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Intellectual Property Rights and the Commodity Form: New Dimensions in the Legislated Transfer of Surplus Value

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Abstract

Intellectual property rights have become an integral part of the modern economy. This article analyzes some of the contradictions of intellectual property rights and suggests a direction for the integration of intellectual property into classical value theory.

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1. Introduction

Karl Marx analyzed how markets first create surplus value and then transfer some of it from capitalists to rentiers, landlords, and other capitalists. While the commodity form that Marx dissected is still relevant today, its scope is rapidly expanding because of widespread use of intellectual property rights. This new commodity form radically deepens the contradictions of the capitalist system.

I am going to restrict my discussion here to intellectual property in science and technology. Markets for goods with high intellectual property content are unlike typical commodity markets. The owners of existing intellectual property provide no material good or even a service yet can nonetheless demand payments for use of their "products." Since intellectual property is a monopoly, its owners do not feel the direct force of competition, only cross-product competition. In addition, the cost of production is more or less irrelevant in markets for intellectual property, since reproduction costs are trivial compared to market prices.

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Payments to owners of intellectual property are more like the extraction of rent than the payment for a commodity. But unlike the passive ownership of land, intellectual property rights supposedly represent a reward for a creative achievement.

Within the eyes of the law, intellectual property rights are akin to the ownership of capital goods, except that this ownership expires after a set period of time. Intellectual property, however, differs from real capital goods in an important respect. In the case of a typical commodity, payments flow to the various agents who control the elements of the social labor process that originally contributed to the production of the capital good, despite the fact that some of the surplus value will provide rewards for nonproducers in the form of profits, interest, and rents.

2. Intellectual Property as a Public Good

Intellectual property rights represent the conversion of the products of what Marx called universal labor into an entirely new type of commodity. Universal labor can be used over and over without depreciating. For example, writing in the *Theories of Surplus Value*, before he had fully worked out his distinction between price and value, Marx observed,

> The product of mental labour—science—always stands far below its value, because the labour-time needed to reproduce it has no relation at all to the labour-time required for its original production. For example, a schoolboy can learn the binomial theorem in an hour. (Marx 1963–71, part i: 353)

Unlike land or most commodities that command rents, intellectual property is nonrivalrous. As Marx observed, "Once discovered, the law of the deflection of a magnetic needle in the field of an electric current, or the law of the magnetization of iron by electricity, cost absolutely nothing" (Marx 1977: 508). Science and information are meta-public goods because they become more valuable with use.

The growing importance of science represented a serious contradiction to the law of value. Marx observed,

> To the degree that labour-time—the mere quantity of labour—is posited by capital as the sole determinant element, to that degree does direct labour and its quantity disappear as the determinant principle of production—of the creation of use-values—and is reduced both quantitatively, to a smaller proportion, and qualitatively, as an, of course, indispensable but subordinate moment, compared to the general scientific labour, technological application of natural sciences, on one side, and to the general productive force arising from social combination in total production on the other side—a combination which appears as a natural fruit of social labour (although it is a historical product). Capitalism thus works towards its own dissolution as the force dominating production. (Marx 1973: 700)

Here Marx was not looking at the overthrow of capitalism by dissatisfied workers, but rather by its technological irrelevance. He continued,

> The theft of alien labour time, on which the present wealth is based, appears a miserable foundation in face of this new one, created by large-scale industry itself. As soon as labour

> in the direct form has ceased to be the great well-spring of wealth, labour time ceases and must cease to be its measure, and hence exchange value [must cease to be the measure] of use value. . . . The free development of individualities, and hence not the reduction of necessary labour time so as to posit surplus labour, but rather the general reduction of the necessary labour of society to a minimum, which then corresponds to the artistic, scientific etc. development of the individuals in the time set free, and with the means created, for all of them. Capital itself is the moving contradiction, [in] that it presses to reduce labour time to a minimum, while it posits labour time, on the other side, as sole measure and source of wealth. (Marx 1973: 705–6)

Marx never suggested that the rise of universal labor would be an exclusive cause for transcending the capitalist mode of production, but it certainly calls for a sharp break with the traditional vision of a market-based system of competitive commodity production. Within this environment, capitalists can no longer pretend that they are serving a social function fostering accumulation by driving workers longer or harder or even by organizing them efficiently.

3. Another Dimension of Universality

Universal labor has another important characteristic. In addition to spreading costlessly throughout society, it often works in strange ways. A scientific idea can cascade for decades and decades, inspiring one technology after another.

In this sense, no one person ever makes a scientific discovery. Instead, science and technology depend on a complex network of information flows, reinforced by a publicly supported educational system. In this social labor process, scientists or artists draw on the work of their predecessors.

In this spirit, Lewis Mumford once proposed,

> It was Henry who in essentials invented the telegraph, not Morse; it was Faraday who invented the dynamo, not Siemens; it was Oersted who invented the radio telegraph, not Marconi and De Forest. The translation of the scientific knowledge into practical instruments was a mere incident in the process of invention. (Mumford 1963: 217–8)

Mumford was mistaken in one respect. Typically, new technologies do not develop from a single scientific idea; instead, they depend on the confluence of a number of scientific discoveries, each of which had been further developed by a number of other people.

Econometric estimates suggest that the typical technological discovery requires about twenty years before it reaches fruition. The more basic scientific research, which lies behind the technology, takes even longer before it begins to affect our daily lives.

By the time technology is mature enough to propose to the patent office, absolutely nobody could determine the relative contributions of the various people involved. As George Akerlof, a winner of the Nobel prize in economics, recently observed, "How much of the value of computer technology is due to Alan Turing, to John von Neuman, to Norbert Wiener, or even to Bill Gates?" (Akerlof 2000: 34).

In the case of the conversion of scientific or technical knowledge into intellectual property, modern capitalism reverts to a winner-take-all arrangement in which the first to make a

claim with the patent system supposedly deserves the exclusive right to the discovery, while offering absolutely nothing to the others who have contributed to its creation.

As a result, rival claimants to intellectual property rights abound. More often than not, they launch expensive litigation in hopes of obtaining exclusive ownership for themselves, or at least a valuable monetary concession.

4. Intellectual Property and the Falling Rate of Profit

In an earlier stage of capitalism, most universal labor passed costlessly into the hands of the capitalists. As a result, one of the most strategically important elements of the production system went uncounted even though the great virtue of the capitalist system was supposed to be that it rewarded every agent according to his or her individual contribution.

How then could a market system rationally allocate resources on the basis of cost when, in reality, nobody can know what actually contributed to the product? This contradiction passed unnoticed in the economic literature at the time, probably because universal labor was quantitatively less significant than it is today.

Marx's vision was that the obvious expansion of the role of universal labor would make clear to all that a system that was single-mindedly focused on squeezing every moment of effort out of its workers could never match the potential of a system that tried to elevate work so that all people could have the opportunity to discover new and better methods of production. In effect, he envisioned a system of production in which all workers would have the chance to make universal labor at least some of their responsibility.

In a curious twist, rather than directly threatening the capitalist system of production, universal labor has become a major prop for the system in the form of intellectual property rights. In fact, the protection of intellectual property has become a substantial counterweight to the tendency for the rate of profit to fall.

In a sense, the relationship between intellectual property rights and the rate of profit is not entirely new. During the late nineteenth century, laissez-faire economists strongly opposed the strengthening of intellectual property rights as a monopolistic intrusion into the sacred grounds of free markets (Perelman 2002). Only after the economy slipped into a crisis mode in the last decades of the century did most economists relent, suddenly recognizing intellectual property rights as a way to avoid the economic catastrophe they saw unfolding.

Some principled laissez-faire economists, such as Hayek and Mises, continued the tradition of resistance to intellectual property rights into the twentieth century, but they were a distinct minority. The rest, blinded to any alternatives to a market economy, insisted that monopoly rights were the only possible way to encourage universal labor. Ironically, these economists rarely noticed that most universal labor, both qualitatively and quantitatively, came from the public sector. In fact, the law allows private parties to claim the exclusive rights to discoveries made under government contracts. Quite frequently, those who claimed patent rights did nothing more than extend work already done in the public sphere.

Not surprisingly, the next surge in strengthening intellectual property rights in the United States began in the latter part of the 1960s, as stagflation began to engulf the economy and earlier trade surpluses turned negative. Although many old line industries could no longer compete effectively in world markets, exports of intellectual property in the form of royalties and copyright fees soared.

I have not seen hard data regarding the effect of intellectual property rights on the rate of profit, but I am convinced that it is substantial. Just think about Microsoft and the pharmaceutical industry with their low marginal costs relative to their market prices. For example, Microsoft reported that it makes 85 percent margin on its Windows system (Abrahams 2002). Only a small part of the 15 percent of the price that covers the costs of the product, goes to actual manufacturing expenses. Other costs, such as marketing, are far greater.

5. Oil for Intellectual Property

While energy resources are central to maintaining life itself, let alone the capitalist mode of production, intellectual property rights are now every bit as important in maintaining the international financial balances of the U.S. economy. Domestic access to oil will remain important, of course, as long as the comfortable classes continue to ride in their sports utility vehicles and heat and cool their megamansions. However, the domestic energy requirements for the production of material goods are becoming increasingly less important as production moves to low-wage peripheral areas of the world.

In any case, intellectual property rights have become the financial counterweight to deindustrialization. Certainly, the revenues that they generate help to balance the massive imports of material goods. Unfortunately, this means of payment still remains woefully insufficient to reimburse the rest of the world for imports to the United States.

The strengthening of intellectual property rights is perhaps the most pressing foreign policy track in the United States today, possibly even more so than oil. The government's efforts go well beyond shoring up the legal rights of holders of intellectual property. The full weight of its power is brought to bear against all evildoers who would dare to create knockoffs of a Disney cartoon or a Nike "swoosh." In the words of Thomas Friedman, perhaps the most enthusiastic proponent of globalization at the *New York Times*,

> The hidden hand of the market will never work without a hidden fist—McDonald's cannot flourish without McDonnell Douglas, the designer of the F-15. And the hidden fist that keeps the world safe for Silicon Valley's technologies is called the United States Army, Air Force, Navy and Marine Corps. . . . Without America on duty, there will be no America Online. (Friedman 1999: 373)

Lest the skeptical reader dismiss Friedman's clever phrasing as nothing more than a rhetorical flourish, consider the words of William Cohen, the secretary of defense in the Clinton administration, when he was sent to speak to the employees of Microsoft in February 1999, upon his arrival in Seattle, Washington, a city that a few months later would become a symbol of resistance to the policies that Cohen was sent to advocate. The secretary told reporters, "I will point out that the prosperity that companies like Microsoft now enjoy could not occur without having the strong military that we have" (quoted in Burns 1999).

Friedman and Cohen have expressed what is probably the central thrust of the foreign policy of the government of the United States.

6. The Contradictions of Intellectual Property

The general thrust of Marx's scattered comments on universal labor is clear: the "natural" course of market development would be the promotion of universal labor and the obsolescence of markets. Markets, however, are anything but natural. They came into being by the good graces of state-sponsored primitive accumulation (Perelman 2001). Once begun, they still require the constant nurturing of state power.

In the case of managing universal labor, the state performs two vital functions to prop up the market. In the first place, as I mentioned earlier, the state directly subsidizes a good deal of universal labor. This arrangement is, in itself, perfectly understandable. As neoclassical economists have long known, individual enterprises have little incentive to employ universal labor because they have difficulty in appropriating all of its fruits in a commodity form. The capitalist state, however, typically refuses to make the results of universal labor available to all. Instead, it converts the universal labor into private property, even when the public sector performed the original research.

Over and above subsidizing universal labor and making it private property, the state uses its coercive powers to enforce these intellectual property rights. Since the misappropriation of intellectual property is less obvious than the theft of physical goods, the protection of intellectual property rights is necessarily far more intrusive than comparable efforts to protect physical goods.

Perhaps the most ominous example of the enforcement of intellectual property came from a Canadian case in which a farmer was accused of "stealing" Monsanto's intellectual property by planting genetically engineered seeds. The farmer protested that he had not planted Monsanto's seeds, although neighbors had. He assumed that pollen from their farms had drifted onto his property. The judge ruled that even though the court had no evidence to prove that the genetic material had not arrived accidentally, the farmer still had the obligation to police his fields to protect them from Monsanto's intellectual property:

> The source. . . is really not significant. . . . Growth of the seed, reproducing the patented gene and cell, and sale of the harvested crop constitutes taking the essence of the plaintiffs' invention, using it, without permission. (Cited in Perelman 2002: 122–3)

Within this environment of strict enforcement, holders of intellectual property insist that providers of commodities that might possibly be used for infringing on their intellectual property rights modify their products in ways that actually diminish their usefulness or even may potentially damage the consumers' personal property.

The privatization of universal labor, like all other attempts to correct crises, creates further contradictions. In this case, privatization erects a serious barrier to further scientific and technological progress, even though the ostensible purpose of intellectual property rights was to promote such progress.

Let me just enumerate a few of the detrimental effects. First of all, every agent, whether an individual researcher or a major corporation, has a strong incentive to maintain the utmost secrecy, thereby stifling the sort of communication that is the very lifeblood of sci-

ence. In addition, incredible efforts are wasted in attempting to get around existing intellectual property by techniques such as reverse engineering.

Because intellectual property law awards a single individual credit for the complex social process, it encourages patent races, which dissipate considerable scientific effort. In addition, many scientists end up devoting considerable time and energy learning about the legal ramifications of their work, efforts that would be better spent in doing science.

Excessive litigation represents an even more obvious dissipation of potentially productive energies. Corporations attempt to extend the boundaries of their intellectual property rights in much the way imperialist nations wage war in an effort to increase their territory. Corporations work frantically to amass patents. Many of these patents have no utility whatsoever except to counterattack those who might challenge their right to use some technique.

The main battlefield is the legal system. Patent suits typically cost millions of dollars. Corporations also expend considerable energy to win favorable legislation. Public relations become a useful adjunct in this effort. These supplemental efforts are also costly.

The monopoly rights associated with intellectual property raise prices, transferring immense quantities of income and wealth to the few corporations that hold the mass of intellectual property rights. By holding millions of people in unnecessary poverty, this system thwarts their potential contributions to the pool of universal labor. In addition, the quest for intellectual property rights has had monstrous effects on higher education.

Finally, intellectual property rights undermine the very nature of free scientific inquiry. The truly great scientific discoveries result from scientists following their own interests rather than the narrow, quick-profit-oriented priorities of giant corporations. In this way, the harsh discipline of financial markets creates a further barrier to progress.

In my book, *Steal This Idea: Intellectual Property Rights and the Corporate Confiscation of Creativity* (Perelman 2002), I have tried to document in more detail the enormous costs that intellectual property rights have imposed on society.

7. Conclusion

Marx believed that capitalism was about to enter a new stage in which universal labor would be the key to development. For this stage to meet its potential, people must have the opportunity to develop their skills freely and to cooperate with one another. The obsolete authoritarianism of the capitalist workplace could only hobble society. In Marx's words, this new stage "calls to life all the powers of science and of nature, as of social combination and of social intercourse, in order to make the creation of wealth independent (relatively) of the labour time employed on it" (Marx 1973: 706).

In other words, value theory, which is merely an analysis of how capitalism works, may have some relevance in a primitive stage where the "worker [is reduced to] nothing more than personified labour-time [and where all] individual distinctions are obliterated" (Marx 1977: 353). In contrast, at the stage where universal labor becomes dominant, the "material conditions [of production] blow this foundation [based on the minimization of labor time] sky-high" (Marx 1973: 706).

In short, universal labor defies the sort of commodification envisioned in economic textbooks. Marx seemed to believe that ultimately rationality would prevail and the contradictions of universal labor would push society toward socialism. The powerful capitalist states have resisted the transition to this new stage. Instead, they have legislated stronger intellectual property rights to counteract the falling rate of profit.

This strategy of defending the capitalist form seriously undermines the social and economic potential of scientific labor, creating an even deeper contradiction, which has gone largely unnoticed.

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