

IS INTELLECTUAL PROPERTY THEFT?

Alfredo Bullard G.

Marx said that private property is theft. In the Marxist vision of reality, to own something is to have stolen it from someone. Today few subscribe to this belief. We know that property is a central institution for market development and for the operation of any reasonably structured economy.

Another truism arises from the simple application of this idea to the concept of intellectual property (hereinafter “IP”): IP is equally useful to the operation of the economic system as is the private ownership of tangible goods. If the Marxist belief that private property is theft turned out to be false, so is the belief that IP is theft.

But this conclusion is not as simple as it might seem. The conceptual foundation that justifies the existence of exclusive title over tangible goods does not translate to the existence of exclusive title over ideas. In fact, it is questionable whether IP should even be considered property. Its foundations are, in most cases, very doubtful, and its existence, in every case, justifies a serious limitation on the reach that it is currently granted. In this sense, perhaps, Marx’s phrase might have had a longer and happier life if he had limited himself to stating that IP was theft.

This work does not suggest that IP should be eliminated, although I hold serious doubts as to whether the benefits of certain forms of IP justify its existence. I am, however, convinced that current levels of protection are excessive in many ways, especially in terms of authorship rights and patents. We shall see, from another point of view, that IP could be allowing some (i.e. its owners) to take something that does not belong to them; and, in so doing, they are, in a certain

way, robbing others.

1. IS IP SIMILAR TO PROPERTY IN TANGIBLE GOODS?

IP, as a concept, is often treated as a simple derivative of property. It is the ownership of intangibles. But the very legal regime itself creates important differences. For example, one notorious difference is that while property is perpetual, the property rights of IP are not, with the exception of distinctive signs (trademarks, slogans, and brand names, as long as they are used and their registration is kept up-to-date). In this way, the rights of authors pass into the public domain, that is to say they may be used by all, 70 years after the death of the author.¹ Today, the descendents of Cervantes may not charge a penny for the publication of *Don Quixote*. Likewise, patents pass into the public domain twenty years after their registration.²

This means that once those periods of time have expired, they become common goods, or “public domain,” and anyone who so desires may use them, even without the permission of the owner of the rights; so long as, of course, those rights are respected. In this way, these rights, although they are quite different from classical property rights in that they cannot be sold and they appear more like personal rights, have certain characteristics of the classical property rights in their perpetual nature.³

The difference lies in the economic function that both play. Classical civil property, or private property, normally appears when the requirements of rival consumption and low costs of exclusion are present. The first requirement appears when, in the case of a specific good,

¹ Law on the Rights of the Author, Art. 52: “Copyright lasts for the life of the author and seventy years after his death, whatever the country of origin of the work, and it is bequeathed according to the provisions of the Civil Code.”

² Legislative Decree No. 823. “Art. 60.- Patents last for twenty years, counted from the date of presentation of the request, after which time the invention becomes public domain.”

³ In this way, my work does not question moral rights, that is to say the right of a creator to be recognized a such. Thus, even if the works of Vargas Llosa pass into the public domain, this does not authorize anyone to plagiarize his work, passing it off as their own. In this way, moral rights exist in perpetuity. This work is limited to questioning the property rights of authors and inventors.

simultaneous consumption by more than one person is impossible. A shirt (rival consumption) cannot be worn by two people at the same time, unlike air (non-rival consumption) which can be breathed simultaneously by many different people at the same time, without one person's breathing in a room impacting another person's ability to breathe.

The second requirement refers to low exclusion costs, or mechanisms by which the property-owner can exclude others at a reasonable cost compared to the benefits that can be obtained. This explains, in the case of air, why it is so difficult to obtain property rights over it. Generating the ability to exclude something that expands and escapes, and whose cost of containing it is relatively high in relation to the benefits it creates, makes property rights over air non-viable. The legal system normally grants exclusive private property rights for those goods that, where there is rival consumption, have low exclusion costs.

In general terms, IP—especially authorship rights and patents on invention, and to a lesser extent distinctive signs—does not comply with these two signature characteristics, mainly because of its non-corporeal or immaterial character. In this, it resembles air, because once an idea is created, its use is unlimited and it is very costly to create rights of exclusion.

Just so, authorship rights and patents do not have rival consumption. One can read a work by Borges, without preventing someone else (actually thousands or millions of persons) from reading the same thing. It can be “breathed” by many without one “breathing” excluding another. We must not confuse the work with the book in which it is printed. The book is a material good, and as such, it cannot be used by two people at once; therefore, it has rival consumption and low exclusion costs. But the ideas in the work, those that give it form and content, do not have rival consumption and there are high exclusion costs. The same occurs with a patent. A formula for a drug can be used by many at the same time, without excluding others.

If the cure for AIDS were discovered, many could manufacture it at the same time, without this preventing the use of the idea by he who conceived of it.

From this, we can deduce where authorship rights and patents fall on the map of different types of property:

		EXCLUSION COSTS	
R I V A L R Y		Low	High
	SI	Private Property (house, car)	Imperfect private goods (Trademarks, slogans or distinctive signs)
	NO	Imperfect public goods (non-congested highway)	Public goods Authorship rights and patents.

As we see, the characteristics of IP seem closer to that of a public good than to a private property right.

Kinsella suggests a teaching example to explain the non-rival character of IP, and why it does not respond to the problematic that explains the existence of tangible property. He shows that if we were in the Garden of Eden, where land and all goods were infinitely abundant, there would be no shortage and thus no need for property rules. Property would be meaningless. If someone had a lawnmower, this would be “cloned” automatically when another touched it. Obtaining a lawnmower in these circumstances could not be considered theft. Property does not apply to infinitely abundant things because no conflict arises out of its use. This is the case with

IP, which behaves like a “magic lawnmower” that reproduces itself simply by being touched. In this context, exclusivity is unnecessary.⁴

When a good without rival consumption and with high exclusion costs is identified, public use appears to be the best alternative. More people will become cultured if Vargas Llosa or Borges are allowed to be freely read, and more people would be cured if a drug could be manufactured by an infinite number of laboratories at the same time. None of this would prevent the author or inventor from also using his work or invention.

On the other hand, the exclusion costs of IP are usually great. This is precisely due to its non-corporeal character. If I want to defend my house, I need only build a fence. To steal my television, you must enter my house, and I can always defend my purse by swinging it at a would-be thief. But IP is not that simple. If you can remember a poem, you can recite it; if you can remember a song, you can sing it; and you can photocopy a book. If you know the formula for a drug, you can make it. It is a type of right that can be infinitely produced (like the “magic lawnmower”) and it is thus quite difficult to control.⁵

The result is that IP protects something that is the paradigmatic opposite of classic property: non-rival consumption with high exclusion costs. The natural conclusion should be to consider it a public good.

If this is so, why do we protect IP with exclusive rights? It seems simple: we do this to incentivize creativity. In order to do this, we create a sort of “artificial property” that does not fit the classic requirements of property. In this way, we go against economic logic in order to motivate people to invest time and resources to create useful things for all. It is proposed that

⁴ Kinsella, N. Stephan. “Against Intellectual Property.” Originally published in *Journal of Libertarian Studies*, Volume 15, no. 2 (Spring 2001): 1–53 2001 Ludwig von Mises Institute, www.mises.org. (August 4, 2004)

⁵ This is because information, like water, tends to flow and it is very difficult to prevent its escape. It is also difficult to establish laws about water, because the exclusion costs are elevated by the physical nature of the liquid.

exclusive rights, although expensive to execute and difficult to put into practice, exist only to create these incentives.

Under this concept, we protect the works of Vargas Llosa to motivate him to write, and those of Charlie García to motivate him to compose music, taking on great costs to put into practice these types of rights and accepting that, at least for a time, these rights will be private (creating, as we shall see, a monopoly or privilege) notwithstanding the fact that it is better used as a public good.

This problem of the absence of rivalry and the high exclusion cost of IP was warned by Thomas Jefferson, who was opposed to the recognition of patents:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point Inventions then cannot, in nature, be a subject of property.”⁶

That which permits a good to have rival consumption is precisely the absence of which makes impossible its simultaneous use. Property rights are assigned to scarce goods in order to create maximum utility in their use. In terms of physical goods, their scarcity is a presupposition of the existence of property. But in the case of IP, the opposite occurs. Before the assignment of

⁶ Letter to Isaac McPherson, August 13, 1813” (Peterson, 1988, pp. 604-05), cited by Cole, Julio. PATENTES Y COPYRIGHTS: COSTOS Y BENEFICIOS” Originally published in *Libertas*, No. 36 (Mayo 2002): 103-42. www.economia.ufm.edu. (August 4, 2004)

an IP right, the good (the idea) was sufficiently abundant to be used in different ways. As Cole notes,

It is difficult to justify intellectual property rights under this concept of property, as these do not emerge from the scarcity of the objects themselves, but rather their aim is to create a scarcity, so as to generate a monopoly rent for the rights-holders: here the law does not protect property of a scarce good, but rather the “scarcity” is created by the law itself (and this “artificial” scarcity is precisely the source of the monopoly rents that confer value upon those rights). The great difference between patents (and copyrights) and property rights over tangible goods is that the latter would be scarce even if there were no defined property rights, whereas in the case of patents and copyrights the scarcity only comes into being after defining the property right.⁷

This explains why there cannot be perpetual rights. If the idea is not to protect a good without rival consumption but rather to incentivize its creation, it is not necessary to give the creator a monopoly or perpetual privilege over his idea; rather, it is sufficient to give him the incentives to create it. Once the “necessary” period of time for this has passed, the good passes into the public domain.⁸

This discussion leads us precisely to the question of why copying a work or using a patent without authorization is different from theft. If I enter my neighbor’s house through the window

⁷ Cole, Julio “Patentes: Costos y Beneficios.” www.economia.ufm.edu. (August 4, 2004)

⁸ The exception serves to prove the rule. Brands and other trademarks have permanent protection, as long as they are used, and, in the case of brands, their registry is renewed. The reason is obvious: brands do have rival consumption. Given that their economic function is to distinguish some products from other, if simultaneous use were permitted by different people, they would not fulfill their role. If other companies described their soda as Coca-Cola, this would produce tremendous confusion in the market, and the incentive of producers to improve their products would be diluted, because as soon as they had completed their objective others would easily copy their brand. In reality, brands and trademarks are an ingenious legal means of allowing property title to the prestige of a product. But to be distinctive, the identification element (the brand itself) must be exclusive, which explains the rival nature of its use, even though it has in principle high exclusion costs. This, as Cole correctly notes, creates differences in the legal regime:

The difference between a trademark and a patent is that a trademark identifies the origin of a good, but does not prohibit the manufacture of similar (or even identical) goods, and thus lacks the monopoly character of a patent: If I want to make whiskey and call it “Chivas Regal,” I am violating the law, but this does not prevent me from making and selling whiskey as long as I do not put someone else’s brand name on it. The existence of a patent, however, prevents me from producing and selling the patented object. For this reason, many people happily accept the protection of brand names as perfectly legitimate and of vital importance in a modern capitalist economy, yet nonetheless oppose patents for conceding monopolistic privileges.

Ibid, loc cit.

and I take his television, I can no watch my favorite program, but I have consequently deprived my neighbor of the ability to do so. I have stripped him of his property. But if I copy an author's song, I can hear it and reproduce it, but the author is still able to use it. He has not been stripped of his property. I have not entered his life to take anything away from him. To the contrary, the existence of authorship rights gives him the ability to control who may use his song without affecting him in any way.

2. INFORMATION PRODUCTION AS A PUBLIC GOOD.

But what happens if we consider IP as a public good? Why would a writer struggle to use his imagination to give us an interesting novel if this, as a public good, could be freely used by others? Why would any business have a research and development department if its new inventions would belong to all?

The characteristic of public goods adheres to many forms of information that do not have rival consumption and have high exclusion costs. For this reason, once information is produced and diffused, all benefit from it. One apparent solution to this is that the State could charge taxes and produce the necessary information. In fact this occurs, and it is not unusual for the State to be involved in the production of culture or technology through public institutions or subsidies. It is thus not unusual that the technology that sent man to the moon was primarily the consequence of tax-generated resources; that is to say that it is common to see public funds and subsidies being used in the promotion of culture.

One alternative to state investment is to give a sort of privilege to whoever creates a public good. Indeed, patents or authorship rights are quite similar to concessions, which allow an individual to charge for the exploitation of a public good in exchange for investment therein. In this way, if you had an idea, I grant you the privilege to charge for its use. And, like

concessions, IP is temporary and lasts until the expenditure invested in the creation or maintenance of the public good is recovered by the costs that the State allows them to charge. But unlike concessions, in which the State usually establishes regulations to control the market power of the concessionary, especially if a monopoly is granted, this does not occur with IP, where the rights-holder can fix whatever price he so desires, thus effectively exercising monopoly control.

But IP is not the only case of public information that is privately produced. Private individuals, interacting with each other, create the greatest volume of public information without the need for any privileges to be provided to those who produce it.

One ready example, noted by Pasquel,⁹ is news. Every day we learn what happens in the world via television, radio, newspapers and magazines. The companies in charge of these media invest a great amount of money in obtaining, processing and delivering this information to us, even though they know that they cannot exclude others from reproducing and distributing it. Beyond the pride of the scoop, everyone can take advantage and be “free riders” on the labor of others. Of course, one could imagine an argument that if the media had exclusive property rights over the news, there would be more incentive to investigate and discover new information.

Another interesting example, also noted by Pasquel, citing David Friedman, is faith.¹⁰ It is common to see religious programming on television, or to go to a church to listen to a sermon that informs us about a specific belief, without paying for it and without the existence of any exclusivity over the message. This occurs because many people are convinced, by faith or by belief, that they should contribute economically to those who spread this type of information,

⁹ Pasquel Rodriguez, Enrique. “¿No era la Necesidad la Madre de la Inventiva? Por qué Eliminar las Patentes, los Derechos de Autor y el Subsidio Estatal a la Producción de Información.” Monograph presented at the annual meeting of ALACDE. Lima, Abril del 2004. Unpublished manuscript.

¹⁰ Ibid, loc cit.

creating positive externalities for others.

Martin cites language as another example.¹¹ As he shows, language clearly demonstrates why ideas should be available to all. All types of language may be freely used by all, and not only by those who create it. The invention of a word that enables communication does not create exclusive rights for he who invents it.¹²

Another example is fashion. Designers continually innovate new forms of clothing even though IP protection is virtually non-existent in this area. The creative incentive weighs towards becoming famous as an innovative person, not having an exclusive right over a new design.

But perhaps the most interesting example, for its similarity with certain forms of IP, is scientific knowledge. Scientists carry out research and publish their results, assuming the cost of their labor without the ability to exclude most of their discoveries from the public domain. It is not difficult to support an argument that scientists would have more incentives to perform research if all of their discoveries could be protected by exclusive rights. But at the same time, this exclusivity would slow down scientific development, because the discoveries of my ancestors could not be used at low cost, thus making new discoveries more difficult.

If one wanted to say that scientific discovery is different from inventing something new, one would have to admit that it is a vague distinction. The ability to patent the result of genetic research shows that every invention is part imagination, part discovery of something that already exists in nature.

In the same vein, Rand shows that the difference between creation and discovery is unclear and non-rigorous. Moreover, the moral reasons that one activity and not the other is

¹¹ Martin, Brian "Against Intellectual Property". www.uow.edu. (5 de August, 2004)

¹² Perhaps the only exception is brands. But note that in this case, exclusivity does not prevent the use of words for communication. A consumer can use the word Coca-Cola to communicate without paying for it, or a competitor can use the brand symbol to include it in a commercial making a comparison. Exclusivity is limited to the use of the brand to identify products or services.

protected by property rights is also unclear. Nobody created the materials. The inventors only manipulate them and structure them according to physical laws. If an engineer invents a better mousetrap, he does it by joining and assembling pre-existing parts so that they can carry out a new function. Others that learn of this new invention can also build a better mousetrap. But the mousetrap only follows the laws of nature. The inventor invented neither the material of which the trap is made, nor the appropriate facts and laws to make it work. He has only discovered that, putting these elements in a certain order, they function in a certain way.¹³

We are not arguing that IP cannot incentivize greater creativity among certain people. Indeed, we are convinced that it does. But this does not mean that without IP there would be no creation. The question is not whether IP incentivizes innovation and creativity or not. The question is whether the amount of innovation that it does incentivize, that is to say the amount of innovation that would not be produced if there were no IP, justifies the economic costs that this exclusivity generates.

In the following pages, we will analyze the costs and benefits of IP, in particular patents and authorship rights, in order to answer these questions.

3. THE COSTS OF IP.

Restriction on competition.

The first and most apparent of these costs is associated with the monopoly it can create. Although arguably IP does not always create a monopoly, it is no rare that this be the consequence. Certainly Vargas Llosa's ownership over the rights to one of his books does not give him a monopoly in the literature market, as his books compete with those of other authors like García Márquez or Borges. The same could be said about the invention of Betamax, which

¹³ Cited by Kinsella, op cit, loc cit.

competed and was destroyed by VHS. But there are inventions which create monopolies. The recent discovery of the cure to a disease creates a monopoly until another cure is discovered which extinguishes the patent.

But whether or not it creates a monopoly, IP reduces competition. This restriction on competition creates those costs commonly associated with monopolies. First, it restricts the availability of ideas: fewer people can read Vargas Llosa, or fewer sick people can use a recently discovered medicine. Second, the prices of works and inventions will be elevated.

Reduced innovation and development.

Although it seems paradoxical, IP can act in a way precisely opposite to its supposed objective of motivating innovation.

One example is that of Henry Ford, who did not hold the patent on the automobile and therefore had to struggle for years against a cartel that owned the patent and did not want affordable cars to be produced. Undoubtedly, during these years many consumers were denied autos that they could have had were there no such thing as patents.¹⁴

One even more dramatic example is aviation. Bittlingmayer described the deformation of the wings patented by the Wright brothers (enabling flight), which extended to any system that bended the “lateral margins” in opposite directions. Another group of aviation pioneers, financed by Alexander Graham Bell, were aware of the Wright patent but apparently had doubts about the method of bending the wings. Bell suggested using folded wings, or “spoilers,” that had been used in France. Curtiss later incorporated this concept into his successful flights in 1908. The Wright Brothers sued Curtiss for patent infringement in 1909, arguing that their method applied equally to folded wings. After lengthy litigation, Orville Wright won the case in 1914. Curtiss then made a small change in his method of controlling the spoilers, and the Wright

¹⁴ Cole, Julio. “Patentes: Costos y Beneficios”, loc cit.

company filed another suit. Only after the United States became involved in the First World War did the government intervene to resolve the litigation, as factories were unwilling to manufacture airplanes for fear of being sued by the Wright Brothers.¹⁵

Another case is the steam engine. For more than twenty years, James Watt prevented the development of steam engines more modern than the version that he had patented. Some believe that the real Industrial Revolution began the day that his patent expired in 1785.¹⁶

This type of situation also occurs in the area of authorship rights. As Pasquel explains:

One famous case is that of a director named Litchfield, who sued Steven Spielberg alleging that “E.T.” was nothing more than a copy of his film, “Lokey from Maldomar.” But the most shocking case was that of Ashleigh Brilliant, who coined more than 7,500 phrases, and won over 100 lawsuits for violation of her authorship rights.¹⁷

But holding up invention and creation cannot be a mere “collateral damage” of the existence of IP. Sometimes, IP grants powers that can be used intentionally and strategically, not to improve the provision of extant inventions and works but to restrict it. As Cole shows:

Patent owners also have incentives to do this (that is to say, “invent around” their own patents) with the aim of hindering potential competition. Insofar as this is induced by the patent system, the resources consumed (as well as associated legal expenses) are essentially wasted, from the social point of view, and should be considered another cost of the system. To give an example, Bresnahan (1985) noted that to protect its monopoly position in the photocopier market, Xerox patented every imaginable aspect of its technology. “IBM has spent millions to ‘invent around’ the primary Xerox patents, and some 25% of the budget was spent on legal fees instead of research and development.”¹⁸

Another example is AT&T, which, since its founding in 1875, obtained patents to ensure its monopoly on telephones. They also held up the commercialization of the radio for 20 years.

And General Electric obtained a series of patents to hold up the development of fluorescent

¹⁵ Cited by Cole, Julio “Patentes: Costos y Beneficios” loc cit.

¹⁶ Pasquel, op cit, loc cit.

¹⁷ Pasquel, op cit, loc cit.

¹⁸ Cole, Julio. “Patentes: Costos y Beneficios” loc cit.

lighting and thus protect its production of incandescent lighting.¹⁹

More recent examples show the use of patents to hold up development of internet services. Amazon.com has patented “one-click” shopping, that is to say the option of purchasing items on the Internet with a “click” of the “mouse,” thus restricting the use of a system already prevalent on other websites. And British Telecom announced its intention of enforcing a patent on hypertext, the working basis of nearly every web page in the world.²⁰

The economic explanation is simple: A monopolist has incentives to defend his monopoly income. His technological research will thus shift not to discovering useful patents, but rather defensive patents. Meanwhile, a potential entrant seeking a new patent to compete with the monopolist must struggle to obtain any competitive profit. While the monopolist struggles to keep his profit exceptionally high, the entrant struggles just to gain a normal profit in the market. This explains why the monopolist has more incentive to develop defensive patents than has the potential entrant in developing patents that would allow him to enter the market. The result is a great waste of resources that disincentivizes innovation.²¹

Patents also retard the development of network economies. As we know, in the real world, the development of network economies is essential in certain fields. Markets like the Internet, computers, and telecommunications require the development of ever-greater and more integrated networks.

Networks create positive externalities when the private consumption of an individual increases the value of the consumption of the same product for everyone else. For example, the value of a telephone network increases every time a new user joins it, because each of the other

¹⁹ Martin, *op cit*, *loc cit*.

²⁰ Callahan, Gene “Rethinking Patent Law” www.mises.org

²¹ For an interesting discussion of this topic, see Menell, Peter S. “Intellectual Property: General Theories” www.dklevine.com.

subscribers may now communicate with more people. One single telephone is worthless because it does not allow communication with anyone else. Only with the existence of a second telephone does the first gain value, a value which increases with each additional telephone.

To integrate a network, technology must be compatible. But patents can prevent, or raise the costs, of a potential entrant's use of a compatible technology that would allow him to incorporate into the network. The result is slower network growth and a corresponding reduction in value.²²

An example of this effect is the case of Microsoft and its Windows operating system. Most discussion of this problem has been based around the application of antitrust or anti-monopoly statutes. But perhaps the solution to the problem could be found in the fact of Microsoft's authorship rights over its software. There is today a massive network of compatible computers, which allows a Word file to be read by any one of them that has Windows. This is good, and consumers approve of it, because it increases the sum value of the network every time a Windows computer is introduced into the system. But IP rights make this program more expensive, which means that cheaper programs are not genuinely compatible, which in turn slows the growth and level of connectedness of the network and thus its aggregate value. In other words, a change in IP law would make expensive antitrust litigation unnecessary.

The costs of "enforcement."

As shown above, one of the characteristics of IP is the high cost of excluding third parties, precisely because of the intangible character of protecting ideas and information. In this way, enforcement of IP laws is much more costly than enforcement of law protecting tangible property.

This requires the creation of authorities specialized in enforcing this type of law, frequent

²² For more on this topic, see Menell, *op cit*, *loc cit*

and costly litigation, and difficulties in enforcing the rulings and sentences in this area.

By way of example, one single lawsuit between Kodak and Polaroid over a patent lasted 14 years and cost Kodak some \$100 million. It is estimated that U.S. companies spend \$4 billion per year in patent litigation. And these statistics are only increasing. In the United States, the number of patent lawsuits doubled in the last decade, from 1,171 in 1991 to 2,484 in 2000.²³

4. THE BENEFITS OF IP.

As we have seen, the costs of IP are enormous. But high cost does not mean expensive. Things are expensive not because they cost a lot, but because of what we get in exchange for the price. In this way, the high costs of IP would be justified if the benefits were sufficient to justify them.

The benefit of IP is innovation. Note, however, that it is not all innovation, just that innovation caused by the existence of IP—that is to say, the innovation that would not take place were there no IP. This is not equivalent to all existing patents and authorial rights. As we have seen, a good part of these would still exist without IP were the other incentives to creation. The question is whether IP is worth what it costs us.

The benefits created, if they indeed exist, are much more modest than commonly believed. Anyway, IP in the form in which we currently know it (the scope of rights, terms of protection, etc.) creates excess costs that could be saved, reducing production standards, without substantially reducing the incentives to create or innovate. For example, it is difficult to explain why an author needs protection for 70 years after he dies in order to motivate him to write. In fact, a 10-year protection would not make much of a difference in his creative motivation. Just so, it is not clear that failing to compensate the authors of songs for the right to play them in a pub or a bar, but rather only for the right to reproduce discs, has led to the existence of fewer

²³ Pasquel, *op cit*, *loc cit*.

songs.

Perhaps one of the most suggestive pieces of evidence against finding a clear link between IP and innovation is history itself. Important levels of creation have been found in historical moments in which IP as we know it did not exist.

Great classical works of art and literature were produced when authorial rights did not exist. From Homer to Shakespeare, many writers wrote their masterpieces without the right to control its reproduction or distribution.

The wheel was invented by someone who apparently had no interest in exclusive rights over the idea. This has created tremendous positive externalities for all those who can use the invention without paying for it. Leonardo da Vinci struggled mightily to discover inventions over which he knew that he would never have the exclusive right.

Additionally, many of the empirical studies cited by Menell show an ambiguous or weak relationship between innovation and IP (Mansfield, 1986; Schwartzman, 1976; Taylor and Silbertson, 1973). These studies determined that patents were rarely the main vehicle for appropriating income in the majority of industries, with the exception of the chemical and pharmaceutical industries. In many industries, being the first to introduce a product, rapid progress up the learning curve, or other factors have been seen as equally or more important than IP, which plays a relatively modest role.²⁴

One of Mansfield's studies investigated 31 patents to answer the question: What proportion of these innovations would have been introduced later, or never, if they could not have been patented? The companies surveyed responded that nearly half of the inventions would not have been produced without IP. But most of these cases were in the pharmaceutical industry; excluding that industry, only 25% of the inventions would have been affected without patent

²⁴ Menell, *op cit*, *loc cit*.

protection.²⁵ In another study, the results were even more negative: in pharmaceuticals and chemicals, patents were considered essential in only a third of the cases. In seven industries (electrical equipment, office equipment, motor vehicles, instruments, primary metals, rubber and textiles), patent protection was deemed essential to the development and introduction of less than 10% of inventions. In the office equipment and motor vehicle industries, companies unanimously reported that patent protection was not essential to the development or introduction of any of their inventions during this period.²⁶

In terms of authorship rights, many factors other than IP explain creativity. Many authors write works for prestige (which allows them to earn money in other markets) or simply for personal or academic satisfaction. This may be the case for the majority, if not all, of the authors who write law books, where academic production is intense. The truth is that, of all published titles, only a small fraction of them are truly profitable for the author.

Additionally, even for those who wish to earn money for their works, other mechanisms could achieve this end without the existence of authorship rights. Classic works like “The Three Musketeers” or “Les Miserables” were not written as books per se, but rather as serials in newspapers, much like a soap opera today. Readers bought the newspaper to learn what happened next in the story, and most of the profit was given to the author. Income came from being the first one, not from being the only one.

Shakespeare wrote theatre so that the continuous productions of the play would enable him to charge spectators, as the costs of reproducing the work were high. If there were no authorship rights for music, authors might still write songs so that people would pay to attend their concerts or recitals.

²⁵ Cole, Julio. “Patentes: Costos y Beneficios.” Loc cit.

²⁶ Ibid, loc cit.

Another common practice, absent authorship rights, was patronage. Important families, especially during the Renaissance, were patrons of authors and artists in order to gain prestige. Today, important companies would be willing to be the patrons of singers, writers and even plastic artists, just to publicize their products and services, or to be recognized as entities that support art and culture. In these cases, they would finance the costs that an author could not recoup if authorship rights did not exist.

Another example of a similar idea would be hardware manufacturers having an interest in the existence of software in order to sell their machines. As Pasquel demonstrated, this is what Apple did to sell Macintosh computers (a private good), giving away the MacWrite program for free (a public good).²⁷ Even if we accept that a certain amount of exclusivity is necessary, the immediate question is “how much exclusivity” is necessary to promote innovation. For example, it is improbable that a 1,000-year period of protection of authorial rights would incentivize much more production than a 10-year period. This is because no-one invests time and energy in order to recoup it in 1,000 years. Their expected period of return is much shorter, because in 1,000 years they will be dead. One wonders if a 70-year period after the death of the author really increases creativity. But exclusive rights-holders are always struggling to increase the length of their rights and thus increase their profits, even though it is improbable that longer periods of time really incentivize innovation.

By way of example, in the United States in 1790, an author was protected for 14 years, renewable for another 14. In 1831, this period was extended to 28 years, renewable for another 14. In 1909, the period was extended to 28 years, renewable for another 28. In 1976, the period was extended to the life of the author plus 50 years in the case of human beings, or 75 years for companies. Recently, in 1998, the period was extended to the life of the author plus 75 years,

²⁷ Pasquel, *op cit*, *loc cit*.

and in the corporate case (the rights of companies) to 95 years. The curious aspect to this change is that it was made retroactive, permitting the automatic renewal of patents that were about to expire, even though extant works no longer need an incentive precisely because they have already been created. This shows that extending the period is more the result of “rent seeking,” or the search for profits by interested parties, than the real intent to increase innovation and creativity.

As Cole aptly comments:

It would be very difficult to explain this historical evolution by applying the theory usually applied to justify “intellectual property,” that is, the idea that exclusive rights are necessary to create “incentives” for literary and artistic creation. . . . The successive extensions of the duration of copyright put the lie to any notion of “intellectual property as incentive”: this has not been the real motive of the amendments. How many literary or musical works would never have been created in the last century if the maximum duration had stayed at 28 years? Probably very few, but the question is irrelevant because that is not the point. The reality is that the slogan of incentives is a façade to hide the real purpose, which has always been to extend the duration of profitable monopolies. In theory, intellectual property laws exist to provide incentives for creation; in fact, they are nothing more than a very effective form of rent-seeking.²⁸

Commenting on the “Bono Law” that established the 70-year period after the death of the author with a 95-year period for corporate authors, Cole also notes:

It appears that the Sonny Bono Law was promoted by business groups in the film industry, with strong support from Disney executives who were concerned that some of their well-known characters would pass into the public domain (starting with Mickey Mouse, whose copyright was to expire in 2003)—see “Free Mickey Mouse,” *THE ECONOMIST* (Oct. 12, 2002), p. 73. This posture is not surprising, considering the great commercial value of these copyrights; but it is a bit ironic that the company attempting to prevent its characters from passing into the public domain is the company that probable has most benefitted from characters and stories taken from the public domain: Snow White, Pinocchio, The Little Mermaid, The Jungle Book, and The Hunchback of Notre Dame, to name a few examples.²⁹

Many forms of protection are ridiculously exaggerated. For example, in 1996, the

²⁸ Cole, Julio. “Propiedad Intelectual: Comentarios Sobre Algunas Tendencias Recientes” www.economia.ufm.edu

²⁹ *Ibid*, loc cit.

ASCAP American Society of Composers and Performers) sent letters to U.S. summer camps, seeking the annual royalty payments so that the children who attended the camps could sing songs around a campfire, as this constituted a “public performance” of those songs in exchange for which the camps received monetary compensation in the form of payment by the parents who pay to send their children to camp so that they might sing merrily around the campfire.

Commenting on this case, Cole writes:

Naturally, there was a revolt, with public protest by indignant parents, and the public image of ASCAP was destroyed, which eventually led them to cease requesting payment of the sums originally requested, accepting instead a nominal fee (one dollar per year per camp). Notably, this nominal payment represents the formal recognition of the principle defended by ASCAP: that songs are the property of the rights-holder, and that any public performance thereof, even by schoolchildren singing around a fire, must be done with the permission of the owner. Even more notable is the argument advanced by one of the ASCAP lawyers: “[The camps] purchase paper and other material for their arts-and-crafts, they can also pay for the music [they use]. . . . If they keep singing [our songs] without paying, we will sue them if necessary.”

Probably without realizing it, this lawyer expressed very eloquently the basic fallacy behind the concept of intellectual property. Any economist could explain to him that the camps have to pay for the materials used in arts-and-crafts for a simple reason: those materials are scarce, they have alternate uses, and there is thus an opportunity cost. Cardboard used for painting cannot be used that the same time for something else. The same does not occur with songs. If the children sing a song around the campfire, this does not use it up; others can sing it as well. There is no opportunity cost, and it is thus not a scarce resource.³⁰

Another equally ridiculous case took place in Spain, where two collective organizations, the Sociedad General de Autores de España (SGAE) and the Asociación de Gestión de Derechos Intelectuales (AGDI), demanded that a hotel chain pay for the use of music in the guest rooms. This demand was denied, as the hotels defended themselves with the argument that a guest room was really a temporary domicile and therefore playing a song constituted private use.³¹

5. WHY IS IP THEFT?

³⁰ Cole, Julio. “Propiedad Intelectual: Comentarios Sobre Algunas Tendencias Recientes”, loc cit.

³¹ Ibid, loc cit.

Obviously, the term “theft” is not being used in its legally accepted sense. Theft occurs when a legally defined right is violated; therefore, the contours of theft depends on what the law says. Given that the law recognized IP rights, the exercise of those rights is not legally a theft. In reality, we are arguing that IP is taking something from someone, something that it ought not take.

As Kinsella aptly noted, IP gives partial rights of control over the tangible property of others. This is because an IP rights-holder can prohibit the owner of a tangible good from engaging in certain actions **within his rights**. In this way, an owner of authorship rights can prohibit Juan from writing down certain words in a certain order, using his own paper and his own ink, merely because he had organized those words in that way previously. This invasion of others’ property that IP generate should be taken into account when seeking to justify it.³²

The idea is a simple one. Property implies the right to exclude, which right is defined by law at the moment in which the owner acquires the property. Just so, my neighbor’s rights are defined by the fact that a property line separates what is mine from what is his. If he plants in my yard, he violates my property rights. If I plant in his yard, I violate his property rights. Can you imagine if my neighbor could alter the property line in the future just by thinking about it? This would mean that my property would be affected by an act subsequent to acquisition, which I could not control.

But this is precisely what IP does. An idea, subsequent to my acquisition of rights, can limit the “property line” of my rights, reducing my abilities to exclude others, and conceding to the IP rights-holder the possibility of excluding me from certain uses of my property.

This is shown in the example used by Kinsella:

³² Kinsella, op cit, loc cit.

For example, by inventing a new technique to dig wells, the inventor can prevent everyone else in the world from digging such wells on our property. To take another example, imagine the time when men lived in caves. A brilliant man—let’s call him Galt-Magnon—decides to build a hut in an open field near his crops. It is surely a good idea, and others take note. Naturally they imitate Galt-Magnon, and begin to build their own huts. But the first man to invent a hut, according to the idea of IP, would have the right to prevent others from building huts in their own fields and with their own timber, or charge them a fee to permit them to build huts. Clearly, the inventor in this example becomes a part-owner of the tangible property (land and timber) of everyone else, not because he occupied or possessed them first, . . . but merely because he had an idea.³³

In other words, the exclusive right created by IP gives anyone who has a protectable idea the right to expropriate part of the tangible property of someone else.

In this way, it reduces the incentives to use and invest property, as the exclusivity that IP grants to someone who had an idea reduces the exclusivity granted to the owner of the tangible property. In other words, the inventor or author, through his idea, generates externalities to the owners of tangible property.

Boldrin and Levine explain why this effect is produced, when they fail to clearly understand what the limit should be on IP’s rights over an idea. According to them, IP has two components. The first is the right to own and sell one’s own ideas. The second is the right to control their use once sold. The first is essential and should be granted. No-one can be forced to share or sell an idea to someone else, and anyone can carry an idea with them to their grave if they so desire. The second, known as “downstream licensing,” they see as economically dangerous. Such licensing is nothing more than the use of contracts to prohibit the owner of a disc, a book or a product based on a patent from competing in the future with the right that they acquired. But as they note, the absence of competition leads to monopoly, a situation that economists generally strive to avoid.³⁴

³³ Ibid, loc cit.

³⁴ Boldrin, Michel y Levine, David K. “The Case Against Intellectual Property” www.dklevine.com

As Boldrin and Levine show, the argument that has been used to sustain the monopoly has simply been the need to support creativity. The logic behind this is that investment in innovation is a cost and ideas are distributed at no cost, or at least at a marginal cost. Given that, in perfect competition, prices only reflect the marginal cost, the fixed costs cannot be recuperated. Therefore, if inventors were forced to compete with their clients, they could never recoup the costs of creation. But these authors argue that we are not dealing with fixed costs, but rather with sunk costs. Given that only the ideas found in people or things have value, the cost of invention is the cost of creating the first unit. But this sunk cost is very common in the economy, and does not represent a particularly serious challenge to perfect competition. In other markets, in which sunk costs exist, there is no mechanism similar to IP which grants a monopoly in order to recoup sunk costs.³⁵ The authors argue that competitive markets offer the possibility of recouping sunk costs. For example, in the case of a work of music, this could be recouped in a CD offered for sale. The first CD will sell at a very high cost because there is low supply. It will be purchased by those who value it highly, or by those who wish to reproduce it and sell it quickly and make money before the offer increases. By the time Napster users can obtain a copy, the price will have fallen dramatically. At this point, it will be bought by those who do not have such a strong interest in having and enjoying the song so quickly. By this point, we can expect that the income obtained will have covered the costs of production, including the famous sunk costs, as occurs in other markets.³⁶

In fact, this occurs in the case of news. The effort of obtaining a scoop has sunk costs for the media outlet and/or the journalist, that in theory could not be recouped because once the story is published they will no longer be paid for those costs. But it is clear that the increase in initial

³⁵ *Ibid*, loc cit.

³⁶ Boldrin, Michele y Levine, David K, "Why Napster is Right" www.dklevine.com

sales, motivated by those who want to learn the news quickly, justifies the effort of obtaining it. It has never been necessary to permit a monopoly so that media outlets can recoup the sunk costs of obtaining news. We do not see why the same could not occur in the case of IP.

This is not to deny the possibility that someone, with an idea, could save it and decide when to sell it. They can, additionally, protect industrial or commercial secrets. But once the idea is incorporated into a product, then the idea is in the hands of whoever acquired the product that incorporates it. No longer should the owner have control over what can be done with it, as this would serve to limit what others can do with their own property. This discussion, clearly disputed in whether it should reach the disappearance of patents and authorship rights, does clearly show that the greater the protection, the greater the property rights of others are affected. Therefore, even if we come to the conclusion that IP is justified in order to motivate creativity, we should evaluate the costs that levels of protection place on the rest of society. Excessive terms or exaggerated scope of protection are nothing but a way to expropriate what we already have, paradoxically reducing the incentives for tangible property to generate an adequate and efficient use of resources. IP can even put at risk our own privacy or liberty.

6. Conclusion.

Francis Drake shares two apparently contradictory titles. Drake received the title of Sir from the Queen of England, in recognition of his brave accomplishments at sea. Thus, the English consider him one of their most important naval heroes.

But for the Spanish, Francis Drake was nothing but a pirate who raided boats for his private gain, robbing the wealth that was brought back from America. Drake deserved to be hanged.

Curiously, “pirate” is the name we give to those who violate IP. Also curiously, the title

of Sir and that of pirate were inspired by the same acts. Drake was authorized by the British crown to attack and plunder Spanish ships. In this way, this type of pirate, known as corsairs or privateers, were private businessmen, authorized by their government to commit acts of piracy. These pirates were among the greatest enemies of the mercantilist system, which was based in obtaining wealth from the empire's concession of privileges, especially with respect to the wealth of the colonies.

The authorization to plunder and engage in acts of piracy was known as a **corsair patent**, curiously similar to the name that we today give to the authorization to have a privilege over the use of ideas: the patent on an invention. The corsair patent was a privilege to take the property of others. Today, the patent on an invention is the authorization to appropriate part of the property of others, through ownership of an idea.

As we can see, law converts a pirate into a hero. While the English considered Drake's acts to be legal, the Spanish considered them a crime. The same occurs with our "intellectual pirates." What makes them "pirates" is not their actions, but the legal description that we give them.

The question of whether someone is a pirate, therefore, depends on law. We believe that in relation to IP, it is an open question that is difficult to answer. But we are clear that the current exaggerated levels of some forms of IP cannot be sustained merely based on the alleged purpose of incentivizing invention.

This problem creates more questions than answers. But I believe that the questions create serious doubt over what IP's reach should be. The history books treat Drake as a pirate and as a hero. I genuinely do not know which is true, but it would have been sad if a hero were hanged as a pirate. This is what could be taking place in the name of IP.