

Introductory Remarks for Symposium
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PATENTS, POLICY AND THE FUTURE

by

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Mark Twain was a great admirer of the patent system: “A country without a patent office,” he said, “is just a crab and can’t travel anyway but sideways and backways.”

Fritz Machlup, in a 1952 article, thought it operated on a “wholesome illusion.”

Imitation always and necessarily lags behind innovation. It will be the best deal from the viewpoint of society if innovators optimistically overestimate this lag. If they expect the lag to be longer than it actually is, innovation will be enhanced and imitation will not be delayed. *That it create this socially wholesome illusion on the part of innovators is the strongest justification for a well-designed patent system.*

More recently, George Basalla in his 1988 book *The Evolution of Technology* reflected that

the significance of patents is not that they offer strong and indisputable incentives for invention. The most that can be said is that at some times and under certain circumstances, patents have probably been beneficial in promoting economic growth and inventiveness.

Ideally, a patent is a “social contract” between the inventor and the public whereby the inventor reveals his invention and is given in return, for a limited time, the right to prevent others from engaging in the manufacture, use or selling of the product of the invention.

Patents create, for the benefit of inventors, temporary monopolies over their inventions, by giving them “property rights” on inventions. This idea of “property rights” goes back at least as far as Blackstone in the middle of the 18th century and was elaborated further by French politicians during the French revolution, eager as they were to avoid the use of the words “privilege” or “monopoly.”

Now, these property rights of the inventor exclude others and in turn create a tension, a polarization which has given rise over the history of the patent system here and abroad, to a considerable number of arguments for and against the system. It is interesting to notice that arguments in favor of the system have predominated in periods of economic

contractions while arguments against it have had the upper hand in periods of economic expansion. We find ourselves now in a period of recession and it is, therefore, natural that calls to strengthen “intellectual property” laws are being heard in many quarters.

The arguments put forward these days to justify the system have less to do with the “rights” of the inventor per se, than with the fact that “investments in Research and Development” need be protected from pirates and imitators.

In an article entitled “Toward a Golden Age for Technology Transfer” in a recent number of *Issues in Science and Technology*, Alan Schriesheim, director and CEO of the Argonne National Laboratory, states: “Without protection, no company will invest in the product development and marketing research needed to translate basic technology into practical product.”

On the other hand, Michael Porter, in his book *The Competitive Advantage of Nations* (The Free Press, NY, 1990) writes:

Recent attempts to limit competition by beefing up intellectual property rights reflect a lack of confidence and a desire to blunt the force of competition. History shows that this is no way to sustain competitive advantage... A rapid rate of technological advancement, combined with diffusion of technology... represent the best combination for productivity growth and sustained economic prosperity.

The protection of intellectual property is indeed interlinked with competitiveness. This is one of the key issues of the General Agreement on Trade and Tariffs. As has been remarked, innovative concepts are becoming as important as goods themselves in international trade. Research firms in industrialized nations are anxious to obtain returns on their investments, while developing countries fear to be kept out of profitable ventures. One major dispute concerns whether intellectual property is granted “national treatment” (i.e., foreigners are given the same treatment with respect to intellectual property as nationals) or “reciprocity” (i.e., foreigners are given the same treatment as they would have received in their home market). Most developing countries favor national treatment; developed nations favor reciprocity.

One of the difficulties is that the agreement on Trade and Tariffs is passed between nations while intellectual property is more and more in the hands of multinational corporations.

Now, as Robert Reich points out in his article “Does Corporate Nationality Matter?” (*Issues in Science and Technology*, Winter 1990-91):

In the new global economy, U.S. competitiveness is no longer the same as the profitability, productivity or world market share of American-owned corporations. A better definition of national competitiveness is the capacity of a country’s citizens to maintain and enhance their standard of living, without going into debt to the rest of the world. This goal depends less on the competitiveness of U.S.

corporations than it does on the value that the American workforce is able to add to the global economy.

Reich concludes that “U.S. competitiveness policy should not be based on corporation nationality per se but on corporate behavior.”

All this seems to call for some kind of a globalization of the intellectual property issues and of the patent system.

The fundamental question would then appear to be “How can intellectual property be protected in the global economy?”

But Harland Cleveland in the May/June 1989 issue of *Change* magazine answers: “The question contains the seeds of its own confusion: it’s the wrong verb about the wrong noun.”

He adds:

Knowledge is becoming what physical labor, land, minerals, and energy used to be: the primary source of power for each person, each organization, each society. ...information cannot be “owned” (only its assembly and delivery service can). Knowledge is not exchanged in a market but shared in a kind of commons... The mark of commons is that it cannot be readily divided or appropriated and that it requires an unusual degree of cooperation to be exploited or used at all.

Since the 1982 reorganization of the Federal court system dealing with patents, the notion of “intellectual property” has been expanded to include life forms, mathematical formulations and even financial tactics. Some, such as U.S. Representative Kastenmeier, worry that society is not well served when protection becomes ubiquitous and pervasive.

Professor Merges, one of our panelists, is quoted by the *New York Times* (May 14, 1990) as saying: “You could arrive at the point where every idea, every concept, every minor device is somebody’s property. The transaction costs of conducting business and even of just living would be prohibitive.”

So perhaps, ultimately, the question is less “How to protect intellectual property” than it is “How to optimize creativity in a global information commons.”

But given the fact that every industrialized country in the West has made patenting a national institution, this question has to be addressed within the framework and constraints of that institution.

In other words, “What patent policy should we adopt to ensure our future?” To help us approach this question, our panelists will address the issue of patent and patent policy from their own viewpoint.

Perhaps the first step is for us to understand the present system of patents and what is involved in getting patents.

Mr. Thomas Penn will be our guide here.