and provide sanctions against illegal free-riding.

In this sense IPRs may protect the capital invested in mental labour and innovative nicht-stoffliche products from rapid devalorization due to the ease of their reproduction once they marketed. IPRs also facilitate the tendential realization of the average rate of profit across capitals with different technical and organic compositions of capital despite differences in the tangible bzw. intangible nature of their products. Thus, by enabling firms to secure the average rate of profit on their investment, they promote investment in the production of knowledge-intensive commodities. But these same monopoly privileges also enable producers to sell intellectual products *above* their value (or price of production) and to protect the resulting *super-profits* from being competed away.

This complex of functions suggests an important difference between property rights in stoffliche and nicht-stoffliche objects. Where effective material possession (*Besitz*) of knowledge-based advantages is absent, IPRs qua legal ownership (*Eigentum*) are not so much legal juridical expression of real property rights as the means to create control over property artificially. Neo-liberalism reproduces the Ricardian idea that knowledge is one factor of production among others and adds that it has become the dominant factor in post-industrial (or informational) societies. It should therefore be bought and sold to maximize allocative efficiency and ensure that factor returns correspond to their relative scarcity and productivity. This neo-liberal argument reproduces the fallacy, criticized by Marx, that value is rooted in immanent, eternal qualities of things rather than in social relations (Marx 1976: 993). Marxists should consider intellectual property as a social relation, i.e., a relation between persons, established by the instrumentality of nicht-stofflich things (cf. Marx 1976). Indeed, as Drahos notes, '[e]ach time the law constitutes new abstract objects by, for instance, increasing the scope of patentable subject-matter or legislatively creating new forms of abstract objects such as plant variety rights, the law in effect creates capital' (1996: 158). This juridico-political character explains the enormous ideological effort required to legitimate IPRs, especially against those who

argue that 'knowledge should be free'. It also explains why state sanctions (trade, financial, investment, juridical, police, military, etc.) are needed to reinforce respect for intellectual property and its associated rights against 'home copying' as well as commercial 'pirates'.

Struggles over Intellectual Property Rights

The history of different forms of IPR shows that there are many sites and stakes in struggles over intellectual property and intellectual property rights and that many different social forces engage in these struggles. Nonetheless such struggles and stakes have become more central to accumulation since the crisis of Atlantic Fordism and the shift to the globalizing knowledge-based economy of high-tech capitalism. The increased salience of struggles over IPR (*Eigentum*) should not lead us to neglect the less visible means of control over intellectual property (*Besitz*) and the links between these two forms of appropriating the general intellect (e.g., IPRs and sophisticated encryption). The significance of IPRs proper varies across different spheres of production. They are not always the dominant means to protect intellectual property; and there are different types of intellectual property complex. For example, trademarks and branding are important in the fashion industry); patents matter where there are high fixed costs for inventing and marketing but innovation is vulnerable to reverse engineering (e.g., pharmaceuticals); copyrights matter where there are high fixed costs, low marginal costs, rapid entry, and cheap mechanical or digital reproduction (e.g., audiovisual products); and 'trade secrets' and branding are important for soft drinks, alcohol beverages (Maskus 2000). But we can still treat contemporary struggles over IPR as a window on the forms of movement of new types of contradiction in capitalism.

1. New strategies and conflicts around the *primitive accumulation of capital* (in the form of intellectual property) through the private expropriation (or enclosure) of the collectively produced knowledge of past generations. Its forms include: (a) appropriation of indigenous, tribal, or peasant 'culture' and its transformation without payment into commodified knowledge (documented, formal, private) by commercial enterprises –

biopiracy in its many forms is the most notorious example (Shiva 1997); (b) colonization of new domains of scientific inquiry, especially in the life sciences, so that life forms are enclosed and commodified (Görg and Brand 2002); (c) new forms of 'knowledge management' in individual enterprises, the economy, and other systems in order to enclose more and more areas of activity (e.g., university research) under intellectual property regimes (Bollier 2002). Each of these forms is hotly contested by different forces, e.g., indigenous peoples, scientists, consumers, workers, teachers, and students.

2. Struggles also occur around the *formal and real subsumption* of knowledge production under exploitative class relations. Formal subsumption operates through the separation of intellectual and manual labour and the former's transformation into wage labour producing knowledge for the market. *The Communist Manifesto* noted how the bourgeoisie 'has converted the physician, the lawyer, the priest, the poet, the man of science, into its paid wage-labourers'. Marx also contrasted the unproductive writer, John Milton, who sold *Paradise Lost* for £5 with the productive labour of the 'cultural proletarian in Leipzig who churns out books (such as compendia of economics) under the direction of his book-dealer' (TSV, vol 1). Real subsumption occurs through the development of 'factories of inventions' (Lafargue 1900) and a division of mental labour organized on the Babbage principle and subject to various forms of mechanical or technical control as well as heightened surveillance and performance targeting. It is reinforced through the *separation of intellectual labour from the means of intellectual production* – embodying it in smart machines and expert systems (Hack 2002). As Marx foresaw in the *Grundrisse*, this subordinates workers to accumulated social knowledge and the general understanding embodied in machines.

3. The *digitization* of products and services and their virtually costless circulation in digital form makes it harder to maintain the strict line between consumption and (re)production (Nuss 2002). This reinforces the importance of protecting IPRs, especially where the development costs of the products and services are high relative to circulation costs; encourages the extension of copyright to ideas from their physical

expression in particular products; leads to patenting of abstractions, sequences of virtual events, and mathematical formulae; stimulates encryption and other technologies to re-assert material control over digital products; and requires sanctions to protect these technologies against counter-technologies, hackers, and crackers. Napster, hacking, and 'Copy Fights' over the extension of IPRs are all important sites of struggle here and have led to proposals for alternative IPR regimes that range from leftwing anarchic and rightwing libertarian celebration of 'knowledge that wants to be free' to 'copyleft' (which uses IP law to protect the open source movement against commercial exploitation) (references).

4. *Conflicts between the intellectual commons and intellectual property* (and associated IPRs) create antagonisms and conflicts of interest within the circuits of capital itself and can even become a means of self-blockage. All capitalists would like to pay nothing for their access to ideas, discoveries, and innovations, but want to charge for their own intangible property. Similar conflicts are emerging in education, science, and medicine with tensions between traditional commitments to free circulation of ideas, innovative products, and practices and the new emphasis on commodification or commoditization of knowledge and knowledge management and. These conflicts are irreducible to a zero-sum game. For they are often another expression of the contradiction between use-value and exchange-value and are reproduced quasi-fractally on many scales in the capital relation itself (e.g., Microsoft vs Linux, Microsoft's use of hacker communities to beta-test its commercial software, the sale of value-added services for Linux, strategic alliances between HP, IBM, Dell, and Compaq with GNU/Linux and Red Hat). This leads to distorted or alienated forms of the intellectual commons in high-tech capitalism (e.g., strategic alliances, building patent pools as bargaining tools with competitors to secure free access to their knowledge, etc.). Different fractions of capital and different types of creative worker also have very different interests in the balance to be struck between the intellectual commons and different forms of IPR. The increasing individualization of social relations in contemporary capitalism can also lead individual creative workers to claim 'authorship' and, hence, ownership of the products of their creativity (Howkins 2002). This petty bourgeois outlook neglects how far they stand not

only on the shoulders of intellectual giants but also on the unremarked endeavours of the many generations and countless co-workers who form the collective labourer and general intellect (contrast the 'Hacker Ethic', Himanen 2001).

5. There are many forms of resistance to IPRs, either in general or against the design and implementation of particular IPRs and regimes. They range from the use of the law and legal ideology to demand legal protection for traditional knowledge and compensation for its use through campaigns to establish alternative legal regimes more biased towards the information society than the information economy to different forms of 'hacktivism' and 'cracking' (hacking for destructive purposes).

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