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Do Business **WITHOUT** Intellectual Property

by Stephan Kinsella

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INTRODUCTION

One of the most egregious government interventions in the digital age flies under the label *intellectual property* (IP). This type of intervention has been around since the advent of modern capitalism and the Industrial Revolution. Originally recognized as exceptional, state-granted monopoly privileges, even by their earliest proponents, IP rights are now referred to as a type of "property right"; IP is thought of as a natural and essential part of a capitalist, free market order.

We are told that IP is a type of property right. We are told that it is necessary for innovation. Without patent and copyright, we would live in a world of stagnation. There would be no innovation, no artistic works. Who would bother, if the state did not properly incentivize us? But the astounding truth is that *IP is completely incompatible with a free market*

***system*. It is not necessary for innovation at all. Far from it: it actually gives rise to monopolies that dampen creativity and stultify free market competition. It distorts the market, innovation, and creative culture. And it leads individuals and businesses to adopt coping strategies that are often to their long-run detriment.**

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But in today's world, patent and copyright exist whether we like it or not. Individuals and businesses need to be aware of the reality of IP and take it into account in their business strategies. An open-eyed approach as to the true nature of IP is essential to understanding what IP policy should be in a free society. Understanding what IP is, how it arose, and its role in today's economy can help entrepreneurs develop the proper strategies to thrive and prosper in a mixed economy. The purpose of this guide is to expose the true nature of IP and to provide guidance to entrepreneurs and individuals about the pitfalls of over-reliance on modern IP.

WHAT IS IP?

Intellectual property refers to laws that protect the products of the intellect, as opposed to laws dealing with ownership of commonplace physical or material goods. IP is a broad term that includes several types of legal rights: **copyright** (which gives authors a right in original works such as novels or paintings); **patent** (which gives inventors rights in practical inventions like a mousetrap); **trademark** (which gives companies rights in names used to identify products such as Coca-Cola); and **trade secret**. Trademark is said to have its basis in protecting consumers from deception and fraud by unscrupulous vendors who falsely use others' names and reputations. (My ***Against Intellectual Property***[1] has further detail on the types of IP; see also "**Types of Intellectual Property.**"[2])

WHY DO BUSINESSES NEED TO CARE ABOUT IP?

I have been a **registered US patent lawyer**[3] for 20 years. I've helped clients **obtain hundreds of patents**,[4] and have been called on many times to help defend them from patent and other IP threats. I've also been a very strong advocate of free markets, private enterprise, and private property rights for my entire professional life. People are often confused about my personal situation: "You're anti-IP but you're an IP lawyer? What gives?" So I've been asked many times, "How can you be an IP lawyer if you think IP is illegitimate?" This type of question highlights a dilemma that libertarians and entrepreneurs living in the real world must face. We recognize that some policies are harmful and unjust, but they exist and have to be dealt with. Their existence cannot be ignored but their essential nature should not be either.

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Given the existing IP system, there is a need for companies to adopt IP strategies.

Here's one approach I take when responding to such queries. I view IP as similar to, say, taxes. High taxes and IP are both harmful to prosperity and freedom. But given the existence of these laws and systems, there is a need for companies to be aware of and deal with these laws. Given high taxes, there is a need for CPAs, tax software, and tax attorneys who defend people being threatened with prison for tax evasion.

Likewise, given the existing IP system, there is a need for companies to adopt IP strategies, which sometimes include using IP attorneys and specialists. There is a need to be aware of the contours of the system, to navigate it, even to use it. Given the existence of the

[1] http://www.stephankinsella.com/publications/#IP
[2] http://c4sif.org/2011/03/types-of-intellectual-property/
[3] https://oedci.uspto.gov/OEDCI/details.do?regisNum=37657
[4] http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&u=%2Fnetahtml%2Fsearch-adv.htm&r=0&f=S&l=50&d=PALL&RS=%28%28LREP%2Fstephan+OR+LREP%2Fstephen%29+AND+LREP%2Fkinsella%29&Refine=Refine+Search&Refine=Refine+Search&Query=+%28lrep%2Fstephan+or+lrep%2Fstephen%29+and+%28lrep%2Fkinsella+or+lrep%2Fkznsella%29

patent system, high-tech companies often need to spend resources obtaining patents, if only to be able to defend themselves from patent threats by competitors or patent trolls. Granted, if there were no patent law, then the need to waste funds on such acquisitions and on lawsuits and distorting business strategies would evaporate. Also, if taxes were lower, tax lawyers would have to find a new profession. If we cure cancer, oncologists might be out of a job, too, but I suspect a decent oncologist really hopes that his job is someday rendered unnecessary.

I view my own profession as something like IP oncologists. The cancer of IP exists, and unfortunately, IP attorneys are necessary so long as it does. I wish more IP attorneys would at least oppose IP like most oncologists oppose cancer. But until our thinking about the nature of property rights is changed, we can expect IP professionals, along with the general public, to support some kind of patent and copyright regime.

Individuals living in today's world, faced with the IP system, cannot ignore this prevalent system and mode of thinking—this way of doing business. They must take it into account. There are two fundamental approaches one can take to such matters: *political-normative*, i.e., What kind of legal system should you favor?; and *practical-ethical*: given the existing IP system, how should you react to it? How should you use it? What actions, in personal or business life, are right or wrong, or are practical and profitable, destructive and wasteful?

Let's take these issues in turn.

SHOULD WE ABOLISH IP?

It is clear that patent and copyright should be abolished immediately and completely.

As to the policy issues—what the law should be—it is clear that patent and copyright should be abolished immediately and completely (and so should other forms of IP, such as trademark, trade secret, and defamation law, but let's leave those to the side for now). There are a number of reasons for this conclusion. First, most advocates of IP admit that IP rights are temporary monopoly privileges, that such laws are deviations from the free market. But they argue that the harm done by these statutes is somehow outweighed by innovation gains. That is, they argue that, without IP, we would have less artistic creation and less innovation, that with these laws we have far more innovation and creativity than we would otherwise (in a purely free market), and that the value of this extra innovation is far greater than the costs of these laws. (For example, see "**There's No Such Thing as a Free Patent.**"[5])

[5] http://www.mises.org/story/1763

However, these claims are completely unfounded, and in fact are counterintuitive and implausible; IP proponents do not provide serious arguments or evidence for their pro-IP position. Most of the proponents are special-interest lobbyists—the pharmaceutical industry, Hollywood, or the music industry—who don't really care whether IP is a good idea in a free market; they are simply out for their own interests. They then lobby Congress, who in turn enacts laws that benefit these special interests. Then the guy on the street repeats, fairly mindlessly, the propaganda he's heard filtered down from the special interests, lobbyists, and legislators in groundless pro-IP slogans.

For example, the typical person has an assumption that IP is part of a free market and private property system, that it incentivizes artists and inventors, that it protects the small guy innovating in his basement. This is contrary to reality, but the average person does not always have time to examine these common arguments and assumptions, and so the propagandists succeed. Again, we see this in the very term *intellectual property*, a misleading label that serves the purposes of the IP lobby.

Patent and copyright heavily distort the creative and innovative fields and lower the total amount of innovation in society.

The empirical evidence we do have suggests strongly that patent and copyright heavily distort the creative and innovative fields and lower the total amount of innovation in society. IP imposes huge costs on society and the economy: probably hundreds of billions of dollars a year, if not more. (See, for example: "**Legal Scholars: Thumbs Down on Patent and Copyright**,"[6] "**The Overwhelming Empirical Case *Against* Patent and Copyright,**"[7] and "**Costs of the Patent System Revisited.**"[8])

But the main reason I oppose IP—especially and primarily patent and copyright—is that not only does it impose unnecessary costs on society, slow down progress, impede freedom, and distort culture, research, and development: but it is a *blatant infringement* of property rights.

IP VERSUS PROPERTY RIGHTS

Over the years, I and others have given a variety of arguments to explain why IP is not compatible with a free market. One explanation I have given runs like this. Imagine you live in a neighborhood of 100 people, where everyone owns his own home and the tract of land it sits on. The neighbors might enter into a restrictive covenant that prohibits certain uses of one's home.

For example, everyone might agree to use their property for residential use only and not to paint their house bright orange. If you want to paint your house orange, you can't do it unless you get

[6] http://c4sif.org/2012/10/legal-scholars-thumbs-down-on-patent-and-copyright/
[7] http://c4sif.org/2012/10/the-overwhelming-empirical-case-against-patent-and-copyright/
[8] http://archive.mises.org/14065/costs-of-the-patent-system-revisited/

the neighbors' permission. In effect, everyone has agreed to grant their neighbors a limited, partial property right in their own home: a veto right. The neighbors can prevent you from using your property in certain ways. This practice is common and popular because it can provide benefits to all the members of the covenant.

That is why people enter into these arrangements voluntarily. And that is really why they make sense, why they are compatible with private property rights: because they are entered into by the homeowners *voluntarily*. In fact, such agreements are *exercises* of private property rights—the owners agree to transfer some of their property rights to others in exchange for similar transfers, in the hopes that the overall value of their homes, in the neighborhood, will increase. These property arrangements can be classified as "negative easements" or "negative servitudes." They are "negative" since a person's neighbors cannot use his property, but can prohibit certain uses of his property. The owner of property that is subject to such an easement or servitude is said to have a "burdened" estate. He owns the main use of the property, but it is subject to the veto of others, a veto right that he contractually agreed to.

Copyright and patent holders retain a negative servitude over others' property.

The owners of the burdened estates—you and me—never agreed to this.

And this brings me to my primary objection to patent and copyright. These rights are types of negative servitudes. A copyright holder can use state force to stop you from printing a given pattern of words on your own paper with your own ink and printer. A patent holder can prevent you from using your own materials to shape them into certain arrangements. In effect, copyright and patent holders retain a negative servitude over others' property. But the owners of the burdened estates—you and me—never agreed to this. We didn't contractually grant this servitude to patent and copyright holders. The state simply grants it to them by fiat. (See "**Intellectual Property Rights as Negative Servitudes.**"[9])

So in effect, through the use of IP statutes, the state makes patentees and copyright holders co-owners of everyone else's property, but without the property owners' consent. This results in an erosion of property rights, a seizure of property, a redistribution of wealth. It is a limitation on competition, learning, and emulation. This is exactly the type of policy that free market advocates oppose when implemented under more explicitly socialist governments. Yet when special interests that benefit from these wealth transfers label them "property rights," many people lose sight of the essentially interventionist, anticompetitive nature of these policies.

[9] http://archive.mises.org/17398/intellectual-property-rights-as-negative-servitudes/

HISTORY OF PATENT AND COPYRIGHT LAW

Modern patent and copyright regimes became prominent in Western countries about 200 years ago. Patent law emerged from older mercantilist, protectionist practices where the crown would grant monopolies to court favorites (as authorized in the **Statute of Monopolies of 1624**[10]).Copyright law finds its origins in the censorship of prohibited books and ideas (such as the **Statute of Anne of 1710**[11]). (See also Karl Fogel, "**The Surprising History of Copyright and The Promise of a Post-Copyright World**."[12])

Patent and copyright are state-granted monopoly privileges, not natural property rights.

Free market economists were suspicious of or even hostile to these laws and practices, so defenders of patent and copyright started referring to them as "intellectual property" to appeal to the pro-property sentiments of legislators and the populace. (See "**Intellectual Properganda.**"[13]) But in truth, patent and copyright are state-granted monopoly privileges, not natural property rights.

A large number of software producers in effect opt out of the copyright system through the use of open licenses.

Individuals and companies use these laws to varying degrees, depending on their industry and interests. Software and video game vendors, Hollywood, and the music industry rely widely on copyright and related laws in an attempt to stop "piracy," though a large number of software producers in effect opt out of the copyright system through the use of open licenses, and an increasing number of independent musicians and artists are opting out of copyright protection through the use of Creative Commons licenses. (See "**Let's Make Copyright Opt-OUT.**"[14])

An increasing number of independent musicians and artists are opting out of copyright protection.

Pharmaceutical and high-tech companies rely more heavily on patent law. Pharmaceutical companies claim that they need the patent monopoly to help make up for the costs imposed on them during the expensive and lengthy FDA drug-approval process. But think about that: the state imposes heavy costs on pharmaceutical companies, then tries to partially make up for it by granting an anticompetitive, monopoly privilege right to these companies. High-tech companies stockpile thousands of patents, mainly to use as

[10] http://en.wikipedia.org/wiki/Statute_of_Monopolies
[11] http://en.wikipedia.org/wiki/Statute_of_Anne
[12] http://questioncopyright.org/promise
[13] http://c4sif.org/2010/12/intellectual-properganda/
[14] http://c4sif.org/2011/04/lets-make-copyright-opt-out/

defensive weapons against patent lawsuits filed against them by their competitors. (Patent lawyers and IP litigators profit handsomely from all this activity, siphoning tens, hundreds of millions of dollars a year from the productive economy.) As an example, consider the **ongoing "smartphone" wars**[15] between Apple and Samsung and others, which are being waged in dozens of countries and costing tens of millions of dollars or more.

The effect of this is to entrench the monopoly positions of the larger players who can afford to acquire thousands of patents and pay millions of dollars to lawyers in litigation costs, and to pay each other royalties after the inevitable settlements, then pass most of this cost on to the consumer in the form of higher prices. Smaller companies cannot afford to defend against such lawsuits and have no large patent arsenal to draw on defensively, so the effect of this is to erect barriers against entry, leaving large markets under the control of a small number of large, patent-wielding companies.

This is a monopoly- or oligopoly-type situation. The dominant firms have less incentive to innovate, since they face less competition and can collect monopoly profits from earlier innovation because it has been patented. (See, e.g., "**The Microsoft-Apple Gesture Oligopoly.**"[16])

To obtain a patent, the inventor has to disclose the details of his invention; that is the so-called patent bargain. The public can learn about the invention, and eventually use it, after the 17-or-so year term expires, in exchange for the inventor being granted a temporary monopoly. (See, e.g., "**The Purpose of Patent Law.**"[17]) Some companies, however, find it in their interest to keep a portion of their innovations and other confidential information (like client lists) secret rather than publicize it by filing for a patent application. This is what trade secret law covers.

Most companies with trade names, brand names, and so on rely to some extent on trademark as well.

INTELLECTUAL PROPERTY IS CONTRARY TO FREE MARKETS AND HUMAN FREEDOM

The common view of IP is misguided, not necessarily dishonest. But when proponents of IP say that they are for it because it enhances innovation and welfare, while all the studies point the other way, one has to assume that they are dishonest. They remind me of the liberal advocates of failed welfare policies who continue to advocate for them even after it becomes clear that they cause hu-

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[15] http://c4sif.org/?s=apple+samsung+smartphone+wars
[16] http://c4sif.org/2011/10/the-microsoft-apple-gesture-oligopoly/
[17] http://c4sif.org/2010/12/the-purpose-of-patent-law/

man misery and devastation. These are the types of people rightfully skewered by Thomas Sowell in his great book ***The Vision of the Anointed: Self-Congratulation as a Basis for Social Policy.***[18]

And then we see attempts to apply, enforce, and expand patent and copyright, which do not merely retard innovation or impose some dollar costs on society, but which are truly fascistic and scary, such as the attempt to reduce Internet freedom with SOPA and PIPA in the name of stopping copyright piracy, imprisoning people for years for uploading or downloading a few movies, extraditing foreign students and nationals to face US jail time for having websites with links to piracy sites, invading the homes of people in foreign countries (Kim Dotcom of Megaupload in New Zealand) in the name of protecting intellectual property. The Internet is a key development and tool for the defense of freedom. Anything that imperils freedom of commerce or communication on the Internet should be taken very seriously. (See, e.g., "**SOPA is the Symptom, Copyright is the Disease: The SOPA Wakeup Call to Abolish Copyright.**"[19])

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The state has an interest in restricting digital, technological, and Internet freedom, and uses various excuses to do this this: terrorism, child pornography, tax evasion, prostitution, drugs and Silk Road, digital money (bitcoin), online gambling, money laundering, and copyright "piracy." And then we have the US government, at the behest of very powerful American special interests (big pharmaceuticals, Hollywood, the music industry) twisting the arms of developing countries to adopt draconian US-style patent and copyright laws, all in the name of "capitalism" and "private property rights." Recently, these industries have pressured the United States to try imposing increased IP standards on other countries through the use of the Trans-Pacific Partnership, or TPP, and other measures. (See "**Longer copyright terms, stiffer copyright penalties coming, thanks to TPP and ACTA…**"[20])

Most free market advocates and libertarians oppose laws against narcotics, high taxes, and so on, but when the state labels its monopoly patent and copyright privileges as property, it befuddles and confuses the opposition.

We have to recognize laws and policies that limit competition and restrict freedom for what they are.

The bottom line is that we have to recognize laws and policies that limit competition and restrict freedom for what they are, no matter what the label given by legislators and lobbyists. We have to recognize, expose, and oppose policies that restrict property rights and freedom.

[18] http://www.amazon.com/Vision-Anointed-Self-Congratulation-Social-Policy-ebook/dp/B002TZ3D1M/
[19] http://www.libertarianstandard.com/2012/01/24/sopa-is-the-symptom-copyright-is-the-disease-the-sopa-wakeup-call-to-abolish-copyright/
[20] http://c4sif.org/2013/10/longer-copyright-terms-stiffer-copyright-penalties-coming-thanks-to-tpp-and-acta/

WHY DOES IP PERSIST?

Many intellectuals—legal experts/lawyers in particular— defend what they perceive to be in their personal self-interest. I imagine a large percentage of federal government employees think the state is necessary; and a large number of government school teachers believe in the legitimacy and necessity of public education. Likewise, those in the big pharma want patents, and Hollywood wants copyright to stop piracy. Patent lawyers make their living on this system and so likewise have an interest in promoting it.

But I think the main reason people without such strong interests continue to support IP is a lack of principled thinking. Most people think they are being pragmatic and practical when they eschew principled thinking about rights and property and justice, instead favoring "what works." So they think in empirical, utilitarian terms and reject principle, which they regard as impractical or extremist. They are used to the current system; they assume that the IP we have had for 200 years is part of our private property system; they assume that it must have played some role in the prosperity we've had. They confuse correlation for causation. Even if they recognize that the system is broken, they only advocate reform, never a radical rethinking of the whole system. Radical change frightens people.

Radical change frightens people.

However, the tides are changing and many free market economists seem to have long been skeptical of IP. A growing number of legal scholars do as well, though only a handful of them seem to want to go so far as to abolish the whole system. Among free market proponents such as libertarians, my impression is that since the advent of the Internet in the mid-90s, when copyright and patent enforcement started becoming more visible and virulent, there has been increasing skepticism of IP's legitimacy. Among free-culture types, the free software movement, Austrian libertarians, anarchist libertarians, and left-libertarians there is a large and growing opposition to IP. (See "**The Death Throes of Pro-IP Libertarianism**;"[21] "**The Four Historical Phases of IP Abolitionism**;"[22] and "**The Origins of Libertarian IP Abolitionism.**"[23])

There is a large and growing opposition to IP.

[21] http://mises.org/daily/4601/
[22] http://c4sif.org/2011/04/the-four-historical-phases-of-ip-abolitionism/
[23] http://c4sif.org/2011/04/the-origins-of-libertarian-ip-abolitionism/

IP, INNOVATION, AND FREEDOM

I am often asked for examples of how innovation and creativity could or would develop absent patent and copyright law. It is hard to predict the future. It is hard to predict what regimes, practices, products, and services will emerge after freedom or in a future, more advanced technological world. And yet even today, we have widespread piracy—copying in contravention of copyright law—and violation of patent law as well (and this trend should speed up after 3D printing starts to mature). So let's consider some examples or possible ways creators could profit either in an IP-free world or in a world—like today's—in which piracy is rampant.

Copyright is said to be necessary to help struggling authors.

First, I have collected a large number of **examples**[24] of how IP law has harmed innovation or those it was intended to help. I recount them regularly on the blog, but there are too many to keep up with. But for a few examples, copyright is said to be necessary to help struggling authors. Yet copyright grew out of a guild-censorship system in Europe, which resulted in the Statute of Anne in 1710. Before this, the Stationer's Company had a state-protected monopoly over which books could be published and circulated using the printing press. Without official approval, authors could not be sure their works would be published.

The Statute of Anne pretended to give authors the right to decide, but the publishing industry quickly co-opted these author-based copyrights, resulting in the system still prevalent today, in which an author is forced to sign his rights away to some publishing house in order to get published. Then the publisher can refuse to reprint the work when sales fall, yet copyright prohibits others from reviving the work for over a century. So many works disappear (so-called orphan works) or are lost or too obscure. I discuss this in my post "**How long copyright terms make art disappear.**"[25]

More mindless Hollywood sequels are made than would be the case absent copyright; novels and films have—quite literally—been banned by judicial order because of copyright.

In the case of patent, we have the phenomenon of patent trolling, where patentees who sell no products basically extort money from small companies and individuals, who buckle under because they know they cannot afford a multi-million-dollar patent lawsuit. We have high-tech startup companies who receive patent infringement lawsuits just days before an IPO, designed to delay or ruin the IPO. We have the independent seller of "Eat more Kale" t-shirts being **bullied by**

[24] http://www.c4sif.org/resources
[25] http://c4sif.org/2013/07/how-long-copyright-terms-make-art-disappear/

Chick-Fil-A[26] because it allegedly infringes their "Eat mor chikin" slogan. Documentary producers are unable to get their films cleared because of outrageous copyright claims.

Copyright holders use the Digital Millennium Copyright Act procedure to get criticisms taken off YouTube since there is little penalty or sanction for abuse of this process. It exerts a chilling effect on freedom of expression and it distorts the culture. More mindless Hollywood sequels are made than would be the case absent copyright; novels and films have—quite literally—been banned by judicial order because of copyright, such as a sequel to *Catcher in the Rye*. (See "**Book Banning Courtesy of Copyright Law.**"[27])

WHAT SHOULD YOU DO?

First, Do No Harm

Let's consider the proper stance toward IP law.

Before turning to some practical ways to navigate the modern business world, including patent and copyright law, let's consider the proper stance toward IP law. Each person, in his private capacity, recognizing the immorality of IP and its incompatibility with justice, free markets, capitalism, and private property rights, *should never advocate or support IP law*. Your business should not lobby for it, and you should not vote for it. You could condemn it and speak against it, oppose it whenever possible.

IP law is like the drug war. Even if you recognize that narcotics should not be criminalized—that the state has no right to lock people up for using or selling drugs—you might choose to respect the law to avoid the risk of jail. Your stance would be: the law is immoral and should be repealed, even if you warily abide by such laws out of prudential concerns.

Likewise, whatever your practical coping strategy for dealing with IP law (discussed below), you should always make it clear that you oppose patent and copyright law, that you do not condone or endorse it, that you recognize it as unjust and completely incompatible with individual rights and freedom. The moral, principled, and practical businessman must denounce IP law while finding ways to cope with it, so long as it exists

[26] http://c4sif.org/2012/07/a-defiant-dude-eat-more-kale-t-shirt-designer-fighting-back-against-chick-fil-as-trademark-bullying-2/
[27] http://www.lewrockwell.com/blog/lewrw/archives/28808.html

But While IP Exists …

Opposing IP is all well and good. But for now it permeates our legal system. Even the most morally punctilious of businessmen have to recognize that patent and copyright law exist and must be taken into account. These legal systems infect, distort, and corrupt the modern business environment, no doubt. But they exist and are enforced.

What does one do, in the face of such legal and business practices, if one is aware of the deficiencies of IP law?

It is obvious that law cannot be ignored. This is a recipe for disaster. In a free society based on private law, you could start a business that streams popular songs; in today's world this may get you shut down, arrested, and invaded by FBI agents.

So one response is to just play the game like everyone else does. Assume that the law is what it is, forget about legitimacy, and focus on profit only. Use copyright and patent to your advantage where necessary, regardless of its legitimacy or morality. Do what other companies do.

Individual human beings, in their capacity as entrepreneurs and businessmen, should strive for both morality and profit.

But is this the wisest approach? If we know that there is something wrong with the very basis of IP law, maybe there is something wrong with going along lock-step with the standard way of dealing with IP. One should not be a Pollyanna martyr and act as if IP law does not exist; but perhaps there is a different position one can take—one that is more profitable both in monetary and moral terms. My contention is that individual human beings, in their capacity as entrepreneurs and businessmen, should strive for both morality and profit. By understanding the corrupting nature of IP, we can avoid some of its pitfalls, and earn both moral and monetary profit.

To IP or Not to IP

The standard advice given to businessmen is to simply take the existing legal system for granted, and to work within it. If the system permits you to obtain patent and copyright, apply for or obtain them. If it permits you to sue your competitors, sue. If the system permits you to lobby legislators through campaign contributions, influence their votes, and give you preference over competitors, do it.

But the success of the Internet and open models of innovation and development in the digital age should give one pause before adopting the business models and approaches mired in the fallacious reasoning of bureaucrats and special interest groups.

The entrepreneur who sees the benefits of freedom and openness and the harm wrought by patent and copyright law should ask himself several questions:

- **Do I really want my business model to depend on patent or copyright?**
- **Do I really want to turn my customers into enemies if they actually use and profit from the information I provide to them?**
- **Do I want to spend tens or hundreds of thousands or millions of dollars, on legal fees to secure and enforce IP rights?**
- **Do I really believe in free markets and fair competition?**
- **Do I want to prosper, flourish, and profit on my own merits, or rely on the state to protect me from competition?**
- **Do I want to be free to innovate and change business strategy and direction as I see fit, or be mired in some IP-maximization strategy?**

Below, we'll examine some case studies, examples, and practical strategies and considerations entrepreneurs can contemplate when faced with an IP-laced business environment.

Steps You Can Take Now

For the sake of liberty, freedom, free markets, and prosperity, IP should be abolished completely and immediately. And everyone should oppose patent and copyright law when they have the chance.

There are many ways to reduce the damage of IP to your own work and business right now.

However, given the entrenched interests and the state's control of the legal system, immediate and radical progress is unlikely. Political action is not the only response that can be taken against corrupt and antiquated systems. Individuals and entrepreneurs can first educate themselves to become aware of the nature of the system we face. They can seek to educate themselves and others and to push for political change. But in their private capacities, they can use their knowledge of the true nature of the laws and institutions that exist to inform their actions. They can begin to confront the IP paradigm with action that is both principled and self-aware, and that also benefits the actor and complements forces of social change. The law tends to follow on the footprints of social change, but there are many ways to reduce the damage of IP to your own work and business right now.

The initial step is one of orientation. Be aware of the nature of the system and what can be done within the system or to navigate around the system. Sometimes the existing legal rules need to be abided by and even employed and manipulated, but sometimes this can lead to a trap.

For example, if you buy into the logic behind the patent system, you file for patents for your employees' innovations. Then, perhaps, you start relying on your dominant position or royalties for a given patent-protected product line instead of being flexible and moving to a different strategy that is not yet patented. This can cause ossification and open the door for newcomers to overwhelm you. Or you might rely overmuch on copyright and sit on your rights, refuse to permit openness, refuse to permit your customers to share your MP3 or video files, refuse to permit your fans to take photographs or make homemade recordings at a concert. Refuse even to make a legally available version of a 15-year-old movie, for a reasonable fee, on convenient stream or other platforms like Netflix or AppleTV or iTunes. This leads would-be customers to simply resort to piracy, or avoid your content altogether and resent you.

So, before adopting the standard strategy of relying on IP laws like patent, copyright, and trademark, to try to suppress competition and treat your customers like enemies and thieves, consider whether a more open, nimble, flexible strategy is preferable. Consumers and fans like openness. They think it's "**awesome**,"[28] in the words of Mike Masnick. It's a good strategy to make your customers and employees love you.

Consider whether a more open, nimble, flexible strategy is preferable. Consumers and fans like openness.

EXAMPLES OF IP CONTRARIANISM

Companies often rely overmuch on IP. Consider how the movie industry's reliance on copyright and refusal to make content available to users in an easy way and at a reasonable price leads to resentment and widespread piracy. Some tech companies obtain patents on their key products and thus are locked into that product category since it is protected. They are protected, for a while, from competition, and their incentive to innovate is reduced. And they need to recoup the tens of thousands of dollars spent on patent lawyers' fees. In the past, it was routine for some famous musician to file a copyright suit against competitors or even fans. Now, copyright holders are often thinking twice. As the quasi-libertarian sci-fi author Cory Doctorow **has observed**,[29] "for pretty much every writer—the big problem isn't piracy, it's obscurity."

For pretty much every writer—the big problem isn't piracy, it's obscurity.

Doctorow himself releases his novels for free via a Creative Commons license. You can download it for free or pay for a paper copy or other version.

We are familiar with Google's "Don't be evil" corporate motto. Many thought this meant Google would not be a patent aggressor. Yet it was sucked into the patent morass when it acquired Motorola Mobility and its pending lawsuits, which it did not drop.

A better example would be Twitter, which found a way to prevent itself from using patents in an aggressive manner. As noted in "**Twitter Heroically Promises Not to Use Patents Offensively,**"[30] Twitter adopted a patent policy where they assigned rights to employees, tying their own hands against using patents offensively, in order to fulfill the promise to engage in true innovation and fair competition and not rely on any state-granted monopoly privilege right.

[28] http://www.techdirt.com/blog/?tag=awesome+stuff
[29] http://craphound.com/littlebrother/about/#freedownload
[30] http://c4sif.org/2012/04/twitter-heroically-promises-not-to-use-patents-offensively/

PUBLISHING AND COPYRIGHT

The standard approach for authors is to rely on copyrights in their published works and be ready to threaten suit against others for copying or unauthorized use. Of course, we all know that today any novel, movie, or song can be easily copied without permission via torrenting, The Pirate Bay, or related technology or sites.

The question is often asked: how can an author make money without copyright? Here are a few responses. First, as noted, the reality of modern piracy means that even with copyright, an author's work can and will be copied very soon after being made public. This is a reality, even given current copyright law. Second, we have to realize most nonfiction authors—authors of law review articles or academic or scholarly works—never make a dime off of them anyway. Academics publish scholarly articles to get their ideas out there or to cement their reputations, or in pursuit of tenure. Sometimes they or their employers have to pay a publishing fee, in fact; and often, the published book or article is kept behind a paywall or priced at a prohibitive level so that few people have access to the author's work.

And even novelists have a hard time making a profit given the traditional publisher model. A few lucky ones make it big, but most authors eke out a meager living at best. This is in part a relic of the publisher-guild system that is partly perpetuated even today by copyright.

Even novelists have a hard time making a profit given the traditional publisher model. A few lucky ones make it big, but most authors eke out a meager living at best.

As noted above, the fundamental danger faced by authors is obscurity. Authors want their work to be widespread and widely available. Once you have notoriety you can parlay this into other opportunities. So it's in the author's interest to release published works with as little restriction as possible. Since it's not even possible at present for an author **to opt out of**[31] copyright protection (it's automatic and basically inalienable), the best one can do is employ some kind of license, such as Creative Commons, to release one's work to the public. I recommend a **CC-BY**[32] (attribution only) or **CC0**[33] license.

As an example of how a novelist might profit in a copyright free world, consider the examples provided in my post "**Conversation with an author about copyright and publishing in a free society**."[34] An author such as J. K. Rowling, of Harry Potter fame, writes a first novel out of passion.

[31] http://c4sif.org/2011/04/lets-make-copyright-opt-out/
[32] http://creativecommons.org/licenses/by/4.0/deed.en_US
[33] http://creativecommons.org/choose/zero/
[34] http://c4sif.org/2012/01/conversation-with-an-author-about-copyright-and-publishing-in-a-free-society/

She self-publishes on Amazon's service or some other, or even has a normal publisher. Her popular book is soon knocked off and millions of kids are reading her book. Some paid for it, others didn't. No matter; she has a new, built-in audience of millions. She announces she has book number two ready to go, and will release it after 1 million people pre-purchase it for $10 each. That's $10 million. And so it goes, through all of the sequels. Soon Ms. Rowling is worth $50 million without relying on copyright.

Once you have notoriety you can parlay this into other opportunities.

And then people start making movies based on the novels (and don't think there wouldn't be blockbuster movies absent copyright; see Rick Falkvinge, "**Debunking The Argument That No Blockbusters Would Be Made Without The Copyright Monopoly**").[35] Maybe there are three versions of the first Harry Potter novel being considered. One of the studios approaches Rowling and asks her to consult on their version, for a share of the profits. Her involvement will improve the movie's quality and her endorsement will bring in more fans, who would rather see her authorized version than that of others. So she rakes in a few more million dollars that way. All fine. All without copyright.

Other examples of how creators have or can profit without patent and copyright are given elsewhere, e.g.:

- "**Innovations that Thrive without IP**"[36]
- "**Examples of Ways Content Creators Can Profit Without Intellectual Property**"[37]
- "**The Creator-Endorsed Mark as an Alternative to Copyright**"[38]

Innovators and entrepreneurs do not need to rely on IP to profit and succeed.

The basic point is that innovators and entrepreneurs do not need to rely on IP to profit and succeed. They need to continually innovate, rely on their reputation, and please their fans and customers. That is ultimately the entrepreneurial function.

With the foregoing examples and lessons in mind, consider:

[35] http://c4sif.org/2012/01/a-scene-from-return-of-the-king-the-third-part-of-lord-of-the-rings-debunking-the-argument-that-no-blockbusters-would-be-made-without--the-copyright-monopoly/
[36] http://www.stephankinsella.com/2010/08/innovations-that-thrive-without-ip/
[37] http://www.stephankinsella.com/2010/07/examples-of-ways-content-creators-can-profit-without-intellectual-property/
[38] http://archive.mises.org/13286/the-creator-endorsed-mark-as-an-alternative-to-copyright/

Music without Intellectual Property

- **Free distribution. Musicians make their money from other sources. Let people copy your hits. Let YouTube flourish. People will want to buy tickets to hear your concerts.**

- **Artists have learned that covers are actually great. It's a great compliment. It never harms the original artist.**

- **If someone steals your stuff, try cheering for a change. Welcome emulation and competition!**

Inventing without Intellectual Property

- **Patents tie your hands. If you get a patent on a key product, you might think twice before being willing to adapt. Patents are stultifying.**

Patents tie your hands.

- **Defensive patents are sometimes necessary, but beware the lure of using them as profit center; consider adopting a policy like Twitter has, of using patents only defensively.**

Dying without Intellectual Property

One of the most critical issues of our day is that, as noted above, copyright cannot be opted out of and it lasts for a long time (life of author plus 70 years). This gives rise to the orphan works problem and the literal disappearance of copyright-protected works. Copyright kills creative works. It causes them to literally disappear. (See "**How long copyright terms make art disappear.**"[39])

Copyright kills creative works. It causes them to literally disappear.

If you have works subject to copyright, you want them to outlive you. You don't want legal uncertainty or squabbling among descendants to doom your work to obscurity. Release them. Release them now, while you live, using CC0 or CC-BY, or put something in your will to accomplish a similar result; one emerging possibility authors can consider is the **Free**

[39] http://c4sif.org/2013/07/how-long-copyright-terms-make-art-disappear/

Culture Trust,[40] a group that you can dedicate your copyright to upon death, to ensure it stays alive and is not buried by orphan works or other problems.

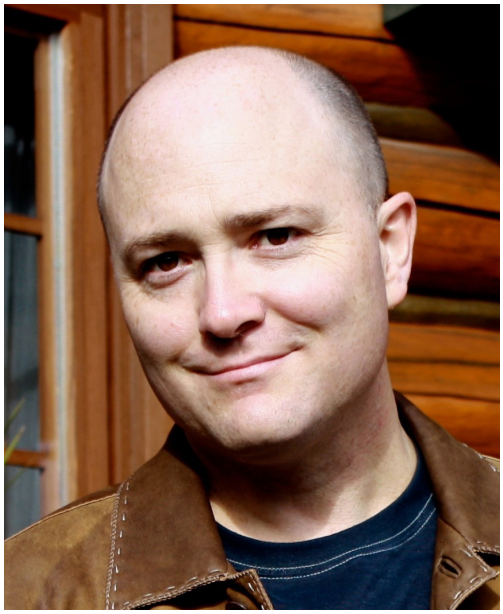
Patents

In today's world, businessmen and tech companies cannot ignore the problem of patents. It is unfortunately necessary to acquire patents as an adjunct to innovation, if only for defensive purposes or bargaining chips. Yet one does not have to reserve the right to use patents aggressively; this can safely be given away, as Twitter has done, reserving the right to use patents defensively. This is all a good free market company should want: the right to compete on a fair, free market—not the right to shut down competitors with the help of the state.

One does not have to reserve the right to use patents aggressively.

An emerging mechanism that might prove to be useful, so long as the patent system exists, is the use of ad hoc or more systemic patent defense pools or leagues (see my post "**The Patent Defense League and Defensive Patent Pooling**"[41]). Any high-tech company today that is pressured to expend hundreds of thousands of dollars on patent acquisition should consider such alternative mechanisms to cope with the modern quasi-mercantilist system.

[40] http://questioncopyright.org/free_culture_thing
[41] http://c4sif.org/2011/08/the-patent-defense-league-and-defensive-patent-pooling/



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