Did You Say "Intellectual Property"? It's a Seductive Mirage

by Richard Stallman

It has become fashionable to toss copyright, patents, and trademarks — three separate and different entities involving three separate and different sets of laws — into one pot and call it "intellectual property". The distorting and confusing term did not arise by accident. Companies that gain from the confusion promoted it. The clearest way out of the confusion is to reject the term entirely.

According to Professor Mark Lemley, now of the Stanford Law School, the widespread use of the term "intellectual property" is a fashion that followed the 1967 founding of the World "Intellectual Property" Organization, and only became really common in recent years. (WIPO is formally a UN organization, but in fact represents the interests of the holders of copyrights, patents, and trademarks.)

The term carries a bias that is not hard to see: it suggests thinking about copyright, patents and trademarks by analogy with property rights for physical objects. (This analogy is at odds with the legal philosophies of copyright law, of patent law, and of trademark law, but only specialists know that.) These laws are in fact not much like physical property law, but use of this term leads legislators to change them to be more so. Since that is the change desired by the companies that exercise copyright, patent and trademark powers, the bias of "intellectual property" suits them.

The bias is enough reason to reject the term, and people have often asked me to propose some other name for the overall category — or have proposed their own alternatives (often humorous). Suggestions include IMPs, for Imposed Monopoly Privileges, and GOLEMs, for Government-Originated Legally Enforced Monopolies. Some speak of "exclusive rights regimes", but referring to restrictions as "rights" is doublethink too.

Some of these alternative names would be an improvement, but it is a mistake to replace "intellectual property" with any other term. A different name will not address the term's deeper problem: overgeneralization. There is no such unified thing as "intellectual property"—it is a mirage. The only reason people think it makes sense as a coherent category is that widespread use of the term gives that impression.

The term "intellectual property" is at best a catch-all to lump together disparate laws. Non-lawyers who hear one term applied to these various laws tend to assume they are based on a common principle, and function similarly.

Nothing could be further from the case. These laws originated separately, evolved differently, cover different activities, have different rules, and raise different public policy issues.

Copyright law was designed to promote authorship and art, and covers the details of expression of a work. Patent law was intended to promote the publication of useful ideas, at the price of giving the one who publishes an idea a temporary monopoly over it—a price that may be worth paying in some fields and not in others.

Trademark law, by contrast, was not intended to promote any particular way of acting, but simply to enable buyers to know what they are buying. Legislators under the influence of "intellectual property", however, have turned it into a scheme that provides incentives for advertising.

Since these laws developed independently, they are different in every detail, as well as in their basic purposes and methods. Thus, if you learn some fact about copyright law, you'd be wise to assume that patent law is different. You'll rarely go wrong!

People often say "intellectual property" when they really mean some larger or smaller category. For instance, rich countries often impose unjust laws on poor countries to squeeze money out of them. Some of these laws are "intellectual property" laws, and others are not; nonetheless, critics of the practice often grab for that label because it has become familiar to them. By using it, they misrepresent the nature of the issue. It would be better to use an accurate term, such as "legislative colonization", that gets to the heart of the matter.

Laymen are not alone in being confused by this term. Even law professors who teach these laws are lured by, and distracted by, the seductiveness of the term "intellectual property", and make general statements that conflict with facts they know. For example, one professor wrote in 2006:

> "Unlike their descendants who now work the floor at WIPO, the framers of the US constitution had a principled, pro-competitive attitude to intellectual property. They knew rights might be necessary, but...they tied congress's hands, restricting its power in multiple ways."

That statement refers to the article 1 section 8, clause 8 in the US Constitution, which authorizes copyright law and patent law. That clause, though, has nothing to do with trademark law. The term "intellectual property" led that professor into a false generalization.

The term "intellectual property" also leads to simplistic thinking. It leads people to focus on the meager commonality in form that these disparate laws have—that they create artificial privileges for certain parties—and to disregard the details which form their substance: the specific restrictions each law places on the public, and the consequences that result. This simplistic focus on the form encourages an "economistic" approach to all these issues.

Economics operates here, as it often does, as a vehicle for unexamined assumptions. These include assumptions about values, such as that amount of production matters, while freedom and way of life do not, and factual assumptions which are mostly false, such as that copyrights on music supports musicians, or that patents on drugs support life-saving research.

Another problem is that, at the broad scale of "intellectual property", the specific issues raised by the various laws become nearly invisible. These issues arise from the specifics of each law—precisely what the term "intellectual property" encourages people to ignore. For instance, one issue relating to copyright law is whether music sharing should be allowed. Patent law has nothing to do with this. Patent law raises issues such as whether poor countries should be allowed to produce life-saving drugs and sell them cheaply to save lives. Copyright law has nothing to do with such matters.

Neither of these issues is solely economic in nature, and their noneconomic aspects are very different; using the shallow economic overgeneralization as the basis for considering them means ignoring the differences. Putting the two laws in the "intellectual property" pot obstructs clear thinking about each one.

Thus, any opinions about "the issue of intellectual property" and any generalizations about this supposed category are almost surely foolish. If you think all those laws are one issue, you will tend to choose your opinions from a selection of sweeping overgeneralizations, none of which is any good.

If you want to think clearly about the issues raised by patents, or copyrights, or trademarks, the first step is to forget the idea of lumping them together, and treat them as separate topics. The second step is to reject the narrow perspectives and simplistic picture the term "intellectual property" suggests. Consider each of these issues separately, in its fullness, and you have a chance of considering them well.

And when it comes to reforming WIPO, among other things let's call for changing its name.

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